

AFTER TORTURE

U.S. Accountability and the Right to Redress

Lisa Magarrell, Lorna Peterson

August 2010

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a legal obligation to
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TORTURE

EXTRAORDINARY RENDITION

CRUEL TREATMENT

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the Right to Redress**

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The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. For more information, go to www.ictj.org.

About the U.S. Accountability Project

The U.S. Accountability Project develops realistic policy options for addressing the serious and systematic violations of human rights incurred through U.S. counterterrorism operations after September 2001. It makes informed analysis and technical assistance available to advocates and policymakers on accountability issues. In undertaking this work, the project applies ICTJ's in-depth international experience and draws comparative lessons appropriate to the U.S. context. For more information, go to www.ictj.org/en/where/region2/2260.html.

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ACRONYMS

ACLU	American Civil Liberties Union
ATS	Alien Tort Statute
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	Committee on Civil and Political Rights
CIA	Central Intelligence Agency
CIVIC	Campaign for Innocent Victims in Conflict
CPA	Coalition Provisional Authority
CSRT	Combatant Status Review Tribunal
DAOD	Defence Administrative Orders and Directives (Canadian Forces)
DOD	Department of Defense
DOJ	Department of Justice
FCA	Foreign Claims Act
FCC	Foreign Claims Commission
FOIA	Freedom of Information Act
FTCA	Federal Tort Claims Act
GAO	Government Accountability Office
ICCPR	International Covenant on Civil and Political Rights
IER	Equity and Reconciliation Commission (Morocco)
JAG	Judge Advocate General
NGO	nongovernmental organization
PHR	Physicians for Human Rights
PTSD	post-traumatic stress disorder
RFRA	Religious Freedom Restoration Act
RICO	Racketeer Influenced and Corrupt Organizations Act
SOFA	Status of Forces Agreement
TVPA	Torture Victim Protection Act
USAID	United States Agency for International Development

Executive Summary

Counterterrorism detainees held in U.S. custody were subject to widespread abuses, including prolonged, arbitrary detention, physical and sexual abuse, enforced disappearance by way of the secret transfer of prisoners to undisclosed locations (“extraordinary rendition”), and other cruel, inhuman, and degrading treatment or torture. The growing evidence of these abuses comes from the prisoners themselves, as well as government inquiries, documents released through Freedom of Information Act (FOIA) requests, and high-level officials who confirm that torture and abuse were a matter of policy. These acts constitute violations of international human rights and humanitarian law, violations that give rise to a right to redress.

Under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR), signatories like the United States are required to provide redress (reparation) to victims of such serious rights violations. The United States has publicly lauded this principle as it applies to other countries and has offered significant financial and political support to torture victims of foreign regimes; yet it has failed to acknowledge or address its obligation to victims of its own detention- and interrogation-related rights violations in counterterrorism operations.

When the United Nations (UN) Committee against Torture questioned the United States about its obligation to provide redress to torture victims, the government’s response in 2005 was that victims could pursue civil litigation in U.S. courts or file claims under the Foreign Claims Act (FCA), by which the military provides compensation for harms to civilians. Yet neither of these has proven successful for most victims of U.S. abuses in the counterterrorism context. Non-citizen detainees’ civil claims have been stymied by procedural roadblocks and defenses couched as national security concerns that have been zealously pursued by government attorneys. A number of cases have been dismissed without ever reaching a hearing on the merits because courts have repeatedly declined to hear cases in which the government asserts that state secrets, classified evidence, evaluations of foreign policy, or national security issues are involved. Additionally, cases have been dismissed because government officials are protected by legal immunities. For its part, the FCA excludes claims from people deemed unfriendly to the United States, who did not file a claim within two years after the incident, or who were held or interrogated by the CIA or other nonmilitary personnel. Nor is the FCA a reparative scheme; it fails on essential components of redress such as acknowledgment of wrongdoing.

It is an international obligation and a fundamental principle of U.S. law that harms such as these invoke a right to a remedy. Redress should aim to acknowledge wrongs, address harms, and provide those affected with the means to rebuild their lives. The type of redress that CAT and ICCPR describe encompasses more than monetary compensation. Many detainees suffer from serious physical complications and

psychological trauma as a result of torture, abuse, and poor detention conditions. Even detainees who did not suffer physical mistreatment stress the importance of a chance to restore their reputations in order to move forward with their lives after prolonged detention without charge or trial.

A comprehensive policy also should include measures such as access to medical care for physical injuries and psychological distress, rehabilitation of reputation for detainees who were never charged or convicted, and an official apology for wrongful detentions and other abuses.

Serious human rights violations give rise to a legal obligation to provide a remedy, and a remedy should be provided to all victims. While broad political acceptance of redress may not exist in the near term, this obligation should be part of the debate now as the United States grapples with the consequences of its counterterrorism policy during the post-9/11 era. Redress not only rights a wrong, it signals a sea change in the policies that supported torture, abuse, and arbitrary detention. Failing to provide redress represents a continuing denial of the humanity of victims, a number of them having suffered horrific abuse. By facing the issue of redress, the United States can make good on its promise to never condone torture and to hold itself to the basic human rights standards it promotes in other parts of the world.

During times of threat to national security, it is particularly important to remain true to these ideals. Violating principles like the right to redress condones the abuses and permits future violations. Conversely, confronting the issue of redress can help the United States achieve its goal of reestablishing the rule of law, rejoining the international community in good standing on human rights, and making the world safer for itself and all people. Consequently, ICTJ recommends:

1. Discussion of redress should be a part of the debate over the consequences of human rights violations. Although redress is a politically charged issue, it remains both a right of victims and an obligation of the United States. It is also an integral part of a variety of complementary forms of justice, including disclosure of truth, criminal justice, and institutional and legal reforms, that together contribute to full accountability for wrongdoing under U.S. counterterrorism policy.
2. Redress should be considered in its full dimension, conveying an acknowledgment of wrongdoing and the humanity of those affected, including their families and communities. Victims should be included in discussions of specific measures that provide full, effective redress for physical, psychological, social, and economic harms.
3. Steps should be taken to make existing remedies fair and accessible. Government attorneys should narrowly tailor national security-based defenses to protect classified information and allow claims to be evaluated on their merits. FCA procedures should be reviewed and modified to improve access for detainees, and the system should operate with greater transparency.
4. Former counterterrorism detainees should be included in existing programs funded by the United States and that provide compensation, rehabilitation, and other assistance to torture survivors.
5. The U.S. government should ultimately adopt legislation leading to the appointment of an independent claims body that would work independently of the military and intelligence systems to hear claims and coordinate all forms of redress related to prolonged or arbitrary detention, extraordinary rendition, torture, and cruel, inhuman, or degrading treatment in which the United States has been involved, directly or indirectly.

1. Introduction

Since President Barack Obama took office in January 2009, the United States has explicitly disowned a prior government policy that effectively adopted torture and other abuses in connection with counterterrorism operations. The current administration's rejection of torture is unequivocal in its terms:

Brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world. They serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods.¹

Whether there will be a full accounting for that prior policy is still an open question, as is the extent to which, without accountability, present-day assurances of a ban on torture are worthy of reliance. As journalist Jane Mayer recently pointed out, “By holding no one accountable for past abuse, and by convening no commission on what did and didn't protect the country, President Obama has left the telling of this dark chapter in American history to those who most want to whitewash it.”²

ICTJ has discussed elsewhere the importance of a full and independent inquiry into what happened and prosecution of those most responsible for serious crimes related to detainee policy.³ This paper examines key questions about one important dimension of accountability—redress—that has yet to be discussed in any comprehensive way in connection with U.S. treatment of counterterrorism detainees. The realization of redress would represent an important step toward justice after torture, prevention of further abuses, and acknowledgment of the actions of government officials and contractors. This paper provides a framework for a serious, well-grounded discussion on the subject in anticipation of the need to consider not only why redress is important but also for whom, in what form, and by what means.

Section 2 discusses the concept of redress, reviews international legal standards applicable to the United States, and considers the legal boundaries for setting policy on redress. Section 3 reviews remedies available, in principle, under U.S. laws, and how these fall far short of adequate and effective redress in the detainee context; the paper also examines relevant precedent. In section 4, the paper looks briefly at the actions and harms that require specific forms of redress and turns to policy questions that arise in this context: what forms redress might take, and how, when, and under what conditions redress should be delivered to those harmed. Conclusions and recommendations are set out in section 5.

While this paper focuses on redress, this is only one dimension of accountability. Redress is most effective when it enables or follows disclosure of the truth about the array of abuses that have occurred, when

prosecution of those most responsible accompanies it, and when accountability is reinforced by legal and institutional reforms that prevent further violations. Accountability with respect to abuses in U.S. counterterrorism operations and specifically to treatment of detainees is still very limited in the United States. The Obama administration has initiated some important reforms.⁴ Some new information about abuses has come to light, but even the reports that have been released still contain some information that is masked from public view.⁵ A preliminary inquiry by the Department of Justice is under way, but almost a year into the investigation, the assistant U.S. attorney assigned to the review has not yet indicated whether charges should be filed in connection with specific cases of detainee abuse.⁶

In July 2010, the British government announced its intention to launch an inquiry into allegations that its security and intelligence services were involved in torture, and “wherever appropriate,” to offer compensation.⁷ While not directly involving the United States, an inquiry and any compensation in such cases would likely highlight the U.S. role, “as there are questions over the degree to which British officers were working with foreign security services who were treating detainees in ways they should not have done.”⁸ The announcement of an inquiry appears to be an encouraging step toward accountability, but the question of redress for serious abuses of international human rights or international humanitarian law is one that must figure in the U.S. debate, for several reasons.

- Redress is a legal obligation that arises inevitably from the fact of torture and other serious abuses. As such, the issue of redress tests the United States’ commitment to the CAT, along with other norms prohibiting torture, cruel treatment, forced disappearance, and prolonged arbitrary detention.⁹ International law recognizes that redress serves to do justice to those victimized and to reaffirm the rule of law.¹⁰
- It is already on the agenda by reason of claims made in scores of civil lawsuits, in at least 33 administrative claims through the FCA, and in legal actions outside of the United States that have led or may lead to judgments against U.S. agents.¹¹
- Undertaking redress can demonstrate that the United States understands and is responsive to consequences experienced around the world due to the U.S. government’s departure from the rule of law over the past decade.
- A decision to enable mechanisms for redress can serve to reassure the international community that the United States holds itself to the same standard it demands of other countries. As such, U.S. allies and potential sources of intelligence should be assured that collaborating with the United States would not lead to their involvement in illegal conduct. Additionally an important recruiting tool for terrorists would be removed. This not only strengthens the United States in the international community, but also makes U.S. forces and the broader public safer.
- Redress can deter future abuses by adding real costs—political, legal, moral, and monetary—to unlawful choices about torture and counterterrorism policy.
- Redress after torture serves as an all-important reminder of the humanity that must be recognized without fail in all people, whether they are guilty, suspect, or innocent. The choice to use torture and the subsequent lack of accountability generate negative consequences domestically for the United States, in part by reinforcing the racism and anti-Muslim biases that underlie many of the abuses against detainees.

Many, if not the majority, of victims in U.S. counterterrorism operations are innocent of wrongdoing and have been held for years without being charged or having any chance of absolution. Others may well be guilty of specific crimes; however, few have been tried. All deserve to be treated consistently according to the rule of law, with respect for human dignity and without cruel or degrading treatment or torture.

Yet one of the problems with the policy debate about the U.S. government’s use of torture is that it has largely skirted questions about the human beings on the receiving end of this policy. There are legiti-

mate fears; the threat of terrorist acts requires grave attention and strong measures. But the debate is also marked by elements of racism, anti-Muslim sentiment, ignorance, and political opportunism that must be set aside or overcome in order to address the true threats to national security in a principled way. Such a context requires a careful analysis of the law and a nuanced policy approach that is based on facts, respects the rule of law, and acknowledges that redress, like other forms of accountability, occurs in a politically charged setting.

This paper explores the United States' legal obligation to redress in human terms the harms caused by its wrongdoing. A criminal policy choice dehumanizes not only the intended target of this illegal conduct but also the society that tolerates or condones it; redress can help to reverse that direction and restore the rule of law.

The scope of this paper is limited to treatment of detainees that violates international humanitarian law and international human rights law. In this respect, the paper is focused on torture and other cruel treatment, extraordinary rendition that operates in secret and outsources detainees' abuse to the authorities of other countries, and prolonged or arbitrary detention that leaves detainees in limbo in secret U.S. controlled facilities or prisons in Afghanistan, Iraq, and Guantánamo Bay. We do not address other areas of inquiry that may or may not represent violations of international humanitarian law, including the many cases of civilian deaths and injuries in both Afghanistan and Iraq at road stops, on patrols, and in searches, in bombing runs, drone attacks, and other circumstances. At the least these events should evoke a humanitarian response;¹² our discussion here should also be relevant to their eventual consideration as claims of violations under international law.

2. The Right and Duty: Relevant Law and Practice

The concept of reparation for violations of rights and their consequent harms can arise in a number of contexts. In the United States, one might easily associate the term with historical wrongs like slavery and the complex demand for reparations many generations later. Likewise, one might assume that a discussion of reparations implies that the United States is on the losing side in armed conflict and must atone for damage caused. While these are reparation issues, we focus on a separate question: redress for serious international human rights violations or violations of international humanitarian law, specifically arbitrary or prolonged detention, forced disappearance through extraordinary rendition, torture, and other abuses of detainees.¹³ To avoid misunderstandings that may accompany the use of “reparation” in the U.S. context, throughout most of this paper we use “redress.” International law generally uses the term reparation and we follow that usage in this section; however, reparation and redress are treated as equivalent throughout the paper. In this section we look at the definition of the right to redress and the corresponding duty of the state, what is required to fulfill that right, and the legal boundaries for reparations policy.

The Source of the Right and Obligation

The United States is a party to several instruments establishing that it is the state’s duty to provide an effective remedy to victims of human rights abuses. The most explicit treaty provision on reparations for acts of torture is found in the CAT, which was ratified by the United States in 1994.¹⁴ The convention’s article 14 provides that, “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”¹⁵ If a torture victim dies, that right passes to his dependents.¹⁶ The United States has acknowledged this duty, representing to the UN committee charged with overseeing compliance that, “The legal system of the United States provides a variety of mechanisms through which persons subjected to torture or other abuse may seek redress, which are consistent with the obligations assumed by the United States upon ratification of the Convention.”¹⁷

As a party to ICCPR, the United States is further obligated to ensure an “effective remedy” for rights violations—including torture, cruel, inhuman, or degrading treatment, arbitrary detention, and enforced disappearance—even when those carrying out the violations do so in an official capacity.¹⁸ The convention’s oversight body, the Human Rights Committee, has explained, “Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy . . . is not discharged.”¹⁹ The committee has also made clear in its concluding observations and views on state compliance that ICCPR requires reparations—particularly in the form of rehabilitation—be made available to victims of

torture and their families.²⁰ ICCPR also makes specific provisions for a right to compensation for anyone who has been a victim of unlawful arrest or detention.²¹

The state's obligation to provide timely, adequate, and effective reparations, as well as the corresponding right of victims to seek them, is also generally considered to be customary international law.²² Customary international law requires compensation when violations of international humanitarian law are attributable to a state.²³ Moreover, customary international law prohibits states from invoking national law as justification for failure to comply with its obligations.²⁴ The Draft Articles on State Responsibility also establish the obligation of a state in breach of international law to "make full reparation" for any damage, whether material or moral, caused by the internationally wrongful act of a state.²⁵

Generally, the state's obligation to provide reparations is with regard to "acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law."²⁶ Also, "States should endeavor to establish national programs for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations."²⁷ The general duty of the state to protect rights also implies that "States Parties [to the ICCPR] have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."²⁸ For example, where paramilitary forces have been involved in violations at the instance of the state or with state tolerance, the state has been held responsible.²⁹

Giving Meaning to the Obligation

While the right to reparation and the corresponding obligation to provide an avenue for it are well established in international law, the contours of how that right is to be met in practice are less defined, particularly when abuses have been massive or widespread. In principle, reparations should be proportional to the gravity of the human rights violation(s) and the harm suffered by the victim.³⁰ They are to be devised and implemented "in accordance with domestic law and international law, and taking account of individual circumstances," so there is no set formula, but rather a principle that must be applied to context.³¹ The UN Special Rapporteur on Torture has made it clear that CAT should be interpreted in light of the guidance provided in the UN's *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.³²

International law, as described by those principles, generally recognizes five ways in which "full and effective reparation" to victims of serious violations of international human rights law or international humanitarian law may be realized: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.³³ Regardless of form, "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."³⁴ Yet in cases of torture or other serious abuses with devastating effects on the individual, family, and community, this is admittedly an objective that can only be approximated. The state's duty to provide reparations may be satisfied by a combination of these forms as necessary and appropriate with respect to the factual circumstances.³⁵ Generally, reparative measures include both material and symbolic elements, and may be directed to individuals or groups, with the greatest reparative effect achieved by a combination of measures that are also linked to other forms of accountability.³⁶

Reparations tend to fall short from the perspective of victims, even when extraordinary and costly efforts are undertaken to provide them. German reparation after the Holocaust is a classic example, in which almost \$40 billion (US) benefiting 4.3 million individuals seems too little too late from the individual victim's or family's point of view.³⁷ Yet, reparations can be meaningful even so, since one of the most

important components of any reparative measure is acknowledgment of wrongdoing, of the standard that was violated, and of the victim's humanity.

Thus, reparations are distinct from humanitarian responses to the plight of human rights victims. This is not only because reparations are compelled by legal obligation and defined by rights rather than need alone, but also because of the message they should deliver about the rights of victims and the obligations of the state. For example, the Constitutional Court of Colombia found that state social services, humanitarian assistance, and reparations were distinct concepts that were complementary, but not interchangeable, since each one has a distinct meaning and derives from different principles.³⁸

Legal Considerations in Reparations Policy

The trigger for reparation is the human rights violation committed. The potential recipients of redress are defined by their experience of that violation, and the terms of redress should reflect both the right affected and the harms suffered. Reparations may be defined one case at a time through the legal system or, as is often the case after serious, systematic, or massive violations, reparations policy may be set through legislation. The latter method involves a political determination about what violations trigger redress, what will be provided, and who will be able to access reparations. Later in this paper we discuss these considerations in connection with the United States and counterterrorism detainee abuses; in this section we examine the basic legal principles that guide and set limits on policy choices.

