Exhibit 3

SUR-REBUTTAL OPINION OF PROFESSOR JULIAN KU

I have been asked by Blank Rome LLP, attorneys for Defendants James Mitchell and John "Bruce" Jessen, to provide this Sur-Rebuttal opinion in response to the December 28, 2016 rebuttal opinion of Professor Kevin Jon Heller (the Rebuttal Opinion) prepared in response to my expert opinion of December 12, 2016.

This Sur-Rebuttal will respond to three claims that Professor Heller made in the Rebuttal Opinion. First, Professor Heller argues that an international consensus for a specific definition of the term "experimentation" under customary international law is unnecessary to determine the existence of a norm for the purposes of the Plaintiffs' Alien Tort Statute (ATS) claim. Second, Professor Heller cites the War Crimes Act of 1996 (WCA) as evidence that the U.S. government has accepted a customary international law prohibition on all non-therapeutic human experiments in non-international armed conflicts.[1] Third, Professor Heller cites studies of state practice by the International Committee for the Red Cross as evidence of widespread international consensus for the same position. As this Sur-Rebuttal explains, none of these claims are convincing.

I. REQUIREMENT OF SPECIFICITY FOR ALIEN TORT STATUTE CLAIMS

The Rebuttal Opinion argues that nothing about the controlling Supreme Court opinion in *Sosa v. Alvarez Machain*[2] "suggests that *each and every term* in a 'norm of customary international law' must be so 'well defined as to support the creation of a federal remedy.'"[3] Instead, the Rebuttal Opinion says *Sosa* requires only the norm itself be sufficiently well defined.

This wordplay is clever but unconvincing. The question of whether an act constitutes "experimentation" is central to any determination as to whether a supposed norm against "non-therapeutic human experimentation" applies to the Defendants' alleged conduct.

For this reason, the original Heller Opinion offered a definition of "human experimentation" as a separate legal term.[4] In my December 12, 2016 opinion, I noted that the sources Heller cited to define this term actually show that the concept is undefined and uncertain under international law.[5] The Rebuttal Opinion's non-response on this point is telling.

The Rebuttal Opinion does attempt to distinguish some interrogation techniques from its overbroad definition of experimentation by arguing that the "Reid" method or the Army Field Manual interrogations do not threaten the physical or mental health of detainees and therefore do

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[1] Rebuttal Report at 4.
[2] *See Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).
[3] Rebuttal Report at 7 (emphasis in original).
[4] *See* Heller Report at 19-20 ("Neither the Geneva Conventions nor API defines the term "experimentation").
[5] *See* Ku Report at 7-8.

not violate the experimentation norm.[6] By focusing on the "endanger physical or mental health" prong of the experimentation norm, the Rebuttal Opinion is conceding that any interrogation method could satisfy its definition of experimentation.[7]

This concession reveals the absurdity of accepting the Rebuttal Opinion's position that "experimentation" can remain undefined for Alien Tort Statute purposes. In the Rebuttal Opinion's view, any activity that endangers the physical or mental health of a detainee is violation of the norm against experimentation, even if it is not clear that the activity in question – such as interrogations – are "experiments." Because the Rebuttal Opinion believes the term "experimentation" does not need to be defined, it is able to claim the existence of a universal international consensus prohibiting any activity that endangers the physical or mental health of detainees or prisoners. But this open-ended approach to defining the norm cannot possibly satisfy the stringent standards imposed by *Sosa.*

The Rebuttal Opinion also claims that no state has ever "claimed that the war crime of non-therapeutic human experimentation is too vague to be applied in the absence of a specific definition of 'experimentation.'"[8] But this analysis flips the *Sosa* presumption on its head. Under the Rebuttal Opinion's version of *Sosa*, a court must accept a norm as well defined if no state has previously claimed the norm was too vague. But the *Sosa* Court clearly sought to create the opposite presumption by forcing the plaintiffs to demonstrate the universality of the *specific application of* the norm before allowing jurisdiction for private plaintiffs.

