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CRIMINAL JUSTICE FOR CRIMINAL POLICY:

Prosecuting Abuses of Detainees in U.S. Counterterrorism Operations

An ICTJ Policy Paper
November 2009

Carolyn Patty Blum, Lisa Magarrell, Marieke Wierda

53 (rs. [REDACTED]) The first session of the interrogation course began in November 2002. See paragraphs 64-65.

Cover Image: Redacted page (52) from *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, a May 2004 Special Review by the CIA's Office of the Inspector General. Portions of that report have been declassified through litigation by the American Civil Liberties Union and other organizations under the Freedom of Information Act. The Bush administration released a few paragraphs and lines of the report in May 2008 and the Obama administration went considerably further in an August 2009 reclassification. Regardless, this page and many others, including all of the Inspector General's recommendations, remain classified as of this writing. Questions persist about the full scope of abuses under U.S. policies on rendition, detention and interrogation. ICTJ's policy paper relies on declassified information and other reporting to make the case for a thorough criminal investigation of abuses in counterterrorism policy and operations. Such an investigation must include those parts of the "dark side" still hidden from public view.

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About ICTJ

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 policy-makers 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

ABCNY	American Bar Association for the City of New York	HRF	Human Rights First
ACLU	American Civil Liberties Union	HRW	Human Rights Watch
AFM	Army Field Manual	ICC	International Criminal Court
AG	Attorney General	ICRC	International Committee of the Red Cross
ATS	Alien Tort Statute	ICTR	International Criminal Tribunal for Rwanda
BSCT	Behavioral Science Consultation Team	ICTY	International Criminal Tribunal for the former Yugoslavia
CCR	Center for Constitutional Rights	IRF	Immediate Reaction Force
CHRGJ	New York University Center for Human Rights and Global Justice	JPra	Joint Personnel Recovery Agency
CIA	Central Intelligence Agency	JSOC	Joint Special Operations Command
CIA-IG	CIA Inspector General	MCA	Military Commissions Act
CID	Criminal Investigation Division	MEJA	Military Extraterritorial Jurisdiction Act
CIPA	Classified Information Procedures Act	MP	Military Police
CITF	Criminal Investigation Task Force	NSC	National Security Council
CTC	CIA Counterterrorism Center	OIC	Officer in Charge
DIA	Defense Intelligence Agency	OLC	Department of Justice Office of Legal Counsel
DOD	Department of Defense	PHR	Physicians for Human Rights
DOJ	Department of Justice	SERE	Survival Evasion Resistance Escape Program
DTA	Detainee Treatment Act	SOP	Standard Operating Procedure
EIT	Enhanced Interrogation Techniques	UCMJ	Uniform Code of Military Justice
FBI	Federal Bureau of Investigation	SOUTHCOM	U.S. Southern Command
FOB	Forward Operating Base	TRC	Truth and Reconciliation Commission
FOIA	Freedom of Information Act	TVPA	Torture Victims Protection Act
GTMO	Guantanamo Bay Prison	WCA	War Crimes Act

Executive Summary

After September 11, 2001, U.S. counterterrorism policies authorized and fostered systematic violations of human rights standards under national and international law. Those most responsible were not held accountable. Contrary to fundamental democratic values, these policies and actions damaged the standing of the United States in the world and irreparably injured individuals. Abuses against prisoners were committed in detention facilities in Afghanistan, Iraq, and Guantánamo Bay, and in secret prisons run by the Central Intelligence Agency (CIA). These violations humiliated and degraded detainees, stripped them of their core bearings in the world, and, in a number of instances, resulted in death.

On August 24, 2009, U.S. Attorney General Eric Holder announced that he was appointing Assistant U.S. Attorney John Durham to conduct a preliminary review into the possibility that federal laws were violated in the interrogation of specific detainees outside of the United States. The review should serve to gather facts and determine whether a full investigation is warranted. While limited, this is a welcome step in a terrain that has been marked by notable failures of accountability in the face of continuing revelations that crimes were committed.

Abundant documentation indicates that serious abuses of a similar nature occurred across U.S. detention sites in Guantánamo, CIA prisons, and detention facilities in Iraq and Afghanistan. Evidence of these abuses appears in the reports of U.S. government investigations as well as NGO, academic, and journalistic accounts that rely on interviews with detainees, former guards, and interrogators who have first-hand knowledge of incidents and practices. Reports regarding practices in all these locations reveal similar patterns of detainee abuse, both physical and psychological, perpetrated by military personnel, CIA agents, and security contractors alike. Detainees were shackled in stress positions, including suspension by the arms, slapped, kicked, punched, savagely beaten, slammed into walls, and

choked. Forced nudity, sleep deprivation, 24-hour light exposure or complete darkness, freezing cold cells without adequate blankets or clothing, extended isolation, use of threatening dogs, religious abuse including desecration of the Qur'an, sexually degrading treatment and abuse, and threats to torture, rape or kill detainees or their families were common techniques, often used in combination, during detention and interrogation.

Far from being isolated incidents, detainee abuses were sanctioned at the highest levels of government, validated in legal opinion, and then perpetrated systematically. These abuses qualify as “system crimes” and should be prosecuted as such.

Available sources indicate that the CIA and Department of Defense (DOD), after discussing with and getting approval from high-level officials of President George W. Bush's administration, developed specific abusive interrogation techniques to be used on detainees. Department of Justice (DOJ) lawyers produced memoranda that opined that the Geneva Conventions did not protect detainees. Applying a radically narrowed definition of torture, DOJ analyzed and approved the use of specific techniques, such as waterboarding, sleep deprivation, stress positions, and physical force, stating that these acts, used alone or in combination, were not torture. The migration of these techniques through various theaters of war and detention facilities can be tracked through the accounts of military personnel and documents detailing the approval of techniques. The fact that these abuses were the result of officially sanctioned policies means that these crimes should be approached as “system crimes”—crimes that are perpetrated systematically, often as part of an officially sanctioned policy.

Previous failures of accountability for these violations amount to de facto impunity, including an unwillingness to pursue these cases up the chain of command and, where prosecutions did ensue, lenient penalties. Although revelation of the abuses at Abu Ghraib prison in Iraq resulted in a spate of court martial

convictions, those who were tried were mainly low-level guards such as dog handlers or others who were directly involved in abuses. The only commanding officer tried was acquitted of all serious charges. In fact, most of the supervising officers who were implicated in the abuses by government investigations suffered no consequences, and some were promoted within the military. Yet the prosecutions for the abuses at Abu Ghraib were the most organized and comprehensive prosecutions to date. Other military criminal investigations of abuses in Afghanistan and Iraq have occurred on a more sporadic basis, usually resulting in very low sentences or administrative reprimands for serious crimes such as torture by electric shock, sexual assault, severe beatings, setting a detainee on fire, and several instances of torturing detainees to death. Federal courts have successfully prosecuted only a single CIA contractor, who beat a detainee to death during a four-day interrogation. Overall, there has been a failure to effectively investigate or prosecute anyone beyond those who immediately carried out the abuses and a tendency toward lenient penalties for anyone who has been tried. This has resulted in de facto impunity that should not in any way be regarded as an adequate response by the United States to these violations.

Prosecutions should focus on policy-makers and high-level officials. System crimes are usually perpetrated pursuant to a policy that facilitates the widespread commission of crimes and in some cases insulates perpetrators from liability. To prosecute system crimes such as those sanctioned by U.S. officials, it is insufficient to hold accountable only those who carried out orders or whose actions went beyond the stated government policy. A prosecutor must examine the role of the policy itself and the policy's engineers in creating an environment where systematic abuse became commonplace and escalated to even more egregious abuses and detainee deaths. In the current case, evidence indicates that senior politicians and lawyers who actively formulated the policy or proactively aided it through flawed legal advice potentially are those most responsible for its consequences.

The U.S. legal system can adequately deal with system crimes and prosecutions of high-level officials. The abuse of detainees in U.S. custody and related acts violate federal criminal laws prohibiting torture, murder, manslaughter, sexual abuse, assault, kidnapping, war crimes, and obstruction of justice as well as similar provisions under the Uniform Code of Military Justice. Current laws provide adequate jurisdiction to prosecute current and former members of the military, government, and civilians such as contractors who were involved in developing and implementing abusive policies. Tracing criminal liability to high-level officers and policy-makers is also possible under U.S.

law. Conspiracy, aiding and abetting, and dereliction of official duties may be used to track criminal liability up civilian and military chains of command. To highlight the severity of the crimes, prosecutors should focus on using the War Crimes Act and Torture Act when possible.

Obstacles and efforts to discourage prosecution are present but not insurmountable. A prosecutorial strategy should consider how to overcome certain obstacles. The 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect. As a result, humiliating and degrading treatment of detainees in post 9/11 U.S. counterterrorism operations can no longer be charged as war crimes under the statute. Furthermore, statutes of limitations for various crimes must be taken into account. Torture with foreseeable risk of death or serious injury, capital crimes such as murder, or other war crimes resulting in death have no limitations period, but for some cases of torture, cruel treatment, or conspiracy to commit torture, charges may be subject to an eight-year statute of limitations. Under current laws, charges must be filed within five years for most other crimes, including many war crimes. Additionally, although a significant amount of information is already in the public realm, prosecutions for detainee abuses also may involve special evidentiary rules, such as those dealing with classified evidence or privileged executive communications.

Certain defenses, such as necessity and self-defense, already distorted in public discourse as alleged justifications for maltreatment of detainees, are likely to be raised. Given the speculative nature of future terrorist threats and the fact that detainees were imprisoned, these are untenable claims. Interrogators might raise other possible legal defenses, such as mistake of law or superior orders, although they would not be applicable to high-level officials who developed or oversaw the policies, nor to the lawyers who provided legal justifications for them. Despite their currency in public discourse, these defenses essentially seek to justify torture on the grounds of exceptional circumstances, public authority, or superior orders, all of which are expressly prohibited under the UN Convention Against Torture to which the United States is a party.

Prosecution of these crimes is necessary to fulfill international and domestic legal obligations, reaffirm core values, and restore trust in the rule of law within the United States. Prosecution will also assist in establishing global credibility. Prosecution of detainee abuses will send a clear signal, now and in the future, that the distortions of the internationally and domestically recognized prohibition against torture, devised at the highest levels of the U.S. government, were illegal. Although the detainees who experienced abuse were noncitizens whose suffering is infre-

quently recognized in the mainstream U.S. discourse, the experience of other countries makes it clear that legitimizing torture “when necessary” unleashes a cascade of detrimental effects on human rights and the rule of law. The United States is a party to the UN Convention Against Torture that requires a signatory state to criminalize torture and to prosecute that crime. The U.S. Congress passed a statute to fulfill those obligations, and ignoring well-documented breaches will only serve to further erode this norm. On an international level, prosecutions will help restore U.S. credibility that has been badly tarnished by its public circumvention of the Geneva Conventions and legal justifications for detainee abuse. If full-fledged prosecutions are pursued, the United States will take a major step toward restoring its position as one of the foremost advocates for human rights and accountability in the world.

Political will to take up prosecutions should be based on objective legal standards, demonstrated by action, and informed by public knowledge of the truth rather than by partisan sentiment.

The largest hurdle advocates of prosecution for human rights abuses currently face in the United States is a lack of political will to pursue investigation and accountability for past and current detainee abuse. Evidenced by the initial resistance to Attorney General Holder’s announcement of preliminary investigations into detainee abuses, it is likely that continued pursuit of prosecutions will meet with backlash by some pundits and a segment of the public inclined to turn a blind eye to crimes perpetrated in the name of “national security.” Leadership and a long-term vision in this respect will be needed, and more limited, “expedient” approaches should be rejected. Prosecution will provide the strongest assurance that the intent to reverse course on U.S. abuses can be trusted. Despite divisions in domestic public sentiment that have been linked to partisan views, the legal obligations to prosecute remain in force. Inaction is not a choice of neutrality over political vengeance or retribution, but in fact is a choice of indifference toward the objective operation of justice that erodes faith in the rule of law.

The failure to pursue criminal investigations in the United States has already led to actions in several European countries, and the continued failure of domestic prosecution may raise international pressure. Additionally, experience with systematic or officially sanctioned abuses in other countries indicates that crimes of this nature cannot simply be forgotten. Evidence and information will continue to surface, whether from information leaks, detainee accounts, or investigation by human rights organizations and the media. As more information becomes available, the sector of the U.S. public that rejects the torture and cruel, inhuman, and degrading treatment that was carried out in their name will likely increase. Although the victims of

these crimes may not garner significant public support in the United States at this time, in the future, their pain and suffering may finally be recognized as one of the very real and condemnable consequences of these policies. Attorney General Holder reminded the public in August 2009 that his duty was to follow the facts and the law where they lead; it is the duty of the public to insist on it.

Conclusions

- Given the vast amount of evidence that crimes were committed on the basis of official policy, criminal prosecution for detainee abuses in the United States is a moral and legal imperative.
- Domestic and international legal obligations require that these crimes be prosecuted, and the facts demand that detainee abuses be treated as system crimes.
- The attorney general must follow the evidence wherever it might lead and pursue investigations and prosecutions. It is likely that this entails going beyond the constraints of Assistant U.S. Attorney Durham’s current mandate.
- A prosecutorial strategy should focus on the role of the policy, its authors, and overseers and, where possible, should put to use anti-torture and war crimes laws specifically designed to indicate the seriousness of these actions.
- Action is needed now, particularly since measures taken to pursue criminal accountability thus far have been inadequate and the time period for prosecuting some crimes is limited.
- The U.S. legal system has the tools to adequately deal with the complexities of system crimes. Prosecutions can and should be pursued in the United States.
- Rigorous investigation and serious efforts at prosecution of these violations should help to restore the rule of law and send a clear signal, now and in the future, that the absolute prohibition on torture and the ban on cruel, inhuman, and degrading treatment will be respected by the United States and that breaches will not be tolerated.
- Prosecutions are a cornerstone of accountability and should be complemented by nonjudicial inquiries into the broader picture, institutional reforms that ensure such abuses will not recur, and reparative measures for the victims of these serious harms.

We reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.

—Barack Obama, Presidential Inauguration Speech, January 20, 2009

1. Introduction

After September 11, 2001, U.S. counterterrorism policies authorized and fostered systematic violations of human rights standards under national and international law for which those most responsible were not held accountable. Contrary to fundamental democratic values, these policies and actions damaged the standing of the United States in the world and irreparably injured individuals. Abuses against prisoners were committed in detention facilities in Afghanistan, Iraq, and Guantánamo Bay, and in secret prisons run by the Central Intelligence Agency (CIA). These violations humiliated and degraded detainees, stripped them of their core bearings in the world, and, in a number of instances, resulted in death.

On August 24, 2009, U.S. Attorney General Eric Holder announced that he was appointing Assistant U.S. Attorney John Durham to conduct a “preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.” The review should serve to gather facts and determine whether a full investigation is warranted.¹ While limited, this is a welcome step in a terrain that has been marked by notable failures of accountability in the face of continuing revelations that crimes were committed.

As a preliminary review moves forward and recommendations are formulated on whether and what kind of investigation is warranted, a number of questions come to the fore. These include: why a criminal investigation is not only important but obligatory; the scope and focus of investigation and prosecution including where the greatest criminal responsibility lies; what provisions of U.S. laws can be used as a basis for prosecutions; and how the U.S. justice system can overcome potential obstacles in the path of accountability.

The design, widespread scope, and consistent nature of the abuses indicate a pattern pointing to the clear involvement of the highest levels of civilian and military command at both the policy and operational levels. Evidence indicates that commanders of military branches, including Special Forces, and the CIA sanctioned subordinates to perpetrate abuses at prisons, detention facilities in combat zones, and secret “black sites.” Political leaders and their legal advisors from the White House, Department of Defense (DOD), Department of Justice (DOJ), and the CIA authorized and approved many of these acts. As such, the abuses appear to constitute “system crimes”—i.e. crimes that occurred on a large scale and were perpetrated as part of officially sanctioned policy.

Debate concerning the United States’ use of torture in the “war on terror” has often focused narrowly on whether a particular abusive technique constitutes torture, with waterboarding a prime example.² However, the evidence gathered to date unquestionably indicates that certain abusive methods—alone or in combination—constituted torture as well as, at a minimum, cruel and inhuman treatment. These are crimes. This broader recognition should shift the debate to the policies that allowed these abuses to be perpetrated in a widespread and systematic fashion, and the resulting criminal liability.³

The evidence of torture and related abuses is well documented, strong, consistent, and corroborated. The accumulated sources that document this include the following:⁴ DOJ investigations and reports;⁵ DOD investigations and reports;⁶ the CIA Inspector General's report on detention and interrogation activities;⁷ Congressional committee investigations and reports;⁸ reports by the International Committee of the Red Cross (ICRC);⁹ interviews with former detainees;¹⁰ academic studies;¹¹ nongovernmental human rights reporting;¹² documentation from legal filings;¹³ accounts of U.S. service men and women;¹⁴ accounts of former detainees;¹⁵ and other declassified U.S. government documents.¹⁶ Yet this documentation represents only a small fraction of the evidence that could be made available with further declassification and access to documents solely in the government's possession. For example, based on the information currently available, it appears that logs were maintained for detainee interrogations.¹⁷ The CIA videotaped interrogation sessions and documented the use of waterboarding;¹⁸ detainees also have reported being videotaped.¹⁹ Most detainees have reported being photographed.²⁰ Only a relatively small percentage of former detainees have been interviewed about their experiences.²¹ Hearings in which detainees have testified about their treatment remain heavily censored.²² Thus, while much is known about the nature, scope, and extent of abuses against detainees in the U.S. "war on terror," much more remains to be uncovered.

The new opening for criminal investigation could be an important step forward in uncovering and addressing abuses and reversing failures of accountability. In January 2009, when President Barack Obama ordered an end to abusive practices,²³ he committed to a future in which torture and cruel, inhuman, or degrading treatment would play no part in U.S. policy. Investigation and prosecution of crimes that occurred as part of carrying out these policies is a crucial piece of ensuring that this commitment is honored in fact and underscored by the operation of the rule of law.

In Chapter 2, this paper will answer the question of what illegal behavior is at stake that could be prosecuted. We briefly summarize the abuses and, in an annex, chart the remarkable similarities in abuses across detention facilities in Guantánamo, Iraq, Afghanistan, and CIA detention sites. In doing so, we argue that some of the "enhanced interrogation techniques" constitute crimes that were perpetrated in a systematic way.²⁴ This section also includes an overview of how the policy behind these crimes was developed and by whom.

The paper next examines the policy questions that should inform decisions about prosecutions, including:

- **Why** the United States should consider prosecutions (Chapter 3)
- Considerations in deciding **who** ought to be prosecuted, and how accountability has fallen far short to date (Chapter 4); and
- **How** prosecutions could be brought, including relevant criminal laws, bases for jurisdiction, and possible obstacles and defenses (Chapter 5).

Given that these aggressive and abusive practices are unlawful under both U.S. and international law, it is our conclusion that those who bear the greatest responsibility should be investigated and prosecuted in U.S. courts, both military and federal. We also argue that U.S. law allows for such prosecutions and that potential obstacles in the law can be overcome. Our conclusions are found in Chapter 6.

2. The Abuse of Detainees as a System Crime

The Crime Base: Effects of the Policy in Various Locations

Abuses in pursuit of U.S. counterterrorism detention and interrogation policies occurred within a “totalizing environment” where a variety of inhumane techniques were coupled with extreme conditions of custody. First, until the U.S. Supreme Court rulings of 2004,²⁵ prisoners generally had little or no contact with the outside world except, for some, through access to the ICRC.²⁶ This extreme isolation contributed to the dependence of prisoners on their interrogators and jailers. Second, a major innovation of the imprisonment of these suspects was the integration of the “jailing” function with the “intelligence-gathering” function. Thus prison guards and military police helped create an environment in which prisoners were “softened up” for their interrogations.²⁷ Third, interrogators were given a tremendous amount of control over the daily life of the detainees, including access to medical care, family mail, and prayer, to name just a few examples.²⁸

While limitations on available information continue to constrain factual findings and make it impossible to know how many cases of abuse there are, the similarity of patterns of reported abuses across the various sites of U.S. detention is striking. The abuses documented at the principal sites are summarized below. A chart (Annex) illustrates the widespread and similar nature of reported abuses in Guantánamo Bay prison, in Afghanistan, Iraq, and in CIA detention sites. Not all the conduct may amount to torture, but it still should be the subject of rigorous investigation and, where appropriate, prosecution.

- **Guantánamo:** Guantánamo Bay prison, informally known as GTMO, was intended to be a facility beyond the reach of the law.²⁹ Former prisoners report that the transfer to GTMO was particularly harrowing.³⁰ When GTMO first

opened in January 2002, prisoners were housed in temporary, open-air cages that resembled dog kennels and exposed them to the elements.³¹ Camp Delta and its sub-camps then became the permanent home of most of the prisoners.

Guantánamo detainees were routinely subjected to physical and psychological abuse in connection with interrogations and as punitive measures. The detainees’ accounts are remarkably consistent. Among the most commonly reported abusive practices were the routine use of stress positions (chaining or otherwise made to hold positions designed to cause severe stress on the body over a period of time), extremes of light and dark and hot and cold, forced shaving, deprivation of prayer, desecration of the Qur’an, and sleep deprivation, often in combination.³² Prolonged solitary confinement has been a debilitating facet of life at the facility for many of the men.³³ Detainees reported frequent lack of access to basic necessities, such as blankets, clean mattresses,³⁴ toilet paper, food, religious articles, and medical care, unless they cooperated with interrogators.³⁵

As of August 2009, more than 540 prisoners had been released from GTMO, either because they were transferred to their home governments or released to other countries.³⁶ Six men have died in GTMO, five of them labeled suicides.³⁷ As of early September 2009, approximately 226 detainees remained.³⁸

- **Afghanistan:** Despite an almost total lack of transparency about conditions in U.S.-run prisons in Afghanistan, human rights groups, journalists, academic researchers, and former detainees have documented the consistent use of torture and abusive treatment and conditions of confinement against prisoners. From the earliest days of the Afghanistan war, U.S. officials were aware that abusive techniques routinely were being used there.³⁹ Common

practices included use of threatening, barking dogs, forced standing—including with hands above the head or suspension by the arms—continuous shackling, extreme sleep deprivation, sensory deprivation (including hooding), 24-hour light exposure, and forced kneeling, among other abuses.⁴⁰

- **Iraq:** Tens of thousands of Iraqis have been arrested and detained since the beginning of the war in Iraq; some estimates are as high as 100,000.⁴¹ Abu Ghraib may be the most well known prison in Iraq, but the United States also controlled other centralized prisons. Many Forward Operating Bases (FOBs) under divisional or brigade command have facilities for short-term detention. Special Operation Forces also housed prisoners in their own facilities.⁴²

From early in the Iraq war, reports of abuse surfaced.⁴³ Based on visits and interviews conducted from March to November 2003, the ICRC concluded that dozens of abusive practices “were tantamount to torture.”⁴⁴ In April 2004, dozens of photos from Abu Ghraib, taken by soldiers, became public.⁴⁵ The exposed abuses included the use of barking, snarling dogs, stress positions (including being hanged by the arms), forced nudity, isolation (especially in dark cells), sexually degrading treatment, and sleep deprivation.⁴⁶ Detainees also reported being slapped, punched, and kicked.⁴⁷ A former military interrogator described similar abusive practices at the other prisons and FOBs, and noted that interrogations became more about “securing a confession” than actually obtaining intelligence.⁴⁸ Abuses continued even after the Abu Ghraib exposé.⁴⁹

- **Deaths in Afghanistan and Iraq:** In Iraq and Afghanistan, a number of instances of detainee abuse resulted in death. The Army Inspector General Report found that 20 deaths in custody implicated the abuse of the detainee; in 12 other instances, insufficient evidence had been gathered.⁵⁰ Other information has been gathered from the declassification of the records of 22 cases investigated by the military in Iraq and Afghanistan for courts-martial or other disciplinary purposes.⁵¹ Private security contractors working with the military and CIA, as well as CIA agents, also have been implicated in several of the deaths.⁵²
- **CIA Prisons:** Under a program that President Obama ended in January 2009,⁵³ the CIA detained so-called “high value” detainees for prolonged periods in a network of secret cells throughout the world.⁵⁴ The total number of detainees has never been ascertained.⁵⁵ While information now exists on

some of the locations, a survey of all locations has never been revealed.⁵⁶ The detainees effectively were “disappeared”; they had no access to the outside world or the ICRC, and their families were given no information about their whereabouts or if they were even being held by the United States.⁵⁷

Information concerning the treatment of detainees in CIA detention was difficult to obtain prior to the September 2006 transfer of 14 of the prisoners to GTMO.⁵⁸ Soon thereafter, ICRC representatives interviewed those prisoners. In April 2009, ICRC’s report of these interviews was leaked to journalist Mark Danner.⁵⁹ The report indicated that the men were held incommunicado for periods ranging from six months to nearly four and a half years.⁶⁰ These detainees experienced a variety of abusive interrogation methods designed to take a physical and psychological toll on them and to make them more compliant with interrogators’ demands for information. For example, CIA detainees were subject to beatings, punching, continuous shackling, suspension, forced nudity, extremes of temperature, denial of food, forced shaving, hooding, prolonged diapering, threats, and waterboarding.⁶¹

According to a recently declassified December 2004 memorandum sent from an associate general counsel at the CIA to the DOJ Office of Legal Counsel (OLC), a “generic interrogation process” would include combinations of white noise or loud sounds and constant light, nudity, sleep deprivation through vertical shackling, dietary manipulation, slaps, and holds. Slamming detainees into walls (“walling”), water dousing, stress positions, and cramped confinement would be used in combination with the other “conditioning” techniques.⁶²

The CIA Inspector General’s (CIA-IG) report indicates horrific practices occurred that may have fallen outside the contours of advice by the OLC, including the use of an unloaded semi-automatic handgun to threaten detainees,⁶³ mock executions,⁶⁴ smoke inhalation to provoke vomiting,⁶⁵ threats with a power drill,⁶⁶ death threats and threats against family members,⁶⁷ pressing on pressure points to provoke repeated fainting,⁶⁸ scrubbing with harsh brushes,⁶⁹ and excessive use of waterboarding.⁷⁰ Strikingly, the Inspector General addresses not only these excesses, but the whole program of approved enhanced interrogation techniques, when he says it “...diverges sharply from previous Agency policy and practice, rules that govern interrogations by U.S. military and law enforcement officers, statements of U.S. policy by the Department of State, and public statements by

very senior U.S. officials, including the President, as well as the policies expressed by Members of Congress, other Western governments, international organizations, and human rights groups.⁷¹ Physicians for Human Rights (PHR) has reported that medical professionals' monitoring of interrogations and the use of particular techniques "to determine their effectiveness" is equivalent to using prisoners "as human subjects, without their consent, and thus also approaches unlawful experimentation."⁷² Moreover, approved techniques set the tone for what was permissible in detention centers and may have contributed to other abuses.