Decisions about what violations give rise to redress under a state policy generally relate to the pervasiveness and seriousness of the abuses and harm occasioned. The ICCPR states that all violations require a remedy;³⁹ however, the types of redress described by the UN Basic Principles are considered appropriate in cases of “gross” violations of international human rights law and “serious” violations of international humanitarian law.

Torture, cruel, inhuman, and degrading treatment and prolonged, secret, or arbitrary detention—especially when carried out systematically as a matter of policy—are considered “gross” or “serious” violations within the meaning of international law.

Torture, cruel, inhuman, and degrading treatment and prolonged, secret, or arbitrary detention—especially when carried out systematically as a matter of policy—are considered “gross” or “serious” violations within the meaning of international law. This has been borne out in practice. For example, in Morocco, victims of forced disappearance, arbitrary detention, those killed, wounded, or forced into exile, and victims of sexual violence were covered by reparations. The program focused on “criteria of experience, treating all victims with equal respect,” and included deprivation of liberty; forced disappearance; conditions in detention; torture and other cruel, degrading or inhumane treatment; and “the aftermath of physical or psychological abuse.”⁴⁰

In Peru, the reparations law that followed internal conflict (which involved acts of terrorism by illegal armed groups and state abuses in the name of counterterrorism efforts) provided that forced disappearance, other abductions, extrajudicial executions, murders, forced displacement, arbitrary detention, forced recruitment, torture, and rape were abuses that would give rise to reparations.⁴¹ These violations included not only acts committed by the state but also by illegal armed groups who were considered terrorists. The state assumed primary responsibility for redress for all violations, with a right to take legal action to recoup costs of reparations when the authorities could identify perpetrators. The reasoning behind this was the state's dual obligation to respect human rights and to ensure that rights are guaranteed.⁴²

Who then is entitled to redress? The United Nations defines “victim” in the reparations context as “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”⁴³ Notably, this definition does not depend on the nationality of the individual affected, nor is it affected by any alleged or proven prior conduct of the victim. In fact, the application of reparation principles “must ... be without any discrimination of any kind on any ground, without exception.”⁴⁴ As Dinah Shelton, an authority on international law and remedies, notes, “The character of the victim should not be considered because it is irrelevant to the wrong and to the remedy, and implies a value judgment on the worth of an individual that has nothing to do with the injury suffered.”⁴⁵

When governments use the conduct of the victim (whether presumed or proven) to rationalize the use of torture and other abuse, the immutable principle of CAT and ICCPR—that torture and other cruel, inhuman or degrading treatment are prohibited no matter the circumstances—is turned upside down. If policy turns “patriots into criminals and terrorists into victims” it is the policy that must be faulted, not this universally held legal principle.⁴⁶

The Committee Against Torture has also addressed this principle of nondiscrimination; “State Parties [to the CAT] must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of [the]...*reason for which the person is detained, including persons accused of political offences or terrorist acts.*”⁴⁷ This principle was applied in Chile when the Commission on Political Imprisonment and Torture had to resolve a question about the past conduct of torture victims. The commission reported that it did not look into the backgrounds of victims and only considered the actions of state agents, despite awareness that some victims had been involved in serious violations of the rights of others. The commission wrote in its final report, “None of this justifies, however, imprisonment in secret sites, or in any way the use of torture. ... Nothing justifies the violation of the right of every person to be judged and sentenced by due process, and nothing justifies, we reiterate, the practice of torture.”⁴⁸ The Chilean law granted the same form of reparations to all victims.

International human rights law does not prohibit setting priorities in the implementation of redress, and policy decisions may put some vulnerable victims first, as in Canada’s reparation program for survivors of Indian Residential Schools, in which elderly survivors received advanced compensation.⁴⁹ When scarcity of resources or number of victims affects the capacity to implement redress, need may be a driving factor in prioritizing attention. Thus in Sierra Leone, priorities included rape victims who needed surgical attention.⁵⁰ The urgent need for rehabilitation or other forms of redress, particularly following release from prolonged detention, are legitimate criteria that may be relevant to establishing priorities in the U.S. context.

Finally, although human rights law tends to focus on individual rights, the definition of victim for the purposes of reparations includes the notion of “collective harm.” In Peru, a collective reparations program was designed to “contribute to the reconstruction and consolidation of the collective institutional well-being of communities ... which, as a consequence of the period of violence had lost part, or all, of their social and physical infrastructure.”⁵¹ In Morocco, where political prisoners were held unlawfully in secret detention centers for prolonged periods, community-oriented reparations recognized that the communities that were forced to host detention sites were also victims in their own right.⁵² Some of the outlying impacts of U.S. policy, whether inside the country or abroad, may eventually require this kind of attention.

3. U.S. Practice and Precedent

In its reporting to the UN’s Committee against Torture in 2000 and 2005, the United States stressed its positive role in combating torture and providing resources to aid torture victims at home, in its territories, and around the world.⁵³ These include programs for victim assistance and compensation for crime victims, support for treatment centers in the United States and abroad, and appropriations to the UN Voluntary Fund for Victims of Torture.⁵⁴ U.S. foreign assistance to victims of torture is also considerable and commendably includes a commitment to rehabilitation that “aims to empower the torture victim to regain the capacity, confidence, and ability to resume as full a life as possible.”⁵⁵

The United States has generally offered significant support for victims of torture who have suffered at the hands of perpetrators from another country; however, effective acknowledgment of torture and redress for detainees injured as a matter of its own policies following the attacks of September 11, 2001 have not been forthcoming. Instead, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 specifically attempted to bar many detainee suits from U.S. courts.⁵⁶ U.S. forces are, moreover, generally not subject to civil liability in Iraqi or Afghan courts.⁵⁷

When asked by the Committee against Torture about the availability of a right of redress in the United States for torture victims, the United States referred to an array of legal avenues, including civil actions in U.S. courts.⁵⁸ With specific regard to “victims of abuse and mistreatment by U.S. military personnel in Iraq,” the United States pointed to the FCA as the main avenue for redress.⁵⁹ Below we examine the principal avenues available in theory—according to the U.S. government—to detainees who would seek redress for torture and other abuses suffered in connection with detention by the U.S. military, intelligence agents, or their proxies—U.S. contractors and officials of other countries. We also consider lessons implicit in one example of the United States’ previous policies of redress or assistance.

Civil Claims in U.S. Courts

Since the United States captured and incarcerated the first detainees in 2001, the courts have been an important venue for attempts to vindicate their rights. Through civil suits, detainees at Guantánamo have successfully drawn public attention to their situation. They have won victories such as access to counsel, the creation of a process (however inadequate) to evaluate enemy combatant status, and, ultimately, the affirmation of the constitutional right to challenge their detention in court through writs of habeas corpus. However, suits seeking monetary compensation and acknowledgment of torture, abuse, and other detention-related harms have faced nearly insurmountable procedural hurdles; thus far, no case has moved forward to a determination on the merits of claims.

Victims of extraordinary rendition and former detainees from Guantánamo, Iraq, and Afghanistan have filed lawsuits under a variety of legal theories.⁶⁰ Courts consistently have refused to exercise their discretion to extend constitutional remedies to detainees who are not U.S. citizens. These decisions are couched in terms of deference to the executive branch in matters of national security, military affairs, foreign policy, and the court's resistance to providing constitutionally based remedies. In light of these concerns, federal judges have placed the onus for providing a remedy with Congress.⁶¹

Statutory mechanisms designed to protect U.S. government officials also have been insurmountable barriers to detainee claims. To date, courts have accepted government arguments that torture, abuse, and other illegal acts fall within the scope of government employment. Consequently, officials are covered by absolute immunity.⁶² The government is protected from detainee suits alleging intentional torts by a number of exceptions to the law that waives sovereign immunity; thus claims based on military action, policy decisions, or ones that arise in foreign countries are prohibited from proceeding.⁶³

Other types of claims have been dismissed as a result of detainees' non-citizen status, their location in foreign countries during detention, and on other legal and procedural grounds.⁶⁴ The D.C. Circuit ruled that non-resident aliens cannot even be considered "persons" under the Religious Freedom Restoration Act.⁶⁵

The United States has broadly invoked other doctrines to shield counterterrorism policies from public scrutiny. The most problematic of these doctrines is the "state secrets privilege" that has been interpreted by one U.S. Circuit Court of Appeals to allow a lawsuit to be stopped at the outset. Surprisingly this is an area in which the Obama administration has chosen to invoke arguments similar to those of the Bush administration.⁶⁶ In a recent report, the White House said, "We will follow clear procedures so as to provide greater accountability and to ensure the privilege is invoked only when necessary and in the narrowest way possible. We will never invoke the privilege to hide a violation of law or to avoid embarrassment to the government."⁶⁷ The administration's legal posture now needs to comport with this stated commitment.

International law, and international human rights and humanitarian law in particular, have been rendered irrelevant to legal decision-making in detainee cases, even though U.S. laws such as the Alien Tort Statute are firmly grounded in the international legal tradition.⁶⁸ Rich jurisprudence and scholarly commentary are available on the relevance of international law to the incarceration and treatment of civilians and prisoners of war in armed conflict, the legal culpability of commanders and perpetrators for gross human rights abuses and serious violations of international humanitarian law, the use of paramilitary bodies to carry out official duties, and the use of forced disappearance to cover up abuse. Yet this thinking has so far failed to edify judicial decisions due to the reluctance in the United States to draw from these sources.

While the majority of detention-related civil cases have faced dismissal at early stages, a few have met with some success. Among these are constitutional claims brought by U.S. citizens and some cases against government contractors who may or may not be afforded the immunities that protect members of the U.S. military, depending on the circumstances of the contractors' employment.⁶⁹ However, no case has yet proceeded to the merits. Thus, no court yet has evaluated detainees' claims or the damages that might result from a successful suit.

Yet to be fully litigated is the possibility of recovery for individuals who, pursuant to military review procedures, were found to be "non-enemy combatants" but continued to be held for long periods and subjected to mistreatment.⁷⁰ Further, with new revelations of the suspicious nature of the deaths in custody of three detainees at Guantánamo, litigation challenging the government's actions there might also prove to be fertile ground.⁷¹

International law, particularly the Convention against Torture, demands that victims have a forum for a remedy; it is clear that, to date, U.S. courts have not served to meet this state obligation. However, civil suits act as continuing reminders that victims of U.S. policies must have an opportunity to vindicate their rights. In the absence of executive or congressional action, the courts will continue to be the one venue where a victim can seek redress, and, at minimum, relate his or her experience through a formal, public complaint. This in turn assists the creation of an historical record of victims' accounts of what occurred in U.S. military prisons, in CIA custody, and in the custody of foreign countries. As cases have proceeded, even the arguments raised by U.S. officials and private contractors in briefs and affidavits in the litigation have helped pull back some of the veil of secrecy on government rationales and actions. These cases continue to present the current administration with opportunities to break publicly with the policies of the past.

Public interest and social justice lawyers throughout the world have used the courts as a vehicle to protect and vindicate the rights of victims of government excess and abuse, a practice that is also appropriate in this context. The United States has a particularly strong judiciary that can and does act independently from the executive and legislative branch. The United States also has a well-established tradition of judicially ordered redress for wrongdoing. Nonetheless, in the area of national security, with its attendant deferential principles and immunities for government officials, civil litigation has not yet proven itself to be an effective mechanism for redress of the abuses that have occurred in the pursuit of U.S. counterterrorism policies.

In backing away from the issue, the courts have pointed to Congress as the appropriate forum for fashioning an appropriate remedy for the abuses suffered by counterterrorism detainees. The government must take responsibility for its role in pushing the courts in this direction through its overly broad use of doctrines meant to protect, not override, the system of checks and balances on power.

The U.S. government's positions in litigation need to be reexamined and made consistent with values of transparency, justice, and the rule of law, rather than supporting efforts to hide government wrongdoing. The courts and existing U.S. law present a substantial barrier to recovery, but given the current political climate, they may represent the best hope for overcoming subjective fears and prejudices to uphold the law and provide a remedy for detainee abuses.

Foreign Claims Act

The Foreign Claims Act (FCA) is a law providing compensation to individuals harmed by the U.S. military.⁷² It is not a reparations law; it is not limited to instances of rights violations since it also covers negligent acts, so it does not necessarily convey an acknowledgment of wrongdoing and victims' rights. Nor does it contain an expansive enough remedy to achieve reparative justice, since it provides for compensation alone.⁷³ Moreover, the FCA does not apply to the full universe of detainee claims that arise from U.S. counterterrorism operations overseas, since it only pertains to acts by military personnel and Department of Defense (DOD) employees, leaving harms caused by CIA officials and contractors out of reach. Yet, an examination of the FCA's terms and operation in practice is useful to the discussion of redress, whether with a view to accessing an existing, if partial, remedy that may be applicable in some cases, or to provide lessons for devising a more comprehensive, functional system of redress for U.S. counterterrorism detainees.

The FCA provides compensation for death, personal injury, and loss or damage to property resulting from a wrongful or negligent act of military personnel outside the United States. Once someone has filed a claim, it is adjudicated by a Foreign Claims Commission (FCC).⁷⁴ Compensation is only avail-

able for harm that occurred during noncombat activity (the “combat exclusion”).⁷⁵ The claimant must be a resident of a foreign country.⁷⁶ Claims must be filed in writing within two years of the date the harm occurred.⁷⁷ Applicants must be deemed “friendly” to the United States by a claims commission or military officer in order to be eligible for recovery.⁷⁸

Once a claim has been filed, it is adjudicated by a Foreign Claims Commission (FCC) composed of one to three military lawyers or officers.⁷⁹ FCCs may award compensation up to \$50,000, while the U.S. Army Claims Office or Judge Advocate General’s Office processes claims exceeding that amount; claims for more than \$100,000 require approval by the Army General Counsel.⁸⁰ Upon settlement, the claimant must agree to accept payment in full satisfaction of the claim.⁸¹

Only a few incomplete records are available on the adjudication of detainee FCA claims in Iraq and Afghanistan.⁸² In a September 2004 memorandum to the secretary of the Army, Defense Secretary Donald Rumsfeld ordered the review at U.S. Army headquarters of all claims that Iraqi detainees filed based on “allegations of personal injury/abuse and mistreatment, particularly at Abu Ghraib prison.”⁸³ Nevertheless, according to the information U.S. officials released to CAT in 2005, only two of 33 detainees who filed claims were offered compensation (in the amounts of \$350 and \$5,000).⁸⁴

The FCA payment Saleh received was made despite an Army finding that he was never interrogated or abused.

Haidar Muhsin Saleh, the plaintiff in *Saleh v. Titan* (a contractor engaged in interrogations at Abu Ghraib), was reported to have received \$5,000 under the FCA.⁸⁵ The D.C. Circuit Court of Appeals dismissed his claims without reaching the merits and noted that the FCA payment he received was made despite an Army finding that he was never interrogated or abused.⁸⁶ Nevertheless, the dissent points out that Saleh’s allegations of abuse included:

“Roping Plaintiff Saleh and 12 other naked prisoners together by their genitals and then pushing one of the male detainees to the ground, causing the others to suffer extreme physical, mental and emotional distress; . . . [r]epeatedly shocking Plaintiff Saleh with an electric stick and beating him with a cable; . . . [and] [t]ying his hands above his head and sodomizing him . . .”⁸⁷

Despite the limited information about the adjudication of FCA claims, review of claims records related to other contexts (such as deaths at checkpoints or in crossfire) released to the ACLU through FOIA requests is illuminating.⁸⁸ Analysis of these claims in a 2007 report by the Campaign for Innocent Victims in Conflict (CIVIC) points to serious flaws in the claims adjudication process, including low valuation of life and lack of guidelines leading to inconsistent application and frequent denials, often without explanation.⁸⁹

Award amounts varied greatly, often with no explanation. The average payment for loss of life was \$4,200, with payments ranging from \$500 to \$11,000.⁹⁰ One example from government files underscores both the inadequacy of the compensation and of the process itself. According to a summary by the ACLU:

Iraqi woman submits claim that her husband and son were killed when their vehicle was fired on by U.S. forces. Iraqi woman requests \$3,000 for the death of her husband, \$3,000 for the death of her son, and \$6,300 for the damage to the car. The Army suggested \$11,000 instead and the claim was settled for that amount. Notably, the letter to the claimant notifying her that her claim was granted does not apologize for the death of her husband and son, and instead only acknowledges the damage to the car, stating: “Allow me to express my sympathy for the damage to your personal property.”⁹¹

FCCs also suffer from an absence of official guidelines or procedures governing the interpretation of FCA rules, how evidence should be evaluated, and when awards should be granted. FCCs operate with

no evidentiary guidelines, sometimes weighing evidence improperly and tending to favor military accounts over those of civilians.⁹² In several cases, FCCs denied claims for which claimants provided witness statements only because no military record of the event existed.⁹³ Overall, a majority of the claims were denied.⁹⁴

While the rules do not categorically exclude detainee claims, many potential claims fall outside their parameters. Perhaps most significantly, many detainees suffered abuse and prolonged detention in CIA-run “black sites,” or were turned over to foreign custody; however, the FCA applies only to harms caused by military personnel and employees.⁹⁵ Furthermore, many detainee claims may be precluded by the two-year limitations period, either because detainees were unaware of their ability to file or were unable to file in detention. Required to provide evidence to substantiate their claims,⁹⁶ detainees may have a difficult time obtaining sufficient evidence to prove interrogation-related abuse or other harms that occurred during detention since they may be unable to locate witnesses or access their own classified records. The noncombat rule and the requirement that claimants be considered friendly to the United States at the time of detention also complicate these claims. Many detainees are held without charge and released without any formal determination of guilt or innocence, leaving them with no defense to being labeled hostile to U.S. national security interests. Thus even within the limited scope of application, valid claims might be denied, and access to the FCA as a form of compensation appears inconsistent.⁹⁷ The FCA fails as reparations and has shortcomings even as a more limited remedy.

