

REDRESS FOR ‘SOME FOLKS’: PURSUING JUSTICE FOR  
VICTIMS OF TORTURE THROUGH TRADITIONAL GROUNDS OF  
JURISDICTION

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## I. INTRODUCTION

*This is not C.I.A.'s program. This is not the President's program. This is America's program.*

—Former CIA Director Michael Hayden<sup>1</sup>

*After learning the news [of the Senate Torture Report], Mr. Bashmilah pressed Ms. Satterthwaite, who heads the global justice program at New York University Law School, to tell him what might follow from the Senate's recognition. Would there be an apology? Would there be some kind of compensation?<sup>2</sup>*

It has now been nearly three years since the release of the summary of the U.S. Senate Select Committee on Intelligence report on CIA abuses, known as the “Torture Report.”<sup>3</sup> In that time, the U.S. has still refused to prosecute any participants in the torture program. Moreover, the new administration has explicitly threatened to reopen the CIA's secret overseas “black site” prisons and bring back torture of detainees.<sup>4</sup>

On its publication in December 2014, the Torture Report reminded the world that after September 11, 2001, the CIA tortured at least 119 people at secret prisons around the globe.<sup>5</sup> Through its “Rendition, Detention, and Interrogation” (RDI) program, the CIA kidnapped, held at dark sites, and systematically tortured detainees in what has been described as an American gulag.<sup>6</sup> According to the report, the CIA's “enhanced interrogation

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<sup>1</sup> Connie Bruck, *The Inside War*, THE NEW YORKER, June 22, 2015.

<sup>2</sup> Scott Shane, *Amid Details on Torture, Data on 26 Who Were Held in Error*, N.Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/13/us/politics/amid-details-on-torture-data-on-26-held-in-error.html>.

<sup>3</sup> S. SELECT COMM. ON INTELLIGENCE, 114TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, EXECUTIVE SUMMARY (Comm. Print 2014), [https://fas.org/irp/congress/2014\\_rpt/ssci-rdi.pdf](https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf) [hereinafter SSCI Report].

<sup>4</sup> One of Donald Trump's first steps after taking office was to prepare a sweeping executive order that would clear the way for the CIA to reopen its black sites. That particular order was quashed; however, Trump had “vowed during [his] campaign to bring back waterboarding and a ‘hell of a lot worse’— not only because ‘torture works,’ but because even ‘if it doesn't work, they deserve it anyway.’” Charlie Savage, *Trump Poised to Lift Ban on C.I.A. ‘Black Site’ Prisons*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html>.

<sup>5</sup> See generally SSCI Report, *supra* note 3.

<sup>6</sup> See STEPHEN GREY, GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM 169 (St. Martin's Press 2006); Stephen Grey, *America's Gulag*, NEW STATESMAN (May 17, 2004), <https://www.newstatesman.com/node/159775>; Leila Nadya Sadat, *Extraordinary Rendition*,

techniques” included waterboarding, slamming detainees against a wall, sleep deprivation, nudity, rectal feeding without documented medical necessity, ice baths, death threats to the detainees, and threats to kill or sexually assault their family members.<sup>7</sup> The Report also refers to the effects of such treatment on the detainees, including “hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.”<sup>8</sup>

While the report shocked many, most of the information it contained was not new. In 2006, the Council of Europe reported that “across the world, the United States has progressively woven a clandestine ‘spiderweb’ of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture.”<sup>9</sup> In 2005, a confidential International Committee of the Red Cross (ICRC) report to the CIA described detainees being subjected “to a harsh regime employing a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information.”<sup>10</sup> Detainees were transferred to multiple locations, maintained in continuous solitary confinement and incommunicado detention, and subjected to the abuses detailed above.<sup>11</sup>

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*Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1211, 1215 (2007).

<sup>7</sup> See generally SSCI Report, *supra* note 3.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> EUR. PAR. ASS., *Res. 1507: Alleged Secret Detentions and Unlawful Inter-state Transfers of Detainees Involving Council of Europe Member States* (June 27, 2006), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17454&lang=en> (“[T]he United States has introduced new legal concepts, such as ‘enemy combatant’ and ‘rendition’, [sic] which were previously unheard of in international law and stand contrary to the basic legal principles that prevail on our continent . . . . The spiderweb has been spun out with the collaboration or tolerance of many countries, including several Council of Europe member states. This cooperation, which took place in secret and without any democratic legitimacy, has allowed the development of a system that is utterly incompatible with the fundamental principles of the Council of Europe.”).

<sup>10</sup> INT’L COMM. RED CROSS, REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY (Feb. 14, 2007), <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

<sup>11</sup> The ICRC reported that detainees were subjected to suffocation by water, prolonged stress standing, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation and use of loud music, exposure to cold temperature/cold water, prolonged use of handcuffs and shackles, threats, forced shaving, and deprivation/restricted provision of solid food. Furthermore, the ICRC “underscore[d] that the consistency of the detailed allegations provided separately by each of the [detainees] adds particular weight” to their allegations. *Id.*

Yet the Senate's Torture Report actually covered a small subset of U.S. torture.<sup>12</sup> The images of prisoners tortured at Abu Ghraib remain seared into memory.<sup>13</sup> But still more chilling is the fact that, as part of the RDI program, the CIA conducted "extraordinary renditions" of hundreds, or even thousands, of people to other countries to be tortured.<sup>14</sup> A senior counterterrorism official defined such renditions as "operations to apprehend terrorists abroad, usually without the knowledge of and almost always without public acknowledgment of the host government."<sup>15</sup> The CIA conducted 1,245 flights, according one report.<sup>16</sup> As of 2006, an estimated 100 people had been kidnapped by the CIA on European Union territory alone (with the cooperation of Council of Europe members) and rendered to other countries, often after having passed through secret detention centers used by the CIA, some located in Europe.<sup>17</sup> As will be described below,

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<sup>12</sup> Beyond the CIA dark sites, 700 people were detained at Guantánamo, where many were tortured using techniques promoted by Defense Secretary Donald Rumsfeld. *See, e.g.*, Michael Ratner, Michael Smith & Heidi Boghosian, Review of the Senate Intelligence Committee's Report on CIA's Detention & Interrogation, L. & DISORDER RADIO (Dec. 15, 2014), <http://lawanddisorder.org/2014/12/9235>.

<sup>13</sup> An overview of the Abu Ghraib abuse is available (no images are shown) at CNN Library, *Iraq Prison Abuse Scandal Fast Facts*, CNN (Apr. 10, 2017), <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/>.

<sup>14</sup> Steven Watt, *Outsourced Terror: The Horrific Stories of CIA-sponsored Torture that Aren't in the Senate Report*, SLATE (Dec. 19, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/12/senate\\_torture\\_report\\_s\\_unnamed\\_victims\\_the\\_cia\\_had\\_hundreds\\_or\\_thousands.html](http://www.slate.com/articles/news_and_politics/politics/2014/12/senate_torture_report_s_unnamed_victims_the_cia_had_hundreds_or_thousands.html); *see also* MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32890, RENDITIONS: CONSTRAINTS IMPOSED BY LAWS ON TORTURE (2009), <http://fas.org/sgp/crs/natsec/RL32890.pdf>.

<sup>15</sup> RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 143 (Free Press, 2004). Clarke also writes:

The first time I had proposed a snatch, in 1993, the White House Counsel, Lloyd Cutler, demanded a meeting with the President to explain how it violated international law. Clinton had seemed to be siding with Cutler until Al Gore belatedly joined the meeting, having just flown overnight from South Africa. Clinton recapped the arguments on both sides for Gore: Lloyd says this. Dick says that. Gore laughed and said, "That's a no-brainer. Of course it's a violation of international law, that's why it's a covert action. The guy is a terrorist. Go grab his ass."

*Id.* at 144.

<sup>16</sup> European Parliament Press Release, IPR/02/947 CIA Activities in Europe: European Parliament Adopts Final Report Deploring Passivity from Some Member States (Feb. 14, 2007), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070209IPR02947+0+DOC+XML+V0//EN>.

<sup>17</sup> *See* OPEN SOC'Y JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 6* (Open Society Foundations, 2013), <https://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (last visited Sept. 15, 2017).

some fifty-four countries, from Albania to Zimbabwe, participated in the RDI program, including many EU member states.<sup>18</sup>

In Romania, for example, Mihail Kogălniceanu Airbase served as a location for the CIA to interrogate Iraqi and Afghani captives. Senator Dick Marty of the Council of Europe reported detainees were subjected to “interrogation techniques tantamount to torture”; he also underscored “a permissive attitude on the part of the Romanian authorities.”<sup>19</sup>

One example of United Kingdom (UK) involvement was in 2002 when a British MI6 officer interrogating a detainee held by the U.S. military reported back to London that the person had been mistreated.<sup>20</sup> He asked for advice and received this response:

HMG’s [Her Majesty’s Government] stated commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it. In no case should [detainees] be coerced during or in conjunction with an SIS [British intelligence] interview of them.<sup>21</sup>

In 2004, the UK’s MI6 conducted multiple rendition operations in conjunction with the CIA, in which they abducted two Libyan dissidents and

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<sup>18</sup> *Id.* at 6 (giving the full list: Afghanistan, Albania, Algeria, Australia, Austria, Azerbaijan, Belgium, Bosnia-Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Djibouti, Egypt, Ethiopia, Finland, Gambia, Georgia, Germany, Greece, Hong Kong, Iceland, Indonesia, Iran, Ireland, Italy, Jordan, Kenya, Libya, Lithuania, Macedonia, Malawi, Malaysia, Mauritania, Morocco, Pakistan, Poland, Portugal, Romania, Saudi Arabia, Somalia, South Africa, Spain, Sri Lanka, Sweden, Syria, Thailand, Turkey, United Arab Emirates, United Kingdom, Uzbekistan, Yemen, and Zimbabwe); *see also* European Parliament Press Release, *supra* note 16.

<sup>19</sup> Associated Press, *Was Romanian Base a CIA Prisoner Site?*, NBC News (Feb. 23, 2008), [http://www.nbcnews.com/id/23311127/ns/world\\_news-terrorism/t/was-romanian-base-cia-prisoner-site/#.WgupZxOPL-Y](http://www.nbcnews.com/id/23311127/ns/world_news-terrorism/t/was-romanian-base-cia-prisoner-site/#.WgupZxOPL-Y) (Former Presidential Security Adviser Ioan Talpes has said that ex-President Ion Iliescu signed an agreement with the Americans “guaranteeing that Romania would secure the perimeter and otherwise not interfere. . . . [When Talpes was] [p]ressed about whether prisoners were tortured, he said bluntly: ‘Even if I knew that one of my allies did something, I wouldn’t tell you.’”).

<sup>20</sup> Ian Cobain, *How UK’s Torture Policy was Traced Back up Political Ladder*, THE GUARDIAN (June 17, 2009), <https://www.theguardian.com/politics/2009/jun/18/mi5-terrorism-torture-policy-blair> (last alteration in original).