The evidence of systematic abuses of detainees across the different detention sites tends to indicate that abuses occurred as the result of a policy—explicit or tacit—and not because of a few "bad apples."⁷³ An investigation of these crimes must look up the chain of command for the ultimate decision-makers sanctioning criminal acts in the detention and interrogation of detainees.

Official Knowledge and Responsibility for "Enhanced Interrogation" Policy and Torture

Apart from the systematic nature of abuses, the evidence further shows that high-ranking officials in the administration of former president George W. Bush are implicated in creating, sanctioning, and ordering a plan to use abusive interrogation techniques on detainees apprehended in the "war on terror." Declassified U.S. government documents,⁷⁴ journalistic accounts,⁷⁵ and Congressional investigations provide significant support for the view that post-9/11 detainee abuses were the product of top-down decisions to sanction interrogation practices for which the CIA and the DOD sought official approval.⁷⁶ This information implicates top-level officials in the White House, DOJ, CIA, and DOD. This section of the briefing paper will outline briefly some of the information that is known thus far on high-level involvement. But without a thorough investigation and a full judicial process, the full extent of criminal conduct cannot be ascertained.

Principals Committee

The National Security Council (NSC) Principals Committee was a small committee set up to advise President Bush on national security issues;⁷⁷ it included Vice President Dick Cheney, National Security Advisor Condoleezza Rice (chair), Defense Secretary Donald Rumsfeld, Secretary of State Colin Powell, CIA Director George Tenet, and Attorney General John Ashcroft.⁷⁸ The committee held meetings in the White House situation room. Typically the principals and/or their deputies

would be present.⁷⁹ In the small group and individual briefings that occurred over at least several years, Tenet and his deputy, John McLaughlin, as well as CIA lawyers briefed President Bush and members of the Principals Committee about the interrogation of CIA detainees.⁸⁰ They sought and received approval to use "enhanced interrogation methods," which included sleep deprivation, waterboarding, and other forms of torture.⁸¹

Specifically in the spring of 2002, after the capture of Abu Zubaydah,⁸² the CIA sought and obtained policy approval to implement an interrogation program for Zubaydah and then for other so-called "high value" detainees.⁸³ Sometime in May 2002, attorneys from the CIA's Office of General Counsel met directly with Ashcroft, Rice, Alberto Gonzales, the White House counsel, and others to discuss the possible use of "alternative" interrogation methods and proposed specific techniques, including waterboarding.⁸⁴ Tenet also met with Rice, who approved the proposed interrogation plan of Abu Zubaydah, contingent on Ashcroft personally concurring with its legality.⁸⁵ Ashcroft agreed and concluded that "enhanced interrogation" was lawful.⁸⁶ Relying on oral agreement from DOJ lawyers and Rice, the CIA applied harsh interrogation tactics to Zubaydah and others, even before any legal memoranda were finalized and circulated.⁸⁷

In spring 2003, Tenet asked for a reaffirmation of the policies and practices in the interrogation program.⁸⁸ The Principals Committee again met and discussed the CIA interrogation techniques and program. They concluded it was lawful and reflected administration policy.⁸⁹ Even after rescission of legal memoranda justifying the use of abusive interrogation methods, Ashcroft assured the CIA in writing that, with the exception of waterboarding, the agency's interrogation methods were legal.⁹⁰ Legal memoranda continued to validate the program, and, as far as is known, approval of the program continued.⁹¹ The sequence of events is critical. Recent declassified disclosures suggest to some analysts that members of the Principals Committee may have provided ex post facto authorization of aggressive interrogation practices.⁹² The role of the Principals Committee requires further in-depth investigation.

In September 2006, President Bush acknowledged the CIA secret detention program with the transfer of 14 of the CIA detainees to Guantánamo Bay.⁹³ In 2007, he reasserted the authority to carry out the CIA's interrogation and detention functions.⁹⁴

Role of War Council

One of the crucial findings that allowed for the sanctioning of so-called “enhanced interrogation techniques” was the decision to eschew the applicability of the Geneva Conventions to captured detainees accused of membership in or collaboration with al-Qaeda or the Taliban.⁹⁵ This decision marked both a radical departure from past practice and understandings of the legal obligations toward detainees and constituted an expansive interpretation of presidential authority. The decision, and its underlying legal rationale, underpinned many other decisions that were to follow. These decisions were fashioned by a small group of Bush administration lawyers, the self-styled “War Council.” Members included David Addington, legal adviser and later chief of staff to Vice President Cheney; Alberto Gonzales, White House counsel and later, attorney general; William J. Haynes II, DOD’s general counsel; John Yoo, deputy assistant attorney general, DOJ’s Office of Legal Counsel (OLC); Tim Flanagan, Gonzales’s deputy;⁹⁶ and John Rizzo, the CIA’s acting general counsel.⁹⁷ These lawyers met every few weeks in Gonzales’s or Haynes’s office to plot legal strategy and were the driving force behind the legal opinions that justified and shaped Bush administration policy toward detainee treatment.⁹⁸

In August 2002, DOJ Assistant Attorney General and head of the OLC Jay Bybee issued two crucial memoranda, although sources name Yoo as the author.⁹⁹ The memorandum addressed to Gonzales narrowly construed the meaning of torture under U.S. and international law such that only actions resulting in “injury such as death, organ failure, or serious impairment of body functions” would qualify within its definition.¹⁰⁰ The second memorandum, addressed to Rizzo (who sought the OLC’s opinion for the interrogation of suspect Abu Zubaydah), authorized specific interrogation methods such as waterboarding, stress positions, temperature control, exploitation of phobias, and physical force, including the circumstances and combinations in which they could be used and considered legally acceptable.¹⁰¹ Bybee later testified that prior to issuing the two memoranda, he, along with Yoo and two other OLC lawyers, had seen an assessment of the psychological effects of military resistance training that informed his thinking.¹⁰² The memoranda’s narrowly construed definition of torture, in all of its aspects, also was specifically intended to protect interrogators and policy-makers from prosecutions for the crime of torture.¹⁰³ The memorandum prepared for Gonzales also argued that prosecutions would be forestalled because of the applicability of certain justification defenses such as necessity and self-defense.¹⁰⁴

Bybee’s successor, Jack Goldsmith, rescinded the August 2002 memorandum addressed to Gonzales the next year.¹⁰⁵ But in 2004, acting OLC head Daniel Levin wrote a letter to CIA

Acting General Counsel Rizzo stating that even waterboarding would be legal if it were carried out with the series of safeguards stated in CIA plans.¹⁰⁶ In late December 2004, Levin drafted a new guiding memorandum for public release in advance of the hearings to confirm Gonzales as Attorney General. The memorandum changed the most restrictive concepts of torture—for example, rejecting the severity standard of the August 2002 memorandum.¹⁰⁷ Yet, the memorandum continued to imply a restrictive conception of “specific intent” to commit torture.¹⁰⁸ In a revealing footnote, the memorandum undercut its break with past legal reasoning by stating that, “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.”¹⁰⁹

In a letter dated December 30, 2004, a CIA associate general counsel sent Levin a CIA background paper that describes

... a generic interrogation process that sets forth how the Agency would expect to use approved interrogation measures, both in combination and in sequence with other techniques. Our hope is that this letter will permit your office to render advice that an interrogation following the enclosed description would not violate the provision of 18 USC § 2340A [the Torture Act].¹¹⁰

By May 2005, the DOJ had completed three more reviews of the CIA program that concluded that the techniques the CIA sought to use, alone, in combination, or sequentially, were not severe enough to constitute torture within the meaning of the statute.¹¹¹ Declassified documents indicate that a full legal review was short-circuited due to pressure to complete the legal analysis swiftly.¹¹² Whether the OLC opinions were drafted for the purposes of providing justifications for abusive practices that may have occurred without explicit legal authorization is a question that merits further investigation.¹¹³

“Reverse Engineering” of SERE Techniques

Evidence indicates that abusive interrogation policy and practices adopted by both the CIA and DOD were inspired by techniques from the Survival Evasion Resistance Escape (SERE) training program. The SERE program, under the auspices of DOD’s Joint Personnel Recovery Agency (JPRA),¹¹⁴ is a training program for military personnel who are at risk of capture, and involves subjecting them to torture techniques used by the other side in past conflicts.¹¹⁵ This training was used to teach military personnel how to resist the physical and psychological pressures to which they might be subject if taken prisoner by enemies who did not adhere to the Geneva Conventions.¹¹⁶ SERE techniques

include isolation and degradation, sensory deprivation, psychological and physical pressure, stress positions, sleep deprivation, waterboarding, and other tactics.¹¹⁷ Since SERE was a “defensive” program set up to train U.S. servicemen, its trainers had no experience with the interrogation of suspects.¹¹⁸

William J. Haynes II at DOD’s Office of General Counsel contacted the JPRA as early as December 2001 for information about detainee “exploitation” and received an explanation of its work and offer of assistance.¹¹⁹ The CIA, too, was interested in what the SERE program had to offer. By late 2001, the Agency had contacted Dr. James Mitchell, a former SERE psychologist.¹²⁰ Mitchell teamed up with Dr. Bruce Jessen, the senior SERE psychologist at JPRA, to generate a paper on al-Qaeda resistance capabilities and countermeasures to defeat that resistance, and circulated it to JPRA.¹²¹ The paper relied heavily on methods gleaned from SERE training.¹²² Eventually, it was circulated to officers at the Joint Staff and to several Combatant Commands, including those with responsibility for Afghanistan, Iraq, and Guantánamo.¹²³ By March 2002, Jessen, along with a JPRA instructor, were training DOD personnel in the interrogation techniques derived from SERE training.¹²⁴ Within a few more months, Mitchell had been detailed to the CIA’s secret detention site in Thailand, where Abu Zubaydah and others were held and, to the dismay of other interrogators on site, began implementing new CIA interrogation techniques.¹²⁵

DOD Approval for “Enhanced Interrogation”

Secretary of Defense Rumsfeld approved the use of “enhanced interrogation” techniques, inconsistent with controlling and long-standing military practice.¹²⁶ Military personnel implemented their use in Guantánamo, Afghanistan, and Iraq.¹²⁷ As far as is currently known, unlike the CIA program, DOD initially did not create and seek approval for explicit interrogation plans allowing for aggressive techniques for particular detainees.¹²⁸ However, DOD senior officials heavily pressured local commanders and personnel to “deliver” intelligence, and that appears to have led the field commanders to request approval to use increasingly aggressive interrogation techniques.¹²⁹ Parsing the details of this relationship will be an important piece of the puzzle for a criminal investigation. Nevertheless, the information available indicates that a kind of symbiosis apparently existed between the higher levels and lower levels of civilian and military command that led to the systematic use of abusive techniques on detainees.

Guantánamo

Within a short period of time—from mid September to mid October 2002—a confluence of events occurred at GTMO. First, Maj. Gen. Michael E. Dunlavey, GTMO’s commander,

sent GTMO personnel to a JPRA SERE training.¹³⁰ At the same time, senior government lawyers, including Gonzales, Addington, Rizzo, Haynes, Assistant Attorney General Michael Chertoff from DOD’s criminal division, and others visited Guantánamo.¹³¹ Following that visit, Jerald Phifer, Dunlavey’s director for intelligence, reported that he was pressured by Dunlavey to draft a request for authorization to use aggressive techniques in interrogations.¹³² Phifer asked a member of the Behavioral Science Consultation Team (BSCT), who had attended the SERE training, to draft the memorandum with the request.¹³³ This memorandum enumerated a list of specific requested aggressive interrogation techniques heavily influenced by the SERE training techniques.¹³⁴

At the same time, Jonathan Fredman, the CIA’s chief counsel to the Counter-Terrorism Center, travelled to GTMO and participated in a meeting convened by Lt. Col. Diane Beaver, the judge advocate general and chief legal aide to Dunlavey, to discuss Phifer’s memorandum requesting the use of aggressive techniques.¹³⁵ Fredman provided legal advice on interrogation techniques in line with the DOJ memoranda.¹³⁶ The “leakage” from one detention site to another was in high relief in this meeting, as Fredman freely discussed CIA methods, and others referred to abusive practices, including sleep deprivation, used in Afghanistan facilities.¹³⁷ Less than two weeks later, Beaver drafted a short legal analysis in support of the memorandum and concluded that the requested interrogation techniques were legal.¹³⁸

Phifer submitted to Dunlavey the memorandum requesting approval to use “counter-resistance” interrogation techniques.¹³⁹ Dunlavey then forwarded this memorandum, accompanied by Beaver’s legal analysis and his own memorandum requesting approval to use the aggressive interrogation methods, up the chain of command to Gen. James Hill, commander of the U.S. Southern Command (SOUTHCOM).¹⁴⁰ From there, it continued up to the chairman of the Joint Chiefs of Staff, Richard Myers.¹⁴¹ He sought advice from various branches of the military about their views of the requested methods. All complained that the harsh interrogation tactics under consideration might be illegal,¹⁴² all of their views were ignored.¹⁴³ Legal Counsel to the Joint Chiefs of Staff Capt. Jane Dalton’s review of the policy also was cut short; she asserted that this was due to Haynes’s request that a broad-based review not occur.¹⁴⁴

By November 2002, Commander Maj. Gen. Geoffrey Miller was in place at GTMO.¹⁴⁵ He was in direct contact with the DOD General Counsel’s office, the Office of the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict,¹⁴⁶ and Deputy Secretary of Defense Paul Wolfowitz.¹⁴⁷

GTMO's guard and administrative task force and interrogation task force were integrated under one command at this point.¹⁴⁸ The goal was to create an environment in which all aspects of the prison served the goal of gathering intelligence, and interrogators were firmly in control.¹⁴⁹ Although Miller was aware that the request for the use of "enhanced interrogation techniques" was still pending at DOD and had not yet been authorized,¹⁵⁰ he approved an interrogation plan for detainee Mohamed al-Qahtani, which would incorporate a number of these proposed techniques and would use others that went well beyond the specific DOD request.¹⁵¹ Gen. Hill, after having discussed the matter in early November 2002 with Rumsfeld, verbally approved several of the proposed techniques.¹⁵² However, interrogators and other personnel expressed sharp disagreement on the appropriate procedures to use with this prisoner, and the Criminal Investigation Task Force (CITF) and the Federal Bureau of Investigation (FBI) objected to the proposed and implemented techniques.¹⁵³

As the debate raged at GTMO regarding the interrogation of al-Qahtani and others, the original Dunlavey request continued making its way up to the top of the DOD chain of command. On November 27, 2002, Haynes forwarded a memo to Rumsfeld recommending blanket approval for 15 of the 18 requested aggressive techniques for use at GTMO.¹⁵⁴ These included the use of stress positions, deprivation of light and auditory stimuli, hooding, removal of clothing, the use of dogs to induce stress, and pushing and poking detainees.¹⁵⁵ Haynes's memo indicated prior discussions with Myers, Wolfowitz, and Doug Feith, the undersecretary of defense for policy, and they all concurred with his recommendations.¹⁵⁶ Haynes relied solely on Beaver's legal analysis.¹⁵⁷

In early December 2002, Rumsfeld approved Haynes' recommendation.¹⁵⁸ Following the authorization, GTMO senior staff developed standard operating procedures to implement the use of stress positions, stripping detainees, "non-injurious" physical contact, and other techniques now authorized by Rumsfeld.¹⁵⁹ However, the list of approved techniques, already controversial, became more so when, on several occasions, Navy General Counsel Alberto Mora protested to Haynes about the legality of the techniques.¹⁶⁰ Eventually, Mora drafted a legal memorandum that criticized the techniques and, according to testimony, threatened to sign it on January 15, 2003, if Rumsfeld did not rescind the authorization.¹⁶¹ Later that day, Rumsfeld capitulated and rescinded blanket authority for the techniques whose legality Mora and others had questioned.¹⁶²

DOD Working Group

After rescinding his own order on January 15, 2003,¹⁶³ Rumsfeld convened a Detainee Interrogation Working Group and tasked it with generating a new interrogation policy.¹⁶⁴ The group solicited information and recommendations from the Defense Intelligence Agency (DIA), commanders from Guantánamo and Afghanistan, JPRA, and the OLC. These discussions included recommendations to use SERE and other aggressive techniques in detainee interrogation.¹⁶⁵ Members of the working group tried to raise concerns about the legality and utility of these practices.¹⁶⁶ Again, DOD suppressed dissent. This time, Haynes instructed the working group to regard a March 14, 2003, OLC legal memo, authored by John Yoo, as authoritative, and that it should supplant the legal analysis being prepared by the group itself.¹⁶⁷

The working group's final report led Rumsfeld to approve a new list of aggressive SERE-influenced techniques for Guantánamo in April 2003.¹⁶⁸ These included dietary manipulation, environmental manipulation (including extremes of temperature, light, and dark), sleep adjustment, removal of clothing, prolonged standing, sleep deprivation, hooding, increasing anxiety through exploiting detainee aversions, and slaps to the face and stomach.¹⁶⁹ Rumsfeld also left the window open for the use of additional techniques as long as DOD and the Joint Chiefs approved them.¹⁷⁰ Abusive practices continued, even after the OLC's Assistant Attorney General Goldsmith rescinded Yoo's memorandum in December 2003.¹⁷¹

Iraq and Afghanistan

From early on in the Afghanistan conflict, reports of abuses were publicly known.¹⁷² Commanders in Afghanistan sought and received information and training from JPRA on the reverse-engineered SERE techniques.¹⁷³ In addition, a Standard Operating Procedure (SOP) was approved for Afghanistan that included isolation, stress positions, and multiple interrogators as interrogation techniques, which were among others authorized by Rumsfeld.¹⁷⁴ The use of sleep deprivation was already in common use in Afghanistan.¹⁷⁵ The use of this and other techniques was acknowledged in the October 2002 meeting at GTMO among CIA and DOD officials.¹⁷⁶ In Iraq, despite the fact that the government recognized that the Geneva Conventions protected detainees,¹⁷⁷ a July 15, 2003, Special Mission Unit SOP advocated the use of stress positions, the presence of military working dogs, 20-hour interrogations, isolation, yelling, loud music, and light control.¹⁷⁸ Through the involvement of specific personnel, GTMO and Afghanistan abusive tactics bled into Iraq. In August 2003, Maj. Gen. Miller was dispatched from GTMO to Iraq to evaluate detainee operations there and to adapt his methods to the Iraqi context.¹⁷⁹ His team helped train interroga-

tors stationed at Abu Ghraib and elsewhere.¹⁸⁰ Capt. Carolyn Wood, formerly commander of the intelligence-gathering operation at Bagram Prison in Afghanistan, was transferred to Iraq around the same time and assumed the post of Interrogation Officer in Charge (OIC) at Abu Ghraib.¹⁸¹ In September and October 2003, Lt. Gen. Ricardo Sanchez, the commander of U.S. forces in Iraq, issued lists of approved interrogation techniques derived from the earlier Rumsfeld list of approved techniques.¹⁸² Sanchez received recommendations from Wood and Miller.¹⁸³

In response to the photographic disclosures of abuse at Abu Ghraib prison, the commander for the Central Command, Gen. John Abizaid, suspended all outstanding SOPs and prohibited military use of interrogation techniques not listed in Army Field Manual 34-52.¹⁸⁴ Nonetheless, he approved the use of a few aggressive techniques on “hardened” detainees on a case-by-case basis.¹⁸⁵ Abuses continued in both Afghanistan and Iraq.¹⁸⁶

System Crimes

In conjunction with counterterrorism policies and the wars in Afghanistan and Iraq, the United States created a network of interrogation centers and prisons in which detainees routinely were subject to horrendous abuse. The United States engaged in prolonged unlawful detention and the enforced disappearance of some prisoners. Abusive techniques were used throughout all of these prisons, were of remarkably similar character, and had the same devastating impact on individual victims.¹⁸⁷ A number of deaths occurred in facilities in Iraq and Afghanistan. While information about the abuse and torture of detainees continues to be revealed, much still is not known about the breadth and depth of the U.S. torture program, the secret detention of prisoners, and deaths in official custody.