Lessons from Japanese Internment

As the courts have pointed out, Congress is capable—in principle—of devising a policy on redress that could attend to the large number of victims of abuse who might seek to make a claim against the United States. An administrative system for fielding and resolving such claims can be an effective mechanism for determining redress. However, such an approach has its own significant challenges and often requires litigation to set policy in motion or fill gaps where policy is incomplete.

While not a precise factual parallel, the unjust internment during World War II of individuals of Japanese descent in the United States and Latin America offers some valuable, if not particularly heartening, insights. In the politically toxic climate of the time, national security concerns and exploitation of fear and prejudice were used to overcome rights standards normally held dear as national values. At its nadir, this thinking led to the now discredited decision in *Korematsu v. United States*, in which the Supreme Court held that the government’s counterespionage needs outweighed the individual rights of a Japanese internee.⁹⁸ U.S. national security policy regarding Japanese and other groups whose origins could be traced back to Axis countries had extremely wide-reaching effects both within and outside the United States.

In the days after the attack on Pearl Harbor, the U.S. government began rounding up people of Japanese, Italian, and German descent.⁹⁹ The United States encouraged the internment of people of Japanese descent in many Latin American countries, especially Peru, which had a large Japanese-Peruvian population, was strategically located, and had a willing government and similar degree of anti-Japanese sentiment.¹⁰⁰ Peru enacted blacklisting laws against people of Japanese descent, seizing their property and land in the process. The United States began detaining German, Italian, and Japanese Latin Americans from Peru, Ecuador, Colombia, Bolivia, Panama, and Costa Rica.¹⁰¹ The majority of these were of Japanese origin, and 80 percent were from Peru.¹⁰² Some were deported to Japan in exchange for the return of American citizens who had been in Japan when war was declared and were held by the Japanese government; others ended up in internment camps in the United States for the duration of the war.¹⁰³

At the end of the war, Japanese Latin Americans in U.S. internment camps were classified as illegal aliens and slated for deportation.¹⁰⁴ Peru refused to take them, and many were deported to Japan or Germany. Incrementally they gained some rights, and in 1948 the Evacuation Claims Act was passed, which provided for some compensation for property lost during the internment.¹⁰⁵

After extensive advocacy efforts by Japanese Americans, in 1976 President Gerald Ford repealed Executive Order 9066, which had initiated the overall internment process, and stated that internment was wrong.¹⁰⁶ A 1979 commission of inquiry reviewed the facts and circumstances of internment and issued a report and recommendations. Two cases in the 1980s attempted to resolve some of the consequences of Japanese internment. Several individuals successfully petitioned to vacate earlier internment-related criminal sentences.¹⁰⁷ A class action on behalf of all internment camp survivors seeking damages from the U.S. government was dismissed on statute of limitations grounds despite the fact that the government had concealed critical evidence.¹⁰⁸ Reparation followed later through the 1988 Civil Liberties Act, which committed the president to a formal apology and authorized a \$20,000 reparations payment to U.S. citizens and legal resident aliens who were interned.¹⁰⁹ However, Latin Americans who had been interned were not included. A federal class action on their behalf was settled in 1998, resulting in an apology and payments of \$5,000 to each class member.¹¹⁰

In order to avoid retreading this ground during the current threat to national security, the United States should take heed of the lessons the Japanese internment has to offer. The steps taken to acknowledge wrongdoing and redress victims of the unjust policy would have been more effective had they occurred closer to the time of the events. Early acknowledgment of wrongdoing is crucial as it is the first step toward recognition of the humanity and dignity of the victims. In order for redress to move forward, both wider society and political representatives need to fully understand the wrongs that were done and how policies based in prejudice and fear negatively affected individuals, families, and larger communities. In the Japanese internment cases, in addition to extensive litigation, a commission of inquiry was used to gather information and formulate recommendations. A similar inquiry in the current context would provide a stronger base from which to advocate for reparative justice policy.

Victims who are not U.S. citizens have limited power; their voices need to be amplified through litigation and by advocates who are more likely to be heard. The experience of the Latin American internees demonstrates that despite the disadvantage of not having citizenship, they eventually gained some recognition of their rights. But this case also serves as a reminder that the eventual outcome was not due to the simple passage of time, but to persistent advocacy efforts that continued despite setbacks at the highest level of the U.S. justice system and despite only incremental political gains for many years. These lessons from a shameful precedent in U.S. history should be seized on sooner rather than later as the United States grapples with the legacy of counterterrorism policies and detainee abuse.

4. Terms of Redress

“The illegal actions against Mr. Hamad resulted in loss of income to his wife and children, leaving them destitute.”

In a civil complaint filed in federal court in April 2010, Sudanese national Adel Hassan Hamad alleges that he was doing humanitarian aid work in Pakistan in 2002 when he was taken from his apartment by several heavily armed men. He was held in Pakistan, then Bagram Air Force Base in Afghanistan, and transferred in 2003 to Guantánamo Bay, where he was held without charge or trial for any criminal act. He claims that he was tortured and otherwise mistreated in detention, including being forced to stand three days without food or sleep, kicked, left naked outside in the cold, and set upon by dogs.¹¹¹ According to the complaint:

“Mr. Hamad is married with five living children and two deceased children. The illegal actions against Mr. Hamad resulted in loss of income to his wife and children, leaving them destitute. One of his daughters was born shortly after Mr. Hamad was seized, and died while Mr. Hamad was held at Guantánamo because the family could not afford proper medical care while he was detained and unable to work. Because of Mr. Hamad’s detention in Guantánamo, he was never able to help, see or hold his daughter...”

“Plaintiff seeks compensation for the forced disappearance, prolonged arbitrary detention, inhuman, degrading and cruel treatment, torture, for being targeted during time of war as a civilian, and due process violations that [he] suffered while under and relating to the custody of the United States and its agents at Bagram and Guantánamo, and to hold responsible those officials charged with the unwarranted custody of [Mr. Hamad].”¹¹²

The use of torture and other serious mistreatment by the United States has been credibly documented across detention sites, conceded in former officials’ memoranda and statements, and even roundly defended by the former president and others in his administration.¹¹³ We know that many detainees were held in secret detention—effectively “disappeared” for some time.¹¹⁴ And we know that many detainees who are not clearly identified as former combatants have been held without charges or trial for years, in many cases with very tenuous grounds for detaining them in the first place.¹¹⁵ The fact of serious human rights abuses and violations of international humanitarian law like these should result in some form of acknowledgment and redress.

While redress is about acknowledging what happened in the past, one of its purposes must be to make a future possible for victims of human rights abuses or their families.¹¹⁶ In Peru reparations for victims were to include symbolic measures such as public gestures of acknowledgment and memorials; health care for resulting mental or physical problems; schooling for victims or a family member if educational

advancement was interrupted due to the abuse; free legal assistance; normalization of legal status; points toward subsidized housing benefits; and compensation for those who were permanently disabled as the result of torture.¹¹⁷

There are many uncertainties in positing specific measures of redress in a climate as politically and judicially hostile as that encountered today in the United States; setting out detailed proposals for a robust reparations policy may be premature. Nevertheless, a framework for debate on appropriate measures and the process of redress is crucial to a serious discussion of this issue. Here we look at the essential questions policymakers would need to address if they were to take up this issue and shape a policy on redress for torture.

Redress for Violations and Harms

Full and effective redress must take into consideration the human consequences of human rights violations and the situation of the victims in the present day. Information about such consequences is spotty; there is a lack of systematic information on detainees' experience in detention and following release. Thus this section seeks only to indicate the general kinds of harms that may have been suffered, which in turn will be relevant to the kinds of reparative justice that might be appropriate.¹¹⁸ Further determinations about redress need to occur when the picture is more complete. The information that follows is based on reports of interviews that NGOs and journalists conducted with former detainees, as well as first-hand accounts by former detainees.

Physical and Psychological Harms

The conditions of detention and interrogation methods such as use of excessively hot or cold cells, constant exposure to light or loud music, inadequate food, and unsanitary conditions seriously injured many detainees. They were also subject to beatings, sexual abuse, sleep deprivation, and stress positions designed to put serious physical strain on their bodies, along with other forms of mistreatment. Detainees injured as a result of harsh treatment were denied medical care or given inadequate treatment.¹¹⁹

This harsh treatment has caused numerous deaths and had lasting consequences for surviving victims. In a Physicians for Human Rights (PHR) evaluation of 11 former detainees, all experienced persistent musculoskeletal pain and chronic severe headaches, possibly correlated to head trauma.¹²⁰ Some former detainees attest to permanent physical impairments, such as numbness and weakness in the arms due to suspension by the arms; vision problems as a result of exposure to constant fluorescent light; hearing loss after constant exposure to loud music; and back pain and numbness in the legs due to prolonged stress positions and exposure to cold.¹²¹ Severe beatings and other forms of torture have reportedly resulted in injuries such as dislocations of the shoulders, nerve injury, and loss of eyesight.¹²² Prolonged detention has resulted in a general deterioration of health for many detainees, including some still in U.S. custody.¹²³

Most of the former detainees interviewed by PHR and other groups report lasting mental health complications such as depression, anxiety, sleeplessness, and post-traumatic stress disorder (PTSD).¹²⁴ Feelings of hopelessness, sadness, isolation, bouts of weeping, panic attacks, and nervous or explosive reactions to minor problems are reported.¹²⁵ Memory loss is a frequent result of traumatic experiences and is also documented.¹²⁶ Flashbacks often occur as night terrors, contributing to the sleeplessness reported by many detainees interviewed in the PHR study.¹²⁷

The detainee is not alone in suffering psychologically. Family members are particularly affected when "extraordinary rendition" or other forms of secret detention effectively result in enforced disappearance of their loved one.¹²⁸

Continuing Legal, Economic, and Social Consequences

For many detainees, release from U.S. detention does not entail a return to the freedoms they enjoyed previously. In Yemen former detainees are held in Yemeni prisons in poor conditions until the detainee can find someone to sign a “guarantee” that he will not flee—often at a price.¹²⁹ In Tunisia, former detainees report being imprisoned by the government in worse conditions than what they experienced in U.S. detention and subjected to harsh interrogations that include sleep deprivation.¹³⁰ Government surveillance is also an issue. In Yemen, the government keeps tabs on the activities of former detainees, requiring them to report in once a month and give prior notification of any travel within the country. Restrictions on international travel imposed both by home countries and the United States have affected some former detainees’ access to health care as well as their ability to continue working in former professions.¹³¹

For detainees who were captured in raids or detained for long periods, loss or destruction of property without compensation has been an issue. Former detainees report money or other property being seized during raids or from them during incarceration. Others report outright destruction of property, such as damage to houses, slaughter of livestock, and damage to crops or vehicles.¹³² Detainees’ families also suffer these economic consequences of detention.

The U.S. practice of not informing family members of detainees’ whereabouts or status resulted in families spending sums of money searching for detainees who seemingly disappeared without a trace, as well as suffering the torment of not learning of their loved one’s fate.¹³³ Other families, left without their primary breadwinner, fell into poverty or ended up having to relocate, rely on relatives, or pull children out of school to work.¹³⁴ Former detainees who have spoken on the issue often report difficulty finding work.¹³⁵ Some lost successful businesses during their detention and have had difficulty starting again from scratch.¹³⁶ Potential employers or lenders may be unwilling to associate themselves with a former detainee.¹³⁷ Others find that deterioration of their health has left them unable to work.¹³⁸

Home governments have provided little or no assistance with job training or reintegration.¹³⁹ The inability to work and support their families has left former detainees homeless and estranged from families.¹⁴⁰ Although some detainees report that separation from their families during detention was particularly difficult, they also struggle with reintegration into family and community life.¹⁴¹ Detainees held for many years no longer recognize their children upon return, and children react fearfully to parents they’ve never known.¹⁴² Some of the detainees say they feel ashamed that they have caused their family trouble, have been unable to provide for them, or feel as though they no longer deserve to be a part of family life. Others report a general sense of being “changed,” no longer belonging as a part of family or community.¹⁴³

Beyond the difficulty of reintegrating into the job market, former detainees also report pervasive problems reentering all aspects of society. Released detainees cite both social stigma and rejection, and personal feelings of no longer belonging after their experiences.¹⁴⁴ One detainee feels his family is afraid of him, while another is ashamed to have brought his wife and children such dishonor.¹⁴⁵ Financial dependence on family members strains relationships.¹⁴⁶ The extreme nervousness and hyper-vigilance that accompany PTSD and other anxiety disorders also inhibit detainees from forming and building social relationships; many have become extremely mistrustful of others.¹⁴⁷ The United States has made efforts to resettle some former Guantánamo prisoners in other countries; however, these new homes are isolating and may not include the support necessary for integration into a society completely foreign to the former prisoner.¹⁴⁸ While many detainees relocated voluntarily, displacement may increase feelings of loneliness and disconnection from society and further strain family relationships.¹⁴⁹

Types of Appropriate Redress

In order to meet its obligation to redress serious human rights violations, the United States needs to draw upon an array of measures to truly acknowledge what happened and respond to the kinds of harm detailed above. Here we consider the forms of redress as they have been developed in international law and how appropriate they may be to the context of detainee abuses. Taken together, these measures respond in a more satisfying way than any one of them might be able to achieve alone; that effectiveness is further heightened if other avenues of accountability (criminal justice, inquiry, institutional reform) are also pursued.

“Where is the support system for people who have endured cruel, inhuman and degrading treatment?”

According to former Guantánamo inmate Moazzem Begg, former prisoners returning to the United Kingdom have received support from activists and community members, but those returning to some other countries have had little help: “Whether they are in Bermuda, Morocco, Mauritania or Yemen, the story is pretty much the same—where is the welfare for people who have been tortured? Where is the support system for people who have endured cruel, inhuman and degrading treatment? The fact of the matter is, rarely does it exist.”¹⁵⁰

Compensation

Compensation is the most common form of redress and the main one that the U.S. system already contemplates, albeit ineffectively, through the FCA and civil court actions. Generally compensation is considered appropriate reparation for economically assessable damage, such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; harm to reputation; and costs required for legal assistance, and medical, psychological, and social services.¹⁵¹ Compensation is limited to damage actually incurred as a result of the internationally wrongful act and excludes damage that is indirect or remote.¹⁵²

This form of redress gives great flexibility and autonomy to the person entitled to the compensation. process involved is administratively simple and can easily be applied across a diverse range of locations without major difficulties. And for many, it signals accountability in very concrete, measurable terms. It is a form of redress that other countries have also applied in addressing similar claims, whether under provisions similar to the FCA, judicial cases, or other government actions.¹⁵³ Furthermore, international law places special emphasis on compensation after unlawful detention.¹⁵⁴

There are negative considerations as well. Compensation alone, without some more meaningful accountability and acknowledgment of wrongdoing, can be seen as an attempt to buy silence or equate money with irreparable losses. Compensation is never fully adequate to repair the damage done in these cases; without other measures of satisfaction, its inadequacy can be particularly striking. There may be political resistance to providing this kind of redress because of the level of autonomy afforded the recipient and concern about possible misuse of the funds. Despite these drawbacks, compensation should be among the forms of redress available to former detainees. It constitutes a meaningful gesture while offering the kind of support that detainees need to get back on their feet. It can replace lost property or businesses, and it offers a new horizon of possibility to people whose lives were disrupted by lengthy detention and the trauma of torture and cruel, inhuman, or degrading treatment.

Any compensation scheme designed as part of redress should be mindful of the types of inconsistencies, injustices, lack of comprehensive approach and other limitations present in the FCA system. A compensation scheme would need to cover harms caused not only by military but also by nonmilitary actors, such as the CIA and contractors. It also would need to link to other forms of redress to be effective as

reparation. Prohibitions and penalties for using funds to support terrorism could be incorporated into any compensation scheme to allay fears that compensation might be funneled back to terrorist networks. Consideration should also be given to compensation of family members of detainees in cases of detainee deaths, and as victims in their own right.¹⁵⁵

Restitution

Restitution is designed to “restore the victim to the original situation” before the human rights violation. Restitution may include restoration of a victim’s liberty, enjoyment of human rights, identity, family life, citizenship, place of residence, employment, and property.¹⁵⁶ This form of reparative justice is generally deemed preferable to other forms, unless it is “materially impossible” or would “involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”¹⁵⁷ Restitution has the potential to restore what was actually lost by the victim; however, this is difficult to achieve in practice because what has been lost is often lost permanently.¹⁵⁸

In the context of detainee abuses, some forms of restitution may be impractical. Some victims died, many former detainees are unable to return home and must restart their lives in a new country; destroyed property, even if replaced, may not be appropriate to the former detainee’s current situation. When it is not feasible to restore property lost as a result of U.S. wrongdoing, compensation may have to fill the gap. Yet restitution of an individual’s reputation, his or her freedom of movement, and specifically his or her ability to be reunited with family are aspects that, in some cases, may be possible to achieve and even outweigh other more material forms of restitution.

Rehabilitation

Rehabilitation refers to medical and psychological care as well as legal and social services necessary to address human rights violations.¹⁵⁹ In other words, international law is concerned with “the process of restoring the individual’s full health and reputation after the trauma of a serious attack on one’s physical or mental integrity,” in an effort to “achieve maximum physical and psychological fitness by addressing the individual, the family, local community and even the society as a whole.”¹⁶⁰

Rehabilitation is a form of redress that is particularly important after torture, forced disappearance, and prolonged detention without charge, and should be prioritized. Culturally appropriate and trustworthy medical and psychological attention is critical, yet complicated to achieve when former detainees are dispersed around the world and profoundly distrustful of the U.S. government. Given the role of some U.S. medical and mental health personnel in overseeing abuses, they should not be involved in providing rehabilitation without first undertaking serious vetting of anyone who is involved in a rehabilitation project.¹⁶¹

One way to respond to the need for rehabilitation may be through channeling government funding to victim-centered or victims’ organizations or NGOs to provide mutual support and assistance, as the United States does in other contexts.¹⁶² Another possibility is to ensure that states receiving former detainees are provided with the wherewithal to ensure this kind of care for victims. However, to ensure reparative effect, such a step should originate from and be explicitly recognized by the United States as a form of redress.