The Supreme Court's application of the *Sosa* standard in the *Sosa* case itself demonstrates why Professor Heller is mistaken to dismiss the necessity of determining the specific applicability of the term "human experimentation" to the Defendants' alleged psychological experimentation. In the *Sosa* case, the plaintiff alleged a norm against "arbitrary arrest and detention," which the Court agreed was widely accepted and universal. But the Court found that the *specific application* of this norm to an alleged 24-hour detention was insufficient to sustain jurisdiction. This is true even though the allegations in *Sosa* clearly satisfied a possible definition of "arbitrary detention." The Court found that the specific application of the standard, and an understanding of the term giving content to the standard, needed to be sufficiently well-defined before permitting the existence of a federal remedy.[9]

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[6] In fact, both the Reid Technique and the Army Field Manual have been accused of endangering physical and mental health. The Reid Technique has been denounced as "psychologically manipulative" and prone to forcing false confessions. *See* Douglas Quan, "Alberta judge slams use of 'Reid' interrogation technique in Calgary police investigation," *The Calgary Herald* (September 11, 2012). Portions of the current Army Field Manual have been criticized by the UN Committee on Torture as causing psychosis. Concluding Observations of the UN Committee Against Torture on the third to fifth periodic reports of the United States, 8 (20 November 2014), U.N. Doc. CAT/C/USA/CO/3-5.

[7] Rebuttal Report at 12.

[8] Rebuttal Report at 5.

[9] *See Sosa* 542 U.S. at 732-33 & n.21 (describing "requirement of clear definition.").

This uncertainty as to the specific meaning *and* the applicability of the norm against human experimentation to alleged psychological experiments is exactly the type of situation the *Sosa* Court sought to guard against.

II. THE UNITED STATES' VIEWS ON CUSTOMARY INTERNATIONAL LAW AND HUMAN EXPERIMENTATION

The Rebuttal Opinion states that the "United States government not only unequivocally considers [Common Article 3] to prohibit non-therapeutic human experimentation in [non-international armed conflicts], it specifically deems it a grave breach of the Geneva Conventions…."[10] The Rebuttal Opinion then cites the WCA as support for this statement. But the Rebuttal Opinion's reliance on the WCA is misplaced. The United States has specifically chosen to limit criminal punishments to "biological experiments" and has never endorsed Professor Heller's broad open-ended definition of non-therapeutic human experimentation.

A. The Text of the WCA

The WCA imposes criminal penalties on anyone who commits a "war crime." The WCA then goes on to define a "war crime" as, among other things, "any conduct … which constitutes a grave breach of Common Article 3 (as defined in subsection(d))." Subsection (d), in turn, then provides nine definitions of conduct constituting grave breaches: torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. Subsection (d)(1)(C) specifies that "biological experiments without a legitimate medical or dental purpose and in so doing endanger[] the body or health of such person or persons" are a grave breach of Common Article 3.

It is thus clear that the plain text of the WCA does not prohibit any form of "non-therapeutic human experimentation," despite the Rebuttal Opinion's implication otherwise. Rather, the WCA's prohibitions are limited to "biological experiments without a legitimate medical or dental purpose…."[11] This reference to "biological experiments" is, on its face, narrower than the Rebuttal Opinion's claim that the U.S. has accepted an international law norm against all "non-therapeutic human experimentation." This narrower prohibition would not reach the Defendants' alleged psychological experiments on the Plaintiffs since those alleged experiments were not "biological."

B. The Legislative History of the WCA

The legislative history confirms that Congress' choice of the phrase "biological experiments" in Subsection (d)(1)(c) was not intended to recognize an international norm prohibiting all forms of human experimentation in non-international armed conflicts. Rather, the legislative history shows that Congress deliberately sought to clarify and narrow the definition of "grave breaches" under Common Article 3 to exclude many kinds of conduct.