The systematic nature of these crimes—and the officially sanctioned policies underlying them—qualifies them as “system crimes.” System crimes (as with most organized crime) are generally characterized by a division of labor between planners and implementers, as well as arrangements in structure and execution that tend to make connections between these two levels difficult to establish. They are complicated by the fact that government agents often commit them with the approval of high-level, powerful officials and often under the cloak of official secrecy. The concept of system crimes is inherently contradictory to that of crimes committed by a few “bad apples”; instead it conjures the notion of the “rotten barrel”—i.e. a system that requires broad participation from low-level perpetrator to

high-level official planners and authorizers who sanctioned the abuses.¹⁸⁸

In a May 2009 speech at the American Enterprise Institute, former Vice President Dick Cheney defended the legality and efficacy of the Bush-era counterterrorism policies of “enhanced interrogations” and extraordinary renditions. He blamed the Abu Ghraib abuses on “a few sadistic guards” and took pains to distinguish these “disgraces” from the “lawful, skillful, and entirely honorable” work of CIA agents.¹⁸⁹ In an August 2009 interview with Fox News, Cheney reaffirmed that the “enhanced interrogation techniques” were “good policy.”¹⁹⁰ This paper asserts that exactly the opposite is true. The policy of “enhanced interrogations” created both an explicit and implicit mandate to use abusive techniques amounting to torture and cruel, inhuman, and degrading treatment.¹⁹¹

3. Why Prosecute?

There are many reasons, both from a policy and a legal perspective, why the United States should consider the rigorous investigation and ultimate prosecution of those most responsible for the violations described above. Prosecution can be an important route to dismantling a system crime. Since Nuremberg, international law has focused on the global criminalization of system crimes such as genocide, torture, war crimes, and crimes against humanity. Particularly in recent years, many societies have gone through a similar process of investigating such crimes and countering impunity. The United States should prosecute these violations for four principal reasons:

- Prosecutions are necessary to restore the rule of law.
- The United States has a clear legal duty to prosecute, and victims have a right to demand justice.
- The violations themselves resulted from a distortion of the law.
- Prosecutions would assist in restoring the credibility of the United States as an advocate for justice in the world.

Looking Back to Move Forward: Restoring the Rule of Law

Prosecutions are sometimes either justified or opposed on the reasoning that their main rationale is deterrence or retribution.¹⁹² While the impact of deterrence can be difficult to prove, allowing perpetrators of torture to escape responsibility generally is believed to contribute to further abuse.¹⁹³ At the same time, opponents may confuse an emphasis on retribution as calls for vengeance. The call for accountability is sometimes mistakenly deemed a “witch-hunt” carried out against a past regime or administration. This ignores the fact that prosecutions, when applied dispassionately to breaches of the law, are not acts of vengeance by or against individuals but are reaffirmations of the rights of victims and statements of disapproval of certain

policies or acts that have been defined as crimes at the societal level. One also must consider what message taking no action conveys. Inaction is not a stance of neutrality over political vengeance or retribution, but ultimately one of indifference that erodes faith in the rule of law.

Although some of the truth behind the violations that have occurred pursuant to U.S. counterterrorism policies may already have been exposed, it is an entirely different matter to have that truth tested and tried by the judicial process.¹⁹⁴ As stated by renowned Argentine scholar Carlos Nino:

When trials take place before impartial courts, with ample opportunity for the accused to be heard, thorough consideration of defenses, and adherence to the procedures governing evidence and the imposition of punishment, the benefits of the rule of law are showcased. In a trial setting, the value of the rule of law is further highlighted when the meticulous procedures of the court are juxtaposed—as prosecutors repeatedly did in Argentina—with the lawless conduct of the defendants.¹⁹⁵

A strong rationale for prosecution of system crimes is to convey to citizens a *disapproval of violations and support for core democratic values*. A resolute expression of formal disapproval by state institutions committed to human rights and democratic values can assist in persuading citizens as well as institutions of the centrality of those values. Trials can help draw the distinction between conduct that is condoned and conduct that is condemned by the state. This contributes to the public’s trust in state institutions. Rather than stirring up the past, trials can serve this essentially forward-looking goal.

In many parts of the world, societies enjoy far less stability than the United States and may fear attack from terrorists, insurgents, or other destabilizing elements if prosecutions are undertaken.

Yet such conditions do not allow states to sidestep or suspend their fundamental obligations under both international and domestic laws. The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”) states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or other public emergency, may be invoked as a justification of torture.”¹⁹⁶ Accordingly, in recent times, countries have increasingly applied their legal duties in this regard. International experience also shows that far from being effective in guarding against attack, torture does not result in good information and historically has proved highly ineffective in dealing with state security issues. The use of torture also erodes relations with other states, thereby making it more difficult to achieve effective security cooperation.¹⁹⁷

Indeed, President Obama clearly recognized the need for a drastic change of course, also from a security perspective:

In one of my very first acts as President, I prohibited the use of these interrogation techniques by the United States because they undermine our moral authority and do not make us safer. Enlisting our values in the protection of our people makes us stronger and more secure.¹⁹⁸

Admittedly, in the past such abuses were not always prosecuted, but recent years reveal an increasing global trend toward the prosecution of systematic human rights violations. An early example of positively expressed prosecutorial goals can be found in the campaign of President Raúl Alfonsín in Argentina in 1983, where the architects of the justice policy strongly argued in favor of prosecuting the most senior members of the military junta responsible for the deaths, disappearances, and mistreatment of thousands of civilians during the “Dirty War” from 1976 to 1983. Five of the top leaders were convicted in 1985. President Alfonsín pursued this policy in spite of considerable threats to Argentina’s peace and stability at the delicate phase of transition from military to civilian rule.¹⁹⁹ Another example of a successful prosecution in the aftermath of a regime that justified its abuses on the basis of an anti-terror campaign against the illegal armed group Shining Path (Sendero Luminoso) was the recent conviction for human rights abuses of former president Alberto Fujimori in Peru.²⁰⁰ In the aftermath of the arrest of Augusto Pinochet in London in 1998, prosecutions of security-related human rights abuses committed by military actors and intelligence officials also are occurring in Chile.²⁰¹ In recent history, some states have even pursued criminal accountability in situations of ongoing conflict, in cases as diverse as Colombia and Uganda.²⁰²

In societies facing a legacy or pattern of human rights abuse, some argue that the past should be left behind and the focus should turn toward the future. Part of this argument is that victims are urged to abandon their claims to justice as well.²⁰³ South Africa is often put forward as the paradigmatic case for “turning the page” and focusing instead on reconciliation of the society, because of the “amnesty for truth” formula available before its Truth and Reconciliation Commission (TRC). In fact, amnesty was offered to a relatively small number of perpetrators, and the TRC itself highlighted the need for “a bold prosecution policy.”²⁰⁴ The rule of law was seen as an imperative that could not easily be set aside; if amnesty was to be offered for truth, the threat of the law’s operation had to be realized where truth was not forthcoming. One of the main criticisms of the South African experience is that post-TRC prosecutions have not been pursued.²⁰⁵

How does the calculus about prosecutions change when victims of abuse are, for the most part, not U.S. nationals? People suspected of terrorism tend not to garner much public sympathy. But it is crucial to emphasize that most U.S. counterterrorism detainees were effectively without voice, agency, or legal recourse while held in captivity and subjected to abuse. The boundaries of democracy are equally shaken when legal standards designed to protect all persons—nationals and nonnationals alike—fall prey to claims that harsh measures are necessary to defend the state. The experience of other countries shows that this is a slippery slope. The duty of the United States to refrain from torture and cruel, inhuman, or degrading treatment is not one that stops at its borders; neither is it suspended when confining people of certain beliefs or actions, whether criminal or not.

As in most contexts, the demand for restoring the rule of law is divisive, with some favoring such a step and others keen to “turn the page.”²⁰⁶ But as many societies have realized, it is not always possible simply to turn the page. If not dealt with, the abuses committed in pursuit of the United States’ counterterrorism policies are likely to continue to come to public attention on their own, be it through litigation, news reports, photographs, investigative journalism, popular culture and the media, legal actions against U.S. officials abroad, and so forth. If unresolved, questions about the extent and legality of these abuses are likely to fester far into the future. In the words of the great American author William Faulkner: “The past is not dead. In fact, it’s not even past.”²⁰⁷

In the United States, an effective and comprehensive response to violations cannot be delayed. It must be found now, and strategic prosecutions are one important part of that response.

Legal Duty to Prosecute

Among the reasons for prosecutions, the legal obligations of the United States to prosecute torture are incontrovertible. The United States itself has agreed to be bound by international law provisions that contain a duty to prosecute. The aggressive interrogation techniques enumerated in this paper likely are violations of the proscriptions to refrain from torture and cruel, humiliating or degrading treatment under the Geneva Conventions and customary international humanitarian law²⁰⁸ as well as absolute prohibitions of torture under the Torture Convention.²⁰⁹ The Geneva Conventions Common Article 3 incurs individual criminal responsibility and invokes a duty to prosecute in U.S. and customary international law.²¹⁰ The Torture Convention, ratified by the United States, includes a clear treaty obligation to prosecute torture.²¹¹ The latter is particularly remarkable for its close resemblance to an actionable criminal code.²¹² Not only does the Torture Convention require state parties to criminalize any act of torture (as well as all acts constituting attempt, complicity or participation in torture) and make it punishable by appropriate penalties,²¹³ it also provides that each state party must in all cases either prosecute an offender domestically or extradite him to the appropriate country for prosecution.²¹⁴

Furthermore, the International Court of Justice has held that Geneva Conventions Common Article 3 is customary international law and constitutes “a minimum yardstick” for all conflicts; it contains rules that reflect “elementary considerations of humanity.”²¹⁵ Under Common Article 3, behavior not amounting to torture may still be criminal and amount to “cruel treatment.”²¹⁶ Acts that amount to “outrages upon personal dignity” also are strictly prohibited.²¹⁷

In international law, the prohibition against torture is considered a norm of the highest order or *ius cogens* and is absolute and non-derogable, that is, it is a protection that cannot be given up or taken away.²¹⁸ In recognition of these standards, U.S. law itself criminalizes torture and includes additional provisions applicable to punish those who abuse prisoners.²¹⁹

The fulfillment of this duty also responds to the rights of victims of illegal abuses, who have a legitimate expectation that states fulfill their obligation to “investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.”²²⁰ International law further provides that effective remedies to vindicate the rights of victims of serious human rights abuses include criminal or administrative sanctions of those responsible for such abuses.²²¹ The United

Nations has issued “Basic Principles” on the rights of victims to remedies. These principles set out the foregoing rights and obligations and state that in taking this “victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law...as well as with humanity at large.”²²²

In announcing the appointment of U.S. Attorney Durham, Attorney General Holder asked that he determine “whether there is sufficient predication to warrant a full investigation.”²²³ This preliminary investigation should be accomplished swiftly and objectively in order both to rectify earlier failures of accountability and to fulfill the United States’ legal duty to prosecute torture and other violations of the law.

The Deliberate Distortion of Law to Allow Torture and Other Abuses

The attempt by U.S. policy-makers and their legal advisors to manipulate the law itself is a strong rationale for why these violations should be addressed by legal mechanisms rather than solely by other, nonjudicial means. In this case, the lawyers and their clients—the most senior civilian and military officials—made the violations possible through their interpretation of the law. The law itself became a casualty and suffered harm. Prosecutions show that unfettered authority does not justify unlawful actions, serve to restore the law to its rightful place in the society, and demonstrate that no one is above the law. This is no less true today than when Robert Jackson said at the Nuremberg tribunals that the choice to submit German leaders to the law after World War II was “one of the most significant tributes that Power has ever paid to Reason.”²²⁴

In order to illustrate the extent of the manipulation of the law in formulating policies to underlie enhanced interrogations, it is worth contrasting briefly the approach of the International Criminal Tribunal for the former Yugoslavia (ICTY) on torture with that of Bush administration lawyers. While the case law of the ICTY obviously does not directly bind the United States,²²⁵ nonetheless it is a vivid example of how one of the most important international criminal courts of the 21st century has defined torture in a way that takes due account of “elementary considerations of humanity.”²²⁶ The ICTY definition of torture is based on the Torture Convention.

- (1) There must be an act or omission inflicting severe pain or suffering, whether physical or mental;
- (2) The act or omission must be intentional;
- (3) The act or omission must have been carried out with a specific purpose such as

to obtain information or a confession, to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.²²⁷

The ICTY has said, “[W]hen assessing the seriousness of the acts charged as torture, the Trial Chamber must take into account all the circumstances of the case, including the nature and context of the infliction of pain, the premeditation and institutionalization of the ill-treatment, the physical condition of the victim, the manner and method used, and the position of inferiority of the victim. In particular, to the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern, or are directed to the same prohibited goal.”²²⁸

The ICTY has held that permanent injury is not a requirement for torture.²²⁹ In the view of the ICTY, the following examples may constitute torture if the requisite elements are present: “Beatings, sexual violence, prolonged denial of sleep, food, hygiene and medical assistance, as well as threats to torture, rape or kill relatives.”²³⁰ At the same time, the ICTY does not confine torture to an enumerated list of acts and has stated:

There are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case law has not determined the absolute degree of pain required for an act to amount to torture. Thus, while the suffering inflicted by some acts may be so obvious that the acts amount per se to torture, in general allegations of torture must be considered on a case-by-case basis so as to determine whether, in light of the acts committed and their context, severe physical or mental pain or suffering was inflicted.²³¹

It is without question that under the international law definition and approach applied by the ICTY, torture and other crimes, as defined under international law, took place in Guantánamo, Iraq, Afghanistan, and CIA detention sites. Tellingly, ICTY jurisprudence can be distinguished from the analysis and advice given by U.S. lawyers over a series of memoranda.²³² The contrast is stark. These memoranda show a purposeful attempt to subvert both Constitutional and legal standards as well as international law obligations. The following does not constitute a comprehensive legal analysis of the memoranda but provides illustrative examples of their distortion of the law.

- **Creation of a legal vacuum in terms of applicable international law.** On January 25, 2002, White House Counsel Alberto Gonzales advised President Bush that captured members of the Taliban and al-Qaeda are not protected under the Third Geneva Convention.²³³ He relied on a memorandum from the OLC that concluded that, as a matter of domestic and international law, the president had the constitutional authority to eschew the application of the Third Geneva Convention to captured prisoners.²³⁴ A number of authoritative commentators believe that this fundamental and radical deviation from legal obligation was one of the most crucial decisions in allowing abuses to occur.²³⁵
- **Narrowing the torture definition.** An OLC memorandum of August 1, 2002, concluded that to constitute torture under Section 2340A of the Torture Act, an act must inflict physical pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or death.²³⁶ Meanwhile, mental pain or suffering must result in significant psychological harm lasting for months or years.²³⁷ This definition significantly deviates from the Torture Convention definition, including as it consistently has been applied in the jurisprudence of the ICTY.²³⁸
- **Fixation on specific, detailed techniques and whether they fall within the (narrow) definition.** The memoranda lay out various techniques in detail and purport to determine whether each of them would constitute torture, in many cases without fully considering their cumulative effect or the subjective impact of the treatment, as is central to the ICTY’s analysis. For instance, a memorandum of October 11, 2002, concludes that none of the proposed aggressive interrogation methods for which commanders at GTMO sought approval violate prohibitions against cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution or violate criminal provisions of the Uniform Code of Military Justice.²³⁹ Even when techniques were analyzed for use on a particular detainee, singly and in concert, as occurred in one of the August 1, 2002, memoranda, the memorandum goes to extreme efforts to ensure that none of the techniques, even used in combination, could be considered torture.²⁴⁰ Likewise, a May 2005 OLC memorandum responding to a CIA request concerning combinations of interrogation techniques focuses on a de-contextualized analysis of each proposed combination in order to ratify the legality of the practice.²⁴¹ The memorandum clinically analyzes each combination and concludes that such treatment is acceptable as long it is through

“authorized use by adequately trained interrogators.”²⁴² The memorandum fails to consider whether such treatment, used in conjunction with environmental manipulation, other injurious practices, and repeated consistently over a long period of time on individuals in varying stages of mental and physical deterioration would rise to the level of torture. Instead the emphasis is on the legality of the acts in a vacuum and relies primarily on the expertise, qualifications, and representations of the very interrogators involved as to the expected outcomes.²⁴³

- **Misinterpretation of international cases.** The August 1, 2002, OLC memorandum also fails to examine sufficiently international legal interpretations of the scope of torture; instead, it primarily utilizes two international cases to reinforce its own interpretation of the parameters of the torture definition.²⁴⁴ The memorandum discusses Public Committee Against Torture in Israel v. Israel, in which the Israeli Supreme Court held that certain interrogation techniques were illegal but avoided pronouncing on whether they constituted torture.²⁴⁵ The other case cited by the August 1, 2002, memorandum was Ireland v. the United Kingdom, a 30-year-old case of the European Court of Human Rights concerning the treatment of detainees by the British in Northern Ireland. (The court labeled hooding, white noise, stress positions, deprivation of food, water, and sleep as cruel, inhuman, and degrading treatment).²⁴⁶ Yet, the memorandum ignores more recent European decisions, such as Selmouni v. France and Dikme v. Turkey, in which the court ruled that beatings, threats, sexual abuse, and blindfolding, especially in combination, constitute torture.²⁴⁷

These legal memoranda do not sustain arguable legal theories or positions but, instead, constitute distortions of the law to justify specific enhanced interrogation techniques.²⁴⁸ They no longer were in the realm of independent legal advice.²⁴⁹ Rather than safeguard the “elementary considerations of humanity,” these memos advised that time-tested and internationally recognized standards did not constrain the president. Instead, they distorted the definition of torture and encouraged endless, perverse debates on the degree of suffering caused by individual techniques, with no appreciation of the actual impact of these techniques on their victims. Rather than serve as guardians of the law, as was their obligation as government lawyers, the attorneys crafting these memoranda used the law as a tool to pave the way for an illegal policy, thus aiding and abetting its creation.

Ultimately, the legal approach put forward proved unsustainable. A combination of internal and external pressures caused the

Bush administration to rescind some of the legal opinions.²⁵⁰ However, those who developed these distortions of law have not been called to account, and some have instead gone on to occupy prominent positions. In one instance, one of the legal architects became a federal circuit court judge, another is a law professor, and others have found lucrative jobs in the private sector.²⁵¹

The abandonment of legal standards was so deliberate that it demands criminal accountability. A legal solution is warranted to address this particular issue and restore the rightful place of the rule of law in society.

U.S. Credibility as a Global Advocate for Justice

In the case of the United States, the reasons in favor of prosecutions should not be viewed purely on an internal, societal basis; the policy choices regarding prosecutions literally affect the whole world. As President Obama said on April 16, 2009, upon the public release of additional OLC memoranda, “The United States is a nation of laws. My Administration will always act in accordance with those laws, and with an unshakeable commitment to our ideals.”²⁵² Obama’s Ambassador-at-Large for War Crimes, Stephen Rapp, recently made a similar claim, stating in a *Time* magazine interview, “We will conduct ourselves so that no prosecutor at the international level would ever have cause to take up a case against an American citizen.”²⁵³

The United States has long been a front-runner in the fight against impunity and is a major supporter of criminal accountability in a variety of contexts. In playing such a role, the United States has recognized the crucial role that criminal prosecutions can play in acknowledging the suffering of victims, restoring their dignity, and reconstituting the primacy of law in that particular national context.

To this end, the United States pressed for and prevailed in the creation of an elaborate system of post-conflict tribunals at the end of World War II. U.S. prosecutors, such as former U.S. Supreme Court justice and chief Nuremberg prosecutor Robert Jackson, as well as many others helped develop the methodology of investigating and prosecuting system crimes. Since then, the United States has been a major supporter of international tribunals, including the ICTY and the International Criminal Tribunal for Rwanda (ICTR); Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; Bosnia War Crimes Chamber; and the Special Tribunal for Lebanon. The United States has played a key role in the establishment and development of all of these tribunals and in many cases is the biggest financial contributor.²⁵⁴ Likewise, the United States has

long been a supporter of trials for the Khmer Rouge.²⁵⁵ The United States played a key role in orchestrating the handover of Charles Taylor to the Special Court for Sierra Leone in 2006.²⁵⁶ U.S. nationals have been at the forefront of efforts to prosecute in all these bodies and have made remarkable contributions to international justice, including the improvement of technical aspects of investigation and prosecution, as well as developing the jurisprudence and operational policies of international tribunals.²⁵⁷

A key stated policy objective of the United States' 2003 invasion of Iraq was the public trial of Saddam Hussein and key members of his regime. "There needs to be a public trial," President Bush said on December 15, 2003. "And all the atrocities must come out, and justice must be delivered."²⁵⁸ The U.S. Regime Crimes Liaison Office gave direct technical support to the trials of Saddam Hussein and members of his regime.²⁵⁹

In addition, the United States has judged torturers from other countries on its soil. In cases under the U.S. federal laws, the Alien Torture Statute (ATS) and Torture Victims Protection Act (TVPA), U.S. judges and juries have ruled on the civil responsibility for crimes against humanity and torture.²⁶⁰ Under the law criminalizing torture, the United States prosecuted Charles "Chuckie" Taylor Jr. for torture he committed in Liberia between 1999 and 2003.²⁶¹ In January 2009, a federal judge sentenced him to 97 years in prison.²⁶² A DOJ press release quoted Acting Assistant Attorney General Matthew Friedrich of the Criminal Division: "Our message to human rights violators, no matter where they are, remains the same: We will use the full reach of U.S. law, and every lawful resource at the disposal of our investigators and prosecutors, to hold you fully accountable for your crimes."²⁶³ Executive Assistant Director Arthur M. Cummings II of the FBI's National Security Division added, "This sentence sends a resounding message that torture will not be tolerated here at home or by U.S. nationals abroad... The FBI and our law enforcement partners will continue to investigate such acts wherever they occur."²⁶⁴

If the United States declines to look at its own history of violations through a prosecutorial lens, it can easily be accused of not practicing what it preaches, and its moral voice to pronounce on other situations and promote accountability will be seriously compromised. Moreover, failure by the United States to confront its own abuses will set a negative precedent worldwide. After all, if one of the most secure, wealthiest nations in the world, one in which the rule of law has been truly entrenched, chooses to let such breaches go unpunished, what is the incentive for other states to act differently?

4. Who to Prosecute: Strategic Considerations

Prosecutions to Date: Failures of Accountability up the Chain of Command

The strategic considerations of who to prosecute in connection with detainee abuses—something that the newly opened preliminary inquiry will need to address—should be informed by the unsatisfactory record to date of U.S. criminal investigations into these abuses.²⁶⁵ Despite substantial evidence of widespread maltreatment of detainees, few individuals have been held criminally responsible for ordering or carrying out these acts.²⁶⁶ Criminal prosecutions almost exclusively have focused on low-level perpetrators. Only one commander has been prosecuted for involvement in abuses, and he was acquitted. This dissonance—between the systematic nature and scope of the abuses in detention facilities on the one hand and the limited reach of prosecutions on the other hand—leads to a broad finding that impunity has occurred *de facto* over the past eight years.²⁶⁷

No better example symbolizes the failure of criminal accountability for system crimes than the prosecutions of abuses at Abu Ghraib. After the photos of prisoner abuse from the prison were broadcast on U.S. television, a scandal about the treatment of prisoners rocked elected officials, the nation, and the world. The official story was that a few “bad apples” were responsible for the abuses. Due to the notoriety of the abuses, pressure to offer up sacrificial lambs mounted quickly in order to defuse the public reaction. Investigations and prosecutions for the abuses proceeded more rapidly than any others in the past eight years.