Rehabilitation of reputation is particularly challenging given the U.S. record of holding detainees without charge while fueling and sustaining suspicions about their potential links to terrorist groups. The political discourse, particularly in the United States, has too often assumed that individuals suspected of links to terrorism or terrorist acts are guilty. Even more insidious has been the discriminatory insinuation that Muslims are particularly suspect. Outside of the United States, the stigma of having been detained for terrorist activity has greatly affected the lives of ex-detainees. As Amnesty International reports, “Even for those who have been returned to their home country to be reunited with their families and friends, the physical and

psychological reminders of their time in Guantánamo will remain, and the stigma of having been labeled an ‘enemy combatant,’ ‘the worst of the worst’ will stay with them for the rest of their lives.”¹⁶³

The United States cannot issue assurances about the future conduct of any individual, whether the person is a U.S. citizen or a citizen of another country detained abroad; nor should it vouch for any legitimately held prisoners of war while the relevant armed conflict is ongoing. But hundreds and even thousands of detainees were released who never were charged with any crime, and this fact is something the United States can attest to when appropriate. However, the government is likely to be reluctant to take this step. After reviewing Guantánamo detainee cases on the order of President Obama in 2009, a task force spoke of detainees released for transfer in terms of their limited potential threat, rather than emphasizing the lack of charges against them.¹⁶⁴ Adherence to the principle that individuals are innocent until proven guilty is directly at stake here. Given the arbitrary nature of the original detentions of many former U.S. prisoners and recognition that “hundreds of innocent men were sent to the Guantánamo Bay prison camp,” a statement that the individual was never charged or found responsible for a criminal act would reassert this principle and serve as an important form of redress.¹⁶⁵ Such a statement, issued upon release or published in a publicly accessible form, could also be combined with an individual letter of apology, as discussed below.

Satisfaction

Satisfaction usually involves measures that provide an indirect benefit to the victim, often overlapping with other justice mechanisms. Examples include measures to cease continuing violations, verification, and full, public disclosure of the truth about what happened, the victims’ experience, and the role of those responsible.¹⁶⁶ As former Guantánamo prisoner Binyam Mohammed stated on his return to the United Kingdom, “I am not asking for vengeance; only that the truth should be made known, so that nobody in the future should have to endure what I have endured.”¹⁶⁷

Official declarations or judicial decisions restoring the dignity, reputation, and rights of the victim and those closely connected are also often considered measures of satisfaction, as are public apologies; judicial and administrative sanctions against people liable for the violations; and use of educational material that includes an accurate account of the abuses and furthers knowledge about international human rights law and international humanitarian law.¹⁶⁸

“Both the American public and the victims of these past policies need to understand what the CIA did in the name of U.S. national security.”

Former detainee and Yemeni national Mohamed Farag Bashmilah speaks eloquently about the importance of verifying and acknowledging the truth:

“I was finally released, never once having faced any terrorism-related charges. Since my release, the U.S. government has never explained why I was detained and has blocked all attempts to find out more about my detention.... During my detention, I agonized constantly about my family back in Yemen, knowing they had no idea where I was. They never once received information about who had taken me, why I was taken, or even whether I was alive. They were never contacted by the U.S. government or the International Committee of the Red Cross. My mother and wife were in such anguish that they had to be hospitalized for illness, stress, and anxiety. My father passed away while I was disappeared and I am still distraught thinking that he died without knowing whether I was dead or alive. I continue to suffer from bouts of illness that medical doctors attribute to the treatment I experienced in the ‘black sites.’ My physical symptoms are made worse by the anxiety caused by never knowing where I was held, and not having any form of acknowledgment that I was disappeared and tortured by the U.S. government.... Both the American public and the victims of these past policies need to understand what the CIA did in the name of U.S. national security. We need to find out where we were all held and who is still missing.”¹⁶⁹

Apology is often the form of redress most sought after and the least often proffered, at least in a meaningful way. Apologies can restore victims' lost respect by offering "moral recognition or acknowledgment of their human worth and dignity."¹⁷⁰ The British government's recent apology for the events of what has become known as "Bloody Sunday" is an example of a straightforward acknowledgment of abuse and responsibility.¹⁷¹ However, to date apologies connected with events of the U.S. "war on terror" have been more about avoiding accountability than recognizing it.¹⁷² Some former detainees have explicitly requested apologies from the United States for their suffering. Others view them as pointless gestures, including a former Guantánamo Bay detainee who simply stated, "I can't support myself on an apology."¹⁷³

While apologies on their own are insufficient, they offer an important recognition of the humanity of victims; by the same token, other measures, unaccompanied by acknowledgment of wrongdoing, are likely to be felt insufficient.¹⁷⁴ Where political will for official apology is lacking, citizen apologies have also played a role in bridging the accountability gap and eventually moving government to action. Such is the case of "Sorry Day" in Australia, in which individuals affirmed their remorse for a government policy of forced assimilation that tore aboriginal families apart.¹⁷⁵

Guarantees of Non-repetition

Guarantees that human rights violations are prevented in the future are intended to assure victims of abuses and society at large that cessation of abuses is not fleeting and that redress is genuine. These measures are usually directed at others and provide indirect assurances to victims. They might include the following steps: ensuring there is effective transparency and accountability in civilian control of military and security forces; that all civilian and military proceedings abide by international standards of due process, fairness, and impartiality; and that the media, whistleblowers, and human rights defenders are protected. Other measures might include providing training for military and intelligence forces, limiting the use of private security contractors, and reviewing and reforming laws that restrict accountability and contribute to gross violations of international human rights or humanitarian law.

The Timing of Redress

Reparation can be a lengthy process both in terms of society coming to terms with what its leaders did in the name of national security and in establishing a credible approach that victims and their families can trust. Enormous political hurdles are often placed in the way of reparations due to lack of sympathy for victims, lack of an important political constituency advocating on their behalf, general lack of visibility of the issue or the victims, financial considerations, and an array of competing government priorities. All of these factors affect the timing of redress.

It is not unusual for countries to recognize the need to redress harms caused to sympathetic victims well before recognizing the existence and rights of victims who are unpopular or affected by unacknowledged state abuses. There is no legal ground that would justify deferring the duty to make redress available to detainees who suffered serious rights abuses; however, it may be some time before the political climate allows the United States to acknowledge that not only did it commit grave rights violations in its counterterrorism operations, but also that consequently it has an obligation to provide redress for the individuals affected by its wrongdoing.

Early in Peru's internal armed conflict, redress was approved for mayors and others affected by the acts of illegal armed groups operating in the country.¹⁷⁶ Much later, there was a pardon that allowed the release of "innocent detainees" who had been convicted of terrorism-related crimes or treason on the basis of insufficient evidence; a special commission was set up to determine appropriate assistance for them.¹⁷⁷ It was not until several years later that legislation was passed that called for a reparations plan that included other

victims of rights violations, whether state agents or illegal armed groups perpetrated such violations.¹⁷⁸ Even then, some potential claimants were excluded from operation of the law if they were “members of subversive organizations,” though the law recognized their right to seek redress through the courts.¹⁷⁹ And after Augusto Pinochet’s dictatorship ended in Chile, torture victims and their families waited more than a decade to have their stories heard, after an initial inquiry focused only on deaths and disappearances.

In both of these examples, decisions to enact reparations legislation came after extensive inquiries—truth commissions in these cases—had documented patterns of abuses by the state and recommended reparative measures. Political viability often comes long after the legal obligation accrues. The more truth that is available publicly and acknowledged officially, the more likely that some shift in public and congressional opinion can be achieved earlier to recognize the rights of victims viewed as less than sympathetic in the public imagination.

Redress should take place after a full inquiry, allowing reparative justice policy to be constructed with better knowledge of the dimension of the wrongdoing and harms involved. This has been the case in a number of contexts such as Peru, Guatemala, Morocco, and initial reparations programs in Chile. But the failure to hold a formal inquiry into the full spectrum of violations, along with their causes and consequences, does not mean that redress is or should be taken off the agenda. German reparations after World War II did not depend on a special inquiry; in Canada, redress for forced assimilation of aboriginal children was the product of a negotiated settlement of extensive litigation, and its execution, in the main, preceded a truth commission.

If the truth has not yet been fully explored, the process of reparation can lead to the documentation of victims’ experience. In Chile, the government charged the Commission on Political Imprisonment and Torture with determining who should be entitled to redress for these crimes and issuing a report. The commission interviewed thousands of claimants and its report served as the basis for legislated redress as well as acknowledgment of the truth about torture.¹⁸⁰

In the United States, civil litigation, disclosure of the truth through specific investigations, and litigation under FOIA have made some headway and provide a substantial basis of facts on which to start the debate on redress. This should in turn spur greater efforts to unveil the truth about what happened and the consequences for the individuals affected. But the question of timing of redress is not just about the relation of this accountability measure to the truth; it is mostly a question of timing with respect to evolving political will and public consciousness. At present, it seems unlikely that anything short of a court order affirmed at the highest level would allow redress to occur; even then, such an order would only apply to the plaintiffs who brought that particular lawsuit. Strategies to move Congress toward a policy on redress should consider incremental steps over time that may have to start with demands that fall short of the full scope of the United States’ legal responsibility for torture. More broadly, it may be necessary to first focus on addressing the fear, anti-Muslim sentiment, and racism that have made torture an acceptable option for some sectors of the U.S. public. Greater disclosure of information about abuses, transparent accountability, and an executive policy of no tolerance for fear-mongering and anti-Muslim rhetoric could help create a more objective basis for debate on redress.

The Process and Modes of Delivering Redress

The victims of U.S. abuses are dispersed around the globe, which presents a difficulty in uniting to advocate for their support, although some have been able to do so.¹⁸¹ The global reach of U.S. counterterrorism policy and associated abuses define a context that differs dramatically from one that presents itself on a national stage, in which political will is ultimately susceptible to a call for national healing or pressure to

recognize the rights of all citizens. Instead, the situation of the United States plays out internationally, and victims of abuses who are not U.S. citizens find they have very little capacity to leverage support and positive attention, except in individual cases made visible through press accounts or litigation.

Generally, measures of redress are strengthened by a process of consultation that allows victims to help define a meaningful response to the harms they have suffered.¹⁸² This has not occurred in the U.S. context; rather, the choice for former detainees who were victims of these serious violations has been to either disengage or to take on a long, daunting quest for justice against the odds through a civil lawsuit. There is a lack of systematic information about what detainees suffered and the consequences for them and their families. This presents a difficulty in designing a reparative justice policy that would be adequately responsive and meaningful. Denial of detainees' humanity and a refusal by the U.S. government and public alike to countenance detainees' experiences of U.S. counterterrorism policy undermine the possibility of obtaining the political support needed to move claims for redress forward in the political process. Consulting with victims and facilitating their participation in the process would go some way to resolving this dilemma.

If some form of redress were made possible, how should access to this be accomplished and how should measures of redress be delivered? The United States might start by taking its own practice to heart. According to its report on assistance to victims of torture, the United States provides substantial financial support to treatment centers and groups that provide rehabilitation and other assistance to torture victims; it also works through USAID and other programs on issues of resettlement, rehabilitation, and additional forms of assistance for torture victims. Funds could be provided through channels such as these for the benefit of former detainees who were affected by serious mistreatment. The explicit acknowledgment of the legal obligation and the facts that give rise to redress would mark the difference between this response and other aid programs.

Where violations have been widespread or systematic, reparative measures devised outside of a courtroom are best placed to use forms of redress other than compensation and to represent a more encompassing approach to what happened. Generally, a policy-based approach to reparative justice must be created through legislation.¹⁸³ In the United States, courts and government lawyers have pointed to a legislative remedy for detainee claims.¹⁸⁴ While litigation continues to be a key avenue for victims of torture and other abuses to assert their legal rights, the legal dicta on this point and government arguments in favor of a Congressional solution should not be allowed to simply serve as a distraction or delay tactic.

5. Conclusions and Recommendations

Redress is a right under international law and U.S. law that ultimately cannot be ignored if the United States is to come to terms with past abuses and live up to accountability standards it has supported around the world. Rehabilitation, compensation, and other support that the United States generously promotes and finances for those victimized at the hands of others should be at least equally available when the responsible party is the United States itself. As a party to CAT and ICCPR as well as at the imperative of customary international law and its own principles and longstanding tradition of redress for harm after wrongdoing, the United States has an obligation to provide reparations to victims of torture and other serious human rights violations.

Yet in a political climate still rife with fear, with a cultivated presumption of guilt placed on every detainee regardless of circumstances, continued political discourse supporting the use of torture and other extreme measures, and a far-reaching prejudice against Muslims centered on the detainees, redress is not an easy objective. For years, even in the face of stark evidence of prolonged, arbitrary detention without charge, proven cases of rendition to torture, disclosure of the existence of secret interrogation sites, and memoranda that detail a policy of abusive and degrading treatment, the issue of redress has taken a back seat and denial or proffered justification of these facts has been the official story. Even after a change in government in 2009, acknowledgment of the truth has been slow to come, partial at best, and made with the express refusal to look back and come to terms with what happened.

In the face of what is already known, a refusal to make redress effective and accessible to those harmed by U.S. abuses constitutes yet another negation of the rule of law and the humanity of former detainees. Efforts to obtain the disclosure and acknowledgment of more information about detainee abuses and policies must continue to be a priority. Much more needs to be disclosed about the factual grounds for initial and prolonged detention, the use of extraordinary rendition and secret detention sites, and the extent and nature of detainee abuses. But, in order for redress to gain traction, that information needs to open a window of understanding into the human consequences felt in the lives of the people who experienced illegal abuses, directly and indirectly. Inquiries and other efforts to reveal the truth should seek to systematically describe the violations, harms, and consequences suffered by former detainees, their families, and communities.

Despite statements to the contrary by the United States in its reports to the Committee against Torture, access to a remedy is not really available to detainees who have suffered torture and other serious rights abuses by U.S. officials, their contractors, or other proxies. The FCA is a poor substitute for more robust reparative justice, is unavailable to many potential claimants, and is administered too ineffectively and arbitrarily to provide an adequate model for redress. The roadblocks to civil litigation are Kafkaesque.

Legal hurdles and government reluctance to let facts of prior government wrongdoing come to light have, to date, kept the merits of detainee claims beyond the reach of justice. Serious changes in the U.S. government's approach to litigation would make a significant difference and specialized legislation will also ultimately be required, yet the political space for shifting government practice or creating a special remedy through Congressional action has never seemed less favorable.

Nevertheless, the issue is unlikely to disappear. A monetary judgment has already been entered against CIA officials in a case in Italy,¹⁸⁵ and civil claims continue to be filed in U.S. courts. In November 2010, the UN Human Rights Council is scheduled to review the human rights record of the United States, and this issue is likely to be addressed there. The United States will also face a periodic review before the Committee against Torture in November 2011. The committee has asked specifically about:

... steps taken to ensure that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture, including sexual violence, perpetrated by its officials. In this respect, please provide information about any reparation programs, including psychological treatment and other forms of rehabilitation, provided to victims of torture and ill-treatment, as well as about the allocation of adequate resources to ensure the effective functioning of such programs. ... Statistical data, disaggregated by sex and age, on the number of requests for redress made, the number granted and the amounts ordered and those actually provided in each case. In particular, information should be provided on the number of cases filed by detainees, including under the Foreign Claims Act, since the examination of the last periodic report in 2006....¹⁸⁶

In Australia, a former Guantánamo detainee won a lawsuit seeking compensation for that government's role in aiding and abetting his torture by foreign agents.¹⁸⁷ Sweden has reportedly made awards of compensation to rendition victims in two cases.¹⁸⁸ In the well-known case of Canadian citizen Maher Arar, that government compensated him following an official inquiry.¹⁸⁹ As already noted, the British government has pledged to launch an inquiry and announced its intention to offer compensation where appropriate.¹⁹⁰ Yet, the responsibility of these governments is effectively secondary to that of the United States. At some point, the U.S. government will need to confront its own responsibility for these harms if it wants to regain its stature in the international community and truly uphold its commitment to honor international human rights. Ongoing litigation and advocacy efforts in the United States need to continue to press for recognition of government responsibility in U.S. courts.

For many former detainees, liberty finally recovered may be so welcome and the possibility of redress so remote that they will walk away with no further expectation or hope of justice. Some will find a way to rebuild their lives after their torture, prolonged detention, and other serious human rights abuses; some undoubtedly will not. In either case, the law requires that meaningful forms of redress should be accessible to all victims of mistreatment who would seek it or welcome it if offered. Medical attention, adequate shelter, and the possibility to launch their lives into the future are crucial for some. For others, acknowledgment of wrongdoing, rehabilitation of reputations when possible, and apology may be the greatest forms of satisfaction. Policymakers and advocates alike need to think more broadly about the nature of reparations and about the wide variety of consequences endured around the globe as the result of U.S. government wrongdoing, and consider that the need for some measures may be urgent. Compensation is not the only form that redress might take, though it might be an important way to provide something that is broadly accessible at little administrative cost. Other measures of redress, such as rehabilitation, should also be considered and perhaps taken in advance of more controversial steps.

The United States should adhere to the law and conclude that torture, cruel, inhuman, and degrading treatment, extraordinary rendition, and prolonged or arbitrary detention in the context of its counterterrorism operations require adequate redress. Judges and policymakers should resist the inclination to con-

sider this as a right only for U.S. citizens or individuals somehow proven innocent of wrongdoing. Where torture and other serious abuse were involved, there should be no discrimination among victims unless to prioritize those with the most urgent needs. Reference to the past acts of victims is out of place in determining appropriate redress. Moreover, given the prohibition on all of these acts, any attempt to draw a line between torture and cruel, inhuman, or degrading treatment should be avoided; such an attempt would not only be difficult to administer but also draw distinctions that are experienced differently in any case.