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[10] Rebuttal Report at 4 (emphasis in original).
[11] 18 U.S.C. §2441(d)(1)(C).

i. 1996 and 1997 Versions

The original WCA was introduced by Congressman Walter Jones of North Carolina to remedy a gap in U.S. law which would allow "a modern-day Adolf Hitler move [to] the United States without worry, as he could not be found guilty in our courts of committing a war crime."[12] The original WCA thus gave the U.S. the legal authority to "try and prosecute the perpetrators of war crimes against American citizens."[13] Importantly, the original WCA applied only to grave breaches during "international armed conflicts."[14] Though Congress enacted amendments to the WCA in 1997 that extended criminal liability to "grave breaches" of Common Article 3, it failed to provide a definition of that term in the statute.[15]

ii. 2006 Amendments

In 2006, the U.S. Supreme Court held that CA3 applied to the conflict with Al Qaeda and that Congress had limited the use of military commissions to those consistent with CA3.[16] The Court further held that existing military commissions did not satisfy CA3 and therefore had not been authorized by Congress. In response to the Supreme Court's decision, Congress acted swiftly to authorize military commissions and to "provide[] legal clarity for [US] treaty obligations under the Geneva Conventions" by establishing a "specific list of crimes that are considered grave breaches of the Geneva Conventions."[17] Congress was particularly motivated by a desire to "provide clear notice to United States personnel charged with interrogating detainees"[18] as to the scope of their liability under the now-applicable CA3.

Thus, Congress amended the WCA in 2006 to prohibit six acts drawn straight from the text of CA3 (violence to life and person, murder, mutilation, torture, cruel treatment, and the taking of hostages.) But it also added three more prohibited acts not specifically mentioned in the text of CA3 (performing biological experiments, rape, and sexual assault). It also left out two possible grave breaches specified by CA3: "outrages upon personal dignity" and failure to provide "judicial guarantees." According to the House Report, the limitations were intentional since the Committee believed the plain text of CA3 did not provide enough clarity and certainty as to what constitutes a war crime. As the Committee explained:

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[12] 142 Cong. Rec. H8620-01, 142 Cong. Rec. H8620-01, H8621, 1996 WL 421249
[13] *Id*.
[14] Prepared Statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State, War Crimes Act of 1995, hearing before the Subcommittee on Immigration and Claims of the Committee on the Judiciary, House of Representatives, 104th Congress, on H.R. 2587, June 12, 1996 (at 11).
[15] Foreign Operations, Export Financing, and Related Programs Appropriation Act, 1998, PL 105-118, November 26, 1997, 111 Stat 2386
[16] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[17] Remarks of Senator Frist, 152 Cong. Rec. S10243-01, 152 Cong. Rec. S10243-01, S10243, 2006 WL 2771411
[18] H.R. REP. 109-664(I), H.R. Rep. No. 664(I), 109TH Cong., 2ND Sess. 2006, 2006 WL 2714419 (Leg.Hist.), P.L. 109-366, MILITARY COMMISSIONS ACT OF 2006 (emphasis added).

> The Act does not specifically provide for a general crime of 'outrages upon personal dignity', as provided in Common Article 3, because the committee believes it is nearly impossible to define an 'outrage' as a general matter without resorting to the very kind of vague language that this provision seeks to replace. Instead, this section would identify and criminalize three serious and clear outrages upon personal dignity: biological experimentation, rape, and sexual assault.[19]

Because Congress' intention was to "provide clear notice" to U.S. government actors, it is important to take seriously the language of these provisions as evidence of what the U.S. government believes is required by its CA3 treaty obligations. In the view of the United States, "biological experiments" are prohibited by CA3 because they are an "outrage upon personal dignity." The limitation of a specific prohibition to "biological experiments" indicates that Congress does not believe all forms of human experimentation are prohibited by CA3.

In sum, neither the text nor the legislative history of the WCA supports the Rebuttal Opinion's claim that the U.S. government has embraced a wide-ranging interpretation of CA3 as prohibiting all forms of "non-therapeutic human experimentation." Instead, the legislative history reveals that Congress became concerned about the vagueness of the WCA's CA3 prohibitions when it realized it would be applied to the conduct of U.S. personnel in the war against al-Qaeda. Thus, in 2006, Congress acted to clarify the meaning of CA3 by, among other things, limiting the criminal liability under CA3 to "biological experiments." It is worth noting that Congress could have adopted broader language such as the Rome Statute's prohibition of "medical or scientific experiments of any kind."[20] The Rome Statute had been completed in 1998 and Congress was certainly aware of it as a possible source of law. Yet Congress chose to limit liability under CA3 to a narrower formulation than the Rome Statute provides.