The publication of the disturbing photographs of the abuse put particular soldiers into the public spotlight and focused prosecutorial attention on those individuals. Actions outside of what was depicted in the photographs, including other abuses at Abu Ghraib and the participation of those behind the scenes, were not investigated. Military intelligence, CIA, and civilian

interrogators, along with commanders at the prison, in Iraq, and up the military and civilian chain of command who ordered, allowed or encouraged the abuses were systematically excluded and ignored in the investigations and prosecutions. As John Hutson, dean of Franklin Pierce Law Center and former judge advocate general of the Navy presciently said at the time, “If this ends with a staff sergeant, and everyone else goes home with a chest full of medals, then we’ve got problems.”²⁶⁸

In total, 12 people were prosecuted through the military justice system for abuses at Abu Ghraib. Seven soldiers pleaded guilty.²⁶⁹ In several instances, the accused tried to raise a defense of superior orders. For instance, Specialist Javal Davis, charged with aggravated assault, dereliction of duty, maltreatment of detainees, and conspiracy, attempted to call a number of top military and civilian commanders in support of this defense, a request the presiding military judge denied.²⁷⁰ Ultimately Davis pleaded guilty to battery, dereliction of duty, and making false statements; he received a demotion, a six-month sentence and a bad conduct discharge.²⁷¹ Sgt. Lynndie England similarly tried to raise a defense of superior orders in a preliminary hearing.²⁷² After being ordered to a court martial on charges of conspiracy, multiple counts of maltreatment, and one count of committing an indecent act,²⁷³ England pleaded guilty and was sentenced to three years in prison and a dishonorable discharge.²⁷⁴ Staff Sgt. Ivan L. Frederick III, one of the noncommissioned officers on duty in the cellblock, pleaded guilty to eight counts, including conspiracy, maltreatment of detainees, assault, indecent acts, and dereliction of duty.²⁷⁵ He was sentenced to eight years.²⁷⁶ He was considered one of the ringleaders of the Abu Ghraib abuse; the infamous Abu Ghraib photo of a hooded detainee on a box attached to wires was Frederick’s handiwork.²⁷⁷

Five cases went to trial in court martial proceedings. Specialist Charles Graner raised a defense of superior orders and unsuccessfully sought immunity for Col. Thomas Pappas, the head of the Military Intelligence (MI) brigade in the prison, so that he could testify about MI orders to the military police that led to or encouraged detainee abuse.²⁷⁸ Graner faced multiple charges for his direct participation in detainee cruelty and torture. He was convicted and sentenced to 10 years, forfeiture of benefits, and a dishonorable discharge.²⁷⁹ His was the longest sentence handed down in the aftermath of the abuses at Abu Ghraib. Specialist Sabrina Harman was convicted of conspiracy to maltreat prisoners, four counts of maltreating prisoners, and dereliction of duty; she was sentenced to six months and a bad conduct discharge.²⁸⁰ At her sentencing, she apologized to all detainees and admitted she had failed in her responsibilities as a soldier.²⁸¹ She appeared in several of the Abu Ghraib photographs and took many others.²⁸² Two other subjects of courts martial were army dog handlers. In support of his defense of superior orders, Sgt. Michael Smith was allowed to call an immunized Col. Pappas as a witness. Pappas testified that he had learned about the usefulness of dogs in the interrogation of Arab detainees from Maj. Gen. Geoffrey Miller and his team of intelligence officials from Guantánamo during their visit to Iraq.²⁸³ Despite this testimony linking the behavior to sanctioned practices, this trial was a squandered opportunity to explore more deeply the migration of abusive interrogation and detention practices from Guantánamo Bay to Iraq, as well as the role of commanders in authorizing abusive techniques.²⁸⁴ Instead this trial focused on the failures of one soldier who appeared in a particularly horrific photo in which he held the leash of his growling dog just inches away from a cowering detainee.²⁸⁵ Smith was convicted of six of 13 counts, including maltreatment, dereliction of duty, and conspiracy to frighten prisoners. He was sentenced to 179 days in jail, a demotion, a fine, and a bad conduct discharge.²⁸⁶ In the trial of the other dog handler, Sgt. Santos Cardona, Maj. Gen. Miller was allowed to testify, but he denied that he encouraged the use of dogs in interrogation during his visit to Iraq.²⁸⁷ Cardona was convicted of dereliction of duty and aggravated assault for allowing his dog to bark within inches of a prisoner's face.²⁸⁸ He was sentenced to 90 days of hard labor, reduction in rank, along with a pay cut and forfeiture of a certain amount of pay over time.²⁸⁹

Three years after the abuses were revealed, the court martial of Lt. Col. Stephen Jordan, the former head of the interrogation center at Abu Ghraib, took place. As a commander, he was charged with dereliction of duty, lying to investigators, and failure to obey a lawful order,²⁹⁰ as well as cruelty and maltreatment of prisoners.²⁹¹ He was acquitted of all serious charges, including that he failed to train and properly supervise his

subordinates; he was convicted only of willfully disobeying a direct order not to discuss one of the military investigations in the wake of the scandal.²⁹² That conviction ultimately was dismissed, and, according to a press report, a reprimand was issued instead.²⁹³

A few other ranking officers implicated in the abuses received administrative penalties.²⁹⁴ For example, Col. Pappas was relieved of his command, administratively reprimanded, and fined; then-Brig. Gen. Janis Karpinski, commander of the 800th Military Police Brigade that oversaw U.S. prisons in Iraq, was demoted and removed from her command, in addition to administrative punishment.²⁹⁵ Some of the commanders implicated up the chain of command were promoted instead of investigated. For example, Maj. Gen. Walter Wodjakowski, the former deputy commander of U.S. forces in Iraq, was promoted to head the Army's Infantry Training School at Fort Benning, Georgia.²⁹⁶ Maj. Gen. Barbara Fast, formerly the top intelligence official in Iraq, was promoted to command the Army's Intelligence Center at Fort Huachuca, Arizona.²⁹⁷

In sum, while the prosecutions for abuses at Abu Ghraib represent the most extensive example of criminal accountability for detainee abuse, they also indicate a broad failure to engage in a systematic investigation and prosecution of both direct perpetrator and command involvement in abuses at the prison.

Other information on military prosecutions for abuses and killings of detainees in both Iraq and Afghanistan reveals a more ad hoc approach to prosecutions. These cases also demonstrate in stark terms that sentences tend to be low in spite of the gravity of the crimes. The highest ranking officer to be convicted for an abuse-related death in detention, Marine Maj. Clarke Paulus, was found guilty of dereliction of duty and maltreatment of a detainee who was dragged from his cell at Camp Whitehorse in Iraq, stripped naked, left outside for seven hours, and died. Yet, Paulus's sentence was dismissal from the service and loss of benefits.²⁹⁸

In a case involving the death by torture of Abed Hamed Mowhoush at Forward Operating Base (FOB) Tiger in Iraq in November 2003, Chief Warrant Officer Lewis Welshofer was charged with murder. Welshofer stuffed Mowhoush into a sleeping bag and sat on him, and Mowhoush died of asphyxiation. Welshofer testified that his direct supervisor approved of using the sleeping bag and that he had received mixed signals from his commanders about the treatment and interrogation of prisoners. He was convicted of the lesser charge of negligent homicide and received only a written reprimand, fine, and 60 days of confinement to base, home, and church.²⁹⁹

A number of other examples can be found in which lower ranking personnel received what appear to be minimal sentences. A Marine who engaged in a mock execution of four prisoners received a fine and 30 days of hard labor without confinement.³⁰⁰ Two soldiers who beat a detainee and broke his jaw were reduced in rank, had to forfeit pay, and were sentenced to less than three months in prison.³⁰¹ A soldier who set a detainee on fire was sentenced to 90 days of confinement.³⁰² In a sexual assault case against a female detainee, the perpetrators were sentenced to one month of confinement and ordered to pay fines;³⁰³ when three Marines used electroshocks on a detainee, they were given sentences of one year or less.³⁰⁴

After the Abu Ghraib scandal, some sentences did increase, but inconsistently. Two soldiers were convicted of the murders of two detainees near Baghdad. One received a life sentence and the other five years.³⁰⁵ Similarly, the 2007 execution-style killings of four bound and blindfolded detainees resulted in a conviction for murder and conspiracy, and a life sentence with the possibility of parole for Sgt. Michael Leahy, a former Army medic.³⁰⁶ Master Sgt. John Hatley, the senior noncommissioned officer involved in the killings, was convicted and sentenced to life.³⁰⁷ Sgt. First Class Joseph Mayo pleaded guilty to murder and was sentenced to 35 years.³⁰⁸ Two lower ranking soldiers pleaded guilty to lesser charges and were sentenced to seven months in one case and eight months in the other; both received dishonorable discharges.³⁰⁹

In a February 2009 court martial, First Lt. Michael Behenna was convicted of assault and murder in the death of a detainee and received a 25-year sentence.³¹⁰ But a staff sergeant who testified against Behenna pleaded guilty to assault, maltreatment of a subordinate, and making a false statement received a sentence of only 17 months' confinement, reduction in rank, and a bad conduct discharge.³¹¹ In another 2007 case, four soldiers were charged with the premeditated murder of three detainees who had been released and told to run but then were shot. A military jury convicted Staff Sgt. Raymond Girouard of negligent homicide, a lesser offense, and sentenced him to 10 years. Three others reached plea agreements and received sentences of 18 months or less.³¹²

In the first case to be tried against a former member of the U.S. military in federal court under the Military Extraterritorial Jurisdiction Act (MEJA),³¹³ a civilian jury acquitted a former Marine sergeant, Jose Luis Nazario, of manslaughter, assault, and use of a firearm in the shooting deaths of four men captured during fighting in Fallujah, Iraq, in 2004.³¹⁴ Although the jury cited the lack of forensic evidence, eyewitnesses, or even the names of the victims as the basis for their decision, the jury

forewoman also was quoted as saying, "You don't know what combat is until you're in combat. . . . It's an extraordinary situation."³¹⁵ Two other members of the same unit refused to testify against Sgt. Nazario and initially were held in contempt of court, but those charges later were dismissed.³¹⁶ As with the federal trial, a military jury acquitted Sgt. Ryan Weemer of murder charges and dereliction of duty, despite his confession to the crime. His defense had argued that there were no bodies, no relatives complaining of lost family, and no forensic evidence.³¹⁷

As evidenced by the Fallujah murder case, prosecutions often were stymied by failures at the investigative level. A report by Human Rights First illustrates deficiencies in the investigative process, including the failure to investigate until there was public pressure to do so; inadequate record-keeping; destruction of evidence, including failure to maintain autopsy records (if they were even ordered); underreporting and delayed reporting of incidents; failure to maintain proper detainee medical records; and failure by command to exert its proper role in ordering inquiries against anyone in the chain of command.³¹⁸ For instance, the mishandling of autopsy evidence and the loss or destruction of photos of a detainee being interrogated before his death led a military judge to throw out that evidence; consequently, the prosecution could not pursue the most serious charges in a detainee death case.³¹⁹

A salient example of a failure to investigate until the case received public attention was the December 2002 deaths by torture of Habibullah and Dilawar in Bagram Prison in Afghanistan.³²⁰ An Army Criminal Investigation Division (CID) investigation initially recommended closing the case, in part because Habibullah had so many injuries it was impossible to determine who was responsible for them.³²¹ Renewed interest—and a renewed investigation—occurred after the deaths were publicized.³²² CID investigated and recommended charges against 27 people for abusive treatment and causing the deaths of the detainees, but only 15 were prosecuted. Of those, five pleaded guilty to assault or other crimes; one was convicted of maiming, assault, maltreatment, and making a false statement at trial; the remaining nine were either acquitted or had the charges against them dropped. Information from the soldiers who negotiated plea agreements was not used effectively to spur the prosecution of the other soldiers.³²³ None of the five soldiers who pleaded guilty received sentences greater than five months; the convicted soldier was demoted but received no jail sentence and left the Army with an honorable discharge.³²⁴ While charges against two commanders initially were requested, in one case they were dropped, and in another the commander was never charged.³²⁵

The failures of these prosecutions are telling. The investigations took several years, and witnesses and evidence were no longer available. The prosecution appeared unwilling to tackle the core problem presented by the torture deaths of the two victims: the illegality of the methods used, no matter how senior commanders defined them, since clearly the abuses inflicted on the victims were not permissible under military or international law. Finally, the prosecution never made the victims part of the courtroom story. For the jury, their sympathies clearly were with young, inexperienced soldiers, whom they saw as thrown into a chaotic, confusing world.³²⁶ Press reports indicated that a federal grand jury also was investigating the deaths of these two detainees.³²⁷ This would be a rare inquiry, especially after the completion of the military process. The public attention to the case might have prompted further investigation. No recent accounts, however, report on the outcome of the grand jury process.³²⁸

CIA involvement in abuse or deaths of detainees has resulted in only one trial to date. CIA contractor David Passaro instigated and carried out four days of physical abuse of an Afghan man in custody, as well as depriving him of food, water, and sleep. Passaro—who was tried and convicted in federal court—could have been charged with torture or homicide (which could have carried a life sentence), but instead he only was charged with assault. He was sentenced to eight and a half years in prison.³²⁹

In the death of a detainee in the CIA-controlled “Salt Pit” in Afghanistan, in spite of a referral to DOJ for investigation, no prosecution occurred. The officer implicated was reportedly promoted.³³⁰ Despite the involvement of the CIA (and/or Army Special Forces) in the death of prisoner Abed Mowhoush, none of the agents were ever charged.³³¹ Similarly, the CIA’s involvement in the death-by-torture of a detainee at a FOB near Al Asad was never investigated.³³² At Abu Ghraib, Sabrina Harman captured on film the body, wrapped in plastic sheeting, of “ghost prisoner” Madadel al-Jamadi. Navy prosecutors accused 10 members of the Navy—nine SEALs and one sailor—of being involved in al-Jamadi’s death; nine were given nonjudicial punishment, and the remaining one was acquitted at trial.³³³ Despite implications that the CIA also was involved in the death, no charges were brought.³³⁴

In terms of other inquiries under federal law, a task force was established in June 2004 at the U.S. Attorney’s Office in Alexandria, Virginia, to investigate claims of detainee abuse by civilians.³³⁵ In response to multiple inquiries by Senator Richard Durbin, the task force disclosed that it had received 24 referrals of alleged abuse from the CIA Office of Inspector General and the DOD. Of these, only two were pending as of February 2008.³³⁶

The foregoing data indicates a record of few prosecutions, light sentences, inadequate investigations, and failure to examine command involvement and responsibility.

While the Abu Ghraib abuses stimulated the most rigorous prosecutions so far, these focused predominantly on the men and women pictured alongside victims. No commander was held responsible for the abuses at Abu Ghraib or elsewhere. It would be inaccurate to state that no prosecutions have occurred; yet, President Obama’s recent statement that “individuals who violated standards of behavior in these photos have been investigated, and they have been held accountable,” is an overstatement at best.³³⁷

The initiation of a preliminary inquiry, ordered on August 24, 2009, may be an important first step toward correcting these failures of accountability. But much more will need to be done if investigations and prosecutions intend to tackle the problem of detainee abuse at its origins.

Strategic Focus on Those Most Responsible

In the case of system crimes, a well-developed strategy is essential to the success of a prosecutorial effort. This raises certain strategic challenges.

- A large number of crimes will have been committed, and it will be possible to fully prosecute only a relatively small number.
- Hundreds of people may have been involved in the crimes and not all can or even should be prosecuted.

Senior Bush administration officials have argued that those who engaged in abusive interrogation techniques should not be prosecuted because these were a matter of policy instead of criminal acts.³³⁸ Policy is not nor can it be criminal, according to this line of thinking; therefore, only acts that fell outside the scope of the policy ought to be prosecuted. In fact, U.S. policy has gone further than allowing crimes; it has also focused on protecting involvement in abusive interrogations and reaffirming a defense for good-faith adherence to official authorization and legal advice through subsequent legislation.³³⁹

In many cases of systematic human rights abuse, a policy or system is in place to allow for the widespread commission of crimes.³⁴⁰ These crimes do not occur in isolation but often become widespread by virtue of a policy. Modes of participation in these crimes are complex. Some may argue that it is not possible to identify with certainty those who may have been

involved and what role each person played in crafting and implementing counterterrorism violations. Still others may claim that U.S. law does not currently have the tools at its disposal to adequately describe the form of the crime and the modes of participation in it. But a similar challenge has been faced on many occasions by international criminal tribunals that are asked to deal with complex system crimes such as crimes against humanity, war crimes, and genocide. While a prosecutor of less complex crimes, such as a single murder, must describe how crimes took place by “setting the scene,” the prosecutor of system crimes must demonstrate the “machine” that allowed the crimes to happen and how its various elements were linked together. International tribunals have developed sophisticated ways in which to encompass and charge participation by the accused at different levels within the criminal system, including concepts of command responsibility,³⁴¹ joint criminal enterprise,³⁴² and aiding and abetting.³⁴³ The Oxford Companion to International Criminal Justice states:

Violations of International Criminal Law are frequently perpetrated systematically and on a mass scale, requiring the coordinated actions of numerous individuals. Often it is individuals in political or military leadership positions who are considered most responsible for such systematic ICL violations. However, these individuals often contribute to criminal activity without physically committing any crimes. In this context, joint criminal enterprise is an important form for capturing the criminal conduct of leaders in relation to large scale crimes.³⁴⁴

The United States likewise has a very sophisticated legal system and has numerous legal tools at its disposal to describe complex forms of participation, including various modes of liability such as conspiracy. How U.S. prosecutors concretely could pursue prosecutions of those responsible for systems crimes is discussed further in Chapter 5. Here we address general considerations in relation to formulating a strategy on who to investigate. This is a topic that is relevant not only within the apparently limited confines of John Durham’s preliminary inquiry into “whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations.”³⁴⁵ Clearly his inquiry should consider responsibility for violations of federal laws up the chain of command. But it is also important to ensure that prosecutors do not stop at isolated excesses that went beyond authorized “enhanced interrogation techniques.” They also should follow the chain of command in terms of the extensive, documented pattern of abuses that were the result of the authorized techniques.³⁴⁶

In the abstract, different approaches to the cases are possible. The universe of cases can be viewed as a pyramid. A vertical or longitudinal approach entails investigating and indicting perpetrators from different levels of the pyramid and building the case against the perpetrators at the apex. Another approach, sometimes known as a horizontal approach, deliberately restricts the focus to the apex of the pyramid, thereby directing prosecutorial resources toward investigation and prosecution of those bearing the greatest responsibility. In this case, people at the highest levels of responsibility are those who actively formulated the policies or plans that enabled the crimes to occur or oversaw their implementation.

The horizontal approach to prosecutions has the advantage of giving security to many lower level perpetrators that they are unlikely to be prosecuted. But it has its own challenges. Some argue that this approach indicates that those who implement plans or orders are somehow not morally culpable for their actions. For instance, Attorney General Holder’s statement that the Department of Justice will not prosecute anyone who acted reasonably, in good faith, and within the scope of legal guidance indicates a reluctance to proceed against some lower ranking individuals.³⁴⁷ But there may well be both moral and legal culpability at the lower levels, particularly in carrying out orders that were manifestly unlawful. Prosecution in such instances should not be foreclosed, but may not be the top priority. As is seen from the example of the Abu Ghraib prosecutions,³⁴⁸ the pursuit of only low-level perpetrators leads to a perception (if not a reality) of scapegoating and allows architects of policy to escape criminal culpability.

Only through tackling the highest levels of responsibility is the system or policy behind the crime exposed and dismantled. In the current case, military and intelligence commanders and senior politicians, along with lawyers who proactively aided and abetted the policy through flawed legal advice, bear this responsibility. In our view, these individuals should be the primary subjects of criminal investigations. Thus, the horizontal approach, despite its difficulties, is the preferred approach in the U.S. context.

Focusing on those with the greatest degree of responsibility not only is responsive to the nature of system crimes, but it fits with the central objective of prosecutions. Perpetrators responsible for the formulation of policies and strategies that led to the crimes often attempt to justify their crimes in ideological terms and have attempted to cloak their involvement in secrecy. For these reasons, condemning their conduct and convincing others of its unacceptable nature will be most effective in highlighting the nature of the crimes.

5. How to Prosecute in the United States

As a nation with one of the most advanced legal systems in the world, the United States has at its disposal all the necessary legal and technical capacity to investigate and prosecute those most responsible for serious abuses against detainees. In this section we review some of the considerations involved when investigating these crimes under U.S. laws. A detailed legal analysis is beyond the scope of this policy brief, and many of the issues raised will only be clarified upon further litigation; however, the considerations highlighted here illustrate that investigation and prosecutions are possible and should be pursued in the United States.

Channels for Initiating an Investigation or Prosecution

The attorney general has opened the door at least partially to criminal investigation through mandating a preliminary inquiry. Should Assistant U.S. Attorney John Durham recommend further investigation, he could propose any of several paths, including regular DOJ channels, a task force, or a special prosecutor. An important factor is that in the current climate, any prosecutorial effort—no matter how well substantiated—risks being criticized as politically motivated. For these reasons an investigation must not only have the independence and resources required, but it must be free from even the appearance of a conflict of interest or political bias.

A full investigation could be opened through regular DOJ channels. The DOJ is the primary criminal justice entity for the federal government, and U.S. attorneys and their assistants handle the vast majority of the nation's criminal cases, both simple and complex. U.S. attorneys have the statutory duty—and virtually plenary authority exercised under the supervision of the attorney general through DOJ's Criminal Division—to prosecute criminal cases on behalf of the federal government.³⁴⁹

However, in the current context the DOJ could face a conflict of interest, since federal prosecutors currently have a role in prosecuting cases involving terrorism suspects who claim that evidence against them was obtained through torture or other forms of abuse. In some instances, the DOJ may argue that evidence in cases against detainees was not obtained under torture and abuse. This may be incompatible with DOJ investigating and prosecuting those accused of perpetrating detainee abuse. Moreover, some career DOJ attorneys may have been involved in declining to move forward on cases of detainee abuse originally referred to DOJ from other agencies.

While DOJ could take steps to demonstrate its independence, the question remains whether DOJ could successfully maintain an image of impartiality in these cases. As the detainee abuse cases involve officials from one administration investigating and possibly indicting high-level officials of its predecessor, DOJ is inherently vulnerable to allegations of bias. The results of the preliminary inquiry by Durham and his continuing work on the destruction of CIA interrogation videotapes will be important tests of the ability of regular U.S. attorneys to work independently both in fact and in appearance.

A full investigation also could be undertaken through a task force.³⁵⁰ Task forces often are established in response to public concern and demand for action with respect to a particular issue or problem. They are temporary, primarily ad hoc groups that bring together specialists in an area of law and/or a variety of government agencies in an effort to make prosecutions more efficient. Typically led by an attorney with a federal agency counterpart, task forces most often are formed through DOJ,³⁵¹ but the president can also create a task force, via executive order;³⁵² Congress can also do so through legislation.

An advantage of a task force is the multidisciplinary team that it can assemble. However, a task force set up to investigate

high-level alleged perpetrators of abuses related to U.S. counterterrorism policies could face the same perception problems as a DOJ-based appointment. Such problems could increase if representatives of other agencies involved in counterterrorism and interrogation policies actually form part of the task force. Task forces generally cannot point to any formal independence from government.

Finally, for any legal proceeding that U.S. Attorneys may carry out, the attorney general also has the authority to appoint a special counsel.³⁵³ Special counsels function generally within the framework of DOJ but with a substantial degree of independence. The attorney general sets the special counsel's mandate, but the special counsel is "free to structure the investigation as he or she wishes and to exercise independent prosecutorial discretion to decide whether charges should be brought, within the context of the established procedures of the Department."³⁵⁴ At the conclusion of a special counsel's investigation, he or she must submit a confidential report to the attorney general explaining decisions taken to pursue or decline prosecutions.³⁵⁵

A special counsel—because of his or her formal independence—perhaps offers the best chance for a fully credible criminal inquiry. While all options should be on the table, this option may be the most promising approach for Durham to recommend at the conclusion of his preliminary inquiry.³⁵⁶

Bases of Jurisdiction, Crimes, and Modes of Liability in the United States

Federal jurisdiction is relevant for the current DOJ preliminary investigation and probably is the most important basis for criminal accountability. However, military jurisdiction also applies to individuals, including high-level commanders, who remain in military service, along with certain retired people. Any future prosecutor, whether within the military or the federal system, will analyze the jurisdictional basis for the alleged crimes. Regardless of an alleged perpetrator's status or identity, the law provides an adequate jurisdictional basis to act against those most responsible for serious abuses.