Political will currently falls far short of these standards, so strategies to affirm the right to redress need to take a long-term view. Efforts should be made to promote special legislation to create a program of redress for at least some measures, such as rehabilitation, and some categories of victims, such as detainees who have been released, and to ensure that redress is not closed off for others. As was the case of Latin Americans of Japanese descent after the Second World War, the United States should acknowledge an obligation to non-citizens harmed by government policy; though this was hard-fought, a generation delayed, and inadequate in the case of Latin American internees, it was nonetheless an important step for justice and accountability. A shorter timeline for achieving redress today does not seem impossible in a world much more interconnected and immediate than that of the last century. Even if there is a long wait ahead for victims of U.S. torture policies, action by and on behalf of those seeking justice needs to be persistent over time and find success in incremental gains.

First principles must be stressed in order to turn decisively away from unlawful policies and harmful assumptions and to reverse judicial, congressional, and executive failures to check spiraling injustice. Those first principles include respect for the dignity of all human beings and the right to redress for serious wrongdoing, including violations of human rights—even in times of grave threat to national security. The current administration has avowed its commitment to “the notion that living our values makes us stronger and safer, by following rules of domestic and international law; and following universal standards, not double standards.”¹⁹¹ As the issue of redress for serious violations of human rights law makes its way to the forefront of public attention, it will be important to recall this principled statement of government intention.

While it would be premature to try to describe in any detail what short- and longer-term strategies should be or what a reparation policy should include, we offer the following general recommendations:

- 1. Discussion of redress should be a part of the debate about the consequences of human rights violations.** The fact that it is a politically charged issue does not make it less of a right or obligation. This should be put forward consistently by advocates, who should also demand that the courts and Congress recognize this principle.
 - a. Redress should feature as one of several complementary forms of justice and accountability, including disclosure of the truth, criminal justice, and institutional and legal reforms.
 - b. Efforts should continue to reveal the truth about what happened and to include a clear picture of detainees’ experience. However, even when the facts are only partially known and criminal justice against those responsible for torture has not progressed, it is not too early for steps of redress to restore dignity and humanity to victims of abuses, opening up more of the truth in the process.
- 2. Redress should be considered in its full dimension and varied forms,** in some combination of restitution, rehabilitation, compensation, measures of satisfaction, and guarantees of non-repetition for individual and collective victims. Redress should convey acknowledgment of wrongdoing and of the humanity of victims. Some especially important measures might be prioritized, including:
 - a. Physical and psychological rehabilitation for former and existing detainees who may have sustained some physical or psychological harm. Given the negative role played by some U.S. psychologists and physicians, the United States could provide funding to relevant NGOs or nonpartisan agencies like the UN Voluntary Fund for Victims of Torture for this purpose.

- b. An attestation of release from custody, or other means of rehabilitation of reputation, should be offered to anyone who has been detained and released without being charged or convicted of any crime or who was not determined to be a combatant. Such attestation should indicate that no inferences may be drawn regarding the individual's reputation due to the detention; it should be accompanied with a letter of apology for any arbitrary or prolonged detention, extraordinary rendition, any physical or psychological harm, or secret detention.
 - c. Discussion of specific measures of redress should be undertaken with former detainees, their family members, or their representatives.
- 3. Steps should be taken to make existing remedies fair and accessible.**
 - a. The attorney general should instruct government lawyers to distinguish more appropriately between legitimate secrets that protect national security and illegitimate secrets of state that undermine it, so that civil lawsuits are not truncated on these grounds, courts can act on the merits of claims, and the government can be held accountable.
 - b. The Inspector General of the Department of Defense should review and publicly report on all claims filed under the FCA with regard to detention and detainee treatment, and make transparent recommendations for further action to improve procedures and rectify injustices.
 - c. The General Accountability Office should issue an updated report on the utilization of the FCA in connection with claims stemming from U.S. counterterrorism operations.
- 4. The United States should dedicate funds** and give instructions to enable access to redress, through existing programs of assistance to torture survivors, for former counterterrorism detainees who suffered serious abuses. Should lack of political will result in this step being taken without full acknowledgment of the facts and U.S. legal responsibility, such assistance should be offered on humanitarian grounds with acceptance of U.S. moral responsibility, and execution of such programs should be publicly documented and outcomes tracked. This may provide lessons for future measures of redress when the United States is ready to more fully assume its legal obligations.
- 5. Ultimately, legislation should be adopted,** leading to the appointment of an independent claims body that operates outside of the military and intelligence systems and that can address in a coordinated fashion all claims and forms of redress.
 - a. Claims relating to prolonged or arbitrary detention, extraordinary rendition, torture, cruel, inhuman, or degrading treatment with U.S. involvement should be heard by this body, which should operate in relevant languages and be easily accessible to former detainees.
 - b. Claims should be heard in person when requested, claims records documented by the United States, and their resolution should be made a matter of public record, while protecting the claimant's right to privacy.
 - c. Determination of claims should be governed by clear standards consistent with international human rights law and should apply to conduct by any military, intelligence, political official, contractor, or other proxy of the United States in its counterterrorism operations.
 - d. Such a body should be able to consult appropriately with victims and order appropriate measures of redress including restitution, rehabilitation, and compensation, and to recommend to the government other measures of satisfaction and guarantees of non-repetition.
 - e. Redress should be at the expense of the federal government. Such a system should have adequate funds with which to receive and adjudicate claims and a commitment to ensure that redress is sustainable over time.
 - f. Conditions could be set for compensation or other transferable forms of redress, to ensure that these are not to be used to commit any criminal act; legislation could provide that failure to abide by such conditions or intentionally providing false information to make a claim would be punishable as a crime.

Annex: U.S. Litigation Concerning the Treatment or Extraordinary Rendition of Detainees in U.S. Custody: Cases as of May 2010 and a Brief Summary of Causes of Action

Causes of Action

Constitutional Claims

The Constitution does not provide explicit direct remedies for constitutional violations. Congress may enact legislation giving individuals a right to sue if a government official violates constitutional rights. In addition, in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the U.S. Supreme Court ruled that courts may infer a cause of action, allowing a plaintiff to sue in federal court to recover money damages against federal officials who, in their individual capacity, violated the plaintiff's constitutional rights.¹ Under *Bivens*, courts determine if a preexisting alternative procedure protects the plaintiff's constitutional interests and then discern whether "special factors" counsel hesitation in creating a direct remedy. If the answer to either question is "yes," courts will not create a new cause of action.² In cases brought by non-citizen detainees in the post 9-11 context, courts consistently have ruled that the subject matter of the case implicates national security, foreign policy, diplomatic relations between countries, and military affairs and that these factors counsel hesitation in fashioning a *Bivens* remedy.³

Courts also have ruled that constitutional protections do not extend to non-resident aliens injured in foreign countries where the United States is engaged in armed combat, such as detainees held and abused in Iraq and Afghanistan.⁴ For Guantánamo detainees, *Boumediene v. Bush* establishes at minimum a constitutionally protected right to habeas corpus.⁵ However, the D.C. Circuit has declined to extend this ruling to allow Guantánamo detainees to sue for the violation of rights protected under the Fifth and Eighth Amendments, reasoning that officials had no notice of any rights afforded to non-citizens held in Guantánamo before *Boumediene* was decided. As a result, the officials are entitled to qualified immunity, that is, protection of government officials from liability if they could not have reasonably known their actions amounted to constitutional violations.⁶

Alien Tort Statute (ATS)

The ATS (also referred to as Alien Tort Claims Act) allows non-citizen aliens to sue in federal court for violations of the law of nations or U.S. treaties.⁷ In detention and abuse related cases, plaintiffs' ATS claims predominantly have been brought for the international law violations of torture, cruel, inhuman, or degrading treatment and prolonged arbitrary detention.⁸

The Westfall Act protects federal employees from personal liability for torts committed within the scope of their employment; in these circumstances, it provides a defense of absolute immunity to federal officials.⁹ Under Westfall, the United States is substituted for the individual official, and the Federal Tort Claims Act (FTCA) governs this aspect of the litigation.¹⁰ Thereafter, the suit under the FTCA will be the plaintiff's exclusive remedy.¹¹ Absolute immunity under the Westfall Act is available only to the extent the tort falls within the scope of official employment and does not fall within one of the law's limited exceptions.¹² Plaintiffs have argued unsuccessfully that torture or cruel, inhuman, or degrading treatment can never be within the scope of employment.¹³

Federal Tort Claims Act (FTCA)

The FTCA provides jurisdiction in federal courts for money damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the U.S. government while acting within the scope of his office or employment.¹⁴ In effect, the FTCA acts as a limited waiver of the sovereign immunity of the United States, subject to a number of conditions and exceptions.¹⁵

The requirement for exhaustion of administrative remedies and other specific statutory exceptions to jurisdiction are most relevant to the cases of persons alleging arbitrary detention and mistreatment in detention. The FTCA requires that the person alleging harm first must present a written claim to the responsible agency and receive a final decision from that agency before proceeding to file suit under the act.¹⁶ Administrative claims must be made within two years of the date the harm occurred.¹⁷ A number of claims also fall within the scope of the FTCA's exceptions and thus are barred by the statute. Those most germane here are any claim arising out of (1) a policy decision by a U.S. government employee charged with discretion,¹⁸ (2) certain intentional torts by a U.S. federal employee,¹⁹ (3) the combatant activities of the military during time of war,²⁰ and (4) any claim arising in a foreign country.²¹

Non-federal Tort Claims

Non-federal tort claims, such as assault and battery, wrongful death, intentional or negligent infliction of emotional distress, negligence, and false imprisonment, may be brought alongside federal claims under diversity jurisdiction or in state courts.²² These claims have been brought only against private contractors, not government officials, since the FTCA waives official immunity only for federal, not state, tort claims.²³ State claims brought in federal court will be dismissed if they are preempted by federal law that conflicts with the state law.²⁴

Torture Victims Protection Act (TVPA)

The TVPA provides a statutory cause of action against an individual who, under actual or apparent authority or color of law of any foreign nation, subjects an individual to torture or extra-judicial killing.²⁵ Accordingly, to succeed, plaintiffs must demonstrate that defendants acted under color of foreign law or under its authority.²⁶

Geneva Conventions

Former detainees have asserted violations of the Geneva Conventions both directly and under the ATS.²⁷ In these cases the claims were barred by Westfall Act immunities for federal employees, since according to that act, plaintiffs may seek a remedy exclusively under the FTCA and not separately under the Geneva Conventions.

Religious Freedom Restoration Act (RFRA)

The RFRA provides a private right of action against the government for burdening a person's free exercise of religion.²⁸ In a suit brought by former Guantánamo detainees, the D.C. Circuit interpreted the statute's use of the word "person" to describe those covered by its provisions. The circuit court ruled, by analogy, that, as used in the Fifth Amendment, "person" did not apply to non-citizens; therefore, under RFRA, "persons" did not apply to nonresident aliens.²⁹

Cases

Extraordinary Rendition

*El-Masri v. Tenet*³⁰

The plaintiff, a German citizen of Lebanese origin, brought suit against government officials and contractors for his kidnapping and rendition to a secret CIA prison, where he was tortured and then released on a roadside in Albania. The district court granted the government's motion to dismiss the case based on the defendant's invocation of the state secrets privilege. The U.S. Court of Appeals for the Fourth Circuit affirmed. The court ruled that El-Masri could not establish a *prima facie* case without exposing sensitive, privileged information about the CIA's structure and organization of intelligence operations that the

defendants would be forced to use in the ensuing litigation in order to adequately defend themselves. The U.S. Supreme Court denied certiorari.

*Arar v. Ashcroft*³¹

Maher Arar, a dual Canadian and Syrian citizen, was detained at John F. Kennedy International Airport while going home to Canada from vacation. He says he was mistreated in U.S. custody, and then transferred to Jordan and then Syria where he was interrogated, tortured, and subjected to cruel, inhuman, and degrading treatment. He alleged violations of his Fifth Amendment right to due process and the TVPA arising from his incarcerations and treatment in the United States and Syria. The Second Circuit elected to hear the case *en banc* after a panel dismissed the case. The court affirmed the dismissal and found that “special factors” counseled hesitation in creating a *Bivens* constitutional remedy in an extraordinary rendition case because judicial intervention would affect diplomacy, foreign policy, and national security. It cautioned that a remedy, if there were to be one, should be created by Congress. Furthermore, as to the TVPA claim, the court found the defendants’ motion to dismiss was warranted since the U.S. officials involved were not acting under color of foreign law, as the TVPA requires. The U. S. Supreme Court denied certiorari.

Government Contractors

*Saleh v. Titan Corp.*³²

Former Iraqi detainees raised claims under ATS, Racketeer Influenced and Corrupt Organizations Act (RICO),³³ and state common law alleging torture, sexual assault, and assault at the hands of government contractors CACI and Titan Corporation. At the district court level, the judge granted a motion for summary judgment in favor of Titan, finding that the security contractor providing interpreters in Abu Ghraib prison was under the direct command of the military and, thus, the claims created national security and foreign policy questions unfit for judicial intervention. The court allowed the suit against CACI to proceed because its private security interrogators were not integrated into a military unit and reported to their own chain of command in the prison.³⁴ The D.C. Circuit Court reversed the ruling as to CACI and found that both suits were barred. The court held that because the contractors were conducting operations under military authority, the state law claims were preempted by the FTCA, which exempts the armed forces from suit.³⁵ The plaintiffs have filed a petition for rehearing *en banc*, which is still pending.

*Mohamed et. al. v. Jeppesen Dataplan*³⁶

Victims of torture after extraordinary rendition to secret CIA detention sites and foreign countries brought suit against Jeppesen Dataplan, a contractor whose staff planned and/or flew rendition flights. The government intervened and invoked the state secrets privilege. The district court ruled that Jeppesen’s motion to dismiss should be granted on state secrets grounds because the litigation would involve information about the CIA’s overseas operations that would implicate national security. A panel of the Ninth Circuit overturned this ruling, finding that the subject matter of the case was not itself a state secret and that bars on the admission of sensitive evidence did not justify dismissal of the case outright. The Ninth Circuit agreed to an *en banc* rehearing of this case. Briefing and oral argument has occurred so a new opinion is forthcoming and will supersede the now-withdrawn panel decision.

*Al-Shimari v. CACI Premiere Technology Inc., et. al.*³⁷

Four Iraqi torture victims brought this case against CACI for their role as interrogators at Abu Ghraib and asserted both federal and state law tort claims, in part under the ATS. The court denied CACI’s motion to dismiss on the grounds that the case raised “political questions.” The court ruled that since CACI is a private actor and the government was not a party in the action, dismissal on political questions grounds was inappropriate. The state law claims were not pre-empted by federal law.³⁸

Detention and Abuse

*Rasul v. Myers*³⁹

Guantánamo detainees brought an action against high-ranking military and civilian government officials for their arbitrary, prolonged detention, torture, cruel, inhuman, and degrading treatment, and religious abuse. They stated claims under ATS, customary international law, the Geneva Conventions, the U.S. Constitution, and the Religious Freedom Restoration Act (RFRA). The district court granted the defendants' motions to dismiss as to the ATS, international law, and constitutional law claims. However, the district court denied the defendants' motion to dismiss the RFRA claims. On appeal, the D.C. Circuit upheld the district court's ruling that the officials were acting within the scope of their employment and therefore were the beneficiaries of absolute immunity from suit under the ATS. Further, the detainees were not "persons" under the requirements of RFRA and thus, the district court decision on the RFRA claim should be reversed. On the constitutional claims, the D.C. Circuit held that the defendants were entitled to qualified immunity because at the time the harms occurred they were unaware of any constitutional protections that extended to the plaintiffs. The plaintiffs petitioned for certiorari to the U.S. Supreme Court. In light of its reversal of the D.C. Circuit's decision in *Boumediene v. Bush* and the D.C. Circuit's substantial reliance on that case in its panel decision in *Rasul*, the Supreme Court remanded the case for a new opinion.⁴⁰ The D.C. Circuit held that the effect of *Boumediene*, which established Guantánamo detainees' right to habeas corpus, did not extend to other constitutional claims and that the defendants were entitled to qualified immunity on those counts.⁴¹ The Supreme Court denied the plaintiffs' petition for certiorari.

*In re Iraq and Afghanistan Detainees Litigation*⁴²

Victims of abuse and torture in Iraq and Afghanistan brought suits against government officials, including high-ranking military and civilian officials, for violations of the Fifth and Eighth amendments, as well as international law. The district court granted the defendants' motion to dismiss and found that the Constitution does not apply to nonresident aliens injured extraterritorially while detained by the U.S. military in countries where the United States is engaged in war. Additionally, it found that "special factors" counseled hesitation in the *Bivens* constitutional claims context because the judiciary should not interfere in questions concerning military affairs, national security, and foreign relations. The court also dismissed claims under the Geneva Conventions, finding that non self-executing treaties do not give rise to a private cause of action. The plaintiffs appealed this decision, and it is currently pending before the U.S. Court of Appeals for the District of Columbia.

*Padilla v. Yoo*⁴³

The plaintiff, José Padilla, a U.S. citizen who was seized and detained in the United States as an "enemy combatant," alleged violations of the First, Fourth, Fifth, Sixth and Eighth amendments in a suit against John Yoo, a former Department of Justice (DOJ) lawyer and author of legal memoranda underlying the government's detention and interrogation policies and specifically directed at Padilla's detention. The District Court denied Yoo's motion to dismiss based on *Bivens* "special factors" grounds. The court found that Padilla was not engaged in a conflict or removed from a battlefield when he was detained, and as a U.S. citizen arrested on American soil, his case did not implicate foreign relations issues. The court denied Yoo qualified immunity based on its finding that as a U.S. citizen, Padilla retained his basic constitutional rights despite his designation as an "enemy combatant." The defendant appealed this decision to the U.S. Court of Appeals for the Ninth Circuit. The case has been fully briefed and argued and awaits decision.