<sup>21</sup> *Id.*

their families, including children between six and twelve years old and flew them to Gaddafi's prisons.<sup>22</sup>

Other European countries participated as well. In Poland, a former Soviet-era military compound called Szymany served as the main base for CIA interrogations in Europe. At this site, according to Senator Marty, the CIA used "'enhanced methods' of interrogation, such as extreme sleep deprivation and waterboarding."<sup>23</sup> In Italy, United States and Italian operatives abducted Egyptian cleric Abu Omar and illegally transferred him via Germany to Cairo, where he was held incommunicado and reported that he was tortured in Egyptian custody.<sup>24</sup>

At least some of the renditions were conducted based on mistaken identity. For instance, Laid Saidi, an Algerian detained and tortured along with German citizen Khaled El-Masri, was apprehended because of a taped telephone conversation in which the word *tirat*, meaning 'tires' in Arabic, was mistaken for the word *tayarat*, meaning "airplanes."<sup>25</sup> In another such case, German citizen Khaled El-Masri was abducted in the Balkans, taken to Afghanistan, and tortured.<sup>26</sup> One former Guantánamo commander, Brigadier

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<sup>22</sup> Ian Cobain, *UK Among US Allies Fearing Revelations Over Role in CIA Rendition Programme*, THE GUARDIAN (Dec. 8, 2014), <https://www.theguardian.com/us-news/2014/dec/08/cia-rendition-report-al-qaida-senate-allies-nerve> ("One of the wives, who was pregnant, says she was bound with head-to-foot with tape to a stretcher for the [seventeen]-hour flight. Furthermore, British intelligence officers interrogated detainees held at Guantánamo Bay and at Bagram in Afghanistan, despite being aware they were being mistreated, and the UK government provided logistical support for aircraft in rendition operations, allowing them to refuel at British civilian and military airports on hundreds of occasions. At least two detainees were flown via Diego Garcia, which is British territory.").

<sup>23</sup> *European Rendition Complicity*, REPRIEVE, <http://reprise.org.uk/investigations/eucomplicity> (last visited Nov. 14, 2017). The prison operated between 2002 and 2003. Used for the interrogation of "High Value Detainees," it was located next to the headquarters of Polish intelligence in northeast Poland, near the Lithuanian border. *Id.*

<sup>24</sup> See, e.g., Ian Shapira, *Italy's High Court Upholds Convictions of 23 Americans in Abu Omar Rendition*, WASH. POST (Sept. 19, 2012), [https://www.washingtonpost.com/local/italys-high-court-upholds-convictions-of-23-americans-in-abu-omar-rendition/2012/09/19/af06022c-0286-11e2-91e7-2962c74e7738\\_story.html?utm\\_term=.dc9b683e1f32](https://www.washingtonpost.com/local/italys-high-court-upholds-convictions-of-23-americans-in-abu-omar-rendition/2012/09/19/af06022c-0286-11e2-91e7-2962c74e7738_story.html?utm_term=.dc9b683e1f32); see also Amnesty Int'l, *Italy Must Not Pardon Former CIA Agent Involved in Rendition* (Sept. 13, 2013), <http://amnesty.org/en/press-releases/2013/09/italy-must-not-pardon-former-cia-agent-involved-rendition/>.

<sup>25</sup> Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands*, N.Y. TIMES (July 7, 2006), <http://www.nytimes.com/2006/07/07/world/africa/07algeria.html>. As of 2005, the CIA claimed there had been ten or fewer erroneous renditions. Katherine Shrader, *CIA Watchdog Probes 'Renditions' of Suspects*, USA TODAY (Dec. 27, 2005), [https://usatoday30.usatoday.com/news/washington/2005-12-27-cia-renditions\\_x.htm](https://usatoday30.usatoday.com/news/washington/2005-12-27-cia-renditions_x.htm).

<sup>26</sup> Amy Davidson, *Torturing the Wrong Man*, THE NEW YORKER, Dec. 13, 2012; see also Smith & Mekhennet, *supra* note 25.

General Jay Hood, told a reporter, “[s]ometimes, we just didn’t get the right folks.”<sup>27</sup>

And since the report’s release, even more disturbing details have emerged about the program. In 2016, in response to a Freedom of Information Act (FOIA) lawsuit by the American Civil Liberties Union (ACLU), “[n]early 900 pages of previously classified CIA emails, interrogation reports and internal investigations” revealed new information, including verifying that some CIA prisoners were snatched in error.<sup>28</sup> Abu Zubaydah, who was waterboarded at least eighty-three times in CIA custody, was a particular focus. “Senior CIA officials uniformly believed he should be hidden away in isolation [*forever*], according to a heavily redacted memo from 2002,” which went on to say: “All major players are in concurrence that AZ should remain incommunicado for the remainder of his life.”<sup>29</sup>

This paper argues that it is important to have accountability and redress for the torture perpetrated by U.S. officials and their foreign counterparts for the following reasons: (1) international and U.S. law requires it; (2) impunity for such crimes will encourage their future perpetration; and (3) the victims deserve redress. In Part II, the importance of redress and accountability is analyzed. Part III explains that, although the optimal place to prosecute these crimes would be U.S. courts, such prosecution is unlikely to happen; therefore, it is important that prosecutions take place internationally. Because of the heinousness of the crimes, many legal scholars have called on states to invoke universal jurisdiction (UJ) as a legal basis for such prosecutions. However, UJ remains controversial. This paper argues that because of UJ’s weaknesses it should be used only as a last resort, and that the best option for prosecuting these crimes is using traditional bases of jurisdiction like territorial and personality jurisdiction. The global nature of the RDI program, which involved fifty-four countries, means there are global opportunities to prosecute—indeed, many countries outside the United States have already demonstrated their willingness to do so. The paper concludes that these international venues are where advocates should focus their efforts, as the most practical options for achieving the redress and accountability torture victims deserve.

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<sup>27</sup> Christopher Cooper, *In Guantanamo, Prisoners Languish in Sea of Red Tape*, WALL ST. J. (Jan. 26, 2005), <https://www.wsj.com/articles/SB110670361491836170>.

<sup>28</sup> Brian Bennett & David S. Cloud, *Newly Released CIA Documents Detail Torture Tactics After Sept. 11; Bush Voiced Unease About Treatment of Detainees*, L.A. TIMES (June 14, 2016), <http://www.latimes.com/nation/la-fg-cia-torture-20160614-snap-story.html>.

<sup>29</sup> *Id.* Zubaydah, later determined to be of relatively low importance for Al Qaeda, is still held at Guantánamo. *Id.*

## II. THE NEED FOR REDRESS AND ACCOUNTABILITY

Accountability and redress for the torture U.S. officials committed and endorsed is required by U.S. and international law. The Convention Against Torture (CAT), to which the U.S. is a High Contracting Party, describes and defines torture<sup>30</sup> and contains this absolute prohibition: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>31</sup> The CAT contains a mandatory “try or extradite” provision that requires a State to establish jurisdiction over alleged offenders when the offense is committed within the territory under that State’s jurisdiction, or aboard “a ship or aircraft registered in that State,” or “[w]hen the alleged offender is a national of that State.”<sup>32</sup> The CAT also permits the exercise of jurisdiction in the State’s discretion where “the victim is a national of that State.”<sup>33</sup> Article 14 obligates signatory States to provide torture victims with civil redress in the form of “fair and adequate compensation including the means for as full rehabilitation as possible.”<sup>34</sup> Of the countries who participated in the RDI program, fifty are parties to the CAT.<sup>35</sup>

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<sup>30</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture] (defining “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . .”). Torture had previously been deemed a violation of universal DDHH in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), as well as a series of U.N. resolutions, but none of these documents provided for any international criminal enforcement mechanism. G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 & 1057 U.N.T.S. 407 (entered into force Jan. 3, 1976) [hereinafter ICCPR].

<sup>31</sup> Convention Against Torture, *supra* note 30. According to the U.S. State Department, “this blanket prohibition was viewed by the drafters of CAT as ‘necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.’” MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 2 (2009), <https://fas.org/sgp/crs/intel/RL32438.pdf> (quoting SUMMARY AND ANALYSIS OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT, S. TREATY DOC. NO. 100-20 (1988) [hereinafter SUMMARY AND ANALYSIS OF THE CONVENTION AGAINST TORTURE]).

<sup>32</sup> Convention Against Torture, *supra* note 30, art. 5(1).

<sup>33</sup> *Id.* art. 5(1)(c).

<sup>34</sup> GARCIA, *supra* note 31, at 3 (quoting Convention Against Torture, *supra* note 30, art. 14. “According to the State Department, Article 14 was adopted with an express reference to this treaty obligation extending only to ‘the victim of an act of torture committed in any territory



Common Article 3 (CA3) of the four Geneva Conventions prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>36</sup> CA3 would then seem to apply to detainees apprehended within the Afghanistan or Iraq conflicts.<sup>37</sup> The U.S. government has argued, however, that “unlawful enemy combatants” are unprivileged under the Geneva Conventions.<sup>38</sup>

Under U.S. law, the CAT is implemented by the Torture Act.<sup>39</sup> However, the only prosecution under U.S. laws against torture has been that of Chuckie Taylor, the American citizen son of Liberian President Charles Taylor. In that case, the Eleventh Circuit Court of Appeals applied the Torture Act to a conspiracy of high-level Liberian government officials.<sup>40</sup> At a U.N. Committee Against Torture hearing in November 2014, U.S. officials said that the treaty’s prohibitions on torture apply “wherever the United States exercises governmental authority,” a definition that includes military facilities but not necessarily CIA black sites.<sup>41</sup> The U.S. Congress passed a law in 2005 that no one in American custody shall be subjected to cruel, inhuman and degrading treatment “regardless of nationality or physical

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under [a signatory State’s] jurisdiction,’ but this limiting clause was ‘deleted by mistake.’ ”). *Id.* at 3 (quoting SUMMARY AND ANALYSIS OF THE CONVENTION AGAINST TORTURE, *supra* note 31, at 13–14).

<sup>35</sup> The outliers are Iran, Macedonia, Malaysia, and Zimbabwe. Hong Kong is not a party, but China is. See generally Status of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg\\_no=IV-9&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-9&chapter=4&clang=_en) (last visited Nov. 15, 2017) (listing signatories to the CAT).

<sup>36</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3(1)(a), (c), Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>37</sup> “Within” could mean either apprehended in the physical territory of the conflict, or simply involved in it—even if from a distance. See definitions in Prosecutor v. Tadić, Case No. IT-94-1-I, Opinion and Judgment, ¶¶ 572–576 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997). The nature of the conflicts there, too, were not always international/non-international and sometimes were both within the same conflict.

<sup>38</sup> See New York Times Editorial Board, *Close the Overseas Torture Loophole*, N.Y. TIMES (Oct. 20, 2014), [https://www.nytimes.com/2014/10/21/opinion/president-obama-and-the-convention-against-torture.html?\\_r=0](https://www.nytimes.com/2014/10/21/opinion/president-obama-and-the-convention-against-torture.html?_r=0).

<sup>39</sup> Torture Act, 18 U.S.C. 2340A(b) (2001).

<sup>40</sup> *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010). Note that the trial court in *United States v. Emmanuel*, No. 06-20758-CR, 2007 WL 2002452, at \*8 (S.D. Fla. July 5, 2007) (same case) rejected the definition of torture in the Torture Memos.