The U.S. government has thus adopted a much narrower view of what violates CA3 than offered by the Rebuttal Opinion, and its limitation of these prohibitions to "biological experiments" means it would not apply to the Defendants' alleged conduct in this case.

C. Other Evidence of U.S. Government Views

This legislative history is also important to consider when evaluating the Rebuttal Opinion's claim that the U.S. government has specifically accepted a broader prohibition on "medical procedure[s] that are "not indicated by the state of health of the person concerned"[21] in the Second Additional Protocol to the Geneva Conventions (APII). As noted in my expert opinion of December 12, 2016, the U.S. has never ratified APII.[22] The U.S. has merely stated that it recognizes some provisions of APII as embodying customary international law, but it has never stated that it has accepted all of APII as an international legal obligation. Importantly, the U.S.

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[19] *Id*. (emphasis added). The Committee also explained the "judicial guarantee" part of CA3 was too difficult to define for the purposes of the WCA.
[20] *See* Rome Statute, Article 8(2)(e)(xi).
[21] Additional Protocol II to the Geneva Conventions, Art. 5(2)(e).
[22] Ku Expert Report, at 6.

government has never stated that it believes APII's broad prohibition on "unnecessary medical procedures" embodies customary international law.

The Rebuttal Opinion concedes this fact, but claims that the U.S. government has embraced APII's broad prohibition on unnecessary medical procedures in non-international armed conflict because that prohibition is already reflected in CA3's prohibition on "violence" and "degrading treatment." Essentially, the Rebuttal Opinion is making the circular argument that the U.S. government's acceptance of CA3 means that the U.S. has accepted APII's prohibition on unnecessary medical procedures. But this depends, as always, on how the U.S. government interprets CA3 since the U.S. has never ratified APII.

As the legislative history of the WCA establishes, the U.S. has adopted a very specific understanding of what constitutes a punishable violation of CA3 in the amended WCA. That definition clearly classified "biological experiments" as one of the "outrages on personal dignity" or "degrading treatment" prohibited by CA3. But it is clear that Congress did not adopt APII's broader prohibition of unnecessary medical procedures, even though it had the opportunity to do so when it enacted the WCA in 1996, and amended it in 1997 and 2006 (APII was promulgated in 1977).

The Heller Opinion points to the 2015 U.S. Department of Defense Law of War Manual as evidence the U.S. has adopted APII's definition.[23] But the Law of War Manual does not specifically refer to the APII definition proffered by the Rebuttal Opinion. Rather, it adopts a prohibition on "medical or biological experiments," which is narrower than APII's broader prohibition on "unnecessary medical procedures." Moreover, the Law of War Manual is not intended to represent the views of the United States government as a whole. Rather, it represents the views of the U.S. Department of Defense only and is not intended to create legal rights or obligations.[24] It should not be understood to override the views of Congress as expressed in the 2006 amended WCA. That reading of CA3 as criminalizing biological experiments alone is the sole authoritative statement of the U.S. government's views on this issue.

III. ICRC EVIDENCE OF OTHER STATES' PRACTICE

Finally, the Rebuttal Opinion reiterates that "nearly 50 states, including the United States, criminalized non-therapeutic human experimentation in NIAC."[25] As I have explained above, this statement is inaccurate and misleading with regard to the United States, which has only criminalized biological experiments in non-international armed conflicts (NIAC). Moreover, a review of Professor Heller's sole source for his claim about the other states' practices – the International Committee for the Red Cross Study of Customary International Humanitarian Law – reveals that his characterization of the other states' practice overstates their acceptance of his proposed norm.

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[23] Heller Report at 16.
[24] Law of War Manual, Para 1.1.1. (stating that "this manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.")
[25] Rebuttal Report, at 8; Heller Report at 13.