*Ertel v. Rumsfeld*⁴⁴

The plaintiffs, U.S. citizens and military contractors who came under suspicion because they blew the whistle on illegal contractor practices, allege cruel and inhuman treatment during their detention and interrogation by U.S. military forces in Iraq. The district court denied the defendants' motion to dismiss on the grounds of qualified immunity and lack of personal involvement and ruled that the treatment the

plaintiffs received violated their clearly defined constitutional rights. The court also found that no “special factors” precluded a constitutional remedy in this case because the remedy did not implicate the war powers of the executive, and no new judicial remedy for non-citizens would be created. The case will move forward on the merits.

*Al-Zahrani v. Rumsfeld*⁴⁵

This civil suit, filed on behalf of two detainees who died in custody in Guantánamo, sought damages under the constitution, the Alien Tort Statute, and Federal Tort Claims Act for wrongful detention, torture, and death. The D.C. district court dismissed the case. The court stated that the constitutional claims must be dismissed in accordance with the Supreme Court ruling in *Rasul*, while the FTCA claims were barred by that statute’s foreign country exception. The court ruled that the United States should be substituted as the defendant in the ATS claims and is immune from suit under the Westfall Act. The plaintiffs filed a motion for reconsideration based on the discovery of new evidence that official accounts finding that the two detainees committed suicide were false.⁴⁶

*Celikogus v. Rumsfeld*⁴⁷

Former Guantánamo detainees brought this suit against U.S. officials and civilian and military personnel at Guantánamo, seeking damages under the ATS, the Vienna Convention,⁴⁸ the U.S. Constitution, RFRA, and the federal Civil Rights Act.⁴⁹ All the plaintiffs were released from Guantánamo without charge, and two were held for two years after Combatant Status Review Tribunals (CSRTs) had determined that they were not enemy combatants. The suit was stayed pending the decision in *Rasul v. Myers* but has been reactivated. The government moved to dismiss the case, and briefing before the district court has been completed.

*Hamad v. Gates*⁵⁰

The plaintiff, a former detainee in Guantánamo Bay prison for more than six years, filed a complaint against U.S. government officials. He alleges that, despite government officials’ alleged knowledge of his innocence, he was subjected to torture, abuse, and violations of his due process rights. His claims are based in international law and violations of the Constitution, the ATS, and state law.

ENDNOTES

- 1 WHITE HOUSE, NATIONAL SECURITY STRATEGY 36 (May 2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.
- 2 Jane Mayer, *Counterfactual: A Curious History of the CIA's Secret Interrogation Program*, THE NEW YORKER, March 29, 2010.
- 3 INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, POLICY BRIEF: U.S. INQUIRY INTO HUMAN RIGHTS ABUSES IN THE "WAR ON TERROR" (2008), available at http://www.ictj.org/static/Americas/ICTJ_Commission_of_Inquiry_Policy_Brief_rev1_07_Jan_09.pdf and CRIMINAL JUSTICE FOR CRIMINAL POLICY: PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS 8-14 (2009), available at http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf.
- 4 See, e.g., Exec. Order No. 13,491, 74 Fed. Reg. 4893 (2009) (ensuring lawful interrogation); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (2009) (review and disposition of individuals detained at the Guantánamo Bay Naval Base and close of detention facilities); Exec Order No. 13,493, 74 Fed. Reg. 4901 (2009) (review of detention policy options); Martin Scheinin, Manfred Nowak, Shaheen Sardar Ali & Jeremy Sarkin, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, Annex I, p. 150-151 U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).
- 5 CIA INSPECTOR GENERAL, NO. 2003-7123-Ig, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPT. 2001-OCT. 2003) (May 7, 2004); OFFICE OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (July 29, 2009). See generally INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, CRIMINAL JUSTICE FOR CRIMINAL POLICY: PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS 8-14 (2009), available at http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf.
- 6 Press Statement, Attorney General Eric Holder, Regarding a Preliminary Review of the Interrogation of Certain Detainees (Aug. 24, 2009); Ryan Reilly, *Holder: Review of CIA's Treatment of Detainees Nearly Complete*, MAIN JUSTICE, June 18, 2010, <http://www.mainjustice.com/2010/06/18/review-of-cias-treatment-of-detainees-nearly-complete/>.
- 7 David Cameron, Prime Minister's Statement on Detainees to the House of Commons (July 6, 2010), <http://www.number10.gov.uk/news/statements-and-articles/2010/07/>.
- 8 *Id.*
- 9 Convention against Torture art. 2, 4, 14, 16, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; International Covenant on Civil and Political Rights art. 7, 9(5), Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].
- 10 The UN General Assembly resolution adopting the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* [hereinafter *Basic Principles*] sums up the reasoning in its preamble: "Recognizing that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field." G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).
- 11 See Craig Whitlock, *Italian Court Convicts 23 Americans in CIA Rendition Case; Extradition Undecided*, WASH. POST, Nov. 4, 2009; Milan Court of Ordinary Jurisdiction, Criminal Session 4, (Sentenza del Tribunale Ordinario di Milano in Composizione Monocratica, sez. 4 Penale), Nov. 4, 2009, no. 12428/09, November 4, 2009, filed February 1, 2010, Motivation pp. 161-62 (cited in European Parliament, Directorate-General for External Policies, *Briefing Paper: Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, n. 176, EXPO/B/DROI/2009/27 (Apr. 2010)); Marlies Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush Era Officials*, N.Y. TIMES, Mar. 28, 2009.
- 12 See the work of the Campaign for Innocent Victims in Conflict (CIVIC), http://www.civicworldwide.org/index.php?option=com_content&task=view&id=162&Itemid=99. We also recognize that in our discussion of detainees, there may well be cases of lawful detention in which torture or other serious human rights abuses did not occur; in such cases reparation would not be required.
- 13 According to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force), enforced disappearance is the deprivation of liberty by the state or its agents, along with a refusal to acknowledge the detention or concealing the individual's whereabouts, effectively placing him outside the protection of the law. See also Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1429 (United States is not a party); *cf.*, Rome Statute art. 7.1(i), U.N. Doc. A/CONF.183/9 (July 17, 1998).
- 14 S. Treaty Doc. No. 100-20 (1988) (codified at 18 U.S.C. 2340A).
- 15 CAT, at art. 14(1). In order to strengthen the compensation rights of torture victims, several representatives proposed including "an enforceable right to fair and adequate compensation." In this context, "fair and adequate" was meant to ensure that a torture victim would be properly redressed. M. NOWAK & E. MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 454 (2008). As it does in the case of the duty to prosecute, the CAT treats torture specially, while formulating no explicit right to redress in the case of other mistreatment prohibited by the convention.
- 16 CAT, at art. 14(1).
- 17 United States, *Second Periodic Report Under Article 19, delivered to the Committee Against Torture*, ¶ 79, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005). The United States did lodge a reservation upon ratifying CAT to the effect that Article 14 "requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." *U.S. Reservations, Declaration, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishments*, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990). However, the United States has also specially extended its territorial jurisdiction for crimes including torture. 18 U.S.C. § 7.
- 18 Article 7 prohibits torture, cruel, inhuman, or degrading treatment. Article 2(3) requires state parties "(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."
- 19 Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add.13GC 31 (May 26, 2004). See also Human Rights Committee, *General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment*, ¶ 15, U.N. Doc. HRI/GEN/1/Rev.1 (Oct. 3, 1992) ("States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.").
- 20 See Human Rights Committee, *Concluding Observations: Germany*, ¶¶ 15, 16, U.N. Doc. CCPR/CO/80/DEU (May 4, 2004); Human

- Rights Committee, *Concluding Observations: Egypt*, ¶ 10, U.N. Doc. CCPR/C/79/Add.23 (Aug. 9, 1993).
- 21 ICCPR, at art. 9(5). Unlawful arrest or detention provisions are subject to limited derogation in “time of public emergency which threatens the life of the nation,” but derogation must be explicit, under a state of emergency, limited narrowly to the extent “strictly required by the exigencies” and must not be inconsistent with other international law obligations. ICCPR, at art. 4(1). See also Committee on Civil and Political Rights (CCPR), *General Comment 29 (States of Emergency – Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001). Moreover, intent to derogate must be communicated to the UN Secretary-General. ICCPR, at art. 4(3). With regard to compensation for unlawful detention, the United States registered an understanding to the effect that, “Entitlement to compensation may be subject to the reasonable requirements of domestic law.” *U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992).
- 22 “Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law... (b) Adequate, effective and prompt reparation for harm suffered.” Article 15 asserts that the Basic Principles are a restatement of existing obligations regarding reparations and that these are “intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law.” *Basic Principles*, at VII.11(b).
- 23 See Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS no. 857, 211 (March 2005), [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857p175/$File/irrc_857_Henckaerts.pdf) (“A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.”). See generally Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Common Art. 3, Aug. 12, 1949, 6 U.S.T. 3114 (setting a clear minimum standard that precludes cruel treatment).
- 24 Richard Falk, *Reparations, International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS 482 (Pablo de Greiff ed., 2006); International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, art. 32, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*].
- 25 *Draft Articles*, at art. 31.
- 26 *Basic Principles*, at ¶ 15.
- 27 *Id.* at ¶ 16.
- 28 Human Rights Committee, *General Comment 31*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (referencing the provision against torture in art. 7 and the state’s positive obligation to ensure enjoyment of rights under the covenant in art. 2).
- 29 See, e.g., *Case of 19 Merchants v. Colombia*, Inter-Am. Ct. H.R. (Ser. C), No. 109, ¶¶ 138-140 (2004).
- 30 *Basic Principles*, at ¶ 15. For example, certain restitution measures would be excluded if they would involve a burden to the state out of proportion to the benefit gained by the victim. *Draft Articles*, commentary to art. 34, ¶ 5.
- 31 *Basic Principles*, at ¶ 18.
- 32 Special Rapporteur of the Commission on Human Rights, *Interim Report on the Question of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 29, U.N. Doc. A/55/290 (Aug. 11, 2000); *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 50, U.N. Doc. A/59/324 (Sept. 1, 2004).
- 33 See *Basic Principles*, at Annex ¶ 18.
- 34 *Case Concerning the Factory at Chorzow (Ger. v. Pol.)*, 1927 P.C.I.J. (Ser. A) No. 9, at 47 (July 26); *On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, 198 (July 9).
- 35 See *Basic Principles*; LISA MAGARRELL, *REPARATIONS IN THEORY AND PRACTICE* (2007), available at http://www.ictj.org/static/Reparations/0710_Reparations.pdf.
- 36 See generally MAGARRELL, *REPARATIONS IN THEORY AND PRACTICE*; Pablo de Greiff, *Justice and Reparations*, in THE HANDBOOK OF REPARATIONS 451-477 (Pablo de Greiff ed., 2006).
- 37 Ariel Colonosmos & Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, in THE HANDBOOK OF REPARATIONS 390, 408 (Pablo de Greiff ed., 2006).
- 38 Corte Constitucional, *Sentencia C-1199 (2008)* (Colombia), Justice Nilson Pinilla Pinilla writing for the court (Magistrado Ponente). (This was regarding a claim of unconstitutionality that was raised with respect to several articles of Law 975 (2005); “By which provisions are set forth for the reincorporation of members of armed groups organized outside of the law, which provisions shall contribute effectively to the achievement of national peace and other provisions for humanitarian accords.”)
- 39 Article 2(3) provides, “Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.”
- 40 NATIONAL COMMISSION FOR TRUTH, JUSTICE AND RECONCILIATION (COMMISSION NATIONALE POUR LA VÉRITÉ, L’ÉQUITÉ ET LA RÉCONCILIATION, IER) (MOROCCO), SUMMARY OF THE FINAL REPORT (English summary) 44 (Advisory Council on Human Rights, CCDH, Rabat: Dec. 2005).
- 41 Law No. 28592 (July 29, 2005); the violations that give rise to redress are found in Art. 3.
- 42 TRUTH AND RECONCILIATION COMMISSION (COMISION DE VERDAD Y RECONCILIACION) (PERU), Vol. IX Final Report, 141-42 (2003) (in Spanish).
- 43 *Basic Principles*, at ¶ 8.
- 44 *Id.* at ¶ 25.
- 45 DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 119 (2d ed. 2005). *But see* *McCann v. United Kingdom*, 21 Eur. Ct. H.R. 97 (1995). In this case the court denied damages to the families of suspected members of the Irish Republican Army who had been shot and killed by U.K. military personnel. In refusing to order reparations, the court reasoned by a very slim margin that “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar, the Court does not consider it appropriate to make an award ...” *Id.* ¶¶ 215-19. See generally, Lisa J. LaPlante, *Heeding Peru’s Lesson: Paying Reparations to Detainees of Anti-Terrorism Laws*, 2 H. RTS. COMMENTARY 88, 97 (2006).
- 46 Matthew Cole, *(Terrorism) Blowback*, GQ MAGAZINE, March 2007, at 236.
- 47 Committee Against Torture, *General Comment 2*, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 28, 2008) (emphasis added). See also Human Rights Committee, *General Comment 18*, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (describing the broad and diverse groups covered by the principle of nondiscrimination in the application of ICCPR).
- 48 Report of the Commission on Political Imprisonment and Torture (also known as the Valech Commission), chapter II, pp. 83-84 (translation of original by Lisa Magarrell).

- 49 Survivors older than 65 at the time of the agreement received an advance payment of compensation. See, Aboriginal Healing Foundation, Lump Sum Compensation Payments Research Project: The Circle Rechecks Itself (2007), available at <http://www.ahf.ca/publications/research-series> (“lump sum compensation study”).
- 50 MOHAMED SUMA & CRISTIÁN CORREA, REPORT AND PROPOSALS FOR THE IMPLEMENTATION OF REPARATIONS IN SIERRA LEONE 10-11 (2009), http://www.ictj.org/static/Africa/SierraLeone/ICTJ_SL_ReparationsRpt_Dec2009.pdf.
- 51 TRUTH AND RECONCILIATION COMMISSION (PERU), Vol. IV Final Report, 199.
- 52 NATIONAL COMMISSION FOR TRUTH, JUSTICE AND RECONCILIATION (MOROCCO), SUMMARY OF THE FINAL REPORT 45. Some victims of that country’s period of repression were detained arbitrarily and tortured in legally sanctioned, secret detention sites for many years; hundreds died and others lost years of family life and health.
- 53 United States of America, *First Periodic Report Under Article 19 of the Convention Against Torture, delivered to the Committee Against Torture*, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000); United States of America, *Second Periodic Report Under Article 19 of the Convention Against Torture, delivered to the Committee Against Torture*, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005) [hereinafter *Second Periodic Report*].
- 54 *Second Periodic Report*, at ¶¶ 66-70.
- 55 *Id.* at ¶ 75. The U.S. Agency for International Development (USAID), working through the Victims of Torture fund, reportedly was administering programs in 26 countries in 2005 that supported “treatment programs that attend to the medical, psychological, and social needs of torture survivors and their families,” along with some programs for “advocacy, training, technical assistance, and research.” *Id.* at ¶ 76.
- 56 Detainee Treatment Act of 2005, 10 U.S.C. § 1005(e)(1); Military Commissions Act of 2006 § 7(a), Pub. L. No. 109-336, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.). This section provides in relevant part, “(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” *But see* Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190 (codified in scattered sections of 10 and 18 U.S.C.) (which does not include the jurisdiction stripping provisions of the 2006 act).
- 57 Until the end of 2008, U.S. military personnel as well as its civilian employees and contractors in Iraq were immune from civil liability in Iraqi courts under Coalition Provisional Authority Order No. 17. Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF–Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27, June 17, 2004, available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. According to the Status of Forces Agreement (SOFA) reached between Iraq and the United States in 2009, the United States retains jurisdiction over its forces, and both governments waive all claims arising out of damage to property, injury, or death. The Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.–Iraq, art. 12(3), 21(1), Nov. 17, 2008, available at <http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm>. The United States agrees to pay “just and reasonable compensation” to third parties injured by U.S. personnel in Iraq, “in accordance with the laws and regulations of the United States.” *Id.* at art. 21(2). Iraq retained jurisdiction over U.S. contractors and contractors’ employees, but only people employed by the military; anyone employed by other U.S. departments and agencies is not covered. *Id.* at art.12(2). See also Congressional Research Service, U.S.–Iraq Withdrawal/Status of Forces Agreement: Issues for Congressional Oversight 7 (July 13, 2009). There is no comparable SOFA in Afghanistan. However, one agreement stipulates that the Vienna Convention covers DOD employees, making them immune from Afghan civil jurisdiction, except when acting outside their official duties. See Congressional Research Service, Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized? 7-10 (June 18, 2009). The specific agreement will be published in the Treaties and Other International Acts Series, but is not yet available. See also Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.
- 58 *Second Periodic Report*, at ¶¶ 79-82; United States of America, *Response to the List of Issues to be Considered During the Examination of the Second Periodic Report of the United States of America, delivered to the Committee Against Torture*, 10-11, 78-79, U.N. Doc. CAT/C/USA/Q/2 (May 8, 2006) [hereinafter *Response to CAT*].
- 59 *Second Periodic Report*, at ¶¶ 120-21.
- 60 See Annex for causes of action and summaries of key cases.
- 61 See *Arar v. Ashcroft*, 585 F.3d 559, 565, 575, 580-81 (2d Cir. 2009), *cert denied*, ___ S. Ct. ___, 2010 WL 390379; *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 103-07 (D.D.C. 2007) (appeal pending before the D.C. Court of Appeals).
- 62 See, e.g., *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 113; *Rasul v. Meyers*, 512 F.3d 644, 655 (D.D.C. 2008), vacated, ___ U.S. ___, 129 S. Ct. 763 (2008), *aff’d*, 563 F.3d 527 (D.C. Cir. 2009). See Annex for discussion of Westfall Act and Federal Tort Claims Act (FTCA).
- 63 See 28 U.S.C. § 2680(a), stating that the FTCA will not apply to “Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court rejected the application of the so-called “headquarters doctrine,” allowing a foreign plaintiff to assert FTCA liability against the United States for conduct or injuries occurring in a foreign country if government officials acting within the United States directed the conduct that led to that injury. *Id.* at 692-93. See also Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 732 (2005-2006).
- 64 See Annex for a summary of claims.
- 65 *Rasul v. Meyers*, 512 F.3d at 671-2.
- 66 See Brief of Intervenor-Appellee the United States, Mohamed, et al. v. Jeppsen Dataplan, 578 F.3d 943 (9th Cir. 2009) (No. 08-15693). See also News Conference by President Barack Obama, East Room, White House (April 29, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-4/29/2009/).
- 67 WHITE HOUSE, NATIONAL SECURITY STRATEGY 36-37 (May 2010).
- 68 See *Rasul v. Meyers*, 512 F.3d 644, 663 (D.D.C. 2008); *In re Iraq and Afghanistan Detainee Litigation*, 479 F. Supp. at 112, 115-17; Alien Tort Statute, 28 U.S.C. § 1350.
- 69 *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009) (U.S. citizen plaintiff defeated a motion to dismiss a case against a U.S. government lawyer); *Al-Shimari v. CACI Premiere Technology, Inc., et al.*, 657 F. Supp. 2d 700 (E.D. Va. 2009) (U.S. contractor did not prevail in motion to dismiss).
- 70 *Celikogus v. Rumsfeld*, No. 01996 (D.D.C. Nov. 22, 2006). This case was filed in 2006 and stayed pending the outcome of *Rasul*.