<sup>41</sup> Joshua Keating, *U.N. Torture Committee Blasts US Over Police Shootings and Gitmo*, SLATE (Dec. 1, 2014), [http://slate.com/blogs/the\\_world/2014/12/01/u\\_n\\_torture\\_committee\\_blasts\\_u\\_s\\_over\\_police\\_shootings\\_and\\_gitmo.html](http://slate.com/blogs/the_world/2014/12/01/u_n_torture_committee_blasts_u_s_over_police_shootings_and_gitmo.html).

location.”<sup>42</sup> Although then President Bush reserved the right to bypass the law, the plain language of the statute is clear.<sup>43</sup>

Not only do these crimes violate international and U.S. law, they must be prosecuted because impunity will encourage their perpetration in the future. When former President Obama admitted at a news conference that the United States “tortured some folks,”<sup>44</sup> he was far from the first U.S. official to say so.<sup>45</sup> Given such formal admissions, the United States is under obligation to prosecute. Impunity for these crimes threatens not only America’s reputation in the world but also the preemptory international norms against torture and enforced disappearance. As the Advocates for U.S. Torture Prosecutions have noted, “[p]roper accountability, including criminal prosecution of senior [U.S.] military and civilian officials authorizing acts of torture, is essential to preserving the meaning of the preemptory norm against torture.”<sup>46</sup>

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<sup>42</sup> 42 U.S.C. § 2000dd(a) (2006).

<sup>43</sup> See Memorandum from Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State (Jan. 21, 2013) (stating there is no legal basis to claim that the U.N. torture treaty did not apply to U.S. officials acting overseas).

<sup>44</sup> *Obama: “We tortured some folks” After 9/11*, CBS NEWS (Aug. 1, 2014), <http://cbsnews.com/news/obama-we-tortured-some-folks-after-911>.

<sup>45</sup> Susan J. Crawford, the convening authority responsible for overseeing the Guantánamo military commissions from 2007 to 2010, has said, “We tortured [Mohammed al-]Qahtani,” whose “treatment met the legal definition of torture.” Bob Woodward, *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, WASH. POST (Jan. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html> (alteration in original). Because of this, Crawford refused to refer al Qahtani to the military commissions for trial. *Id.* Alberto Mora, who served as general counsel of the Navy, strongly opposed the use of many of the interrogation techniques approved by a Secretary of Defense Donald Rumsfeld on December 2, 2002, and subsequently used in Guantánamo Bay. Interview with Alberto Mora, General Counsel, U.S. Navy (Sept. 17, 2007). According to Mora, many of these techniques, whether used singly or in combination, could “rise to the level of torture.” *Id.* In 2006, Mora publicly stated that cruel, inhuman or degrading treatment had been applied in “Abu Ghraib, Guantánamo and other locations,” and that the treatment “may have reached the level of torture in some instances.” Alberto J. Mora, *An Affront to American Values*, WASH. POST (May 27, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601548.html>. Colonel Lawrence Wilkerson, chief of staff to Secretary of State Colin Powell, has stated that U.S. armed forces “were involved in practices that violated the Geneva Conventions, the International Convention Against Torture, U.S. domestic law, and the written and unwritten moral code of the American soldier.” THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT 361 (The Constitution Project ed., 2013), [https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment_0.pdf). The leader of the U.S. Army investigation into prisoner abuse at Abu Ghraib, Major General Antonio Taguba, has also gone on record saying that detainees in U.S. custody were tortured there. *Id.*

<sup>46</sup> TRUDY BOND ET AL., SHADOW REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE ON THE REVIEW OF THE PERIODIC REPORT OF THE UNITED STATES OF AMERICA 13

Moreover, if the United States can excuse torture in the name of national security, what other crimes might be allowed? Even before the current administration threatened to bring back waterboarding and “a hell of a lot worse,”<sup>47</sup> Jameel Jaffer stated: “If we fail to hold accountable the torturers, we risk entrenching the dangerous view that the intelligence agencies responsible for protecting the nation’s security are beyond the reach of the law.”<sup>48</sup> Oren Goss notes that, even if the use of torture to gain information “under extreme circumstances is inevitable, it still makes good sense to reject absolutely the use of torture” to prevent the use of “interrogational torture in less-than-catastrophic cases, for nonpreventive purposes, or against persons who are not suspected terrorists.”<sup>49</sup>

Finally, and most importantly, the victims of these heinous crimes deserve redress. Reparations are necessary to repair the legal injury.<sup>50</sup> The next section argues that a duty to the victims requires their advocates to seek the avenues most likely to get results in their particular case.

### III. POSSIBLE VENUES FOR PROSECUTION

#### A. *United States*

The optimal venue for prosecution, of course, would be the United States. Before and since the Senate Torture Report’s release, organizations such as the ACLU have drawn up plans on why the Justice Department should appoint a special prosecutor to investigate the torture policies, what tools would be available to that prosecutor, and what kinds of questions the prosecutor should ask.<sup>51</sup> Geoffrey Robertson has written: “If there is any silver lining retrospectively to be found in those grotesque pictures of black clouds over Manhattan, it will be eventual US commitment to a system of global justice which alone offers a principled method of punishing terrorism

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(The Int’l Hum. Rts. Clinic, Harv. L. Sch. ed., 2014), <http://hrp.law.harvard.edu/wp-content/uploads/2014/10/CAT-Shadow-Report-Advocates-for-US-Torture-Prosecutions.pdf>.

<sup>47</sup> Savage, *supra* note 4.

<sup>48</sup> Jameel Jaffer, *Those Who Approved Torture Shouldn’t Be Above the Law*, MSNBC (Dec. 14, 2014), <http://msnbc.com/msnbc/those-who-approved-torture-shouldnt-be-above-the-law>.

<sup>49</sup> Oren Goss, *Lecture Commentary*, 99 AM. SOC’Y INT’L L. PROC. 407, 407 (2005).

<sup>50</sup> See, e.g., Fionnuala Ní Aoláin, *What is the Remedy for American Torture?*, JUST SECURITY (Nov. 25, 2014, 9:17 AM), <http://justsecurity.org/17720/remedy-american-torture>.

<sup>51</sup> See, e.g., ACCOUNTABILITY FOR TORTURE: WHY A CRIMINAL INVESTIGATION IS NECESSARY 1–2 (ACLU ed., 2017), <https://aclu.org/sites/default/files/assets/accountabilityfortorture-whyacriminalinvestigationisnecessary.pdf>.

on this scale.”<sup>52</sup> Whether or not torture is, as then-President Barack Obama himself has deemed it, “unconstitutional,”<sup>53</sup> the absolute prohibition on torture under the CAT means that those responsible must be prosecuted.

But Obama also said he didn’t want to “look[ ] backwards.”<sup>54</sup> Those investigations that were opened have since been closed. The U.N. Human Rights Committee (UNHRC) has “note[d] with concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment committed in the context of the CIA secret rendition, interrogation and detention programmes were closed in 2012, resulting in only a meagre number of criminal charges being brought against low-level operatives.”<sup>55</sup> However, Assistant Secretary of State for Democracy, Human Rights and Labor Tom Malinowski did say at the UNHRC hearing: “[W]e know that to avoid falling backward, *we must be willing to look backward* and to come to terms with what happened in the past.”<sup>56</sup> Malinowski also stated:

[N]o crime offends human dignity more than torture. . . . We believe that torture, and cruel, inhuman and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions. . . . It’s important to stress that we

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<sup>52</sup> GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE*, at xxix (The New Press ed. 2006) [hereinafter ROBERTSON, *CRIMES AGAINST HUMANITY*].

<sup>53</sup> Charlie Savage, *Barack Obama’s Q&A*, BOSTON.COM (Dec. 20, 2007), <http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>. Professor Alan Dershowitz has argued that under limited circumstances, torture is constitutional. *See, e.g.*, ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 475 (Little, Brown and Co. ed. 2002).

<sup>54</sup> David Johnston & Charlie Savage, *Obama Reluctant to Look into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), <http://www.nytimes.com/2009/01/12/us/politics/12inquire.html>.

<sup>55</sup> U.N. Human Rights Comm., Rep. on the Concluding Observations on the Fourth Periodic Report of the United States of America, CCPR/C/USA/CO/4, (2014), <http://www.refworld.org/docid/5374afcd4.html>. The report goes on:

The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established. The State party should also consider the full incorporation of the doctrine of “command responsibility” in its criminal law and declassify and make public the report of the Senate Special Committee on Intelligence into the CIA secret detention programme.

*Id.*

<sup>56</sup> LORAMY GERSTBAUER, *U.S. FOREIGN POLICY AND THE POLITICS OF APOLOGY* 115 (Routledge ed., 2017) (emphasis added).

expect others to hold us to the same high standards to which we hold them.<sup>57</sup>

Harold Koh and others applauded the acknowledgments made before the Committee.<sup>58</sup> But notwithstanding Malinowski's praiseworthy rhetoric, "de facto immunities" remain, as Ben Davis said, "[t]he process cannot conceive of the possibility of prosecuting a former president."<sup>59</sup> Indeed, many of these torturous behaviors (such as force-feeding, considered to amount to torture under international law,<sup>60</sup> and arbitrary detention) are still being conducted. Professor Jack Goldsmith wrote that "[t]he [Obama] administration has copied most of the Bush program, has expanded some of it, and has narrowed only a bit."<sup>61</sup> Therefore, it is possible that Obama's Department of Justice may not prosecute out of concern about future prosecutions against the President. Fionnuala Ní Aoláin remains concerned that such acknowledgements may draw attention away from the violations of detainees' human rights that are continuing, in that they may

allow us to forget that there are a host of other obligations that follow from naming the fact that torture has taken place. Lest we forget, the United States has a direct obligation to each individual tortured and subject to cruel treatment at Guantanamo Bay, and that obligation is one of repair, remedy and restitution.<sup>62</sup>

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<sup>57</sup> Tom Malinowski, Assistant Sec'y for Democracy Hum. Rts. & Lab., U.S. Dep't of St., Opening Statement at Committee Against Torture (Nov. 12–13, 2014), <http://geneva.usmission.gov/2014/11/12/malinowski-torture-and-degrading-treatment-and-punishment-are-forbidden-in-all-places-at-all-times-with-no-exceptions/>.

<sup>58</sup> Harold Hongju Koh, *America's "Unequivocal Yes" to the Torture Ban*, JUST SECURITY, (Nov. 18, 2014, 9:52 AM), [http://www.justsecurity.org/17551/americas-unequivocal-yes-torture-ban](http://www.justsecurity.org/17551/americas-unequivocal-yes-torture-ban/) ("More important, as noted above, this is the first time in more than two decades that the United States moved away from a strict territorial reading of a human rights treaty.")

<sup>59</sup> Benjamin G. Davis, Assoc. Professor of L., Univ. Toledo. Coll. of L., Statement at the International Law Students Association's International Law Week 2014 Panel: Chaos and Impunity: Core Crimes and Sitting Heads of State (Oct. 24, 2014).