Military jurisdiction is defined by the Uniform Code of Military Justice (UCMJ) and applies to individuals who were on active or reserve service (on orders) at the time of the offense and at the time of investigation and prosecution. The UCMJ functions as a complete set of criminal laws, including offenses that are normally part of civilian criminal codes and those unique to the military or to wartime. The court-martial, where service members may be tried for criminal violations, is a distinct and

separate system of criminal justice from the other federal courts or other administrative military disciplinary systems.³⁵⁷ Numerous nonpunitive and nonjudicial measures—so-called administrative measures—remain the most frequently used methods to deal with UCMJ violations. As discussed previously, to date this has been the course the military has taken most frequently, even in cases of serious abuses.³⁵⁸ Once a member of the military leaves the service, he or she is no longer subject to the UCMJ, with some exceptions for retired personnel, such as those who are entitled to receive retirement pay.³⁵⁹

In the civilian realm, a number of federal laws provide a basis for jurisdiction, including for members of the military who have left the service and are no longer covered by the UCMJ and for U.S. nationals who commit offenses overseas, including at Guantánamo and other military bases and CIA "black sites."³⁶⁰ MEJA, for example, extends jurisdiction to civilians accompanying or supporting the Armed Forces overseas. It applies to DOD civilian employees, contractors, subcontractors, and their employees "present or residing outside the United States in connection with such employment."³⁶¹ The War Crimes Act (WCA) and the Torture Act both contain provisions that apply to acts that occur outside of the United States.³⁶² Federal assault, murder, and kidnapping statutes also provide for extraterritorial jurisdiction.³⁶³

The federal crimes relevant to prosecutions in the United States are, among others, torture,³⁶⁴ war crimes,³⁶⁵ assault,³⁶⁶ murder,³⁶⁷ manslaughter,³⁶⁸ sexual crimes,³⁶⁹ and obstruction of justice.³⁷⁰ The UCMJ contains many of these same crimes,³⁷¹ as well as a prohibition on maltreatment.³⁷² The Torture Act provides for a fine, imprisonment up to 20 years, or both for committing or attempting to commit torture outside the United States; the act confers jurisdiction on the federal courts if the accused is a U.S. national or present in the United States.³⁷³ Conspiracy to commit a torture offense is also criminalized in this law.³⁷⁴ The WCA, as amended,³⁷⁵ defines as war crimes torture, cruel or inhuman treatment, murder, intentionally causing serious bodily injury, rape, and sexual assault or abuse, when committed by a member of the Armed Forces of the United States or a national of the United States.³⁷⁶

While members of the U.S. military could be prosecuted for involvement in detainee abuse in Iraq and Afghanistan under the UCMJ as violations of the WCA or the Torture Act, to date in the relatively limited instances of criminal prosecutions they have been charged with "ordinary" crimes such as aggravated assault, maltreatment, or dereliction of duty.³⁷⁷ The one CIA contractor convicted in federal court for detainee abuse was charged with assault, even though his actions led to the detainee's death.³⁷⁸

This result is preferable to no prosecution, but it is important that if torture or war crimes are committed, they are labeled as such and that the applicable statutes are used so the charges convey the full gravity of the offense.

As discussed in Chapter 4, system crimes often have complex modes of perpetration. Theories of liability that could be used to describe this form of criminal conduct are available under U.S. law. While it is beyond the scope of this paper to determine which of these modalities of criminal responsibility may be appropriate in any given case, conspiracy,³⁷⁹ and aiding and abetting³⁸⁰ may be relevant to charges against policy-makers and commanders.

Unlike international criminal law, federal criminal law does not include a theory of liability similar to “command responsibility,” that is, responsibility that extends to the officer’s failure to act to prevent and punish abuses based on what he or she knew or should have known.³⁸¹ Under the UCMJ, a commander may be charged under an aiding and abetting theory of liability, which has been held in some cases to allow for vicarious liability.³⁸² In order to hold a commander responsible for the actions of his subordinates, the approach in military prosecutions of commanders in the past has been to charge dereliction of duty,³⁸³ failure to obey orders,³⁸⁴ or failure to punish.³⁸⁵

Overcoming Possible Defenses and Other Barriers to Prosecution

While the provisions described above can allow for prosecutions, certain obstacles may arise that should be part of the strategic calculus going forward. These obstacles fall into the following categories: (1) recent statutory changes to discourage criminal accountability for detainee maltreatment; (2) statutes of limitations; (3) evidentiary issues; and (4) affirmative defenses.

However, it is our conclusion that none of these obstacles prevent the possibility of proceeding with prosecutions in the United States. Similar obstacles exist in many other national contexts where system crimes have been successfully prosecuted. However, any prudent prosecutor will take account of these potential barriers and prepare his or her litigation strategy to overcome them.

Amendments to the War Crimes Act

In his May 2004 report, the CIA inspector general concluded, “The Agency faces potentially serious long-term political and legal challenges as a result of the CTC [Counter-Terrorism Center] Detention and Interrogation Program, particularly its

use of EITs [Enhanced Interrogation Techniques].”³⁸⁶ Later, certain provisions in the 2005 Detainee Treatment Act (DTA) and the 2006 Military Commissions Act (MCA) echoed this anticipation of legal challenges to the interrogation program. Among other changes, these laws sought to dissuade prosecutions by framing legal defenses in the specific context of counterterrorism operations, limiting the crimes that could be charged for abuses and protecting those involved in any legal challenge.

The DTA prohibited the cruel, inhuman or degrading treatment or punishment of any individual in the custody or under the physical control of the U.S. government, wherever that might be.³⁸⁷ But it also took care to avail a defendant accused of any misconduct in the interrogation and detention of counterterrorism suspects of a legal defense, premised on the fact that his/her actions were “officially authorized and determined to be lawful at the time that they were conducted” as long as he/she “did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful.”³⁸⁸ The statute further notes that “good faith reliance on advice of counsel should be an important factor, among others, to consider” in assessing the reasonableness of the officials’ actions.³⁸⁹ The MCA later made it clear that this legal defense applied to any actions taken between September 11, 2001, and December 30, 2005, the date of passage of the DTA.³⁹⁰ While the defense of government authorization or “mistake of law” pre-existed the introduction of this language, these provisions carried a specific message. They were framed post-Abu Ghraib, as illegal and abusive treatment began increasingly to surface and the inspector general of the CIA pointed to likely legal trouble ahead. Moreover, despite the language of the Torture Convention that “no exceptional circumstances whatsoever” could be invoked to justify torture, the reference to this defense was tied explicitly to a context that “poses a serious, continuing threat to the United States, its interest, or its allies.”³⁹¹ These provisions sent the signal that those who had committed illegal acts would be protected and that the OLC memoranda formed their first line of defense.

The 2006 MCA’s amendments to the War Crimes Act (WCA) made it more difficult to classify certain acts as war crimes, thereby constituting another means to dissuade prosecutions.³⁹² The MCA amended the WCA to eliminate the crime of “outrages upon personal dignity, particularly humiliating and degrading treatment”; thus these acts are no longer prohibited explicitly as war crimes.³⁹³ Although such “outrages” had been considered a war crime, as violations of Common Article 3, from well before 2001, the 2006 MCA made its amendments of this and other provisions retroactive to November 26, 1997, which

has the effect of eliminating the possibility of war crimes charges for humiliating and degrading treatment of detainees after that date.³⁹⁴ Although the MCA and DTA prohibited degrading treatment, these laws did not define it as a war crime and left compliance, “including through the establishment of administrative rules and procedures,” to the discretion of the president via executive order.³⁹⁵

Since its passage more than 10 years ago, to our knowledge the WCA has never been used as a basis for prosecution.³⁹⁶ Given this history and the recent amendments, one might easily question the political will to enforce its terms. Even though assault, sexual abuse, and other criminal statutes may still be the basis for criminal charges, the WCA continues to have applicability to detainee abuses committed within the context of an armed conflict, as in Afghanistan and Iraq or in other contexts in which the Geneva Conventions and Common Article 3 apply. As such, despite the limitations enacted by the MCA, the War Crimes Act should be put to use.

Finally, the DTA allows for the provision of legal assistance to U.S. personnel or employees engaged in “authorized” detentions and interrogations of aliens “determined or believed to be engaged in or associated with international terrorist activity” occurring between September 11, 2001, and December 30, 2005.³⁹⁷ The MCA updates these provisions to make clear that the U.S. government shall pay these fees in the event of investigations, domestic, international or foreign prosecutions, agency reviews, or civil cases.³⁹⁸ These provisions themselves do not prevent or inhibit prosecution; in fact, their clear implication is that prosecutions are anticipated.

Statutes of Limitations

Prosecution of crimes is generally bound by statutory limitations on the time frame in which they must be charged. Law defines statutory periods, and different categories of crimes fall within different limitations periods.³⁹⁹

For federal crimes, the statute of limitations period generally begins running once the crime is complete, meaning when every element of the crime is satisfied.⁴⁰⁰ The current federal limitations periods are as follows:

- **Five-year general rule for noncapital cases.** Most federal criminal charges, such as assault, battery, maiming, and completed criminal conspiracy will fall under a five-year statute of limitations.⁴⁰¹ War crimes that do not result in death also fall under this rule.
- **Eight-year statute of limitations for noncapital terrorism**

offenses. Under the U.S. Code, the law criminalizing torture and conspiracy to commit torture is subject to this extended limitations period.⁴⁰²

- **Torture with a foreseeable risk of death or serious bodily injury.** If torture results in or creates a foreseeable risk of death or serious bodily injury, then no statute of limitations will apply.⁴⁰³ This rule also applies to conspiracy to commit torture when death or serious bodily injury is a foreseeable risk or an actual result.⁴⁰⁴
- **No statute of limitations for capital offenses.** For crimes punishable by death, there is no statute of limitations.⁴⁰⁵ War crimes that result in death fall into this category.⁴⁰⁶ It is not necessary that the prosecutor actually seek the death penalty in these cases, just that the crime charged is a capital crime.⁴⁰⁷

Article 43 of the UCMJ determines the statute of limitations for offenses under the code. The relevant statute of limitations periods are as follows:

- **Five-year general rule for noncapital cases.** A person charged with an offense under the UCMJ may not be tried by court-martial if sworn charges have not been received by the officer exercising summary court-martial jurisdiction over the command within five years of the offense being committed.⁴⁰⁸
- **No statute of limitations for capital offenses.**⁴⁰⁹

Current statutes of limitations lend urgency to moving ahead with investigations and prosecutions before it is too late. For a number of offenses, five- and eight-year statutes of limitations are at or near their expiration point. At the same time, it is clear that there are crimes that can be charged well into the future, particularly relating to torture cases that involved a foreseeable risk of death or serious bodily injury, including the development, authorization, and use of “enhanced interrogation techniques.”⁴¹⁰

Evidentiary Rules

A particular challenge with system crimes is that they usually are not investigated immediately after the crimes have occurred. This means that information is often dispersed or not collected, and crime scenes are disturbed or dismantled. Witnesses at times have to be asked to reconstruct memories sometimes long after the events, or the witnesses themselves may no longer be available. However, given U.S. law enforcement’s capabilities, record keeping, and forensic research skills, the crimes discussed in this policy brief can still be investigated. Other rules that

occasionally are mentioned as part of this debate may affect the admissibility or availability of certain types of evidence at trial, but may not prevent cases from going ahead.

- **Executive Privilege:** The president has constitutional status as the head of the executive branch of the government; this status confers on him the authority to maintain confidential executive branch communications.⁴¹¹ In criminal cases, courts have recognized presidential authority to keep some executive communications confidential.⁴¹² Federal law now governs access to incumbent and prior presidents' papers.⁴¹³ However, as the Watergate era prosecutions demonstrated, this interest is by no means absolute and must be balanced against a need for publication of certain documents in the context of criminal investigations and trials.⁴¹⁴
- **Classified Evidence:** The Classified Information Procedures Act (CIPA) governs the use of classified information for trial.⁴¹⁵ CIPA covers both classified documents and classified testimony and addresses knowledge gained by a criminal defendant during government employment.⁴¹⁶ CIPA allows either party before trial to move for a pretrial conference to discuss evidentiary issues and allows the government to request the court to issue a protective order prohibiting the disclosure of classified information by the defendant if it has been made available to him.⁴¹⁷ The government also may seek to bar certain classified information from disclosure in discovery.⁴¹⁸

These rules do not prevent cases from going ahead, and U. S. courts have a proven track record of dealing with these complexities in other complex, sensitive proceedings, including trials of accused terrorists.⁴¹⁹ Furthermore, in the context of potential prosecutions of government officials for abusive interrogation techniques, much information is already in the public domain. Classified information likely would not need to form the central basis of any criminal prosecution.

Possible Defenses

Prosecutorial strategy should address the following possible defenses. Ordinarily, an accused will present a wide variety of responses to the charges leveled against him or her, but some types of defenses already are part of the public debate. These are highlighted in OLC memoranda and have been raised in popular discourse by individuals, such as former vice president Cheney, to “justify” abuses.⁴²⁰ Some of these defenses, such as mistake of law or superior orders, pertain to those who implemented the policies rather than those who formulated them; thus, they are likely to be far less relevant in prosecutions that target senior military or civilian officials.

- **Immunity.** Functional immunity is commonly asserted by public officials in the context of civil cases but is not a significant factor in U.S. prosecutions.⁴²¹ However, at some point, Congressional or prosecutorial grants of individualized immunity could pose an obstacle to prosecutions. For example, in the case of Sgt. Michael Smith, one of the Abu Ghraib dog handler defendants, a higher ranking officer, Col. Thomas Pappas—head of military intelligence in the prison—was granted immunity to facilitate his testimony against the lower ranking soldier; despite the implications of Pappas's greater responsibility for the crimes at Abu Ghraib, he was never tried.⁴²² Likewise, the chief prosecutor of the My Lai massacre case from the Vietnam era pointed to politicized Congressional interference with access to evidence through immunity grants and other measures, as a major obstacle to prosecutions.⁴²³ In the current cases, if immunity is granted at all, it would be preferable to grant it on an individual basis to lower ranking officials if necessary to enable them to testify without risk of criminal liability and thus facilitate the prosecution of higher officials.
- **Necessity.** The necessity defense, or “choice of evils,” provides a justification for actions that would otherwise be criminal. As described by the Model Penal Code, for example, the defense is characterized as having three elements: (1) the actor must have intended to avoid the greater harm; (2) the harm avoided must be greater than the harm done; and (3) there must have been no alternative that would have caused less harm than the harm actually caused.⁴²⁴

This is the line that former vice president Cheney has taken repeatedly in his defense of interrogation policy:

[M]y sort of overwhelming view is that the enhanced interrogation techniques were absolutely essential in saving thousands of American lives and preventing further attacks against the United States, and giving us the intelligence we needed to go find Al Qaeda, to find their camps, to find out how they were being financed.⁴²⁵

However, courts have not found a “necessity” defense applicable in situations in which the threat of harm was speculative; therefore, it is unlikely that a court would find that the speculative threat of a future terrorist attack is sufficiently imminent or immediate to warrant illegal interrogation techniques.⁴²⁶ An interrogator or his superior is unlikely to ever have a sufficient degree of certainty that a particular individual has information necessary to avoid an imminent terrorist attack; in fact, experience shows that an interrogator who has permission to torture

will torture many people in an attempt to locate that elusive individual.⁴²⁷ The CIA–IG report bears this out:

Agency officers report that reliance on analytical assessments that were unsupported by credible intelligence may have resulted in the application of EIT’s [Enhanced Interrogation Techniques] without justification. Some participants in the Program, particularly field interrogators, judge that CTC [Counterterrorism Center] assessments to the effect that detainees are withholding information are not always supported by an objective evaluation...but are too heavily based...on presumptions of what the individual might or should know.⁴²⁸

The ineffectiveness of torture as a means of obtaining accurate information is well documented.⁴²⁹ This further undermines the argument that torture is ever necessary to avoid an attack.⁴³⁰ The slippery slope of torture is infinite, and yet, according to some legal experts, “the harm that is caused by torture is definite [and] the benefits gained by torture are difficult to measure and often negligible.”⁴³¹

Although the necessity defense might have some emotionally persuasive capacity, under international law it is clearly unacceptable. As the Torture Convention stipulates in no uncertain terms, “No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴³²

- **Self-defense.** Self-defense is available as a defense to criminal charges when, even though a defendant is deemed to have committed the crime, three conditions are met: (1) the defendant reasonably believes that he is in immediate danger of unlawful bodily harm from his adversary and that the use of force is necessary to avoid this danger; and (2) the amount of force used against his adversary is reasonable.⁴³³ The defense also may be invoked in the case of “defense of another;”⁴³⁴ however this is not an abstract proposition, but one in which the same essential requirements apply. The person intervening on the victim’s behalf must hold a reasonable belief, on the basis of facts as the intervener perceives them, that action is necessary to protect the other person.⁴³⁵

Self-defense can only be invoked in a situation in which the defendant experienced a personal, immediate threat of death or great bodily harm.⁴³⁶ In circumstances of controlled detention and abuse during interrogation, this defense would be unavailable. Nor can this defense be interpreted

broadly to encompass the vague notion of “defending the nation.”⁴³⁷

- **Mistake of law or government authority.** The OLC memoranda and subsequent legislative reforms clearly had a defense rooted in “mistake of law” or “government authority” in mind.⁴³⁸ As applied to the present scenario, a government authority/mistake of law defense would be based on the theory that if government officials had affirmatively, albeit unintentionally, misled another government agent as to what may or may not be legally permissible conduct, that individual should not be punished as a result.⁴³⁹ Generally, ignorance or personal mistake is not a defense to criminal prosecution, and a good-faith or mistaken belief that one’s conduct is legal does not relieve a person of criminal liability for engaging in that conduct.⁴⁴⁰ But the “mistake of law” defense may apply if the defendant shows that he or she acted in good faith, believing that the charged conduct did not violate the law and that this belief arose from reasonable reliance on either an official statement of the law, authority, or even legal counsel.⁴⁴¹

An individual who followed guidance from the OLC may be able to argue good-faith reliance on those instructions, but good faith remains an issue that would have to be determined by the fact-finder.⁴⁴² Most importantly for purposes of the discussion here, the defense may not be premised on subjectively held beliefs; it must be grounded in the objective reasonableness of belief in the lawfulness of the advice.⁴⁴³ This applies as well to reliance on advice of counsel. Moreover, for the defendant to prevail in such a defense there should be evidence that the attorney advised the accused, or his superiors, as counsel, rather than as a participant in the criminal scheme itself or at the behest of others in a criminal conspiracy.⁴⁴⁴ In the context of the sanctioning of horrific abuses wholly inconsistent with past U.S. practice, it could be argued that no person would have formed a reasonable belief that the approved “techniques” were lawful.⁴⁴⁵ Moreover, those who helped shape the policy, including the lawyers who crafted legal justifications for illegal acts, would not be able to avail themselves of this defense.

- **Superior Orders.** “Superior orders” is not usually a defense, but may give rise to mitigation in sentence. Under both U.S. and international law, an order—whether it be direct or indirect, explicit or implied—to commit a manifestly unlawful criminal act should not be obeyed and will not relieve the person carrying out the order of criminal responsibility.⁴⁴⁶ Only if the individual does not know of

the unlawfulness of an order and could not reasonably be expected under the circumstances to recognize the order as unlawful, may the defense of obedience to an order be considered—and then only as a mitigation of punishment.⁴⁴⁷ The UCMJ uses the standard of manifest illegality but, when that is met, provides that “obedience to orders” constitutes a defense.⁴⁴⁸

A superior orders defense is only available to subordinates, and even then, its application may be limited in the context of detainee abuses. Given the grave nature of the abuses, arguably many of the orders to commit abuses were “manifestly unlawful.” This is reinforced by the fact that there were individuals who refused to enforce enhanced interrogation techniques,⁴⁴⁹ protested them,⁴⁵⁰ or indicated concern to superiors about possible liability.⁴⁵¹ If interrogators were trained on the reverse-engineered SERE techniques, which themselves were based on illegal practices used against U.S. servicemen, presumably they would have been able to deduce that enhanced interrogation techniques, derived from these practices, might also be unlawful. The Torture Convention makes it very clear, in any event, that “An order from a superior officer or a public authority may not be invoked as a justification of torture.”⁴⁵²

In his August 2009 statement, Attorney General Holder reminded the U.S. public that his “duty is to examine the facts and to follow the law. In this case, given all of the information currently available, it is clear...that this review is the only responsible course of action.”⁴⁵³ In charting any prosecutorial strategy, the anticipation of defenses is a necessary element. However, reaching a conclusion about the viability of a prosecution in any specific case depends on the facts and requires in-depth investigation before there is any decision not to proceed. Public discourse may have distorted the true meaning of defenses such as necessity and self-defense, and legislative efforts may have sought to shield U.S. personnel from the consequences of wrongdoing. Still the duty of the attorney general is to see past that and to focus on the facts and the law. The facts and the law clearly support an investigation well beyond a few cases or incidents in which policy guidelines were exceeded.

Overcoming Obstacles Posed by Lack of Political Will

If prosecutions are to send a strong message of a return to the rule of law, that accountability is a priority, and that no one is above the law, they must also come to terms with another type of

hurdle: the lack of political will, informed by public sentiment. Historical lessons may inform this debate; accountability was also a sensitive topic in the context of the Vietnam War. In the case that arose from the 1968 massacre of Vietnamese civilians by members of the U.S. military at My Lai, 30 men were recommended for charges, but only 16 eventually were charged; five men were tried. Lt. William Calley was the only one convicted.⁴⁵⁴ In April 1971, just three days after Lt. Calley received a life sentence at his court martial, President Richard M. Nixon announced that he would personally review the case.⁴⁵⁵ According to a senior legal adviser to the Army Criminal Investigation Command during that period, once this happened, “commanders balked at pressing charges, lawyers didn’t want to prosecute, juries were unwilling to convict... ‘Everybody wanted Vietnam to go away.’”⁴⁵⁶

If there was a lack of support for trying Calley, the failures of accountability were even more pronounced up the chain of command. Less than six months later, a jury acquitted Capt. Ernest Medina, Calley’s superior officer.⁴⁵⁷ Looking back decades later, former DOD secretary Melvin R. Laird wrote of the massacre and the subsequent Calley trial: “I well remember the unexpected public support for Lieutenant William Calley... Americans flooded the White House with letters of protest when it appeared that Calley would be the scapegoat while his superiors walked free. The best way to keep foot soldiers honest is to make sure their commanders know that they themselves will be held responsible for any breach of honor.”⁴⁵⁸

Although Calley was sentenced to life in prison, the term was repeatedly reduced as the war drew to a close, and he was eventually paroled after serving only three years and six months.⁴⁵⁹

Since Vietnam, the law has evolved, with the Torture Convention, the WCA, and the Torture Statute coming into effect. But the challenges of lagging political will and of public sentiment—which generally has tremendous sympathy for soldiers who were “doing their duty” in a difficult situation—remain. This hurdle requires steadfast and principled action by those tasked with doing justice, who must have a commitment to the rule of law and an understanding that impunity tarnishes the whole of the institutions involved.

During the courts-martial relating to the My Lai (also known as Son My) massacre, Telford Taylor, U.S. chief prosecutor at the Nuremberg Tribunals, wrote in a passage that might easily refer to the events that occurred at Abu Ghraib and other sites of detainee abuse,

Whether or not individuals are held to criminal account is perhaps not the most important question posed by the Vietnam war today. But the Son My courts-martial are shaping the question for us, and they cannot be fairly determined without full inquiry into the higher responsibilities. Little as the leaders of the Army seem to realize it, this is the only road to the Army's salvation, for its moral health will not be recovered until its leaders are willing to scrutinize their behavior.⁴⁶⁰

Regrettably the post-Vietnam era did not yield the accountability that it should. Today, the United States is once again at a crossroad. It is not alone in facing the complex challenge of criminal accountability in the aftermath of periods in which systematic abuses of human rights prevailed. But it should seek to improve on examples from other countries in the past, such as Indonesia following the 1999 carnage in East Timor. In 2002, in an attempt to avoid international trials, Indonesia mandated an ad hoc Human Rights Court to try 18 people for their failure to prevent crimes in East Timor (rather than for their participation in such crimes). Twelve were acquitted in the first instance and another five on appeal. The only person convicted was not Indonesian; he was an Eastern Timorese militia leader whose conviction was eventually overturned.⁴⁶¹ As a result, the role of the Indonesian military in the violence in East Timor was not seriously examined.⁴⁶²

Far from genuine attempts at accountability, these trials essentially served to whitewash the perpetrators and leave in place the factors that allowed the crimes to happen. The United States should aim much higher than this. The fact that defendants in such cases often receive strong public support and praise for serving their country does not diminish their crimes, nor does it warrant the diluting of justice.