- It now has been re-activated; the government has filed a motion to dismiss, and the case has been fully briefed and awaits the decision of the district court. See also MARK & JOSHUA DENBEAUX, ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 21 (2006).
- 71 Al Zahrani v. Rumsfeld, 2010 U.S. Dist. LEXIS 13282 (D.D.C. Feb. 16, 2010); Scott Horton, *The Guantánamo Suicides: A Camp Delta Sergeant Blows the Whistle*, HARPERS (March 2010).
- 72 As a means of compensation for harm the military has done to civilians, the FCA operates alongside a program of solatia or condolence payments. Condolence payments are made via Commander's Emergency Response Program funds, money available to individual units and earmarked for a variety of development purposes. Army Regulation 27-20, ¶ 10-10 (Feb. 8, 2008). CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II: FULL SPECTRUM OPERATIONS 193 (Sept. 1, 2005) [hereinafter FULL SPECTRUM OPERATIONS]. Payments are typically lower than those available through FCA claims, since funds are limited and are made entirely at the discretion of unit commanders. Although a commander may decide to award a condolence payment in situations where a FCA payment would be prohibited, inconsistencies in administration similar to those that affect FCA claims are common, and a survey of available information indicates that most condolence payment requests are denied. See JONATHAN TRACY, CONDOLENCE PAYMENTS 4 (July 2006), available at <http://www.civicworldwide.org/storage/civic/documents/condolence%20payments%20current.pdf> [hereinafter CONDOLENCE PAYMENTS] (noting variation among units); JONATHAN TRACY, COMPENSATING CIVILIAN CASUALTIES: "I AM SORRY FOR YOUR LOSS, AND I WISH YOU WELL IN A FREE IRAQ" 3, 14 (2008), available at <http://www.hks.harvard.edu/cchrp/Tracy%20Report%20Nov%203%202008.pdf> [hereinafter COMPENSATING CIVILIAN CASUALTIES] (reporting a condolence payment of \$500 for a wrongful death).
- 73 The UN rapporteur on extrajudicial, summary or arbitrary executions has made a similar finding. In discussing the wider question of harms caused in U.S. counterterrorism operations more generally, he writes, "The Government has implemented a number of programs to provide compensation and restitution to civilian victims of U.S. military operations. . . . In some respects, the Government has done less than the law requires by de-linking reparation from the question of whether illegal conduct occurred. In other respects, the Government has done more, by providing reparations to the families of those killed in lawful attacks. My overall assessment is that the Government's approach has, in practice, meant far more people have received reparations for the loss of their loved ones than has often been the case in previous conflicts, but that reparation programs need to be made more consistent and comprehensive." Philip Alston, *Mission to the United States of America, Addendum*, ¶ 67, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009).
- 74 Army Regulation 27-20, ¶¶ 10-6, 10-9 (Feb. 8, 2008); UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO REPORT 07-699, MILITARY OPERATIONS: THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 49 (May 2007) [hereinafter GAO REPORT].
- 75 10 U.S.C. § 2734(a); Army Regulation 27-20, ¶ 10-3(a). The act has also been interpreted to include harms caused by civilian employees of the armed forces, but not by contractors. Army Regulation 27-20, ¶ 10-3(a). The FCA's stated purpose is to "promote and maintain friendly relations" with civilians. 10 U.S.C. § 2734(a).
- 76 10 U.S.C. § 2734(a).
- 77 10 U.S.C. § 2734(b)(1); Judge Advocate General, JAG Instruction 5800.7E, 8-5 MANUAL OF THE JUDGE ADVOCATE GENERAL 8089(a) (June 20, 2007).
- 78 10 U.S.C. § 2734(b)(2). To be eligible for compensation through the FCA, "In the case of a national of a country at war with the United States, or of any ally of that country, the claimant [must be] determined by the commission or by the local military commander to be friendly to the United States." This does not necessarily preclude detainee claims, as a claims commission could make a finding that a detainee was not unfriendly to the United States at the time harms occurred. See, e.g., Army Regulation 27-20, ¶ 10-4(i) (stating that a prisoner of war or interned enemy alien may file a personal property claim, and that a national or ally of an enemy country may make a claim if he is determined to be friendly to the United States at the time of the incident).
- 79 Army Regulation 27-20, ¶ 10-6, 10-9; GAO REPORT, at 49.
- 80 Army Regulation 27-20, ¶ 10-9(a-e).
- 81 10 U.S.C. § 2734(e). An FCA award is not a bar to a claim in federal court, although the obstacles to recovery in that venue are substantial. See *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) and discussion of that case in Annex.
- 82 Records of a few filed claims from family members and detainees are available, but final adjudications of these claims are unclear. See Claims Form, Bates No. 000355, available at <http://www.aclu.org/files/projects/foiasearch/pdf/DOD045969.pdf>; Claims Form, Bates No. 000349, Aug. 11, 2003, available at <http://www.aclu.org/files/projects/foiasearch/pdf/DOD045963.pdf>; Record of Claims under Foreign Claims Act and Military Claims Act, Bates No. 000290, May 12, 2004, available at <http://www.aclu.org/files/projects/foiasearch/pdf/DOD045906.pdf>. See also Letter from Army Captain, FCC 15A, to unknown claimant, available at <http://www.aclu.org/files/projects/foiasearch/pdf/DODDOA022943.pdf> (recording the settlement of a detainee-related claim that the FCC formally denied because it was filed by the detainee's mother rather than the detainee himself). These records were made public pursuant to FOIA litigation undertaken by the ACLU.
- 83 Memorandum from Secretary of Defense Donald Rumsfeld to the Secretary of the Army, subject: Processing Claims by Iraqi Detainees Based on Allegations of Personal Injury/Abuse and Mistreatment (Sept. 15, 2004) (on file with ICTJ).
- 84 *Response to CAT*, at Annex 8. The claims were mostly from Iraq; according to this annex, in addition to the two cases in which compensation was offered, six were denied or are pending denial, 23 were being investigated, and two were "transferred." *Id.*
- 85 It is unclear whether this is the same case referenced in the U.S. responses to CAT, which is not identified by name.
- 86 See *Saleh*, 580 F.3d at 4.
- 87 *Id.* (citing Third Am. Compl., ¶ 116).
- 88 See ACLU Press Release, "Newly Released Documents Reveal Details of Civilian Casualty Claims in Afghanistan and Iraq," April 1, 2010. The claims are part of the ACLU's searchable FOIA database, available at <http://www.aclu.org/accountability/search.html>. In April 2010, the ACLU released another 13,000 records representing more than 800 civilian claims, which it received through FOIA litigation. These recent records are on a log available at <http://www.aclu.org/natsec/foia/log2.html>.
- 89 See generally CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, WHITE PAPER: U.S. MILITARY CLAIMS SYSTEM FOR CIVILIANS (May 2007) [hereinafter U.S. MILITARY CLAIMS SYSTEM FOR CIVILIANS]; COMPENSATING CIVILIAN CASUALTIES.
- 90 U.S. MILITARY CLAIMS SYSTEM FOR CIVILIANS, at 3; COMPENSATING CIVILIAN CASUALTIES, at 19.
- 91 File, Claim No. 06-147-T041/321-7, Bates No. 23972-24008, April 6, 2006, available at <http://www.aclu.org/natsec/foia/log2.html>. See also ACLU Press Release, "Newly Released Documents Reveal Details of Civilian Casualty Claims in Afghanistan and Iraq," April 1, 2010.
- 92 COMPENSATING CIVILIAN CASUALTIES, at 57 (noting instances when FCCs ignored witness accounts that did not agree with military incident reports).

- 93 See, e.g., Memorandum, 101st Airborne Division (Air Assault), Tikrit, Iraq, Bates No. 000558, Mar. 4, 2006, available at http://www.aclu.org/natsec/foia/pdf/Army0558_0563.pdf; Memorandum, 1st Brigade, 3d Infantry Division, Forward Operating Base Speicher, Bates No. 001601, Nov. 19, 2005, available at http://www.aclu.org/natsec/foia/pdf/Army1601_1604.pdf; Memorandum of Opinion, 1st Brigade Combat Team, 101st Airborne Division, Kirkuk, Iraq, Bates No. 001149, Feb. 13, 2006, available at http://www.aclu.org/natsec/foia/pdf/Army1149_1152.pdf.
- 94 COMPENSATING CIVILIAN CASUALTIES, at 14.
- 95 10 U.S.C. § 2734(a); Army Regulation 27-20, ¶ 10-3(a).
- 96 GAO REPORT, at 50.
- 97 10 U.S.C. § 2734(b)(2).
- 98 323 U.S. 214 (1944). The decision has long since been discredited and an apology extended for the policy the court upheld, yet the Supreme Court has never explicitly overturned the decision.
- 99 Eric K. Yamamoto & Liann Ebesugawa, *Report on Redress: The Japanese American Internment*, in THE HANDBOOK OF REPARATIONS 257, 259 (Pablo de Greiff ed., 2006).
- 100 The U.S. government also successfully pressured Panama to intern all people of Japanese descent. COMMISSION ON WARTIME RELOCATION AND INTERNMENT, PERSONAL JUSTICE DENIED 307 (1997) [HEREINAFTER PERSONAL JUSTICE DENIED]; Lika C. Miyake, *Forsaken and Forgotten: The U.S. Internment of Japanese Peruvians During World War II*, 9 ASIAN L.J. 163, 168 (2002).
- 101 PERSONAL JUSTICE DENIED, at 308.
- 102 *Id.* at 305.
- 103 *Id.* at 307; Miyake, *Forsaken and Forgotten* 163, 168, 170-75.
- 104 President, Proclamation Removal of Alien Enemies, No. 2662 of Sept. 8, 1945 (10 F.R. 11635 – Sept. 12, 1945).
- 105 Public Law 863 allowed Latin Americans of Japanese origin to challenge their deportation. Two years later, Public Law 751 gave the remaining Latin American internees the right to apply for permanent resident status and ultimately qualify for citizenship. 48 U.S.C. 645 (repealed), Pub. L. No. 863, 73 Stat. 10 (1948); Refugee Relief Act, Pub. L. No. 751, 67 Stat. 400 (1953). See also Yamamoto & Ebesugawa, *Report on Redress: The Japanese American Internment*, at 269.
- 106 Yamamoto & Ebesugawa, *Report on Redress: The Japanese American Internment*, at 268-69.
- 107 *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).
- 108 *Hohri v. United States*, 847 F.2d 779 (Fed. Cir. 1988).
- 109 Pub. L. No. 100-383, 102 Stat. 903 101 (1988).
- 110 *Mochizuki v. United States*, 43 Fed. Cl. 97 (Fed. Cl. 1999).
- 111 Complaint, Adel Hassan Hamad v. Robert M. Gates, et al., U.S. District Court, Western District of Washington, April 7, 2010, ¶¶ 56-67.
- 112 *Id.* at ¶¶ 6, 14. See also, Reprieve, *Q&A Polly Rossdale on the Life after Guantanamo*, April 20, 2010, http://www.reprieve.org.uk/2010_04_20life_after_guantanamo.
- 113 For one detailed account of abuses in detention, see INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, CRIMINAL JUSTICE FOR CRIMINAL POLICY: PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS annex 1, 53-63 (2009), available at http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf. See also George W. Bush Defends Waterboarding: Would Waterboard Khalid Sheik Mohammed Again, HUFFINGTON POST, June 3, 2010.
- 114 Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, & Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, ¶¶ 98-162, U.N. Doc. A/HRC/13/42, Jan. 26, 2010.
- 115 *Celikogogus*, No. 01996. See also MARK & JOSHUA DENBEAUX, ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 21 (2006); Tim Reid, *George Bush 'Knew Guantánamo Prisoners Were Innocent'*, TIMES (London), April 9, 2010.
- 116 See, e.g., Mohamed Farag Bashmilah, *Disappeared in the Name of National Security*, HUFFINGTON POST, Feb. 19, 2009, available at http://www.huffingtonpost.com/mohamed-farag-bashmilah/disappeared-in-the-name-o_b_168200.html.
- 117 Truth and Reconciliation Commission, *Final Report*, Annex 6, Law No. 28592 (July 29, 2005).
- 118 It is beyond the scope of this paper to address all of the harms suffered in connection with U.S. counterterrorism operations. In fact, some of the most well-known cases involve civilian killings, whether in aerial attacks, checkpoint shootings, or patrols and searches in Afghanistan or Iraq. These acts, as well as potentially devastating long-term consequences from chemicals used in warfare, need to be addressed in the future. However, this paper is focused on the deliberate policy of torture and other cruel treatment that constitute serious violations of international human rights or humanitarian law.
- 119 Furthermore, many detainees said they could not get medical care for physical injuries after they were released. PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES 30-31 (2008); HUMAN RIGHTS WATCH, NO DIRECTION HOME: RETURNS FROM GUANTANAMO TO YEMEN 42 (2009); Amended Complaint, ¶ 198 Al Zahrani v. Rumsfeld, Case No. 09-cv-00028 (ESH) (D.D.C. Jan. 29, 2009).
- 120 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 90.
- 121 *Id.*; HUMAN RIGHTS WATCH, GUANTANAMO: DETAINEE ACCOUNTS 23-24 (2004); Second Amended Complaint, ¶¶ 76, 97, 101, 108, 123, 147, 163, *Celikogogus v. Rumsfeld*, Case No. 1:06-cv-1996 (D.D.C. April 4, 2008); Complaint, ¶¶ 80, 138-40. *Rasul v. Rumsfeld*, Case No. 1:04-cv-1864 (D.D.C. Oct. 27, 2004).
- 122 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 19, 25, 76-7; Video: *Justice Denied: Voices from Guantanamo*, video, available at <http://www.youtube.com/watch?v=vm-tf13lto>.
- 123 See generally HUMAN RIGHTS WATCH, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO (2008); PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS.
- 124 PTSD is a serious condition involving intrusive memories and flashbacks, hyper-arousal or extreme nervousness, and avoidance and emotional numbing behavior. In the PHR study, 10 of the 11 former detainees interviewed suffered all major symptoms of PTSD. PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 91. Ongoing trauma is a common harm alleged in the civil cases brought by former detainees in the United States as well. See Second Amended Complaint, ¶¶ 76, 97, 101, 108, 123, 147, 163, *Celikogogus v. Rumsfeld*.
- 125 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 91-92.
- 126 *Id.* at 91 (a detainee could not remember verses of the Qur'an). See also HUMAN RIGHTS WATCH, GUANTANAMO: DETAINEE ACCOUNTS, at 23.
- 127 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 92; HUMAN RIGHTS WATCH, GUANTANAMO: DETAINEE ACCOUNTS, at 23, 24. Sexual dysfunction and alcohol abuse are also reported.
- 128 See *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering*