<sup>60</sup> See Spencer Ackerman, *US Bid for Secret Guantánamo Force-feeding Hearings Prompts Cover-up Fears*, THE GUARDIAN (Sept. 29, 2014), <https://www.theguardian.com/world/2014/sep/29/obama-guantanamo-bay-force-feeding-hearing-secret>; see also Stephen Lendman, *Guantanamo Force-Feeding Constitutes Torture*, GLOBAL RESEARCH (May 20, 2013), <https://www.globalresearch.ca/guantanamo-force-feeding-constitutes-torture/5335757>.

<sup>61</sup> Jack Goldsmith, *The Cheney Fallacy*, NEW REPUBLIC (May 18, 2009), <https://newrepublic.com/article/62742/the-cheney-fallacy>.

<sup>62</sup> See Ní Aoláin, *supra* note 50.

After the above-mentioned hearing, the Committee Against Torture recommended that the United States “[e]nsure that alleged perpetrators and accomplices are duly prosecuted, including persons in positions of command and those who provided legal cover to torture, and, if found guilty, handed down penalties commensurate with the grave nature of their acts.”<sup>63</sup> Yet thus far, when prosecutions and civil suits have been brought, American courts have rejected them, deferring to the Department of Justice’s (DOJ) invocation of the state secrets privilege and immunity doctrines and Congressional legislation stripping habeas corpus from detainees and hindering civil suits of government officials who authorized or participated in torture.<sup>64</sup>

Furthermore, Congress and the Bush, Obama, and now Trump administrations have repeatedly blocked attempts at redress in civil courts by torture survivors and the relatives of torture victims.<sup>65</sup> Canadian citizen Maher Arar’s U.S. lawsuit was dismissed on grounds that judicial intervention was inappropriate due to sensitive national security and foreign policy questions.<sup>66</sup> Similarly, U.S. courts dismissed Khaled El-Masri’s lawsuit, challenging his abduction, torture, and secret detention by the CIA, on state secrets grounds.<sup>67</sup> However, in one bright spot, the Center for Constitutional Rights (CCR) won a monetary settlement in U.S. court for seventy-two Iraqis in its Al-Quraishi case against the Abu Ghraib contractor, L-3 Services.<sup>68</sup>

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<sup>63</sup> U.N. Committee Against Torture, Rep. on Concluding Observations on the Third to Fifth Periodic Reports of United States of America, CAT/C/USA/CO/3-5 (2014), [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT\\_CAT\\_COC\\_USA\\_18893\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_COC_USA_18893_E.pdf).

<sup>64</sup> See Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 42 U.S.C. § 2000dd (2005)) (giving immunity to U.S. personnel who used authorized ‘operational practices’ in the detention and interrogation of detainees alleged to be engaged in terrorist activities); Military Commissions Act of 2006, 28 U.S.C. § 2241(e)(1) (2006), which stripped habeas corpus from detainees.

<sup>65</sup> Non-citizen detainees’ civil claims have been stymied by procedural roadblocks and defenses characterized as national security concerns, including the government’s assertions of state secrets, classified evidence, evaluations of foreign policy, or national security issues. Additionally, cases have been dismissed because government officials are protected by legal immunities. For a non-exhaustive list of cases brought by plaintiffs held in U.S. custody abroad, alleging torture or cruel, inhumane, or degrading treatment or punishment, see Bond, *supra* note 46, Appendix D.

<sup>66</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); see *Arar v. Ashcroft et al.*, CTR. FOR CONSTITUTIONAL RIGHTS (Sept. 21, 2015), <http://ccrjustice.org/home/what-we-do/our-cases/arar-v-ashcroft-et-al>.

<sup>67</sup> See, e.g., *El-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006).

<sup>68</sup> See *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201 (4th Cir. 2011), *rev’d en banc*, 679 F.3d 205 (4th Cir. 2012) (dismissing appeal for lack of jurisdiction and remanding to district

In CCR's *Al Shimari* case—another suit against an Abu Ghraib contractor, CACI—the Fourth Circuit vacated the district court's dismissal and reinstated the case in October 2016.<sup>69</sup> At issue is whether the legality of torture is an unreviewable “political question.”<sup>70</sup> As Andrea Prasow of Human Rights Watch pointed out, invoking state secrets privilege may be harder to do since the Senate report has declassified many of those secrets.<sup>71</sup>

In a controversial op-ed, Anthony Romero of the ACLU called for President Obama to pardon those responsible for the torture, claiming that as they are already benefiting from tacit pardons, explicit pardons would at least show that what they had done was against the law.<sup>72</sup> Such action may not be needed. The ACLU recently settled a lawsuit against James Elmer Mitchell and John “Bruce” Jessen, two psychologists contracted by the CIA to design, implement, and oversee the torture program.<sup>73</sup> The suit was on behalf of Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and the family of Gul Rahman.<sup>74</sup> All three were kidnapped by the CIA and tortured and experimented upon according to Mitchell and Jessen's protocols; Rahman died as a result of his torture.<sup>75</sup> The U.S. government stated that it was willing to consider “protective measures” to safeguard its interests while still allowing the case to go forward.<sup>76</sup> This marked the first time the U.S. government has not invoked the “state secrets” privilege at the outset, and is almost certainly due to the release of the SSCI report.<sup>77</sup> Through such prosecutions, the U.S.

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court, resulting in settlement); *Al-Quraishi, et al. v. Nakhla and L-3 Services*, CTR. FOR CONSTITUTIONAL RGTS. (July 15, 2015), <http://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services>.

<sup>69</sup> *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147 (4th Cir. 2016).

<sup>70</sup> *Id.* at 157–62.

<sup>71</sup> Eli Lake & Josh Rogin, *CIA Torture Report May Set Off Global Prosecutions*, BLOOMBERG VIEW (Dec. 9, 2014, 7:35 PM), <https://www.bloomberg.com/view/articles/2014-12-10/cia-torture-report-may-set-off-global-prosecutions> (“Judges have accepted the state secrets claim. Now it will be much harder to do that when we all have access to a 500-page public report that details a lot of this.”).

<sup>72</sup> Anthony D. Romero, *Pardon Bush and Those Who Tortured*, N.Y. TIMES (Dec. 8, 2014), [https://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html?\\_r=0](https://www.nytimes.com/2014/12/09/opinion/pardon-bush-and-those-who-tortured.html?_r=0).

<sup>73</sup> *Salim v. Mitchell – Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU (Aug. 17, 2017), <http://aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program>.

<sup>74</sup> *Salim v. Mitchell*, No. CV-15-0286-JLQ, 2017 WL 3389011, at \*1 (E.D. Wash. Aug. 7, 2017).

<sup>75</sup> *Id.* at \*3.

<sup>76</sup> Dror Ladin, *The Government's Unprecedented Position in CIA Torture Lawsuit Is Very Good News*, ACLU (Apr. 15, 2016, 11:00 AM), <https://www.aclu.org/blog/speak-freely/governments-unprecedented-position-cia-torture-lawsuit-very-good-news>.

<sup>77</sup> *Id.*

government may begin to confront its own responsibility for these harms, regain its stature in the international community, and truly uphold its commitment to honor international human rights.

### *B. International Courts*

Despite these small signs of progress, given the failure thus far of the United States to prosecute, it is important that perpetrators of torture be tried in the courts of other countries, at the International Criminal Court (ICC), or in regional courts, particularly since so much of the RDI program took place overseas.

In 2006, the European Commission for Democracy Through Law (better known as the Council of Europe's "Venice Commission") issued a legal opinion concluding that EU Member States are "under an obligation to prevent a prisoner's *exposure to the risk of torture*" or inhuman or degrading treatment and that "the assessment of the reality of the risk must be carried out very rigorously."<sup>78</sup>

At the ICC, Chief Prosecutor Fatou Bensouda in 2014 opened a preliminary examination into U.S. treatment of detainees in Afghanistan,<sup>79</sup> crossing an "important threshold" in examining the RDI program.<sup>80</sup> In November 2017, Bensouda requested permission to investigate U.S. military personnel and members of the CIA, citing "the gravity of the acts committed . . . and the absence of relevant national proceedings against those who appear to be most responsible for the most serious crimes within this situation."<sup>81</sup> Other ICC states' parties implicated in the RDI program include

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<sup>78</sup> Eur. Comm'n for Democracy Through Law, *Opinion on the Int'l Legal Obligations of Council of Eur. Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 66th Sess., Opinion No. 363 (2006), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)009-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)009-e).

<sup>79</sup> Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Issues Her Annual Report on Preliminary Examination Activities (Dec. 2, 2014), <http://icc-cpi.int/Pages/item.aspx?name=PR1070&ln=en>.

<sup>80</sup> Ryan Goodman, *Int'l Criminal Court's Examination of U.S. Treatment of Detainees Takes Shape*, JUST SECURITY (Dec. 3, 2014, 12:06 PM), <http://justsecurity.org/17948/international-criminal-courts-examination-u-s-treatment-detainees-takes-shape/>. Earlier, the U.S. delegation had requested that the court not publish even preliminary allegations, warning that "the world would see *any ICC mention of possible American war crimes* as evidence of guilt, even if the court never brought a formal case." *Id.* (emphasis added).

<sup>81</sup> Barney Thompson, ICC Seeks Investigation Into US Military, CIA Personnel in Afghanistan War Crime Probe (Nov. 20, 2017), <https://www.ft.com/content/1dc0782e-18d1-3b4f-836d-66e0f6f16017>; Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Requests Judicial Authorisation to Commence an Investigation



Belgium, Canada, Djibouti, Germany, Italy, Jordan, Lithuania, Malawi, Poland, Romania, Tanzania, and the UK<sup>82</sup>—all of which present potential future avenues for ICC prosecution.

Regional courts are another venue in which victims may seek redress and accountability. The European Court of Human Rights (ECtHR) recently held that Macedonia's participation in U.S. detention operations violated El-Masri's rights under the European Convention on Human Rights, and that his ill treatment by the CIA amounted to torture.<sup>83</sup>

In 2014, the ECtHR ruled that the Polish government had allowed the CIA to run a secret prison at Stare Kiejkuty at which two terrorism suspects were tortured.<sup>84</sup> One of the applicants, the aforementioned Abu Zubaydah, is currently held at Guantanamo; the other, Al-Nashiri, "was prosecuted before a U.S. military commission and is the subject of [extended] habeas [lawsuits] in the DC Circuit."<sup>85</sup> And legal challenges to secret detention and extraordinary rendition are pending before the ECtHR against Lithuania, Romania, and Italy, and before the African Commission on Human and Peoples' Rights in the case of Mohammed al-Asad, a Yemeni national who was wrongfully detained in Djibouti as part of the CIA rendition program.<sup>86</sup>

In the Americas, after the release of the Senate Torture Report, the Inter-American Commission on Human Rights (IACHR) "reiterate[d] its calls on

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into the Situation in the Islamic Republic of Afghanistan (Nov. 20, 2017), <https://www.icc-cpi.int/Pages/item.aspx?name=171120-otp-stat-afgh>.

<sup>82</sup> See OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 17 and accompanying text; *cf.* *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Nov. 20, 2017).

<sup>83</sup> See, e.g., Amrit Singh, *European Court of Human Rights Finds Against CIA Abuse of Khaled el-Masri*, THE GUARDIAN (Dec. 13, 2012), <https://www.theguardian.com/commentisfree/2012/dec/13/european-court-human-rights-cia-abuse-khaled-elmasri>.