In Footnote 53, the Heller Opinion lists 46 states as having deemed "human experimentation a war crime in non-international armed conflict."[26] A close review of the ICRC study on state practice reveals that several of the 46 states cited by Heller do not actually prohibit all forms of non-therapeutic human experimentation. For instance, 4 of the 46 states cited by Heller (including the United States) have limited their explicit statutory prohibitions on experimentation in non-international armed conflicts to "biological experiments."[27] Two of the states cited by the Heller Opinion (Jordan and Nicaragua) had only provided draft laws, which the ICRC nonetheless cited as state practice.[28]

Moreover, as the Heller Opinion concedes, 25 other states listed in the ICRC study prohibit some form of experimentation in international armed conflicts, but do not specifically prohibit experimentation in non-international armed conflicts. This means out of the 71 states that prohibit experimentation, 25 do not specifically prohibit it during non-international armed conflicts, 4 limit any NIAC prohibition to biological experimentations, and 2 have only adopted draft laws. The ICRC Study did not consider the practice of the world's other 50 states and the reliability of the ICRC study's evidence of states it did review has been called into question by at least one prominent scholar deeply familiar the study's creation and methodology.[29]

In any event, far from showing a universal consensus, the ICRC study reveals that, at best, 40 of the world's 121 states have adopted laws that would support Professor Heller's proposed norm against all forms of human experimentation in NIAC.

IV. CONCLUSION

The Rebuttal Opinion makes three incorrect claims: 1) that there is no need to define the term "experimentation" or demonstrate its specific application in Alien Tort Statute cases; 2) that the

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[26] Heller Report at 13 (listing Armenia, Australia, Azerbaijan, Bangladesh, Belarus, Belgium, Bosnia, Bulgaria, Burundi, Cambodia, Canada, Colombia, Congo, Cote d'Ivoire, Croatia, DRC, Ethiopia, Finland, France, Georgia, Germany, Iraq, Ireland, Jordan, Lithuania, Mali, Moldova, Netherlands, New Zealand, Niger, Nigeria, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Senegal, Serbia, Slovenia, South Africa, Spain, Tajikistan, Thailand, UK, US, and Yemen).

[27] *See* discussion in III ICRC STUDY OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) at 2171-2185. See entry for Ethiopia at ¶1490 ("Ethiopia's Penal Code provides that carrying out biological experiments is a war crime against the civilian population."); France at ¶1442 ("France's LOAC Summary Note provides that biological experiments are war crimes under the law of armed conflicts."); Lithuania at ¶1498 ("Under Lithuania's Criminal Code as amended, carrying out biological experiments on protected persons and removal of organs or tissues for transplantation constitute war crimes.").

[28] *See id* at ¶1495 (citing Jordan's draft military criminal code) and id at ¶1509 (citing Nicaragua's draft penal code).

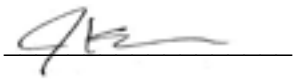
[29] *See* Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 82 INTERNATIONAL LAW STUDIES 99, 103 (2006) (criticizing reliability and accuracy of ICRC statements of state practice).

WCA means that the United States has accepted a legal prohibition all non-therapeutic human experimentation in non-international armed conflicts; and 3) that the ICRC study shows widespread international state practice for the same legal view.

As this Sur-Rebuttal explains, leaving the term "experimentation" undefined would mean that the Court would be recognizing a universal international law prohibition on any activity that endangers physical or mental health. Yet such vague overbroad international law claims are precisely what the Supreme Court in *Sosa* was seeking to prevent. Additionally, while it is correct that the United States has criminalized biological experiments during NIACs in the WCA, a review of the text and legislative history reveals that the U.S. Congress chose to narrow the possible scope of CA3 by limiting liability under that provision to biological experimentation. Moreover, the U.S. is not alone in this narrower position. Other states party to the Geneva Conventions have failed to adopt a specific ban on all human experimentation during NIACs, despite the Rebuttal Opinion's implications otherwise. Indeed, a careful review of the underlying material relied upon by the two Heller opinions shows that while numerous states have adopted a general ban on certain kinds of experimentation during armed conflicts, only some of those states have specifically prohibited non-biological experimentation during NIACs.

Given the U.S. Supreme Court's admonition to federal courts in *Sosa v. Alvarez-Machain* to limit Alien Tort Statute claims to "specific, universal, and obligatory"[30] international norms, this lack of international consensus on a specific prohibition on all forms of experimentation in NIAC means the consensus required for ATS liability over the Defendants' alleged conduct does not exist.

SIGNED:



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[30] *Sosa*, 542 U.S. at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).