- Terrorism*, ¶ 30, *delivered to the General Assembly and the Human Rights Council* U.N. Doc. A/64/211 (Aug. 3, 2009) (prepared by Martin Scheinin); New York University Center for Human Rights & Global Justice, *The United States and Gender, National Security and Counter-Terrorism*, Concept Note (April 14, 2010), available at <http://www.chrgj.org/projects/docs/ConceptNote.pdf>.
- 129 Sudarsan Raghavan, *Ex-detainees' Woes in Yemen Add to U.S. Fears of Releasing Others*, WASHINGTON POST, Nov. 29, 2009; HUMAN RIGHTS WATCH, NO DIRECTION HOME: RETURNS FROM GUANTANAMO TO YEMEN, 41 (2009).
- 130 HUMAN RIGHTS WATCH, ILL-FATED HOMECOMINGS A TUNISIAN CASE STUDY OF GUANTANAMO REPATRIATIONS 1 (2007).
- 131 *Id.* at 42; *Arar*, 585 F.3d 559 (Arar sued for constitutional violations based on his detention in John F. Kennedy International Airport in New York and subsequent detention and torture in Syria. Arar alleged in his complaint that travel restrictions prevent him from entering the United States. Complaint of Maher Arar at ¶ 67, *Arar v. Ashcroft*, No. CV-04-0249 (E.D.N.Y. 2006)).
- 132 HUMAN RIGHTS FIRST, UNDUCE PROCESS: AN EXAMINATION OF DETENTION AND TRIALS OF BAGRAM DETAINEES IN APRIL 2009 19 (2009); PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 22, 53-54.
- 133 Alissa J. Rubin, *Afghans Detail Detention in 'Black Jail' at U.S. Base*, N.Y. TIMES, Nov. 28, 2009. Under a new policy instituted in August 2009, detainees can only be held in military prisons for two weeks, but prior to that detainees report being held for months with no notice given to family members. See ALSO UNIVERSITY OF CALIFORNIA BERKELEY INTERNATIONAL HUMAN RIGHTS LAW CLINIC AND HUMAN RIGHTS CENTER, RETURNING HOME: RESETTLEMENT AND REINTEGRATION OF DETAINEES RELEASED FROM THE U.S. NAVAL BASE IN GUANTANAMO BAY CUBA 5 (2009) [hereinafter UC BERKELEY, RETURNING HOME].
- 134 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 22; HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 41.
- 135 See, e.g., UC BERKELEY, RETURNING HOME, at 5.
- 136 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 37.
- 137 Raghavan, *Ex-detainees' Woes in Yemen Add to U.S. Fears of Releasing Others*; HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 40, 43.
- 138 HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 42.
- 139 Taieb Mahjoub, *Ex-Gitmo Inmates 'Could Return to Extremism'*, AFP, Jan. 14, 2010; HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 42; UC BERKELEY, RETURNING HOME, at 2, 4.
- 140 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 54, 56, 67; HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 41.
- 141 HUMAN RIGHTS FIRST, UNDUCE PROCESS, at 19.
- 142 HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 41; Video: Justice Denied: Voices from Guantanamo, available at <http://www.youtube.com/watch?v=vm-tfT3ltoc>.
- 143 HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 41, 42; HUMAN RIGHTS WATCH, GUANTANAMO: DETAINEE ACCOUNTS, at 23; PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 92.
- 144 See, e.g., UC BERKELEY, RETURNING HOME, at 4-5.
- 145 HUMAN RIGHTS WATCH, NO DIRECTION HOME, AT 39, 41; PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 19.
- 146 HUMAN RIGHTS WATCH, NO DIRECTION HOME, at 41; Raghavan, *Ex-detainees' Woes in Yemen Add to U.S. Fears of Releasing Others*.
- 147 HUMAN RIGHTS WATCH, GUANTANAMO: DETAINEE ACCOUNTS, at 23; PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 91-93
- 148 See, e.g., Michaela Stanková, *Detainees say Slovak camp is worse than Guantanamo*, The Slovak Spectator, June 30, 2010; Mike Melia, *Ex-Gitmo Detainee Struggles to Rebuild Life in Chad*, ASSOCIATED PRESS, Dec. 17, 2009; Tomoko A. Hosaka & William Foreman, *Palau Uighurs Face Culture Shock*, HUFFINGTON POST, June 12, 2009.
- 149 PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, at 93.
- 150 William Maclean, *Stress, Trauma, Stigma Stalk Ex-Guantanamo Inmates*, REUTERS, July 30, 2009.
- 151 *Basic Principles*, at art. 20. See also *Draft Articles*, Commentary to art. 36.
- 152 Falk, *Reparations, International Law, and Global Justice*, at 489; *Draft Articles*, Commentary to art 34, at ¶ 5.
- 153 For example, Canada's system is somewhat similar to the FCA; it allows people injured by the government (including the military) to file a claim or apply for an *ex gratia* payment. These claims are adjudicated by judge advocates and JAG officers. Claims and Ex-Gratia Procedures, Department of National Defense Directive DAOD 7004-0, 7004-1 (Can). Maher Arar, a Canadian citizen who was detained at Kennedy Airport and transferred to Syria for torture, also received a settlement from the Canadian government after filing a claim in Canadian court. He originally sought \$37 million and an official apology for Canada's role in erroneously giving his name to the U.S. government as a suspected terrorist. He settled for \$10 million after a judicial inquiry into the incident and he received a parliamentary apology, although not an official government apology. *Ottawa Reaches \$10M Settlement with Arar*, CBC NEWS, Jan. 25, 2007, available at <http://www.cbc.ca/canada/story/2007/01/25/arar-harper.html>. Australian courts have also proved to be an option for some injured civilians. In at least one case, an Iraqi family that was fired on by Australian soldiers in Baghdad, later resettled in Australia, filed a case in Australian court. The military gave \$7,700 to the family after the incident but chose to file for compensation in court as well. AAP, *Iraqi Family Sues Australia Over Diggers*, WEST AUSTRALIAN, Feb. 28, 2008. In another court case, a Guantánamo detainee won a suit against Australia seeking compensation for the government's role in aiding and abetting his torture by foreign agents. Joel Gibson, *Former Guantanamo Inmate has Second Win with Defamation Victory*, MORNING HERALD (Australia), Mar. 17, 2010.
- 154 ICCPR, at art. 9(5) ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.")
- 155 This would be consistent with the definition of victim found in the *Basic Principles*, ¶ 8 ("Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.")
- 156 *Basic Principles*, at art. 19. See also *Draft Articles*, commentary to art. 35 ("Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act."); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (1985) ("Principles of Justice") G.A. Res. 40/34, ¶¶ 8-11, U.N. Doc. A/RES/40/34 (Nov. 29, 1985).
- 157 See *Israeli Wall Case*, at ¶ 152-53 (affirming the primacy of restitution as a reparative measure, except where "materially impossible").
- 158 Falk, *Reparations, International Law, and Global Justice*, at 482-83.
- 159 *Basic Principles*, at art. 21.
- 160 Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS, at 275.
- 161 See, e.g., PHYSICIANS FOR HUMAN RIGHTS, EXPERIMENTS IN TORTURE: EVIDENCE OF HUMAN SUBJECT RESEARCH AND EXPERIMENTATION IN THE 'ENHANCED' INTERROGATION PROGRAM (2010).
- 162 *Second Periodic Report*, at ¶ 66-70.

- 163 AMNESTY INTERNATIONAL, *GUANTANAMO: LIVES TORN APART: THE IMPACT OF INDEFINITE DETENTION ON DETAINEES AND THEIR FAMILIES* (2006).
- 164 THE GUANTÁNAMO REVIEW TASK FORCE, *FINAL REPORT 17* (January 2010) (“It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country.”).
- 165 Reid, *George W. Bush ‘Knew Guantánamo Prisoners Were Innocent’*.
- 166 In a separate article, the *Basic Principles* also require states to provide transparency and access to information regarding human rights violations. “States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.” *Basic Principles*, at art. 24.
- 167 Binyam Mohammed, *Statement Following His Release from Guantánamo Bay* (Feb. 23, 2009), available at <http://www.reprive.org.uk/statementofbinyammohamed>.
- 168 *Basic Principles*, at art. 22. See also INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, *CRIMINAL JUSTICE FOR CRIMINAL POLICY: PROSECUTING ABUSES OF DETAINEES IN U.S. COUNTERTERRORISM OPERATIONS* (2009) (on the importance of criminal investigation and sanctions).
- 169 Mohamed Farag Bashmilah, *Disappeared in the Name of National Security*, HUFFINGTON POST, Feb. 19, 2009, http://www.huffingtonpost.com/mohamed-farag-bashmilah/disappeared-in-the-name-o_b_168200.html.
- 170 See Janna Thompson, *Apology, Justice and Respect: A Critical Defense of Political Apology*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 32-34 (2008).
- 171 *Bloody Sunday Report Published*, BBC NEWS, June 15, 2010, http://news.bbc.co.uk/2/hi/northern_ireland/10320609.stm.
- 172 See Mark Gibney & Niklaus Steiner, *Apology and the American “War on Terror”*, in *THE AGE OF APOLOGY: FACING UP TO THE PAST* 288 (2008).
- 173 HUMAN RIGHTS WATCH, *No Direction Home*, at 42-43.
- 174 de Greiff, *Justice and Reparations*, at 133.
- 175 For the history of the grassroots “Sorry Day” movement in Australia, see National Sorry Day Committee, *History of Sorry Day*, http://www.nsd.org.au/home/index.php?option=com_content&view=category&layout=blog&id=20&Itemid=51.
- 176 Supreme Decree 051-88-PCM, Apr. 12, 1988. See generally JULIE GUILLEROT & LISA MAGARRELL, *MEMORIAS DE UN PROCESO INACABADO: REPARACIONES EN LA TRANSICIÓN PERUANA* 124 (2006).
- 177 Supreme Decree 002-2002-JUS, Jan. 15, 2002 (creating the Special Commission on Assistance for Innocents who were Pardoned (CEAI)).
- 178 Law Creating the Comprehensive Reparations Plan, Law No. 28592, July 29, 2005.
- 179 *Id.* at art. 4.
- 180 For information on this commission, see <http://www.usip.org/resources/commission-inquiry-chile-03>.
- 181 See, e.g., the London-based Guantánamo Justice Centre, founded by former detainees, <http://www.gitmojusticecentre.com/about-us>.
- 182 The *Basic Guidelines* adopt a “victim-oriented perspective,” as stated in the preamble. See also the discussion of this issue in Cristián Correa, Julie Guillerot & Lisa Magarrell, *Reparations and Victim Participation: A Look at the Truth Commission Experience*, in *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY, SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING* (Ferstman, Goetz and Stephens eds., 2009).
- 183 de Greiff, *Justice in Reparations*, 451. In the United States, class actions might be able to result in a similarly broad judgment, but unless a judge gives considerable leeway for fashioning remedies, legislation is generally the best way to create a policy that can be applied broadly and encompass a more holistic array of reparative measures. Cf. Class action litigation in Canada regarding forced assimilation and mistreatment of aboriginal children sent to church boarding schools eventually led to a settlement that included reparations and a truth process. <http://www.residentialschoolsettlement.ca/English.html>.
- 184 See, e.g., *Arar*, 585 F.3d at 564; *In re Iraq and Afghanistan Detainee Litigation*, 479 F. Supp. 2d at 107; Opposition by U.S. Government and Ashcroft at 10-15, *Arar v. Ashcroft*, No. 09-923 (U.S. Feb. 1, 2010).
- 185 Ruling of the Milan Court of Ordinary Jurisdiction, Criminal, Session 4 (Sentenza del Tribunale Ordinario de Milano in Composizione Monocratica, sez. 4 Penale), Nov. 4, 2009, no.12428/09, filed February 1, 2010 (cited in European Parliament, Directorate-General for External Policies, *Briefing Paper: Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, n. 176, EXPO/B/DROI/2009/27 (Apr. 2010)).
- 186 List of Issues Prior to the Submission of the Fifth Periodic Report of United States of America, ¶ 27, U.N. Doc. CAT/C/USA/Q/5 (Jan. 20, 2010).
- 187 Gibson, *Former Guantanamo Inmate Has Second Win with Defamation Victory*.
- 188 See European Parliament, Directorate-General for External Policies, *Briefing Paper: Current Challenges Regarding Respect of Human Rights in the Fight Against Terrorism*, n. 174, EXPO/B/DROI/2009/27 (Apr. 2010).
- 189 David Ljunggren, *Canada to Apologize to Arar, Pay Compensation*, REUTERS, Jan. 26, 2007. See also Editors, *No Price to Pay for Torture*, N.Y. TIMES, June 15, 2010.
- 190 David Cameron, Prime Minister’s Statement on Detainees to the House of Commons (July 6, 2010), <http://www.number10.gov.uk/news/statements-and-articles/2010/07/>.
- 191 Harold Hongju Koh, Remarks at the Annual Meeting of the American Society of International Law, Washington, D.C., The Obama Administration and International Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. On March 1, 2010, U.S. Undersecretary for Democracy and Global Affairs Maria Otero also made this point in a speech to the UN Human Rights Council; she stressed that one of the tenets of the Obama administration is “a dedication to apply consistently international human rights law to all countries in the world, including ourselves. We seek to lead by example, by meeting our own obligations under both domestic and international law.” <http://www.state.gov/g/137416.htm>.

ANNEX ENDNOTES

- 1 403 U.S. 388 (1971).
- 2 *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).
- 3 *Arar*, 585 F.3d at 565, 575, 578, 580-81; *Rasul v. Myers*, 563 F.3d 527, 532 n. 5 (D.C. Cir. 2009); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 103-07 (D.D.C. 2007).
- 4 *See Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d at 95 (this case is currently on appeal in the D.C. Circuit).
- 5 553 U.S. 723, 128 S. Ct. 2229 (2008).
- 6 *See Rasul*, 563 F.3d at 530. The quoted language was “It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Boumediene*, 128 S. Ct. at 2262.
- 7 28 U.S.C. § 1350.
- 8 *See generally* *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *Rasul*, 563 F.3d 527; *Al-Zahrani v. Rumsfeld*, 2010 U.S. Dist. LEXIS 13282 (D.D.C. Feb. 16, 2010).
- 9 *See* Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(b), 102 Stat. 4563 (Westfall Act).
- 10 *See* 28 U.S.C. § 2679(d).
- 11 *See* 28 U.S.C. § 2679(b).
- 12 The two limited exceptions that apply allow civil actions to go forward if brought against an employee of the federal government for violations of the Constitution (the “*Bivens*” exception) and for violations of a U.S. statute under which lawsuits against an individual federal official is otherwise authorized (the “statutory exception”). *See* 28 U.S.C. § 2679(b)(2)(A) and (B).
- 13 *See, e.g.*, *Rasul v. Meyers*, 512 F.3d 644, 659-60 (D.C. Cir. 2008). *See also* Elizabeth Wilson, *Is Torture All in a Days Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation against U.S. Federal Officials*, 6 RUTGERS J. L. & PUB. POL’Y 175 (2008) (for arguments on the meaning of scope of employment).
- 14 *See* 28 U.S.C. § 1346. The circumstances must be those in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
- 15 These limitations and conditions must be strictly construed, and exceptions to them are not to be implied. *See, e.g.*, *Stubbs v. United States*, 620 F. 2d 775, 779 (10th Cir. 1980).
- 16 28 U.S.C. § 2675.
- 17 28 U.S.C. § 2401.
- 18 28 U.S.C. § 2680(a).
- 19 28 U.S.C. § 2680(h).
- 20 28 U.S.C. § 2680(j).
- 21 28 U.S.C. § 2680(k).
- 22 Diversity of Citizenship, 28 U.S.C. § 1332(a)(2).
- 23 28 U.S.C. § 1346.
- 24 *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-13 (1988) (looking to the FTCA exceptions to the waiver of sovereign immunity for guidance as to whether allowing a suit to go forward would produce a “significant” conflict with federal policies and interests, and to delineate the conflict’s boundaries). *See also* *Saleh*, 580 F.3d at 6 (citing *Boyle*).
- 25 28 U.S.C. § 1350 at n. (a)(1).
- 26 *Arar*, 585 F. 3d, at 568 (categorically rejecting use of TVPA even in an extraordinary rendition context).
- 27 *See* *Rasul v. Meyers*, 563 F.3d 527 (D.C. Cir. 2009); *Celikoglu v. Rumsfeld*, No. 01996 (D.D.C. Nov. 22, 2006).
- 28 *See* 42 U.S.C. 2000bb-1(b).
- 29 *Rasul v. Meyers*, 512 F.3d 664, 671-2 (D.C. Cir. 2008) (in a prior hearing, the D.C. District Court had allowed RFRA claims to proceed). Although concurring in the result in *Rasul II* (including that the plaintiffs could not prevail on their RFRA claim), Judge Janice Brown disagreed with the majority’s textual interpretation, noting that “[i]t leaves us with the unfortunate and quite dubious distinction of being the only court to declare those held at Guantanamo are not ‘person[s].’ This is a most regrettable holding in a case where plaintiffs have alleged high-level U.S. government officials treated them as less than human.” *Id.* at 676.
- 30 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff’d*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 552 U.S. 947 (2007).
- 31 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *aff’d*, 532 F.3d 157 (2d Cir. 2008), *aff’d en banc*, 585 F.3d 559 (2d Cir. 2009), *cert denied*, ___ S. Ct. ___, 2010 WL 390379.
- 32 436 F. Supp. 2d 55 (D.D.C. 2006), *aff’d in part and rev’d in part*, 580 F.3d 1 (D.C. Cir. 2009).
- 33 Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-68 (providing a civil cause of action for acts performed as part of a criminal organization).
- 34 *Ibrahim v. Titan Corp.*, 556 F. Supp.2d 1 (D.D.C. 2007).
- 35 *Saleh*, 580 F.3d at 13.
- 36 539 F. Supp. 2d 1128 (N.D. Cal. 2008), *rev’d*, 563 F.3d 992 (9th Cir. 2009), *rehearing en banc* 579 F.3d 943 (9th Cir. 2009).
- 37 657 F. Supp. 2d 700 (E.D. Va. 2009).
- 38 CACI argued that the FTCA, which exempts the armed forces and those involved in combatant activities from suit, represents a unique federal interest that conflicts with and preempts state law. The court found that CACI was not necessarily involved in combat activities such as the armed forces would be engaged in, and, even if they were, no uniquely federal interest was at stake in the case, nor were the claims in the case in conflict with a federal interest.
- 39 *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006), *rev’d sub nom.*, *Rasul v. Meyers*, 512 F.3d 644 (D.C. Cir. 2008), *vacated*, ___ U.S. ___, 129 S. Ct. 763 (2008), *aff’d*, 563 F.3d 527 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1013 (2009).
- 40 553 U.S. 723 (2008) (holding that Guantánamo detainees had a constitutionally based right to habeas corpus and that the Detainee Treatment Act failed to provide an adequate substitute to that right).
- 41 *Rasul*, 563 F.3d at 529-33.
- 42 479 F. Supp. 2d 85 (D.D.C. 2007).
- 43 633 F. Supp. 2d 1005 (N.D. Cal. 2009).
- 44 2010 U.S. Dist. LEXIS 20023 (N.D. Ill. Mar. 5, 2010).
- 45 2010 U.S. Dist. LEXIS 13282 (D.D.C. Feb. 16, 2010).
- 46 Plaintiff’s Motion for Reconsideration in Light of Newly Discovered Evidence, *Al-Zahrani v. Rumsfeld*, No. 09-cv-00028 (ESH)

(D.D.C. Mar. 16, 2010).

47 No. 01996 (D.D.C. Nov. 22, 2006).

48 The claim under the Vienna Convention was filed under the ATS, which allows suits for violations of customary international law.

49 Civil Rights Act, 42 U.S.C. § 1985(3) (ensuring equal protection under the laws). The complaint alleges that the defendants
conspired to deprive the plaintiffs of their rights under the U.S. Constitution, treaties, and U.S. law.

50 No. 07-1098 (W.D. Wash. Apr. 7, 2010).



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