<sup>84</sup> Dan Bilefsky, *Court Censures Poland Over C.I.A. Renditions*, N.Y. TIMES (July 24, 2014), <https://www.nytimes.com/2014/07/25/world/europe/europe-poland-cia-black-site-extraordinary-rendition.html>.

<sup>85</sup> Fionnuala Ní Aoláin, *The Accountability Matrix Widens: Torture, Black Sites and the European Convention*, JUST SECURITY (July 29, 2014, 8:58 AM), <http://www.justsecurity.org/13289/accountability-matrix-widens-torture-black-sites-european-convention>. The Court found breaches of Convention articles 3 (torture), 5, 6 (liberty, security and trial), 8 (family and private life), and 13 (right to an effective remedy) in both *Husayn (Abu Zubaydah) v. Poland* and *Al Nashiri v Poland*. The Court went further in *Al Nashiri*, finding violations of article 2 (right to life) and 3 of the Convention, as well as article 1 of Protocol 6 (abolition of the death penalty). *Id.*

<sup>86</sup> Lauren Walker, *Torture Report Leaks May Reopen CIA Rendition Case*, NEWSWEEK (Dec. 3, 2014), <http://www.newsweek.com/torture-report-leaks-may-reopen-cia-rendition-case-288753>.

the United States to carry out a full investigation in order to clarify the facts, and prosecute and punish all persons within its jurisdiction responsible for acts of torture or other cruel, inhuman or degrading treatment or punishment; and to provide integral reparations to the victims.”<sup>87</sup> However, since the U.S. is not a member of the Inter-American Court on Human Rights, this call is unlikely to lead to action.

### C. *The Unbearable Lightness of Universal Jurisdiction*

Many commentators have called for universal jurisdiction (UJ) to be invoked as a legal basis for these torture prosecutions because of the global scale and heinousness of the crimes. Per the *Reinstatement (Third) of the Foreign Relations Law of the United States*, “[u]nder universal jurisdiction, any state in the world may prosecute and try the core international crimes—crimes against humanity, genocide, torture, and war crimes—without any territorial, personal, or national-interest link to the crime in question when it was committed.”<sup>88</sup>

In 1935, as part of an effort by the American Society of International Law to codify international law, Harvard Research in International Law described five traditional bases of jurisdiction over international crime. In addition to UJ, these bases are territorial, nationality, protective, and passive personality jurisdiction.<sup>89</sup>

Territorial and active personality jurisdiction are fairly straightforward; territorial includes crimes committed in that country’s territory and encompasses both objective and subjective types. Active personality jurisdiction applies when a national of that country commits a crime.<sup>90</sup>

The protective principle, meanwhile, allows jurisdiction over extraterritorial acts if they pose a potential threat to “certain important

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<sup>87</sup> Press Release, Org. Am. States, IACHR Calls on the United States to Investigate and Punish Acts of Torture Established in the Senate Intelligence Committee Report (Dec. 12, 2014), [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/152.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/152.asp).

<sup>88</sup> Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 1 (2011) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, cmts. c–g, 404, cmts. a–b, 423 (AM. LAW INST. 1987)). Langer includes torture in his list of core international crimes.

<sup>89</sup> Christopher L. Blakesley & Dan E. Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT’L L. REV. 1, 13 (2007) (citing Harvard Research in Int’l Law, *Draft Convention on Jurisdiction With Respect to Crime*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935)).

<sup>90</sup> *Id.* at 18. Interestingly, Europe has traditionally had a more expansive application of the nationality theory of jurisdiction. *Id.* at 20.

interests or functions of the asserting state,”<sup>91</sup> that is, the risk of causing a “serious adverse effect on a state’s security, integrity, sovereignty, or a basic or important governmental function.”<sup>92</sup> Christopher Blakesley and Dan Stigall note that “[m]any incidents of terrorism and other crimes against humanity committed against nationals or basic national interests will allow jurisdiction in the object state based on the protective principle.”<sup>93</sup>

Another ground for jurisdiction is passive personality, in which a national of that country was the victim of a crime.<sup>94</sup> Although some have described passive personality theory as “generally frowned upon in international law,” the same commentators note that it remains “unquestionably available in relation to international crimes.”<sup>95</sup> Blakesley and Stigall write, “Certainly, given the wider acceptance of [passive personality] principle, it would be difficult to say that international law bars a broad application of it.”<sup>96</sup> They argue that “[w]ith regard to both international crimes and U.S. jurisdiction over terrorists [sic] the passive personality principle is in the ascendant, although usually connected to other bases of jurisdiction.”<sup>97</sup> In *United States v. Yousef*, the Second Circuit applied the passive personality principle to a bomb plot against a “United States-flag aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States.”<sup>98</sup>

Furthermore, in U.S. law, both the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 and the USA PATRIOT Act suggest use of the passive personality principle.<sup>99</sup> The former states that one of the Act’s purposes is to provide jurisdiction over extraterritorial terrorism against U.S.

<sup>91</sup> *Id.* at 22.

<sup>92</sup> *Id.* The traditional protective principle has been described thusly:

A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed.

*Id.* at 22 n.143.

<sup>93</sup> *Id.* at 22–23.

<sup>94</sup> *Id.* at 13.

<sup>95</sup> Robert Cryer, *International Criminal Law vs. State Sovereignty: Another Round?*, 16 EUR. J. INT’L L. 979, 987 (2005) (citing Rohrig, Brunner & Heinze, 17 ILR 393 (1950)).

<sup>96</sup> Blakesley & Stigall, *supra* note 89, at 26 n.165.

<sup>97</sup> *Id.* at 27 (citing *Wyatt v. Syrian Arab Republic*, 362 F. Supp. 2d 103 (D.D.C. 2005) (noting that relevant court decisions seem to combine passive personality with other jurisdictional bases to offenses threatening national security and narcotics trafficking)).

<sup>98</sup> *United States v. Yousef*, 327 F.3d 56, 96 (2d Cir. 2003). The court also observed that “there is no doubt that jurisdiction is proper under the ‘protective principle. . . .’” *Id.* at 97.

<sup>99</sup> Blakesley & Stigall, *supra* note 89, at 27 (citing 18 U.S.C. § 2331 (2001)).

nationals.<sup>100</sup> Both laws have also been interpreted as employing the protective principle.<sup>101</sup> In fact, the USA PATRIOT Act combines virtually all theories, without explicitly naming them as such.<sup>102</sup>

In recent years, the line between narrowly tailored UJ and traditional passive personality jurisdiction has blurred. Langer has described this as the “new UJ” where there is sufficient ‘nexus’ with that country.<sup>103</sup> Meanwhile, Nahal Kazemi has advocated for an “optimization theory” of UJ.<sup>104</sup> Kazemi argues that UJ should not be based on the “heinousness of the offense,” nor should any expansion of UJ be “predicated on a comparison between the crime in question and piracy.”<sup>105</sup> Instead, she recommends that “States should look toward the practical realities of prosecution and how [UJ] affects [their] ability [ ] to achieve optimal levels of prosecution and deterrence.”<sup>106</sup>

The idea that the courts of other countries can try State actors for human rights abuses is a relatively recent one. Antonio Cassese observes that universality operates as a “default jurisdiction” under customary international law when the territorial state or the state of active nationality for some reason does not prosecute the offender.<sup>107</sup> He locates the logic behind this use of universality in treaties including the Geneva Conventions and the CAT.<sup>108</sup>

<sup>100</sup> *Id.* at 27–28.

<sup>101</sup> *Id.* at 28.

<sup>102</sup> *Id.* at 28 n.175 (“[I]t is clear the nationality nexus provides jurisdiction when a U.S. national is a victim or perpetrator of terrorism.” (citing Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 317, 377, 804, 2001 U.S.C.C.A.N. (115 Stat.) 272 (2001))).

<sup>103</sup> Langer, *supra* note 88, at 43. Langer also distinguishes between the prosecution of foreign political enemies and the prosecution of foreign military enemies, noting that “while trials have been used to harass or suppress the latter, the parties to an armed conflict have usually been able to invoke jurisdictional bases other than universal jurisdiction, including territoriality, passive personality, and the protective principle.” *Id.*

<sup>104</sup> Nahal Kazemi, *Justifications for Universal Jurisdiction: Shocking the Conscience Is Not Enough*, 49 TULSA L. REV. 1, 29 (2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 593 (2003).

<sup>108</sup> *Id.* In those treaties, “the contracting state is offered the choice between prosecuting the suspect or handing him over to a relevant country.” *Id.* at 593–94. *But see* Arrest Warrant (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3 (Apr. 11). “[A]lthough the purpose of [multilateral] treaties is to assure ‘universal punishment of the offences in question . . . [by denying] perpetrators . . . refuge in all States, [it is incorrect to denominate this jurisdiction as true universal jurisdiction].’” Robert Cryer, *The Doctrinal Foundations of International Criminalization*, in INT'L CRIM. LAW 127 (M. Cherif Bassiouni ed., 3d ed. 2008).

UJ laws, particularly in Europe, have mostly been limited to cases with a connection to the country. The ICJ judges in the *Arrest Warrant* case, the PCIJ in the *Lotus* case, and mainstream European scholars draw a distinction between jurisdiction to prescribe (or “legislate”) and jurisdiction to enforce.<sup>109</sup> Laying out “The Case for Universal Jurisdiction” in *Foreign Affairs*, Kenneth Roth noted that “the exercise by US courts of jurisdiction over certain heinous crimes committed overseas is an accepted part of American jurisprudence,” and that UJ was “the concept that allowed Israel to try Adolf Eichmann.”<sup>110</sup>

In the case of Chilean ex-dictator Augusto Pinochet, the UK House of Lords found that international crimes like torture could not be protected by former head-of-state immunity.<sup>111</sup> Philippe Sands has laid out three “Pinochet principles” of UJ: (1) “certain crimes [ ] are so serious that they are treated by the international community as being international crimes over which any state may, in principle, exercise jurisdiction”; (2) “national courts, rather than international courts only, can—and in some cases must—exercise jurisdiction over these international crimes, irrespective of any direct connection with the acts”; and (3) for these crimes, it can no longer be assumed that former sovereigns or high officials will be afforded immunities.<sup>112</sup>

Professor Margaret deGuzman has argued that UJ may be a particularly effective method for norm promotion—which she called one of the key goals of international criminal law.<sup>113</sup> According to Ben Ferencz, one of the Nuremberg prosecutors, the purpose of UJ is deterrence,<sup>114</sup> a conclusion

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<sup>109</sup> See, e.g., F.A. Mann, *The Doctrine of Jurisdiction in International Law*, reprinted in *STUDIES IN INTERNATIONAL LAW* (Clarendon Press ed., 1973); D.W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 1982 *BRIT. Y.B. INT’L L.* 1, 1; HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 307–10 (Robert W. Tucker ed., 2d ed. 1966).