Today in the United States, there is clearly ambivalence about the way to address past abuses. Even when he announced a preliminary inquiry into wrongdoing, Attorney General Holder anticipated that "there are those who will use my decision... as a means of broadly criticizing the work of our nation's intelligence community. I could not disagree more with that view."⁴⁶³ At the time of this paper's writing, public opinion is almost evenly divided on the attorney general's decision to open a preliminary inquiry.⁴⁶⁴ This is not an unusual scenario; preoccupation with national security concerns trumping human rights imperatives may push the public in that direction. For example, influential sectors within Chile supported the dictatorship of Augusto Pinochet and its policies even after it came to an end. Pinochet had argued that a harsh response to his opponents, including using torture and disappearance, was necessary, and many

Chileans were willing to overlook these abuses due to their own fears.⁴⁶⁵ Even though Pinochet was voted out of government in 1990, he remained a popular figure among the military and a potent force within some parts of the society. Only after more than a decade of efforts to establish the truth and to bring those responsible to justice did a new and more meaningful debate on human rights begin to occur within Chilean society and the media.⁴⁶⁶ By the time Pinochet returned to Chile in March 2000 after his arrest in London on an international warrant (issued at Spain's behest in connection with charges of torture and other crimes),⁴⁶⁷ his political power was diminished. Only a minority denied or sought to justify the terrible human rights crimes that had been committed during his rule.⁴⁶⁸

Investigating those most responsible for torture and related crimes in the context of U.S. counterterrorism operations respects the universality of human rights and the principle that the prohibition on torture should not be violated no matter who is the victim. As fear abates, as more information becomes available regarding the extent and nature of abuses, and as the failure to investigate serious crimes continues to damage trust in the rule of law at home and abroad, public sentiment is likely to shift, and more people may reach the conclusion: "not in my name."

If these crimes are not fully investigated in the United States, they may be pursued elsewhere. The result could continue to confront U.S. officials with the uncomfortable truth. The Torture Convention lends itself to the exercise of universal jurisdiction, since there are more than 140 state parties,⁴⁶⁹ and the only pre-condition for prosecution by a state party is the presence of the accused in its territory.⁴⁷⁰

Ineffective or insufficient prosecutions in the United States have already led to several actions in European countries, where the law allows private citizens to file formal criminal complaints for investigation. In Germany, a complaint was filed in 2004 by the U.S.-based Center for Constitutional Rights and other human rights groups seeking criminal charges against then-Secretary of Defense Donald Rumsfeld for abuses at Abu Ghraib.⁴⁷¹ A second complaint was lodged in 2006 against former CIA director George Tenet, and other named and unnamed officials, including former attorney general Alberto Gonzales and OLC attorney John Yoo, for ordering, aiding and abetting, and/or failing to prevent or punish subordinates' commission of war crimes at Abu Ghraib and Guantánamo.⁴⁷² In France, a private prosecution complaint was filed alleging that Rumsfeld, who was in France at the time, had ordered and authorized torture.⁴⁷³ In Spain, two cases were filed in 2009 relating to abuses at Guantánamo. One complaint alleges that six former high-level Bush

administration lawyers violated the Geneva Conventions and the Torture Convention by crafting a legal framework purportedly to justify torture of detainees in Guantánamo.⁴⁷⁴ The other complaint focuses on “possible material authors” of torture, accomplices, and those who gave orders in the alleged torture of four former Guantánamo detainees who were Spanish residents.⁴⁷⁵ In Italy, a criminal prosecution of CIA and Italian intelligence officers for their involvement in the kidnapping and rendition of an Egyptian cleric in Milan is currently under way, with U.S. defendants being tried in absentia.⁴⁷⁶

While few of these cases have progressed beyond the earliest stages, they constitute important means to ensuring eventual accountability. Unsurprisingly, these complaints have encountered significant challenges in going forward, perhaps due to the focus on those at the highest levels of government and their lawyers for their role in authorizing abusive policies. At the same time, the very fact that these cases are being pursued abroad by victims and their advocates gives credence to the view that victims of serious abuses will continue to seek access to the courts to vindicate the right to be free from torture. Regardless of the outcome of such cases, they may result in increased pressure for the United States to conduct its own investigations.

It is far preferable for the United States to come to terms with its own legacy of abusive practices. In a society governed by the rule of law, when crimes of such severity as torture, deaths in detention, and related abuses occur, these should naturally be investigated and prosecuted at or near the time of events, particularly if they are systematic. There has already been a long wait for accountability in the United States; for years, secrecy, cultivation of fear, and a slow, steady erosion of the rule of law prevailed. Reversing that course in a new era requires an informed public and political will—at the highest levels—to defend the rule of law.

With Attorney General Holder’s August 2009 decision to appoint a prosecutor to conduct a preliminary inquiry, the United States has an opportunity to begin to fulfill its legal and moral obligation to investigate serious wrongdoing by its own officials. At the same time, there are reasons to be concerned about the future of this initial inquiry. The same assistant U.S. attorney has already been investigating the destruction of CIA interrogation videotapes since January 2008 with little apparent progress.⁴⁷⁷ Moreover, the scope of the new inquiry reportedly is drawn quite narrowly, focusing on as few as two or three cases of abuse in excess of the already-horrific guidelines, rather than on the systematic policy of “enhanced interrogation.”⁴⁷⁸ Holder reminded the public in August that his duty was to follow the facts and the law where they lead; it is the duty of the public to insist on it.

6. Conclusion

Criminal prosecution in the United States for detainee abuses in U.S. counterterrorism operations is a legal and moral imperative that is not only soundly justified, but also eminently feasible. Abundant documentation indicates U.S. military and CIA officials, interrogators, and civilian contractors tortured and abused detainees across all U.S. detention facilities in Guantánamo, CIA prisons, and in Iraq and Afghanistan. Reports regarding practices in these locations reveal remarkably similar patterns of detainee abuse, both physical and psychological. The systematic abuses were the direct result of policies that senior officials at the CIA, DOD, DOJ, and the White House designed and approved. These officially mandated abuses should be investigated and prosecuted as “system crimes.”

Domestic and international legal obligations require that these crimes be prosecuted. In particular, the Torture Convention, signed and ratified by the United States, requires domestic prosecution of torture. The attorney general has initiated a preliminary investigation into some cases of detainee abuse, apparently with a focus on crimes that, *prima facie*, went beyond what was authorized by DOJ legal memoranda. Investigation and prosecution must go beyond this mandate and encompass the illegality of “enhanced interrogation” policies and the crimes these engendered.

Action is needed now, particularly since measures taken to pursue criminal accountability thus far have been inadequate. While the Abu Ghraib scandal spurred military investigations and a flurry of courts-martial, the resulting sentences generally were lenient and involved only individuals at the lower ranks. In federal civilian courts, only one CIA contractor has been convicted. Given the seriousness of the crimes, investigations and prosecutions for these and other documented abuses should have gone up the chain of command. This lack of a serious commitment to criminal accountability has resulted in *de facto* impunity for those who had overall responsibility and crafted, authorized,

or condoned the policies that led to wholesale detainee abuse and, on a number of occasions, death.

The U.S. legal system has the tools to deal adequately with the complexities of system crimes. The abuse of detainees in U.S. custody violates federal criminal laws and provisions of the Uniform Code of Military Justice. The Torture Act and War Crimes Act should be taken off the shelf and used as appropriate to their terms and to U.S. international obligations under the Geneva Conventions and the Torture Convention. Legal concepts such as conspiracy, aiding and abetting, and dereliction of official duties may be used to trace criminal liability up civilian and military chains of command.

Any prudent prosecutorial strategy must take into account potential obstacles, including procedural issues such as statutes of limitations and admissibility of classified and privileged evidence. Bush-era amendments to war crimes legislation may make the pursuit of war crimes charges more difficult, and defenses, such as government authority and reliance on legal advice, should be anticipated. But none of these are insurmountable barriers to prosecution. Prosecutions can and should be pursued in the United States.

It is likely that investigations or prosecutions into these matters will continue to meet with some backlash in the United States from the public and political officials who are inclined to turn a blind eye to crimes perpetrated by soldiers and CIA interrogators, purportedly in the name of national security. Despite divisions in domestic public sentiment, legal obligations to prosecute remain in force.

The failure to pursue criminal investigations in the United States has already led to actions in several European countries. Additionally, experiences in other countries that have had to address patterns of serious human rights violations show that

crimes of this nature cannot simply be forgotten. Evidence and information will continue to surface, whether from leaks, detainee accounts, declassification of documents, or human rights organization and media investigations. As more information becomes available, it is likely that people increasingly will demand that these types of human rights violations cannot and must never be done in their name. Even if the victims of these crimes may not garner significant public support in the United States at this stage, in the future their pain and suffering may finally be recognized as one of the very real and condemnable consequences of these policies. And as efforts to suppress shameful information continue, more distrust will be generated toward U.S. political, military, intelligence, and justice institutions.

Rigorous investigation and prosecution now of those most responsible for these violations will act to restore the rule of law and send a clear signal, now and in the future, that the absolute prohibition on torture will be respected by the United States and that breaches will not be tolerated. The justifications put forward in the legal memoranda and elsewhere should be seen as a deliberate attempt to distort legal standards. Their repudiation must be coupled with prosecutions to demonstrate that no one is above the law.

Criminal prosecutions are vital to any effort to achieve true accountability. The positive effect of such measures is further enhanced if additional forms of accountability are also pursued. Measures such as an independent nonjudicial inquiry, institutional reform, and reparations are valuable complements that can fill in the broader picture and can point to needed policy reforms, ensure non-repetition, and attend to victims' redress.

On an international level, prosecutions will serve to restore U.S. credibility, which has been badly tarnished by its circumvention of the Geneva Conventions and distortion of the law to "justify" detainee abuse. In prosecuting these violations, the United States will take a major step toward restoring its position as a nation that advocates for human rights and accountability in the world.

ENDNOTES

- 1 Department of Justice, "Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees," August 24, 2009. Holder appointed Durham since he was already undertaking an investigation of the destruction of CIA videotapes of detainee interrogations, recognizing that he was familiar with relevant information and had already built a strong investigative team. *Ibid.*
- 2 During his confirmation hearings for Attorney General, senators questioned Michael Mukasey as to whether he believed waterboarding was torture; he demurred. Philip Shenon, "So Is Waterboarding Torture? Mukasey May Never Say," *New York Times*, January 26, 2008, <http://www.nytimes.com/2008/01/26/washington/26justice.html>. In contrast, during his confirmation hearings for Attorney General, when Eric Holder was faced with the same questions, he acknowledged that waterboarding is torture. Eric Lichtblau, "Nominee Wants Some Detainees Tried in the U.S.," *New York Times*, January 16, 2009, <http://www.nytimes.com/2009/01/16/us/politics/16holder.html>.
- 3 Other abuses committed in the course of anti-terror actions, such as prolonged or arbitrary detention, forced disappearances, "extraordinary rendition" and excessive use of force against civilians in Iraq or Afghanistan could be put to a similar analysis.
- 4 The examples in the subsequent footnotes are a small sample of the available documentation.
- 5 See, e.g., Department of Justice, Office of the Inspector General, Oversight and Review Division, *A Review of the FBI's Involvement and Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq*, May 2008 (hereinafter FBI Inspector General Review).
- 6 See, e.g., James R. Schlesinger, *Final Report of the Independent Panel to Review DOD Detention Operations*, special report made at the request of the Department of Defense, August 2004; Major General Antonio Taguba, *Article 15-6, Investigation of the 800th Military Police Brigade*, March 2004 (hereinafter Taguba Report).
- 7 Central Intelligence Agency Office of Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001-October 2003)*, special review, May 7, 2004 (hereinafter CIA-IG Report).
- 8 See, e.g., Senate Committee on Armed Services, *Inquiry into the Treatment of Detainees in U.S. Custody*, 110th Cong., 2d sess., 2008, Committee Print (hereinafter Senate Armed Services Committee Report).
- 9 See, e.g., International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees"* in CIA Custody, February 2007 (hereinafter 2007 ICRC Detainee Report).
- 10 See, e.g., Laurel Fletcher & Eric Stover, *The Guantánamo Effect: Exposing The Consequences of U.S. Detention and Interrogation Practices* (Berkeley and Los Angeles: University of California Press, 2009); Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by the U.S.* (Cambridge: Physicians for Human Rights, June 2008); Amnesty International, *USA: Human Dignity Denied—Torture and Accountability in the "War on Terror"* (New York: Amnesty International, 2004); Amnesty International, *USA: Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power* (New York: Amnesty International, 2005).
- 11 See, e.g., Fletcher & Stover, *Guantánamo Effect*.
- 12 See, e.g., Physicians for Human Rights and Human Rights First, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (Cambridge and New York: Human Rights First and Physicians for Human Rights, 2007); Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba* (New York: Center for Constitutional Rights, July 2006); Human Rights Watch, *"No Blood, No Foul," Soldiers' Accounts of Detainee Abuse in Iraq* (New York: Human Rights Watch, July 2006); Amnesty International, *Guantanamo and Beyond*; Amnesty International, *Human Dignity Denied*; Human Rights Watch, *The Road to Abu Ghraib* (New York: Human Rights Watch, June 2004).
- 13 See, e.g., William Glaberson, "U.S. Judge Challenges Evidence on a Detainee," *New York Times*, July 23, 2009, <http://www.nytimes.com/2009/07/23/us/23gitmo.html> (noting the torture of detainee Mohammed Jawad).
- 14 Tony Lagouranis & Allen Mikaelian, *Fear Up Harsh: An Army Interrogator's Dark Journey Through Iraq* (New York: Nal Caliber, 2007).
- 15 Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantánamo* (New York: Palgrave, Macmillan, 2008); Mozzam Begg, *Enemy Combatant: My Imprisonment at Guantánamo, Bagram and Kandahar* (New York: The New Press, 2006).
- 16 Many of the declassified documents have been made available through Freedom of Information Act (FOIA) requests and posted online by advocacy organizations, such as the American Civil Liberties Union (ACLU). See, e.g., American Civil Liberties Union, "ACLU Torture FOIA Search," <http://www.aclu.org/accountability/search.html> (accessed August 17, 2009); National Security Archives, "Torture Archive," http://www.gwu.edu/~nsarchiv/torture_archive/index.htm (accessed September 5, 2009).
- 17 See, e.g., Adam Zagorin, "Inside the Interrogation of Detainee 063," *Time*, June 12, 2005 (leaked interrogation log of Guantánamo prisoner, Mohamed al Qahtani).
- 18 Physicians for Human Rights, *Aiding Torture: Health Professionals' Ethics and Human Rights Violations Revealed in the May 2004 CIA Inspector General's Report* (Cambridge and Washington, D.C.: Physicians for Human Rights, August 2009), 4 n. 16 (citing the guidelines of the Office of Medical Services). The destruction of videotapes of the interrogation of CIA prisoners is under federal investigation. See, e.g., Mark Mazzetti, "Grand Jury Inquiry on Destruction of C.I.A. Tapes," *New York Times*, July 2, 2009, http://www.nytimes.com/2009/07/03/us/03inquire.html?_r=1&partner=rss&emc=rss.
- 19 Interrogation videotape of Omar Khadr at Guantánamo Bay, http://www.youtube.com/watch?v=aQHFFbD_-Pg (accessed August 11, 2009); Mark Mazzetti and Scott Shane, "Tapes' Destruction Hovers Over Detainee Cases," *New York Times*, March 2, 2008, <http://www.nytimes.com/2008/03/28/washington/28intel.html>.
- 20 Fletcher & Stover, *Guantánamo Effect*, 25, 41. In addition to the well-known photographs taken by guards at Abu Ghraib prison, dozens of other photographs have yet to be declassified. In FOIA litigation regarding these photographs, the government changed its litigation posture. It now opposes release and filed a petition for certiorari to the U.S. Supreme Court to overturn a court order requiring the release of the photographs. See ACLU, et al. v. Department of Defense, et al., 543 F.3d. 59 (2d Cir. 2008); Petition for Writ of Certiorari, U.S. Department of Defense, et al. v. ACLU, et al. (2009) (No. -----). See also Scott Wilson, "Obama Shifts on Abuse Photos," *Washington Post*, May 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/13/AR2009051301751.html>.
- 21 For example, researchers conducting one study were able to interview 62 former Guantánamo detainees from nine countries. See Fletcher & Stover, *Guantánamo Effect*, 13. The leaked ICRC report documents the experiences of 14 former CIA prisoners who were transferred to Guantánamo. International Committee of the Red Cross, *2007 ICRC Detainee Report*. Given the large numbers of former prisoners, these examples, and other reporting, capture a relatively small percentage of prisoner experience.
- 22 See, e.g., Walter Pincus, "Wearing Out the 'Classified' Stamp on Abu Zubaida," *Washington Post*, July 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/13/AR2009071303302.html>; American Civil Liberties Union, "CSRT Censorship," <http://www.aclu.org/safefree/torture/csrtfoia.html>.
- 23 Executive Order no. 13,491, 74 Fed. Reg. 4893 (January 27, 2009).
- 24 Throughout this paper, we discuss the systematic nature of the abuses and their widespread occurrence across the various detention sites. This finding is relevant to the question of assessing responsibility for a policy of abuse. It is beyond the scope of this paper to analyze whether these practices constitute crimes against humanity.
- 25 *Rasul v. Bush*, 542 U.S. 466 (2004). *Rasul* led to the ability of counsel to meet with prisoners at Guantánamo. However, many prisoners in custody in other prisons remained incommunicado.
- 26 The U.S. is a signatory to the four Geneva Conventions of 1949 and is required to give ICRC access to all prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, Art. 9 (hereinafter *Third Geneva Convention*). However, in February 2002, President Bush declared the Geneva Conventions did not apply to the war with al-Qaeda and that members of the Taliban did not qualify as prisoners of war. President George W. Bush, *Humane Treatment of Al Qaeda and Taliban Detainees*, memorandum for the Vice President, Secretary of State, Secretary of Defense, Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff, February 7, 2002, 1. In *Hamdan v. Rumsfeld*, the U.S. Supreme Court clarified that, at minimum, Common Article 3 of the four Geneva Conventions applied to Hamdan, a terrorism suspect associated with al-Qaeda and held in Guantánamo. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006).
- 27 Maj. Gen. Geoffrey Miller, who, in November 2002, replaced Gen. Michael Dunlavey as commander of Guantánamo, implemented this innovation at Guantánamo. He instituted coordination between the Joint Detention Group

- (guards) and the Joint Intelligence Group (interrogators). In his view, guards should 'set the conditions' for interrogations. As one commentator noted, "every aspect of the prisoner's physical existence...would be created to the interrogator's requirements." Andy Worthington, *The Guantánamo Files: The Stories of 774 Detainees in America's Illegal Prison* (London: Pluto Press, 2007), 192. Miller referred to GTMO as "the testing lab in the global war on terrorism." Eric Saar, *Inside the Wire* (New York: Penguin Press, 2005), 153.
- 28 Physicians for Human Rights, *Broken Laws, Broken Lives*, 58; Fletcher & Stover, *Guantánamo Effect*, 44-46, 57-62.
- 29 A memorandum, written by lawyers in the DOJ Office of Legal Counsel, concluded that a federal district court had no jurisdiction over a writ of habeas corpus from a Guantánamo Bay detainee. Patrick Philbin and John Yoo, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba*, memorandum for William J. Haynes, II, General Counsel, Department of Defense, December 28, 2001, 1, 5-6.
- 30 Andy Worthington, *Guantánamo Files*, 125.
- 31 Center for Constitutional Rights, *Report on Torture*, 14.
- 32 See Annex.
- 33 Physicians for Human Rights, *Broken Laws, Broken Lives*, 52-53; Human Rights Watch, *Locked Up Alone: Detention Conditions and Mental Health at Guantánamo* (New York: Human Rights Watch, June 2008), 9-13, 20-23 (describing psychological effects of incarceration in "supermax" facilities); Amnesty International, *United States of America, Cruel and Inhuman: Conditions of Isolation for Detainees at Guantánamo Bay* (London: Amnesty International, April 2007), 1.
- 34 Physicians for Human Rights, *Broken Laws, Broken Lives*, 58; John Goetz and Britta Sandberg, "Freed Guantánamo Detainees Claim Abuse Continues Under Obama," *San Francisco Sentinel*, July 21, 2009, <http://www.sanfranciscosentinel.com/?p=35790>.
- 35 Physicians for Human Rights, *Aiding Torture*, 3; Fletcher & Stover, *Guantánamo Effect*, 57-62.
- 36 See, e.g., Department of Justice, "United States Transfers Two Guantánamo Bay Detainees to the Government of Portugal," press release, August 28, 2009, <http://www.usdoj.gov/opa/pr/2009/August/09-ag-892.html>.
- 37 The most recent suicide was in June 2009. Associated Press, "Guantánamo Detainee Apparently Commits Suicide, U.S. Military Says," *Washington Post*, June 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/02/AR2009060203929.html>; "Military: Guantánamo Bay detainee dies of apparent suicide," *CNN.com*, June 2, 2009, <http://www.cnn.com/2009/US/06/02/GUANTANAMO.SUICIDE/index.html>. One of the six men, Abdul Razzak, apparently died of colorectal cancer. Associated Press, "Alleged Taliban Member Detained in Guantánamo Bay Dies of Cancer," *Washington Post*, December 31, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/30/AR2007123002423.html>.
- 38 Bill Means, "Guantánamo Detainee Loses Latest Legal Challenge," *CNNPolitics.com*, September 1, 2009, <http://www.cnn.com/2009/POLITICS/09/01/gitmo.detainee/>.
- 39 Esther Schrader, "Military to Probe Alleged Abuse of Afghan Prisoners," *Los Angeles Times*, February 12, 2002, <http://articles.latimes.com/2002/feb/12/news/mn-27601>.
- 40 See Annex.
- 41 Associated Press, "US Military Closes Largest Detention Camp in Iraq," *New York Times*, September 16, 2009, http://www.nytimes.com/aponline/2009/09/16/world/AP-ML-Iraq-US-Prison-Camp.html?_r=1. Roughly 90,000 detainees have been released from U.S. detention centers over the past six years, a process which will end sometime in 2010 when the last center will be turned over to Iraqi control. Approximately 10,000 remain in U.S. custody. See Campbell Robertson, "Iraqis Freed by U.S. Face Few Jobs and Little Hope," *New York Times*, August 6, 2009, http://www.nytimes.com/2009/08/07/world/middleeast/07detainees.html?_r=1.
- 42 Deborah Pearlstein and Priti Patel, *Behind the Wire: An Update to Ending Secret Detention* (New York: Human Rights First, 2005), 4.
- 43 Amnesty International, *Iraq: Memorandum on Concerns Relating to Law and Order* (New York: Amnesty International, July 2003) 11-12.
- 44 International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, February 2004, 4.
- 45 See Seymour Hersh, "Torture at Abu Ghraib," *New Yorker*, May 10, 2004; Rebecca Leung, "Abuse of Iraqi Prisoners by GIs Probed," *CBSNews.com*, April 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/6011/main614063.shtml>. The U.S. government is fighting a court-ordered release of an additional group of 21 photographs. See n. 20. Hundreds of photographs exist that relate to cases of alleged abuse from various detention sites. See Associated Press, "Report: Iraq Prisoner Abuse Photos Depict Torture, Rape," *USA Today*, May 29, 2009, http://www.usatoday.com/news/military/2009-05-28-iraq-abuse-photos_N.htm; Mark Benjamin, "Taguba Denies He's Seen Abuse Photos suppressed by Obama," May 30, 2009, *Salon.com*, <http://www.salon.com/news/feature/2009/05/30/taguba/index.html>.
- 46 Physicians for Human Rights, *Broken Laws, Broken Lives*, 18, 22, 25; Physicians for Human Rights, *Break Them Down, Systematic Use of Psychological Torture by U.S. Forces* (Cambridge: Physicians for Human Rights, May 2005), 3-7.
- 47 Physicians for Human Rights, *Broken Laws, Broken Lives*, 25.
- 48 Lagouranis & Mikaelian, *Fear Up Harsh*, 81-139.
- 49 Human Rights Watch, *No Blood, No Foul*, 14-15, 21, 22.
- 50 U.S. Department of the Army, Inspector General, *Detainee Operations Inspection*, July 21, 2004, 16; Human Rights First reports that 98 people have died in U.S. custody; the military says that in 34 cases, the persons were killed; 15 died of natural causes; 1 death was accidental; and for 48 persons, the cause of death is unknown. In Human Rights First's analysis, 45 homicides occurred and of these, at least eight if not twelve were the result of torture. Human Rights First, "Fact Sheet: Deaths in Custody by the Numbers," <http://www.humanrightsfirst.info/pdf/06217-etn-app-a-hrf-dic.pdf>. See also Annex.
- 51 Associated Press, "Pattern Cited in Killings of Civilians by U.S.," *New York Times*, September 4, 2007, <http://www.nytimes.com/2007/09/04/world/middleeast/04ACLU.html?fta=y>.
- 52 Human Rights Watch, "U.S. Failure to Provide Justice for Afghan Victims," press release, February 17, 2007, <http://www.hrw.org/en/news/2007/02/14/us-failure-provide-justice-afghan-victims>; Scott Shane, "CIA Contractor Guilty in Beating of Afghan Who Later Died," *New York Times*, May 31, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9D03E1DF153EF93BA2575BC0A9609C8B63>.
- 53 On his second day in office, President Barack Obama signed an executive order requiring the CIA to conform interrogations to Army Field Manual guidelines, ordering the closure "as expeditiously as possible" of detention facilities that it was operating, and banning the CIA from future detention operations. Executive Order no. 13491; Scott Shane, "CIA to Close Secret Overseas Prisons for Terrorism Suspects," *New York Times*, April 10, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9B02E6DA1639F933A25757COA96F9C8B63>. The U.S. continues to rely on foreign intelligence services, some with records of human rights abuses, to detain and interrogate terrorism suspects. See Eric Schmitt and Mark Mazzetti, "U.S. Relies More on Aid of Allies in Terror Cases," *New York Times*, May 23, 2009, <http://www.nytimes.com/2009/05/24/world/24intel.html>.
- 54 Jane Mayer, "The Black Sites," *New Yorker*, August 13, 2007.
- 55 See, e.g., William Fisher, "Rights-US: Dozens of CIA 'Ghost Prisoners' Missing," *Ipsnews.net*, April 24, 2009, <http://www.ipsnews.net/news.asp?idnews=46629> (reporting on continued disappearance of three dozen detainees); Amnesty International, Cageprisoners, Center for Human Rights and Global Justice, Center for Constitutional Rights, Human Rights Watch and Reprieve, *Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror"* (New York and London: Amnesty International, Cageprisoners, Center for Human Rights and Global Justice, Center for Constitutional Rights, Human Rights Watch and Reprieve, June 2007), 2.
- 56 European bodies have engaged in extensive investigation and reporting on the CIA sites to determine if any European countries housed CIA detainees or allowed airspace or air bases to be used for transport of suspects. See, e.g., Council of Europe, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees Involving the Council of Europe Member States: Second Report*, June 11, 2007, Doc. 11302 rev.; see also Matthew Cole, "Officials: Lithuania Hosted Secret Prison to Get 'Our Ear,'" *Abcnews.com*, August 20, 2009, <http://abcnews.go.com/print?id=8373807>.
- 57 Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the "War on Terror"* (New York: NYU School of Law, 2005), 1-2; Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.
- 58 President, "Remarks on the War on Terror," 42 *Weekly Comp. Pres. Doc.* 1570-1571 (September 11, 2006).
- 59 Mark Danner, "The ICRC Report and What It Means," *New York Review of Books* 56, no. 7 (2009).
- 60 International Committee of the Red Cross, *2007 ICRC Detainee Report*, 7.
- 61 Physicians for Human Rights, *Aiding Torture*, 2-6; International Committee of the Red Cross, *2007 ICRC Report*, 8, 10-15, 18. See also Human Rights Watch, *Ghost Prisoner: Two Years in Secret Detention* (New York: Human Rights Watch,