<sup>110</sup> Kenneth Roth, *The Case for Universal Jurisdiction*, *FOREIGN AFFAIRS*, Sept./Oct. 2001, at 150, 150–51. In *Israel v. Eichmann*, Israel claimed the right to try the ‘architect of the Holocaust’ on the grounds of passive personality jurisdiction, protective principle jurisdiction, and universal jurisdiction. Israel’s national legislation conferring upon its courts jurisdiction over “[c]rimes against the Jewish people” was passed in 1950, but applied to any such substantive crimes, whenever and wherever they occurred. *Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, IV LSI 154 (1950) (Isr.)*.

<sup>111</sup> Philippe Sands, *International Law Transformed? From Pinochet to Congo . . . ?*, 16 *LEIDEN J. INT’L L.* 37, 38 (2003).

<sup>112</sup> *Id.*

<sup>113</sup> Margaret M. deGuzman, Assoc. Professor of Law, Temple Univ. Beasley Sch. of Law, Statement at the International Law Students Association’s International Law Week 2014 Panel: Emerging Trends in International Criminal Justice (Oct. 25, 2014).

<sup>114</sup> Benjamin B. Ferencz, Former Prosecutor, Int’l Military Tribunal: Update on the International Criminal Court’s Crime of Aggression: Considering Crimea (Oct. 24, 2014).

echoed by Geoffrey Robertson: “The doctrine of [UJ] over crimes against humanity is justified because it may make some torturer pause at the prospect that sometime, somewhere, some prosecutor may feel strongly enough about his crime to put him on trial.”<sup>115</sup>

Yet invoking UJ is undoubtedly controversial and often ineffective. Critics of UJ call it a nontraditional interpretation of international law. Nahal Kazemi has noted that while UJ is “a critically important development in international law,” it is nevertheless “deeply at odds with hundreds of years of international law and practice.”<sup>116</sup> John Kyl and others have written that UJ prosecutions in Belgium, the UK, Germany, and Switzerland “represent views that run counter to traditional interpretations of international law.”<sup>117</sup> Henry Kissinger has been a vocal opponent of UJ, on the grounds that it infringes on state sovereignty.<sup>118</sup>

Many of the states involved in the rendition program have UJ laws on their books, and several have already invoked them regarding U.S. torture. However, these have produced limited results, particularly after the United States brought political pressure.

In Spain, Judge Baltasar Garzón led investigations of the “Bush Six” after the Center for Constitutional Rights and the European Center for Constitutional and Human Rights submitted an expert opinion to Spain’s Audiencia Nacional in January 2011.<sup>119</sup> But, diplomatic cables have revealed that U.S. Senator Mel Martinez and the U.S. embassy’s charge d’affaires were alarmed by this development, especially “when magistrates

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<sup>115</sup> ROBERTSON, *supra* note 52, at 350.

<sup>116</sup> Kazemi, *supra* note 104, at 37 (citing Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 418 (2000)).

<sup>117</sup> Jon Kyl, Douglas J. Feith & John Fonte, *The War of Law: How New International Law Undermines Democratic Sovereignty*, FOREIGN AFFAIRS, July/Aug. 2013, at 120 (Counter: Would Kyl et al. then consider Nuremberg “counter to traditional interpretations of international law[?]”).

<sup>118</sup> See Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS 6 (July/Aug. 2001).

<sup>119</sup> *Spain: Court Accepts Complaint Against End of Investigations into Torture in Guantánamo*, EURO. CTR. FOR CONST. & HUM. RHTS., [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/spain/articles/spanish-investigations-into-the-united-states-torture-program.html?file=tl\\_files/Dokumente/Education%20Program%20Call%20for%20Scholarships%202017.pdf](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/spain/articles/spanish-investigations-into-the-united-states-torture-program.html?file=tl_files/Dokumente/Education%20Program%20Call%20for%20Scholarships%202017.pdf) (last visited Nov. 21, 2017) (“The Bush Six are accused of having aided and abetted crimes of torture, cruel, inhuman or degrading treatment and grave breaches of the Geneva Conventions of 1949. The crimes in question were committed at US detention facilities at Guantánamo and at other locations.”); see also Andreas Schüller & Morenike Fajana, *Piecing Together the Puzzle: Making US Torturers in Europe Accountable*, STATE WATCH 3 (Sept. 2014), <http://www.statewatch.org/analyses/no-256-torture-schuller-fajana.pdf>.

and prosecutors in both Spain and Germany began comparing notes.”<sup>120</sup> They warned Spain the prosecutions would have “an enormous impact on the bilateral relationship” and noted in a U.S. cable: “This co-ordination among independent investigators will complicate our efforts to manage this case at a discreet government-to-government level.”<sup>121</sup> Spanish lawmakers then approved a bill that severely limited the country’s ability to investigate and prosecute torture and other crimes against humanity committed abroad.<sup>122</sup>

Belgium’s UJ law<sup>123</sup> has undergone a similar arc. Several criminal complaints were filed in Belgian courts in 2003 against former U.S. President George H.W. Bush, U.S. Secretary of State General Colin Powell, U.S. Vice President Dick Cheney, and retired U.S. General Norman Schwarzkopf, alleging that they killed civilians by ordering a missile attack on Baghdad during the Persian Gulf War.<sup>124</sup> Under intense pressure from the U.S. (which indicated that the law could affect the continued presence of NATO headquarters in Belgium),<sup>125</sup> Belgium revised its law in May 2003, stating that only the public prosecutor could initiate a suit with no connection to Belgium.<sup>126</sup> Under the reconfigured legislative scheme, Belgium exercises jurisdiction on the basis of active and passive personality principles.<sup>127</sup> UJ is

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<sup>120</sup> Giles Tremlett, *Wikileaks: US Pressured Spain over CIA Rendition and Guantánamo Torture*, THE GUARDIAN (Dec. 1, 2010), <https://www.theguardian.com/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition>.

<sup>121</sup> *Id.* The cable also read: “Baring (sic) a categorical statement from the US government that no detainees passed through Spain – and we understand that might be undesirable from a policy standpoint even if factually correct – *nothing but time is going to make this go away.*” *Id.* (alteration in original) (emphasis added).

<sup>122</sup> *Spanish Congress Enacts Bill Restricting Spain’s Universal Jurisdiction Law*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://cja.org/spanish-congress-enacts-bill-restricting-spains-universal-jurisdiction-law/> (last visited Nov. 21, 2017).

<sup>123</sup> For extensive background on Belgium’s UJ law and a treatment of Germany and Spain’s laws as well, see Kai Ambos, *Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the ‘Torture Memos’ be Held Criminally Responsible on the Basis of Universal Jurisdiction?*, 42 CASE W. RES. J. INT’L L. 405 (2009).

<sup>124</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 97 AM. J. INT’L L. 962, 985 (2003).

<sup>125</sup> Richard Bernstein, *Belgium Rethinks its Prosecutorial Zeal*, N.Y. TIMES (Apr. 1, 2003), <http://www.nytimes.com/2003/04/01/world/belgium-rethinks-its-prosecutorial-zeal.html>.

<sup>126</sup> See Loi Modifiant la Loi u 16 juin 1993 Relative a la Repression des Violations Graves du Droit International Humanitaire et l’ Article 144ter du Code Judiciaire [Law Amending the Law for the Punishment of Serious Violations of International Humanitarian Law and Article 144 of the Judicial Code] of April 23, 2003, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], May 7, 2003.

<sup>127</sup> CODE PÉNALE [C.PÉN.] arts. 6(1), 7(1), 10(5) (Belg.).

authorized in the case of criminal offenses that Belgium is under a treaty obligation to prosecute, such as the CAT.<sup>128</sup>

In January 2012, on the basis of UJ, a French investigating magistrate issued a formal request, or “letter rogatory,” to the United States requesting access to the detention camp at Guantánamo, to relevant documents, and to all persons who had contact with the three victims during their detention there.<sup>129</sup> The United States has not replied.<sup>130</sup> In February 2014, relying on UJ, American and European NGOs filed a report asking a French judge to subpoena a former U.S. Guantanamo commander for his role in alleged torture and war crimes against detainees.<sup>131</sup>

In Germany, a 2004 complaint brought by Iraqi torture victims against Donald Rumsfeld was dismissed by the prosecutor under “immense pressure from the U.S. government.”<sup>132</sup> The basis of the dismissal was the principle of subsidiarity—that once an investigation had been opened in a different, “more appropriate”<sup>133</sup> venue, Germany would no longer have jurisdiction. Although the prosecutor noted that there was evidence to show the United States was not investigating Rumsfeld, they nevertheless concluded that the “‘complex’ as a whole” was being investigated by American authorities. The complaint was deemed inadmissible by the Higher Regional Court in Stuttgart and dismissed.<sup>134</sup> In 2006, American and German lawyers filed war

<sup>128</sup> *Id.* art. 12*bis*.

<sup>129</sup> *Universal Jurisdiction: Accountability for U.S. Torture*, CTR. FOR CONST. RTS. (Oct. 26, 2007), <https://ccrjustice.org/universal-jurisdiction-accountability-us-torture>.

<sup>130</sup> *Id.* Another leaked cable revealed the American government’s monitoring of the situation, quoting another French judge who predicted that the two judges in the case would “use all the tools at their disposal . . . to pursue their investigations of the civil suit . . . ‘very far.’” French Judiciary to Investigate Guantanamo Imprisonment of 2 Ex-Detainees, WIKILEAKS (June 8, 2005), <http://www.ccrjustice.org/files/wiki%20cable%20france%20torture%20case.pdf>.

<sup>131</sup> Cour d’appel [CA] [regional court of appeal] Paris, Feb. 26, 2014, 2275/05/10 (Fr.), [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/france.html?file=tl\\_files/Dokumente/Universelle%20Justiz/MILLER-DOSSIER-en-20140226.pdf](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/france.html?file=tl_files/Dokumente/Universelle%20Justiz/MILLER-DOSSIER-en-20140226.pdf). However, Miller failed to appear in court. *France: Court Investigates US Torture Cases*, EUR. CTR. FOR CONST. & HUM. RTS., [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/france.html?file=tl\\_files/Dokumente/Universelle%20Justiz/MILLER-DOSSIER-en-20140226.pdf](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/france.html?file=tl_files/Dokumente/Universelle%20Justiz/MILLER-DOSSIER-en-20140226.pdf) (last visited Nov. 21, 2017).

<sup>132</sup> Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT’L L. 927, 952 (2009).

<sup>133</sup> Kaleck suggests that these might include a State that had territorial jurisdiction or the International Criminal Court. *Id.*

<sup>134</sup> *Id.* (citing Letter and Memorandum from the Federal Prosecutor to Wolfgang Kaleck (Feb. 10, 2005), reprinted in 2005 JURISTENZEITUNG 311 (regarding the decision of the Federal Prosecutor in the case against Donald Rumsfeld and others)).



crimes charges in Germany against U.S. Secretary of Defense Donald Rumsfeld, U.S. Attorney General Alberto Gonzales, and U.S. Lieutenant General Ricardo Sanchez.<sup>135</sup> The German prosecutor dismissed the case in 2009, this time claiming, *inter alia*, that there was not a reasonable likelihood of convicting the suspect in Germany.<sup>136</sup>

As seen above, UJ may be uniquely vulnerable to accusations of being used for political ends, “to harass or eliminate foreign political or military enemies,” as Maximo Langer puts it.<sup>137</sup> Courts are more afraid of taking on state actors when jurisdiction is on an extraordinary basis like UJ. Many countries have foreign sovereign immunity laws, which prevent domestic courts from rendering judgments on the acts of foreign States (though there are exceptions to the general rule for precisely the crimes at issue here).<sup>138</sup> Beth Van Schaack has observed that in those cases, “[o]ur lingering concern about these extraordinary bases of jurisdiction seems to taint our thinking—there is more pushback with an immunity defendant.”<sup>139</sup> Katherine Gallagher has noted that when the target defendants are from powerful countries:

[T]he results do not necessarily bode well for those who favor accountability (as a tool for deterrence through public assignment of individual criminal responsibility and resulting punishment, as well as a mechanism for redress) over impunity (whether through the failure to investigate or prosecute known serious violations, or by according certain individuals, notably high-level officials, immunity).<sup>140</sup>

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<sup>135</sup> *Rumsfeld Torture Cases*, EUR. CTR. FOR CONST. & HUM. RTS., [https://www.ecchr.eu/en/our\\_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html](https://www.ecchr.eu/en/our_work/international-crimes-and-accountability/u-s-accountability/rumsfeld.html) (last visited Nov. 21, 2017).

<sup>136</sup> *Id.*

<sup>137</sup> Langer, *supra* note 88, at 41.

<sup>138</sup> *See, e.g.*, Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602–1611 (2013); European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181.

<sup>139</sup> Beth Van Schaack, Professor of Law, Santa Clara Univ. Sch. of L., Statement at the International Law Students Association’s International Law Week 2014 Panel: Chaos & Impunity: Core Crimes & Sitting Heads of State (Oct. 24, 2014), <https://ilsa.org/conferences/ILW/ILW%202014%20Program.pdf>; *see generally* Beth Van Schaack, *Immunity Doctrines: The Need for a Systemic Approach*, JUST SECURITY (Oct. 28, 2014, 8:01 AM), <http://justsecurity.org/16838/immunity-doctrines-systemic-approach/>.

<sup>140</sup> Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-level United States Officials Accountable for Torture*, 7 J. INT’L CRIM. JUST. 1087, 1115 (2009) (emphasis omitted).

As Anthony Sammons writes, prosecutors must exercise restraint in choosing which criminals to pursue and hold strictly to principles of substantive and procedural fairness.<sup>141</sup> “Otherwise, international consensus will judge the judges, and the result will be that universal jurisdiction becomes discredited and again falls into disuse.”<sup>142</sup> If so, the main problem with UJ will be that its lack of effectiveness has done a disservice to the victims.

Pablo de Greiff, U.N. Special Rapporteur on transitional justice, recently expressed concern about current regression in the application of UJ, asking that States with UJ laws on the books “not [ ] backtrack on their accomplishments” and challenging States without such laws “to adopt relevant legislation expeditiously.”<sup>143</sup> Indeed, UJ may be experiencing a resurgence. In 2014, a judge in Argentina issued arrest and extradition warrants for Spanish war criminals, invoking UJ; attorney Carlos Slepoy said it was the first-time former ministers of the Franco regime had been targeted under UJ.<sup>144</sup>

UJ loomed large in public discourse after the Senate report’s release.<sup>145</sup> Amnesty International recommended to the International Law Commission that a proposed Convention on Crimes Against Humanity ought to demand that states exercise UJ over persons accused of such crimes.<sup>146</sup> And legal scholars like Stephen Vladeck have observed that certain U.S. officials may be deterred from traveling to Europe for fear of UJ prosecutions, noting: “If I am someone implicated in the torture report, I am thinking twice about

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<sup>141</sup> Anthony Sammons, *The “Under-Theorization” of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT’L L. 111, 137 (2003).

<sup>142</sup> *Id.* at 143.

<sup>143</sup> Press Release, Office of the High Commissioner of Human Rights, *Few Perpetrators of Mass Violations Face Justice, UN Expert Warns* (Sept. 12, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15019&LangID=E>.

<sup>144</sup> Associated Press, *Human Rights Abusers in Franco-era Spain Could be Tried in Argentina*, THE GUARDIAN (Nov. 2, 2014), <https://www.theguardian.com/world/2014/nov/02/buenos-aires-spain-franco-argentina>.

<sup>145</sup> See, e.g., Eli Lake & Josh Rogin, *CIA Torture Report May Set Off Global Prosecutions*, BLOOMBERG (Dec. 9, 2014, 7:35 PM), <http://www.bloombergview.com/articles/2014-12-10/cia-torture-report-may-set-off-global-prosecutions> (quoting CCR’s Baher Azmy, “After reviewing this report, we will give consideration to reopening petitions or filing new petitions in European courts under the principles of universal jurisdiction.”).

<sup>146</sup> Amnesty Int’l, *International Law Commission: Initial Recommendations for a Convention on Crimes Against Humanity*, AI Index IOR 40/1227/2015 (Apr. 2015). Amnesty defined UJ as “jurisdiction over crimes committed outside their territories which are not linked to the state in any way by the nationality of the suspect or the victims or by harm to the state’s own national interests.” *Id.*

traveling to Europe anytime soon.”<sup>147</sup> But for victims of U.S. torture, keeping its perpetrators out of Europe, while possibly satisfying on some level, provides neither accountability nor redress.

Multiple commentators have suggested resorting to UJ only when other forms of jurisdiction have failed. Kazemi has called UJ “a backstop to prevent impunity” and has written: “When States with legitimate interests in prosecution cannot or will not do so, and there is no international legal regime to punish particular conduct, that is when we should turn to universal jurisdiction.”<sup>148</sup> Wolfgang Kaleck, after summarizing European practice, deduced that “due to its difficulties [UJ] should only be used as a last resort in cases of impunity.”<sup>149</sup> In addition to the aforementioned regional mechanisms, Kaleck describes several alternative accountability mechanisms that are being used to address gross human rights violations, including civil suits and alternative theories for establishing jurisdiction over alleged wrongdoers, including territorial jurisdiction.<sup>150</sup> These will be described in more detail below.

#### *D. Alternatives: ‘Traditional’ Grounds of Jurisdiction*

Because of the difficulties UJ presents, it is best for states looking to prosecute these crimes to use alternatives to UJ: the more so-called traditional bases of jurisdiction described above. Thus far, Italy is the only country where a court has criminally convicted officials for their involvement in extraordinary rendition operations. Italy’s highest court recently upheld the convictions of U.S. and Italian officials for their role in the extraordinary rendition of Abu Omar to Egypt, and entered a monetary judgment against CIA officials.<sup>151</sup> Canada, in turn, is the only country to issue an apology to an

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<sup>147</sup> Somini Sengupta, *Americans Involved in Torture Can Be Prosecuted Abroad*, *Analysts Say*, N.Y. TIMES (Dec. 10, 2014), <https://www.nytimes.com/2014/12/11/us/politics/americans-involved-in-torture-can-be-prosecuted-abroad-analysts-say.html>.

<sup>148</sup> Kazemi, *supra* note 104, at 45. Similarly, Katherine Gallagher has observed that “if allegations of torture and abuse were fully and properly investigated in the home countr[ies] of the defendants, and prosecutions before an impartial judiciary were carried out, then there would be no need to turn to universal jurisdiction. . . .” Gallagher, *supra* note 140, at 1116.

<sup>149</sup> Kaleck, *supra* note 132, at 980 (remarking that UJ ought to be regarded as “a sometimes overestimated but still important tool that should be considered and used alongside other local, regional, and international remedies. . . . [A] professionally conducted, transnational, and interdisciplinary [UJ] case might be an important element in the struggle to end impunity and protect human rights.”).

<sup>150</sup> *Id.* at 964–73.

<sup>151</sup> See, e.g., STEVE HENDRICKS, *A KIDNAPPING IN MILAN: THE CIA ON TRIAL* 231 (W.W. Norton & Co. ed., 2010).

extraordinary rendition victim, Canadian citizen Maher Arar, who was extraordinarily rendered by the CIA to Syria, where he was tortured.<sup>152</sup> The Canadian government compensated Arar with C\$10.5 million.<sup>153</sup>

In an encouraging development with potential ramifications for the United States,<sup>154</sup> the UK has begun to allow cases to go forward that were previously barred by state secrets privilege. The UK allowed these cases to go forward despite claims that these actions would damage relations with the U.S.-Pakistani citizen Yunus Rahmatullah<sup>155</sup> and Yemeni citizen Abdel Hakim Belhaj have each won the right to sue the UK government over their kidnappings.<sup>156</sup> A representative of Amnesty International, who intervened in Belhaj's case, said, "The court of appeal has . . . set the stage for real accountability in the UK, which has been a long time in coming."<sup>157</sup> Additionally, Deputy Prime Minister Nick Clegg said that former Prime Minister Tony Blair and Home Secretary Jack Straw should face charges: "If people are found to break the law, be complicit in torture, the full rule of the law should come down on them without fear or favour—however operational or grand they were."<sup>158</sup> Former Guantanamo detainee Shaker Aamer, a British resident, has sued MI5 and MI6 for defamation and claims the UK is trying to keep him from speaking out about British complicity in U.S. torture.<sup>159</sup>

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<sup>152</sup> *Harper's Apology "Means the World": Arar*, CBC NEWS (Jan. 26, 2007), <http://www.cbc.ca/news/canada/harper-s-apology-means-the-world-arar-1.646481>.

<sup>153</sup> *Id.*

<sup>154</sup> See *Roper v. Simmons*, 543 U.S. 551, 603 (2005) (finding British law has a 'confirmatory role' in U.S. law).

<sup>155</sup> Richard Norton-Taylor, *Man Allegedly Tortured by US And UK Troops Wins Right to Sue For Damages*, THE GUARDIAN (Nov. 19, 2014), <https://www.theguardian.com/law/2014/nov/19/man-allegedly-tortured-us-uk-troops-wins-right-sue-damages>.

<sup>156</sup> Owen Bowcott, *Abdel Hakim Belhaj Wins Right to Sue UK Government Over His Kidnap*, THE GUARDIAN (Oct. 30, 2014), <http://www.theguardian.com/world/2014/oct/30/abdel-hakim-belhaj-court-kidnap-mi6-cia-torture>.

<sup>157</sup> *Id.*

<sup>158</sup> Jack Blanchard, *Nick Clegg: Tony Blair Should Face Charges if He Collaborated in CIA Torture*, DAILY MIRROR (Dec. 15, 2014), <http://mirror.co.uk/news/uk-news/nick-clegg-tony-blair-should-4817379>.

<sup>159</sup> Mark Townsend, *Guantánamo Bay: Why Can't Shaker Aamer Return to London?*, THE GUARDIAN OBSERVER (Apr. 20, 2013), <http://www.theguardian.com/world/2013/apr/20/guantanamo-shaker-aamer-london>. Aamer's lawyer, Clive Stafford Smith, points out,

[H]is case has an incendiary element: he is allegedly able to describe in detail how a UK intelligence agent was present while he was beaten. . . . Aamer's allegations of British complicity in his torture and detention would undoubtedly reopen the vexed and fraught debate over British complicity in the darker side of America's 'war on terror.'