- 2007), 6-20 (account of Marwan Jabour, a Palestinian held in a CIA facility). See Annex.
- 62 *Background Paper on CIA's Combined Use of Interrogation Techniques*, memorandum to Dan Levin, transmitted by (redacted) Associate General Counsel, December 30, 2004.
- 63 *CIA-IG Report*, 42.
- 64 *Ibid.*, 70-72.
- 65 *Ibid.*, 72.
- 66 *Ibid.*, 42.
- 67 *Ibid.*, 42-43.
- 68 *Ibid.*, 69-70.
- 69 *Ibid.*, 44.
- 70 *Ibid.*, 36, 91.
- 71 *Ibid.*, 102.
- 72 Physicians for Human Rights, *Aiding Torture*, 1, 4.
- 73 As stated recently by Andrew Sullivan, "This was never about 'bad apples.' It is no longer even faintly plausible to argue that the mounds of identical documented abuses across every theater of combat in the war as it was conducted after January 2002 were a function of a handful of reservists improvising sadism on one night shift." Andrew Sullivan, "Dear President Bush," *The Atlantic*, October 2009.
- 74 See, e.g., American Civil Liberties Union, "ACLU Torture FOIA Search," <http://www.aclu.org/accountability/search.html> (accessed Sept. 10, 2009).
- 75 See, e.g., Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).
- 76 See, e.g., *Senate Armed Services Committee Report*.
- 77 Jan Crawford Greenburg, Howard L. Rosenberg, and Ariane de Vogue, "Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'" *ABCNews.com*, April 9, 2008, <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4583256&page=1>.
- 78 *Ibid.*
- 79 *Ibid.*
- 80 Scott Shane and Mark Mazzetti, "In Adopting Harsh Tactics, No Inquiry Into Past Use," *New York Times*, April 22, 2009, <http://www.nytimes.com/2009/04/22/us/politics/22detain.html>.
- 81 See Annex.
- 82 Abu Zubaydah, at the time of his capture, was thought to be a top level al-Qaeda operative, and President George W. Bush had described him as al-Qaeda's chief of operations. President, "Address to the Nation on the Proposed Department of Homeland Security," 38 Weekly Comp. Pres. Doc. 963 (June 10, 2002). However, according to court documents and interviews with current and former intelligence, law enforcement, and military sources, it appears that Zubaydah was not even an official member of al-Qaeda but rather a "fixer" who served as a sort of travel agent for jihadists seeking to participate in military training camps in Afghanistan. Peter Finn and Joby Warrick, "Detainee's Harsh Treatment Foiled No Plots," *Washington Post*, March 29, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html>.
- 83 *Senate Armed Services Committee Report*, 16.
- 84 John D. Rockefeller IV, *OLC Opinions on the CIA Detention and Interrogation Program*, submitted report for classification review, 111th Cong., 1st sess., April 22, 2009, S4561-S4566.
- 85 *Ibid.*
- 86 *Ibid.*; Margaret Talev, "Document: Cheney, Rice Signed Off on Interrogation Techniques," *McClatchydc.com*, April 22, 2009, <http://www.mcclatchydc.com/homepage/story/66727.html>.
- 87 Mark Mazzetti, "Bush Aides Linked to Talks on Interrogations," *New York Times*, September 24, 2008, <http://www.nytimes.com/2008/09/25/washington/25detain.html>. Some commentators have noted that while the use of "enhanced interrogation techniques" was approved for Zubaydah in a DOJ OLC opinion, as far as the public record currently indicates, authorization for use of similar methods had not been obtained for other CIA detainees. John Sifton, "The Torture Loophole," *DailyBeast.com*, September 1, 2009, <http://www.thedailybeast.com/blogs-and-stories/2009-09-01/a-prob> (noting that a set of unsigned "bullet points" which allegedly extended the plan for Zubaydah to others did not constitute the "official legal opinion" of the DOJ OLC).
- 88 Rockefeller IV, *OLC Opinions*.
- 89 Tenet also briefed Powell and Rumsfeld but this was a few months later. *Ibid.*; Talev, "Cheney, Rice Signed Off on Interrogation Techniques."
- 90 R. Jeffrey Smith and Peter Finn, "Harsh Methods Approved as Early as Summer 2002," *Washington Post*, April 23, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/22/AR2009042203141_2.
- 91 By May 2005, the DOJ had completed three more reviews of the program that came to the same conclusion. OLC memoranda, released by the Obama administration, provided guidelines as to what would be considered acceptable and legal techniques to use in the interrogation program. See Steven G. Bradbury, *Application of 18 U.S.C. §§2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Operatives*, memorandum for John A. Rizzo, May 10, 2005 (hereinafter *Combined Techniques Memo*); Steven G. Bradbury, *Application of 18 U.S.C. §§2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee*, memorandum for John A. Rizzo, May 10, 2005 (hereinafter *Detainee Interrogation Memo*); Steven G. Bradbury, *Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, memorandum for John A. Rizzo, May 30, 2005 (hereinafter *Application of United States Obligations*). See also R. Jeffrey Smith and Peter Finn, "Harsh Methods Approved as Early as Summer 2002," *Washington Post*, April 23, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/22/AR2009042203141_2.html?sid=ST2009042204035.
- 92 See, e.g., Sifton, "The Torture Loophole." Were the Principals Committee to have provided these "after-the-fact" approvals, possibly in both 2003 and 2005, then they might more likely be subject to investigation within the parameters of the mandate described by Attorney General Eric Holder to include those whose actions were outside the bounds of the law. *Ibid.* Sifton's inference is based on a series of recently released documents revealing the CIA's evolving interpretation of the law. See Scott W. Muller, *Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel*, draft memorandum to John Yoo, April 28, 2003; Counterterrorism Center, *Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel*, final memorandum to Patrick Philbin, June 16, 2003; Scott W. Muller, letter to assistant attorney general Jack Goldsmith III, March 2, 2004; Scott W. Muller, memorandum to John Bellinger III, July 2, 2004.
- 93 President, "Remarks on the War on Terror," 1571.
- 94 Executive Order no. 13440, 72 Fed. Reg., 40707-40709 (July 2007); Karen DeYoung, "Bush Approves New CIA Methods," *Washington Post*, July 21, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/20/AR2007072001264.html>.
- 95 President, *Humane Treatment of Al Qaeda and Taliban Detainees Memo*.
- 96 John W. Dean, "Q&A Session on Bad Advice: Bush's Lawyers in The War on Terror," *Findlaw.com*, May 1, 2009, <http://writ.news.findlaw.com/dean/20090501.html>.
- 97 *Senate Armed Services Committee Report*, 31 n. 224.
- 98 For an excellent chronology of the evolution of DOJ Office of Legal Counsel (OLC) legal opinions, both written and oral, in connection with the decisions of policy-makers in the design and authorization of the CIA detention and interrogation program, see generally, Rockefeller IV, *OLC Opinions*; See also Tom Lasseter, "Easing of Laws that Led to Detainee Abuse Hatched in Secret," *McClatchydc.com*, June 18, 2008, <http://www.mcclatchydc.com/detainees/story/38886.html>.
- 99 Mark Mazzetti and Scott Shane, "Interrogation Memos Detail Harsh Tactics by the CIA," *New York Times*, April 16, 2009, <http://www.nytimes.com/2009/04/17/us/politics/17detain.html>. Before drafting the August 1, 2002 opinions, Deputy Assistant Attorney General John Yoo had met with Gonzales and Addington to discuss the subjects that he would address in the memos. Rice also stated that she understood that the DOJ's legal advice to the CIA "was being coordinated by Counsel to the President Alberto Gonzales." *Senate Armed Services Committee Report*, 31-32.
- 100 Jay Bybee, *Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A*, memorandum for Alberto R. Gonzales, August 1, 2002 (hereinafter *August 2002 Memo to Gonzales*).
- 101 Mary Louise Kelly, "In Torture Memo Furor, Rizzo's Name Is At the Top," *National Public Radio*, May 25, 2009, <http://www.npr.org/templates/story/story.php?storyId=103590884>.
- 102 *Senate Armed Services Committee Report*, 35. See also Scott Shane and Mark Mazzetti, "Report Shows Tight C.I.A. Control on Interrogations," *New York Times*, August 25, 2009, http://www.nytimes.com/2009/08/26/us/26prison.html?_r=1&scp=1&sq=Mazzetti%20and%20shane%20strict%20rules%20for%20CIA%20interrogation&st=cse (reporting that a week before completing these first opinions authorizing the use of physical and mental torture, John Yoo was sent a "six page 'psychological assessment' of the first man the brutal methods would be used on, Abu Zubaydah."). The legal memorandum to Rizzo itself reflects that the author or authors relied on assurances from the CIA that the "enhanced" interrogation technique would

- not have long-term negative effects on detainees. These assurances were based on representations from a consultant who had experience with SERE training and the fact that “relevant literature had been reviewed that yielded no information on the long term effects of sleep deprivation.” Jay Bybee, *Interrogation of al Qaeda Operative*, memorandum for John Rizzo, August 1, 2002, 5-6. Physicians for Human Rights recently concluded that “the notion that these abusive techniques can be used safely has no basis in medical science and is not supported by an extensive peer-reviewed literature. From a medical, scientific and common sense perspective, the idea that such abusive and inhumane techniques can be safely deployed is unsupportable.” Physicians for Human Rights, *Aiding Torture*, 5. As the report noted, “... in a striking example of bootstrapping, they [OLC lawyers] turned for advice about the pain caused by the techniques to the very health professions who were implementing them.” *Ibid.*
- 103 Tom Baldwin, “Torture Memos Acted as a ‘Golden Shield’ to Help American Interrogators Try to Stay Within the Law,” *Times* (London), April 18, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6116281.ece. The memoranda were framed as analyses of the applicability of the criminal Torture Act (18 U.S.C. §2340) to the acts of interrogators. See Bybee, *August 2002 Memo to Gonzales*.
- 104 See Bybee, *August 2002 Memo to Gonzales*, 39-46. This memorandum also relied heavily on the argument that prosecutions would violate the President’s constitutional authority to “wage a military campaign.” *Ibid.*, 31-38.
- 105 *Senate Armed Services Committee Report*, 146-147.
- 106 Daniel Levin, letter to John Rizzo, August 6, 2004, <http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc74.pdf>. See also Mark Mazzetti and Scott Shane, “Report Shows Tight CIA Control on Interrogations,” *New York Times*, August 25, 2009, http://www.nytimes.com/2009/08/26/us/26prison.html?_r=1&scp=1&sq=Mazzetti%20and%20shane%20strict%20rules%20for%20CIA%20interrogation&st=cse.
- 107 Daniel Levin, *Legal Standards Applicable Under 18 U.S.C. §§2340-2340A*, memorandum for James B. Comey, December 30, 2004. Levin apparently had himself subjected to waterboarding in order to inform his analysis of different interrogation techniques before preparing the memo. Jan Crawford Greenburg and Ariane de Vogue, “Bush Administration Blocked Waterboarding Critic,” *ABCNews.com*, November 2, 2007, <http://abcnews.go.com/WN/DOJ/story?id=3814076>.
- 108 Levin, *Legal Standards*.
- 109 *Ibid.*, 2 n. 8.
- 110 Associate General Counsel, CIA, “Re: Background Paper on C.I.A.’s Use of Combined Interrogation Techniques,” letter to Daniel Levin, Dec. 30, 2004, <http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004DOC71.pdf>. This letter was declassified and released on August 24, 2009 in response to FOIA litigation by the ACLU and others. The name of the author was redacted from the released version of the letter.
- 111 See Bradbury, *Combined Techniques Memo*; Bradbury, *Detainee Interrogation Memo*; Bradbury, *Application of United States Obligations*.
- 112 James B. Comey, e-mail to Chuck Rosenberg, April 27, 2005, <http://documents.nytimes.com/justice-department-communication-on-interrogation-opinions#p=1>.
- 113 Some have already suggested this connection. See Sifton, “The Torture Loophole.” See also Editorial, “Dick Cheney’s Version,” *New York Times*, September 3, 2009, <http://www.nytimes.com/2009/09/03/opinion/03thu1.html> (“...those [legal] opinions were based on a corrupt and widely discredited legal analysis cooked up after the White House had already decided to use long-banned practices like waterboarding.”).
- 114 *Senate Armed Services Committee Report*, xiii.
- 115 SERE techniques were modeled after torture methods used against American soldiers by Chinese Communist interrogators during the Korean War, which, in turn, had produced false confessions. These methods had included “shackling the Americans to force them to stand for hours, keeping them in cold cells, disrupting their sleep and limiting access to food and hygiene.” According to a government study from that era, these practices were labeled “torture.” Shane & Mazzetti, “In Adopting Harsh Tactics, No Inquiry Into Past Use.”
- 116 *Ibid.*
- 117 *Senate Armed Services Committee Report*, xiii, 9. SERE used waterboarding as a part of its training, but the practice recently has been discontinued. *Ibid.*, xiii.
- 118 According to the *CIA-IG Report*, the “Office of Medical Services contends that... the SERE waterboard experience is so different from the subsequent Agency usage as to make it almost irrelevant.” *CIA IG Report*, 22 n. 26. The same report notes that, “One of the psychologists/interrogators acknowledged that the Agency’s use of the technique differed from that used in SERE training and explained that the Agency’s technique is different because it is ‘for real’ and is more poignant and convincing.” *Ibid.*, 37.
- 119 *Senate Armed Services Committee Report*, 3-4, 6.
- 120 Shane & Mazzetti, “In Adopting Harsh Tactics, No Inquiry Into Past Use.”
- 121 *Senate Armed Services Committee Report*, 6-7. Mitchell was a proponent of forcing detainees into a state of “learned helplessness” which he believed would make the captured suspects more compliant. Scott Shane, “Interrogation Inc.: Two U.S. Architects of Harsh Tactics in 9/11’s Wake,” *New York Times*, August 11, 2009, <http://www.nytimes.com/2009/08/12/us/12psychs.html>.
- 122 In December 2001, the CIA gave Mitchell an al-Qaeda manual which taught interrogation resistance techniques. Mitchell enlisted Jessen to work on the project, and together they put together a proposal to use harsh tactics including slapping, stress positions, sleep deprivation, wall slamming and waterboarding in an American interrogation program for terrorism suspects. Shane, “Interrogation Inc.”
- 123 *Senate Armed Services Committee Report*, 7-8.
- 124 *Ibid.*, 8-9.
- 125 Matthew Cole, “FBI Whistleblower Testimony: Gonzales Imposed Brutal Interrogation Tactics,” *ABCNews.com*, May 12, 2009, <http://abcnews.go.com/Blotter/Story?id=7560666&page=1>. Former FBI agent Ali Soufan testified before Congress that he and other FBI agents had used “rapport building” techniques with Zubaydah, and Zubaydah had cooperated with them. When his abuse began, he refused to talk. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Hearings on What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration*, 111th Cong., 1st sess., May 13, 2009 (Ali Soufan testimony).
- 126 At the time of Secretary of Defense Rumsfeld’s approval of “enhanced” interrogation, the Army Field Manual (AFM) controlled the conduct of human intelligence operations. The techniques approved went far beyond the AFM’s parameters. See U.S. Department of the Army, FM 34-52 *Intelligence Interrogation*, September 28, 1992. In 2006, this part of the AFM was revised and superseded by AFM 2-22.3. The revision followed the passage of the Detainee Treatment Act (DTA), which made clear that interrogation techniques not included in FM 34-52 were barred and were to be considered illegal for the actions of U.S. soldiers, including prohibitions on methods such as sexual humiliation, waterboarding, and mock executions. U.S. Department of the Army, “Army Publishes New Intelligence Manual,” press release, September 6, 2006; U.S. Department of the Army, FM 2-22.3 (FM 34-52): *Human Intelligence Collector Operations*, September 2006.
- 127 See Annex.
- 128 Key exceptions were the interrogations of Mohamed al Qahtani and Mohamedou Ould Slahi, whose interrogations were personally approved by Secretary of Defense Rumsfeld. See *FBI Inspector General Review*, 75,123; Josh White, “Abu Ghraib Tactics Were First Used at Guantánamo,” *Washington Post*, July 14, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/13/AR2005071302380.html>.
- 129 Richard Shiffrin, DOD’s Deputy General Counsel for Intelligence, testified that he was “under pressure” from his superior Jim Haynes to get material to him about the SERE program and interrogation techniques. *Senate Armed Services Committee Report*, 23, 26. Maj. Gen. Dunlavey, the GTMO commander, reported a February 2002 private meeting with Rumsfeld in which the Secretary of Defense urged Dunlavey to “maximize the intelligence production” and to report directly to him. Philippe Sands, “The Green Light,” *Vanity Fair*, May 2008 and see Sands, *Torture Team: Rumsfeld’s Memo and the Betrayal of American Values*, rev. ed. (2008; repr., New York: Palgrave Macmillan, 2009). GTMO Interrogation Control Element Chief David Becker reported that on several occasions Dunlavey had advised him that Deputy Defense Secretary Wolfowitz’s office had called to express concerns about the insufficient intelligence production at Guantánamo and to obtain more aggressive interrogation techniques. *Senate Armed Services Committee Report*, 23, 26.
- 130 *Senate Armed Services Committee Report*, xvi.
- 131 *Ibid.*, 49. See also Philippe Sands, “The Complicit General,” *New York Review of Books* 56, no. 14 (September 2009).
- 132 *Senate Armed Services Committee Report*, 50.
- 133 *Ibid.* Behavioral Science Consultation Teams (BSCT) were special units of psychologists and other behavioral science personnel who worked closely with interrogators, including sitting in on interrogations, coaching interrogators on how to coerce information from detainees, and setting conditions of the camp experience to get maximal information from detainees. See, e.g., Fletcher & Stover, *Guantánamo Effect*, 60-61.