*Id.*

In Spain, despite the narrowing of the country's UJ law described above, in April 2014, Judge Pablo Ruz announced that he had decided to proceed with the judicial investigation for torture against prisoners at Guantánamo. In this case, Judge Ruz based his decision on Spain's treaty obligations as well as the principle of subsidiarity, finding that cases were *not* proceeding in the U.S and therefore Spain had a duty to prosecute.<sup>160</sup>

Outside of the United States and UK, Germany may provide the optimal trial setting because it allows prior inconsistent statements to be admitted as impeachment evidence. This could prove useful in impeaching U.S. officials' previous denials of wrongdoing.<sup>161</sup> As Elizabeth DiPardo points out, "German evidentiary law allows for judicial records of the accused's previous statements to be read to the court if the accused's live testimony is contradictory."<sup>162</sup>

In addition to the German UJ cases described above, a Munich court did issue arrest warrants for CIA agents in the case of Khaled al-Masri in 2007.<sup>163</sup> The United States has thus far refused to extradite them.<sup>164</sup> However, in the wake of the Senate Torture Report, there is a sense that Germany "has to step up now," writes Wolfgang Büttner of Human Rights Watch.<sup>165</sup> In its complaint, filed December 17, 2014, the ECCHR accused Tenet, Rumsfeld, and others of the war crime of torture under paragraph 8 section 1(3) of the German Code of Crimes against International Law (Völkerstrafgesetzbuch).<sup>166</sup> The complaint notes that "[s]ome survivors of torture are resident in Germany" and could be called as witnesses.<sup>167</sup>

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<sup>160</sup> María Fernández, *Ruz Rechaza Archivar la Investigación por Torturas en el Sáhara y Guantánamo*, EL PAÍS (Apr. 15, 2014), [http://politica.elpais.com/politica/2014/04/15/actualidad/1397564481\\_086033.html](http://politica.elpais.com/politica/2014/04/15/actualidad/1397564481_086033.html).

<sup>161</sup> *But see* ROBERTSON, CRIMES AGAINST HUMANITY, *supra* note 52, at xx ("It has [ ] been a mistake to attempt to fuse the civil law inquisitorial system with the adversarial tradition of Anglo-American trial.").

<sup>162</sup> Elizabeth M. DiPardo, *Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses Before the ICTY*, 31 B.C. INT'L & COMP. L. REV. 277, 293 (2008) (citing StPO § 254(2)). Moreover, German courts allow the introduction of witnesses' prior depositions as evidence of inconsistencies. *Id.* (citing COMPARATIVE CRIMINAL PROCEDURE 132 (John Hatchard et al. eds., 1996)).

<sup>163</sup> Carla Bleiker, *CIA Torture Report: "Germany Has to Step up Now,"* DEUTSCHE WELLE (Dec. 13, 2014), <http://www.dw.de/cia-torture-report-germany-has-to-step-up-now/a-18127016>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* ("[I]f Germany commits to prosecuting persons responsible for torture, it has symbolic power and shows that this kind of torture and abuse is not accepted here.").

<sup>166</sup> Wolfgang Kaleck, *Summary of Criminal Complaint*, EUR. CTR. FOR CONST. & HUM. RTS. (Dec. 17, 2014), [http://ccrjustice.org/files/ECCHR\\_Criminalcomplaint\\_Tenet\\_summary\\_engl\\_2014\\_12\\_17.pdf](http://ccrjustice.org/files/ECCHR_Criminalcomplaint_Tenet_summary_engl_2014_12_17.pdf).

<sup>167</sup> *Id.* at 3.

In France, an investigation is ongoing into the torture and other serious mistreatment of three French citizens, Nizar Sassi, Mourad Benchellali, and Khaled Ben Mustapha, who were detained at Guantánamo.<sup>168</sup> During a visit by Donald Rumsfeld to Paris in 2007, a complaint alleging crimes of torture was filed in French courts,<sup>169</sup> stating that “because of the failure of authorities in the United States and Iraq to launch any independent investigation into the responsibility of Rumsfeld and other high-level U.S. officials for torture,” the CAT obliged France to prosecute those individuals if they entered French territory.<sup>170</sup> However, the complaint and subsequent appeal to the General Prosecutor were dismissed on the grounds of immunity for acts done while in office—a rationale directly contrary to the CAT, which provides for no such immunity.<sup>171</sup> In October 2016, supported by ECCHR and CCR, former Guantánamo detainees Sassi and Benchellali urged a French judge to subpoena William “Jim” Haynes, the former U.S. Department of Defense General Counsel, who worked closely with Rumsfeld.<sup>172</sup> Sassi and Benchellali requested that the Investigative Judge of the Cour d’Appel de Paris—Tribunal de Grande Instance de Paris question Haynes on his role in the torture and other serious mistreatment of the former detainees.<sup>173</sup>

Regarding Ireland’s participation in the RDI program, a report by the Irish Human Rights Commission found that torture was prohibited by a number of human rights treaties to which Ireland is a signatory, as well as the Irish Constitution.<sup>174</sup> Given the credible allegations that CIA aircraft

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<sup>168</sup> *Universal Jurisdiction: Accountability for U.S. Torture*, *supra* note 129 (noting the appeals court confirmed the jurisdiction of the instructing judge in 2005).

<sup>169</sup> Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Oct. 25, 2007, Complaint Against Mr. Rumsfeld.

<sup>170</sup> *Donald Rumsfeld Charged with Torture During Trip to France*, CTR. FOR CONST. RTS. (Oct. 26, 2007), <http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>.

<sup>171</sup> *See* Convention Against Torture, *supra* note 30, art. 2. By contrast, in 2008, a Tunisian ex-diplomat was convicted and sentenced to eight years’ imprisonment for crimes of torture he committed while police chief in Tunisia in the 1990s. Kaleck, *supra* note 132, at 937.

<sup>172</sup> *See France: Court Investigates US Torture Cases*, *supra* note 131.

<sup>173</sup> *Id.*

<sup>174</sup> These include Convention Against Torture, *supra* note 30, art. 3 (prohibition against expulsion or refoulement to a jurisdiction where there is a danger of torture); *id.* art. 16 (prohibition against acts of cruel, inhuman or degrading treatment or punishment committed with the acquiescence of a public official); European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 (absolute prohibition of torture or inhuman or degrading treatment or punishment); *id.* art. 5 (right to liberty and security of the person); ICCPR, *supra* note 30, art. 7 (absolute prohibition of torture or cruel, inhuman or degrading treatment or punishment); *id.* art. 9 (right to liberty and security of the person); CONSTITUTION OF IRELAND (BUNREACTH NA HÉIREANN) 1937 art. 40.3.1 (Ir.) (right to bodily integrity); *id.* art. 40.4.1 (right

involved in “extraordinary rendition” have on a number of occasions stopped at Shannon airport, the need for a system of investigation or monitoring has been triggered.<sup>175</sup> The report concluded:

The reliance on US political assurances is not enough, particularly given that the US has made no secret of its use of “enhanced interrogation techniques” and that it has acknowledged the existence of the “extraordinary rendition” programme. Reliance on such assurances will not relieve Ireland of legal liability if an individual is “rendered” through Irish territory.<sup>176</sup>

In *Finucane v. Mahon*, the Irish Supreme Court held that the applicant had shown there was a probable risk of ill-treatment were he to be returned to the Maze prison in Northern Ireland. Because of this, the Court held that it was required to order the release of the applicant to ensure that his constitutional rights were not violated.<sup>177</sup>

#### IV. CONCLUSION

Geoffrey Robertson has written: “[t]he most urgent problem for international justice is no longer US exceptionalism but the failure of international courts to devise and to operate expeditious and effective . . . procedures for delivering it.”<sup>178</sup> Yet in the end, the responsibility of other governments is effectively secondary to that of the United States. The United States’ failure to adequately investigate and prosecute senior military and civilian officials authorizing the post-9/11 criminal program of torture puts the United States in breach of its obligations.

The historic settlement reached by victims of the RDI program with the contract psychologists who designed and helped implement it<sup>179</sup> is certainly

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to liberty). IRISH HUMAN RIGHTS COMM’N, ‘EXTRAORDINARY RENDITION’: A REVIEW OF IRELAND’S HUMAN RIGHTS OBLIGATIONS 21–22 (2007), [https://www.ihrec.ie/download/pdf/ihr\\_c\\_rendition\\_report\\_final.pdf](https://www.ihrec.ie/download/pdf/ihr_c_rendition_report_final.pdf) (last visited Apr. 18, 2016) [hereinafter IHRC Report].

<sup>175</sup> IHRC Report, *supra* note 174, at 2.

<sup>176</sup> *Id.* at 28.

<sup>177</sup> *Finucane v. Mahon* [1990] IR 165 (Ir.).

<sup>178</sup> ROBERTSON, *supra* note 52, at xix.

<sup>179</sup> Alex Emmons, *Historic Settlement Reached On Behalf of CIA Torture Victims*, THE INTERCEPT (Aug. 17, 2017, 2:16 PM), <https://theintercept.com/2017/08/17/cia-torture-settlement-aclu-mitchell-jessen/>.

one positive development bringing a measure of redress. One of the men, Mohammed Ben Soud, told the *New York Times*: “I feel that justice has been served. Our goal from the beginning was justice and for people to know what happened in this black hole that was run by the C.I.A.’s offices.”<sup>180</sup> Still, the terms of the settlement are confidential, and the fact remains that the U.S. government has never publicly compensated any of those tortured in CIA custody.

Nearly a decade ago now, Senators Dianne Feinstein and Sheldon Whitehouse wrote: “Waterboarding dates to the Spanish Inquisition and has been a favorite of dictators through the ages, including Pol Pot and the regime in Burma. . . . Condoning torture opens the door for our enemies to do the same to captured American troops in the future.”<sup>181</sup> Unfortunately, their predictions proved prescient: Executed American journalist James Foley was among four prisoners who had been waterboarded by Islamic State militants. Foley’s captors “appeared to model the technique on the CIA’s use of waterboarding to interrogate suspected terrorists after the Sept. 11, 2001, attacks.”<sup>182</sup> To prevent the United States and its allies from being models for further heinous acts, and to prevent the United States from repeating the same nightmare over again, those responsible for torture must be held accountable.

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<sup>180</sup> Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES (Aug. 17, 2017), <https://www.nytimes.com/2017/08/17/us/cia-torture-lawsuit-settlement.html>.

<sup>181</sup> Dianne Feinstein & Sheldon Whitehouse, *President Should Sign Anti-Torture Bill*, SAN DIEGO UNION-TRIBUNE (Feb. 29, 2008), <http://whitehouse.senate.gov/news/op-eds/president-should-sign-anti-torture-bill>.

<sup>182</sup> Adam Goldman & Julie Tate, *Captives Held by Islamic State Were Waterboarded*, WASH. POST (Aug. 28, 2014), [http://www.washingtonpost.com/world/national-security/captives-held-by-islamic-state-were-waterboarded/2014/08/28/2b4e1962-2ec9-11e4-9b98-848790384093\\_story.html](http://www.washingtonpost.com/world/national-security/captives-held-by-islamic-state-were-waterboarded/2014/08/28/2b4e1962-2ec9-11e4-9b98-848790384093_story.html).