- 134 *Senate Armed Services Committee Report*, 50.
- 135 *Ibid.*, 53.
- 136 Fredman explained....“severe physical pain [is] described as anything causing permanent damage to major organs or body parts. Mental torture [is] described as anything leading to permanent, profound damage to the senses or personality. It is basically subject to perception. If the detainee dies you’re doing it wrong. So far the techniques we have addressed have not proven to produce these types of results....” Department of Defense, *Counter Resistance Strategy Meeting Minutes*, October 2, 2002, 3.
- 137 *Ibid.*, 3-4.
- 138 *Senate Armed Services Committee Report*, 63-64. Beaver concluded that she did not have to engage in an international law analysis since the President had determined that the prisoners were not enemy prisoners of war as defined under the Geneva Conventions. LTC Diane Beaver, *Legal Brief on Proposed Counter-Resistance Strategies*, memorandum for Commander, Joint Task Force 170, October 11, 2002, 1-2. Beaver reviewed a list of requested interrogation techniques that were categorized into three groups based on escalating use of physical force or deprivation, such as yelling and deception (Category I); stress positions, clothing removal, or use of phobias (Category II); and death threats, “walling,” or waterboarding (Category III). Of the 18 techniques requested for use, 2 were classified as Category I, 12 were Category II, and 4 were Category III. See LTC Jerald Phifer, *Request for Approval of Counter-Resistance Strategies*, memorandum for Commander, Joint Task Force 170, October 11, 2002. Beaver cautioned that it would be “advisable” to gain “permission or immunity in advance” to undertake some of the physical actions against detainees; she further recommended that “all proposed interrogations involving category II and III methods must undergo a legal, medical, behavioral science, and intelligence review prior to their commencement.” Beaver, *Legal Brief on Proposed Counter-Resistance Strategies*, 7.
- 139 Phifer’s memorandum relied largely on the BSCT memorandum. Phifer said that he had expressed discomfort with some of the techniques mentioned, but Dunlavey had pressured him to finish the request. *Senate Armed Services Committee Report*, 61, 63.
- 140 *Ibid.*, 65; Maj. Gen. Michael Dunlavey, *Counter-Resistance Strategies*, memorandum to USSOUTHCOM Commander General James T. Hill, October 11, 2002.
- 141 *Senate Armed Services Committee Report*, 66; Gen. James T. Hill, *Counter-Resistance Techniques*, memorandum for Richard Myers, October 25, 2002.
- 142 *Senate Armed Services Committee Report*, 67-69; U.S. Department of the Air Force, *Counter-Resistance Techniques*, memorandum for UN and Multilateral Affairs Division (J-5), Joint Staff, November 1, 2002; U.S. Department of the Navy, *Navy Planner’s Memo WRT Counter-Resistance Techniques (SJS 02-00697)*, November 4, 2002; U.S. Marine Corps, Service Planner, *Counter-Resistance Techniques*, memorandum for Director, J-5, The Joint Staff, November 4, 2002; U.S. Army Deputy to the Assistant Deputy Chief of Staff for Operations and Plans (Joint Affairs), SJS 02-06697, memorandum for Legal Counsel to Chairman, Joint Chiefs of Staff, November 7, 2002; U.S. Department of the Army, Office of the Judge Advocate (International and Operational Law), *Review—Proposed Counter-Resistance Techniques*, undated.
- 143 Mark Benjamin, “Bush’s Top General Quashed Torture Dissent,” *Salon.com*, June 30, 2008, http://www.salon.com/news/feature/2008/06/30/richard_myers/.
- 144 Dalton reported that Myers was well aware that the military services believed the interrogation techniques might be against the law. *Senate Armed Services Committee Report*, 71-72. See also Sands, “The Complicit General.”
- 145 *Senate Armed Services Committee Report*, 73.
- 146 *Ibid.*, 73.
- 147 *Ibid.*, 74.
- 148 See Joint Task Force Guantanamo, “Timeline,” <http://www.jtfgtmo.southcom.mil/index/JTFGBrochurePg3.pdf>. See also Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon and Schuster, 2006), 96; Fletcher & Stover, *Guantánamo Effect*, 43-44. According to Fletcher and Stover, this integration was at the behest of the Secretary of Defense.
- 149 Fletcher & Stover, *Guantánamo Effect*, 43-44.
- 150 *Senate Armed Services Committee Report*, 74-75.
- 151 *Ibid.*, 75-78; Zagorin, “Inside the Interrogation of Detainee 063.” At some point, Secretary of Defense Rumsfeld also approved the interrogation plan for al Qahtani, *Senate Armed Services Committee Report*, 80. One phase of the interrogation plan, entitled “Coalition Exploitation,” seemed to involve sending al-Qahtani to a third state to “allow those countries to employ interrogation techniques that will enable them to obtain the requisite information.” *Ibid.*, 78; *FBI Inspector General Review*, 87-88. Susan Crawford, convening authority for the Guantánamo military commissions, stated that al-Qahtani’s treatment at GTMO “met the legal definition of torture.” Bob Woodward, “Detainee Tortured, Says US Official,” *Washington Post*, January 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html>.
- 152 Hill approved the use of all Category I and II “counter-resistance” techniques against al-Qahtani. *Senate Armed Services Committee Report*, 75. For discussion of Category I and II techniques, see n. 138.
- 153 *Senate Armed Services Committee Report*, 78-79; *FBI Inspector General Review*, 88-89.
- 154 The three other Category III techniques (use of threats of death or harm to detainee or detainee’s family, exposure to water or cold, and waterboarding) were viewed by Haynes as legally available, but he stated that a blanket approval was “not warranted at this time.” William J. Haynes II, *Counter-Resistance Techniques*, memorandum for Secretary of Defense Donald Rumsfeld, November 27, 2002, 1. See also Phifer, *Request for Approval of Counter-Resistance Strategies*, 2-3 and n. 138 for discussion of categories of techniques.
- 155 *Senate Armed Services Committee Report*, 96.
- 156 *Ibid.* According to Haynes, his recommendation came after Rumsfeld expressed exasperation that he had yet to receive a recommendation on the October 11, 2002 GTMO request. *Senate Armed Services Committee Report*, 94.
- 157 Although Haynes had access to the military memoranda questioning the legality of the requested techniques, he apparently relied solely on Beaver’s brief analysis, despite others finding fault with it. *Senate Armed Services Committee Report*, 70-71, 95. For example, Dalton found the Beaver legal analysis “woefully inadequate” and reliant on a methodology and conclusions that were “very strained.” *Ibid.*, 70. Even Beaver testified that she was “shocked” that the DOD relied upon her opinion. *Ibid.*, 96.
- 158 Rumsfeld signed off on Haynes’ memo to him on December 2, 2002 and notably scribbled at the bottom, “I stand for 8-10 hours a day. Why is standing limited to 4 hours?” See Haynes, *Counter-Resistance Techniques*.
- 159 *Senate Armed Services Committee Report*, 97.
- 160 *Ibid.*, 106-107.
- 161 Alberto Mora, *Statement for the Record: Office of General Counsel Involvement in Interrogation Issues*, memorandum for Inspector General, Department of the Navy, July 7, 2004, 15.
- 162 Donald Rumsfeld, *Counter-Resistance Techniques*, memorandum for Commander U.S. Southern Command, January 15, 2003; *Senate Armed Services Committee Report*, 108.
- 163 Rumsfeld, *Counter-Resistance Techniques*.
- 164 *Ibid.*; *Senate Armed Services Committee Report*, 110.
- 165 *Senate Armed Services Committee Report*, 110-122, 130.
- 166 *Ibid.*, 119, 121-122, 126-127.
- 167 *Ibid.*, 120; John Yoo, *Military Interrogations of Alien Unlawful Combatants Held Outside the United States*, memorandum for William J. Haynes II, March 14, 2003.
- 168 See Department of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, April 4, 2003; Rumsfeld, *Counter-Resistance Techniques*.
- 169 Rumsfeld, *Counter-Resistance Techniques*, Tab A.
- 170 *Ibid.*, 1.
- 171 For example, Mohammed Jawad, a Guantánamo detainee, was subjected to the so-called “frequent flier program,” in May 2004. He was moved repeatedly from one detention cell to another at short intervals and usually at night, in order to facilitate sleep deprivation—despite the fact that this tactic was banned at the facility in March 2004. Jawad was apparently moved 112 times in 14 days. Josh White, “Detainees Attorney Seeks Dismissal Over Abuse,” *Washington Post*, June 8, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/07/AR2008060701904.html>. Goldsmith rescinded the March 14, 2003 Yoo memo in December 2003. The Bybee memo to Gonzales from August 1, 2002 was withdrawn by Goldsmith in June 2004. See *Senate Armed Services Committee Report*, 147.
- 172 For example, a 2004 report by Human Rights Watch detailed allegations of abuse by U.S. forces in Afghanistan, dating from early 2002. See Human Rights Watch, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan* (New York: Human Rights Watch, 2004).
- 173 *Senate Armed Services Committee Report*, 20, 150.
- 174 *Ibid.*, 153.
- 175 *Ibid.*, 151.
- 176 *Ibid.*, 54; Department of Defense, “Counter Resistance Strategy Meeting Minutes,” October 2, 2002, 3-4.

- 177 Douglas Jehland and Neil A. Lewis, "U.S. Disputed Protected Status of Iraq Inmates," *New York Times*, May 23, 2004, <http://www.nytimes.com/2004/05/23/international/middleeast/23IRAQ.html>.
- 178 *Senate Armed Services Committee Report*, 159-160.
- 179 *Taguba Report*. Former Brigadier General Janis Karpinski, who was the head of the 800th Military Police Brigade, recalled that Miller told her he wanted to "Gitmo-ize" Abu Ghraib. R. Jeffrey Smith and Josh White, "General Asserts She Was Overruled on Prison Moves," *Washington Post*, May 12, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A19081-2004May11.html>.
- 180 Tim Golden and Eric Schmitt, "General Took Guantánamo Rules to Iraq for Handling of Prisoners," *New York Times*, May 13, 2004, <http://www.nytimes.com/2004/05/13/politics/13MILL.html>.
- 181 *Senate Armed Services Committee Report*, 165. Wood stated that interrogators had used sleep deprivation and stress positions in Afghanistan, and that she had used her "best judgment and concluded [the techniques] would be effective tools for interrogations" at Abu Ghraib. *Ibid.*, 166.
- 182 Lt. Gen. Ricardo S. Sanchez, *CJTF-7 Interrogation and Counter-Resistance Policy*, memorandum for Commander, USSOUTHCOM, September 14, 2003, Enclosure 1 (hereinafter *September 2003 Memo*); Lt. Gen. Ricardo S. Sanchez, *CJTF-7 Interrogation and Counter-Resistance Policy*, memorandum for C2 and C3, Combined Joint Task Force Seven and Commander, 205th Military Intelligence Brigade, October 12, 2003, 3-5 (hereinafter *October 2003 Memo*). According to Sanchez, the first list of techniques, approved on September 14, 2003, used the Secretary of Defense's April 16, 2003 guidance for Guantanamo as its basis. *Senate Armed Services Committee Report*, 201; Donald Rumsfeld, *Counter-Resistance Techniques*, Tab A. Sanchez's list of approved techniques also relied on techniques that CPT Wood had copied from the Special Mission Unit Task Force in Iraq's interrogation policy. *Senate Armed Services Committee Report*, 201; Sanchez, *September 2003 Memo*, Enclosure, 1. The second set of approved techniques, dated October 12, 2003, eliminated all techniques not listed in either the 1987 or 1992 versions of Army Field Manual 34-52, including dietary manipulation, environmental manipulation, sleep adjustment, false flag, presence of military working dogs, sleep management, stress positions, and yelling, loud music, and light control. However, the memo allowed personnel to use unlisted techniques, subject to legal review and approval by Sanchez. Sanchez, *October 2003 Memo*, 3-5; *Senate Armed Services Committee Report*, 204-205.
- 183 *Senate Armed Services Committee Report*, 197-198, 201.
- 184 *Ibid.*, 222.
- 185 *Ibid.*, 224.
- 186 See, e.g., Eric Schmitt, "Pentagon Seeks to Overhaul Prisons in Afghanistan," *New York Times*, July 19, 2009, <http://www.nytimes.com/2009/07/20/world/asia/20detain.html>; Ian Fishback, "A Matter of Honor," *Washington Post*, September 28, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/27/AR2005092701527.html>.
- 187 See Annex; Sullivan, "Dear President Bush" ("... a systematic pattern of prisoner mistreatment in every theater of combat, by almost all branches of the armed services, and in every major detention facility in Iraq where interrogation took place"); Fletcher & Stover, *Guantánamo Effect*, 69-73, 77-83.
- 188 As the Senate Armed Services Committee report concluded, "The abuse of detainees at Abu Ghraib in late 2003 was not simply the result of a few soldiers acting on their own. Interrogation techniques such as stripping detainees of their clothes, placing them in stress positions, and using military working dogs to intimidate them appeared in Iraq only after they had been approved for use in Afghanistan and at GTMO. Secretary of Defense Donald Rumsfeld's December 2, 2002 authorization of aggressive interrogation techniques and subsequent interrogation policies and plans approved by senior military and civilian officials conveyed the message that physical pressure and degradation were appropriate treatment for detainees." *Senate Armed Services Committee Report*, xxix.
- 189 Richard B. Cheney, "Remarks before the American Enterprise Institute," speech, May 21, 2009, <http://www.aei.org/speech/100050>. Cheney said, "In public discussion of these matters, there has been a strange and sometimes willful attempt to conflate what happened at Abu Ghraib prison with the top secret program of enhanced interrogations. At Abu Ghraib, a few sadistic prison guards abused inmates in violation of American law, military regulations, and simple decency. For the harm they did, to Iraqi prisoners and to America's cause, they deserved and received Army justice. And it takes a deeply unfair cast of mind to equate the disgraces of Abu Ghraib with the lawful, skillful, and entirely honorable work of CIA personnel trained to deal with a few malevolent men." Former Vice President Cheney's argument is similar to that of former South African President F.W. de Klerk in his statements before that country's Truth and Reconciliation Commission. It is well-known that the South African police under apartheid was widely implicated in torture, murder and disappearances. Nonetheless, De Klerk stated that: "The National Party is prepared to accept responsibility for the policies that it adopted and for the actions taken by its office-bearers in the implementation of those policies. It is, however not prepared to accept responsibility for the criminal actions of a handful of operatives of the security forces of which the Party was not aware and which it never would have condoned." F.W. de Klerk, "Testimony before the South African Truth and Reconciliation Commission," *Truth and Reconciliation Commission of South Africa Report Vol. 2* (London: Macmillan Reference Limited 1998), 218-19.
- 190 Richard Cheney, interview by Chris Wallace, *FOX News Sunday*, FOX News, August 31, 2009, <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003195483>. But see Editorial, "Dick Cheney's Version."
- 191 See e.g., Woodward, "Detainee Tortured, Says U.S. Official," *2007 ICRC Detainee Report*, 26; *2004 ICRC Report*; *Taguba Report*.
- 192 For an extensive discussion on the reasons for prosecution in the aftermath of widespread human rights violations, see Carlos Nino, "The Morality of Punishing and Investigating Human Rights Violations," in *Radical Evil on Trial* (New Haven: Yale University Press, 1996).
- 193 For example, an open letter signed by a group of former interrogators and intelligence officers noted that "to ignore evidence of criminal wrongdoing would incentivize future breaches of the law." See Jack Cloonan, Steven Kleinman & Matthew Alexander, "Independent Nonpartisan Commission Needed to Assess Policy Making that Led to Use of Torture and Cruelty in Interrogation," letter to Sen. Diane Feinstein, Sen. Patrick Leahy, Rep. Silvestre Reyes, and Rep. John Conyers, August 21, 2009, http://www.cvt.org/files/pg1/Cloonan-Kleinman-Alexander%20Letter_21Aug09.pdf.
- 194 Douglas A. Johnson, Executive Director of the Center for Victims of Torture, argues that "One of the strengths of the American justice system is impartial judges and citizen juries who take seriously their task to determine the facts and consider appropriate punishment under the circumstances." Douglas A. Johnson, "Should a Special Prosecutor be Named to Investigate Torture? Yes," *Minneapolis Star-Tribune*, August 21, 2009, <http://www.startribune.com/opinion/commentary/53992302.html?el>.
- 195 Nino, *Radical Evil on Trial*, 146.
- 196 UN General Assembly, "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," December 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 (1988), Art. 2(2) (hereinafter "Torture Convention").
- 197 Cloonan, Kleinman & Alexander, "Independent Nonpartisan Commission," 2. ("Policy makers ignored the advice of experienced interrogators, counterterrorism experts and respected military leaders who warned that using torture and cruelty would be ineffective and counter-productive. The path we chose came with heavy costs. Key allies, in some instances, refused to share needed intelligence, terrorist attacks increased world wide, and al Qaeda and like-minded groups recruited a new generation of Jihadists.") *Ibid.*
- 198 White House, Office of the Press Secretary, "Statement of President Barack Obama on Release of OLC Memos," press release, April 16, 2009, http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/.
- 199 It is true that the Argentine trials subsequently encountered backlash, resulting in two laws to limit future prosecutions and in pardons for those convicted. Nonetheless, the importance of the historical precedent should not be underestimated, and Argentina's amnesty law was eventually repealed, paving the way for a second round of trials for crimes committed under the *junta*. See Uki Goni, "Argentina's Junta Trials to Resume," *Guardian* (Manchester, UK), June 15, 2005, <http://www.guardian.co.uk/world/2005/jun/15/argentina.ukigoni>; BBC News, "Argentine Ex-Ruler to Go on Trial," *BBCNews.com*, April 24, 2007, <http://news.bbc.co.uk/2/hi/americas/6586853.stm>.
- 200 Adriana Leon and Chris Kraul, "Ex-Peru President Fujimori Convicted of Mass Murder, Kidnapping," *Los Angeles Times*, April 8, 2009, <http://articles.latimes.com/2009/apr/08/world/fg-fujimori8>.
- 201 CNN, "Chile Seeks Arrests for Alleged Human Rights Violations," *CNN.com*, September 1, 2009, <http://www.cnn.com/2009/WORLD/americas/09/01/chile.dirty.war/>.
- 202 In Colombia, demobilized paramilitaries are liable to be tried under the Justice and Peace Law (Law 975), although they may be eligible for reduced sentences. Uganda has recently established a War Crimes Division within its High Court to try those responsible for crimes against humanity and war crimes. Reuters, "Rebels and Ugandan Government Agree to Terms of Prosecutions of War Crimes," *New York Times*, February 20, 2008, <http://www.nytimes.com/2008/02/20/world/africa/20uganda.html?fta=y>.

- 203 For example, during a Senate Judiciary Committee hearing on the role of the OLC, Professor Robert F. Turner stated, “The Republicans came into power in 1953 but didn’t prosecute Franklin D. Roosevelt and his excesses (such as the Japanese detention) because they knew that in times of great crisis good people can do wrong.” Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, Prepared Statement of Professor Robert F. Turner, SJD, 111th Cong., 1st sess., May 13, 2009, 6.
- 204 The South African Truth and Reconciliation Commission noted in its final report that: “it has always been understood that, where amnesty has not been applied for, it is incumbent on the present state to have a bold prosecution policy in order to avoid any suggestion of impunity or of contravening its obligations in terms of international law.” *Truth and Reconciliation Commission of South Africa Report*, Vol. 6, sec. 5, ch. 1, para 24, <http://www.info.gov.za/otherdocs/2003/trc/rep.pdf>.
- 205 Karin Brulliard, “Apartheid’s Intractable Legacy,” *Washington Post*, February 15, 2009, <http://www.washingtonpost.com/wp-dyn/content/story/2009/02/14/ST2009021400824.html>.
- 206 See, e.g., Editorial, “Dick Cheney’s Version” (comparing views of former Vice President Cheney and that of interrogators).
- 207 William Faulkner, *Requiem for a Nun* (New York: Vintage, 1975).
- 208 *Third Geneva Convention*, Art. 3. The United States became a State Party to the Geneva Conventions in 1955. International Committee of the Red Cross, “State Parties to the Geneva Conventions,” <http://www.icrc.org/IHL.NSF/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument>. In *Hamdan v. Rumsfeld*, the U.S. Supreme Court found that Common Article 3 of the Geneva Conventions was applicable to the conflict with al-Qaeda. 548 U.S. 557 (2006), 630-632.
- 209 “Torture Convention” Art. 3. The U.S. ratified the Torture Convention in 1994. UN Office of the High Commissioner of Human Rights, “Status of Ratification of the Convention Against Torture,” <http://www2.ohchr.org/english/law/cat-ratify.htm>.
- 210 See, e.g., *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for an Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, para. 134, Case No. IT-94-1-AR72 (October 2, 1995); *Prosecutor v. Kunarac et al.*, Judgment, ICTY Appeals Chamber, para. 68, Case No. IT-96-23 & IT-96-23/1-A (June 12, 2002). See also Nigel Rodley & Matt Pollard, *The Treatment of Prisoners Under International Law*, 3rd ed. (Oxford University Press, 2009), 180-194. The ICRC periodically publishes a report of rules of international customary humanitarian law, compiled from state practice and conduct in recent wars. Rule 158 of the report states that “States must investigate war crimes allegedly committed by their nationals or armed forces or on their territory, and if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC 2005), 607.
- 211 “Torture Convention” Arts. 2, 4, 6, 6(1) (“Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.”) In 1994, Congress enacted a law, codified at 18 U.S.C. § 2340, implementing the Torture Convention, which criminalizes acts of torture committed outside United States territory. The law extends U.S. criminal jurisdiction “over any act of (or attempt to commit) torture outside the United States by a United States national or by an alleged offender present in the United States regardless of his or her nationality. It permits the criminal prosecution of alleged torturers in federal courts in specified circumstances.” U.S. Department of State, *Initial Report of States Parties Due in 1995: United States of America*, report submitted to the United Nations Committee Against Torture, CAT/C/28/Add.5 (Feb. 9, 2000), para. 47. See also Nigel Rodley and Matt Pollard, “Criminalisation Of Torture: State Obligations Under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” 2006 *European Human Rights Law Review* 115-141.
- 212 Alexander Zahar, “Torture,” in *Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 537-538.
- 213 Article 4 of the Torture Convention states: “(1) Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture; (2) Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”
- 214 Article 7(1) of the Torture Convention states: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purposes of prosecution.” See also 18 U.S.C. §§ 2340-2340A, implementing the Torture Convention in U.S. law.
- 215 *Nicaragua v. United States Of America, Case Concerning The Military And Paramilitary Activities in and Against Nicaragua*, Judgment on the Merits, International Court of Justice, paras. 218-220 (June 27, 1986).
- 216 For example, the ICTY has defined cruel treatment as: “a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity, b. committed against a person taking no active part in the hostilities.” *Prosecutor v. Blaškić*, Judgment, ICTY Appeals Chamber, para. 595, Case No. IT-95-14-A (July 29, 2004). See also *Prosecutor v. Kvočka et al.*, Judgment, ICTY Trial Chamber, para. 161, Case No. IT-98-30/1-T (November 2, 2001).
- 217 For example, the ICTY has defined outrages on personal dignity as requiring the following elements: “(i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation, or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect.” *Prosecutor v. Kunarac*, para. 161.
- 218 *Prosecutor v. Mucić et al.*, Judgment, ICTY Trial Chamber, para. 454, Case No. IT-96-21-T, (November 16, 1998). The International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that “[t]he most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.” *Prosecutor v. Furundžija*, Judgment, ICTY Trial Chamber, paras. 137-9, 144, 161-7, Case No. IT-95-17/1-T (December 10, 1998). These decisions have been upheld on appeal.
- 219 See the discussion of relevant criminal laws in Chapter 5(B).
- 220 UN General Assembly, Sixtieth Session, *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*, 21 March 2006, A/Res/60/147, Annex, para. 3.
- 221 *Ibid.*, Annex, para. 22(f).
- 222 *Ibid.*, Preamble.
- 223 Department of Justice, “Statement of Attorney General Eric Holder.”
- 224 Robert H. Jackson, “Opening Address to the Tribunal by Chief of Counsel for the United States, at Nuremberg under Count I of the Indictment,” November 21, 1945, 2 Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg: IMT, 1947), 98-155.
- 225 Jurisprudence of the ICTY has been cited with approval by U.S. courts. See, e.g., *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006). The United States also is bound by rules of customary international law and relevant treaties on which the Tribunal has relied in interpreting the definition of torture and judging and sentencing individuals for their crimes.
- 226 *Nicaragua v. United States Of America*, paras. 218-220.
- 227 *Prosecutor v. Limaj et al.*, Judgment, ICTY Trial Chamber, para. 235, Case No. IT-03-66-T, (November 30, 2005). The ICTY interprets the meaning of torture in the context of its mandate to judge war crimes and/or crimes against humanity, among other charges. See UN Security Council, *Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) (as amended on May 1, 2002)*, May 25, 1993, Arts. 2, 5.
- 228 *Prosecutor v. Krnojelac*, Judgment, ICTY Trial Chamber, para.182 Case No. IT-97-25-T (March 15, 2002), emphasis added.
- 229 *Prosecutor v. Limaj*, para. 236; *Prosecutor v. Kvočka*, para. 148.
- 230 *Prosecutor v. Kvočka*, para. 144.
- 231 *Prosecutor v. Naletičić and Martinović*, Judgment, ICTY Appeals Chamber, para. 299, Case No. IT-98-34-A (May 3, 2006).
- 232 For a list and analysis of relevant memos, see Rockefeller IV, *OLC Opinions; American Civil Liberties Union, “Documents Released Under FOIA,”* <http://www.aclu.org/accountability/released.html>.
- 233 Alberto R. Gonzales, *Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, memorandum for the President, January 25, 2002, 1.
- 234 Jay S. Bybee, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, memorandum for Alberto R. Gonzales and William J. Haynes II, January 22, 2002. See also John Yoo and Robert Delahunty, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, memorandum for William J. Haynes II,

- January 9, 2002.
- 235 See, e.g., Sullivan, "Dear President Bush" ("In its full consequence, that memo, even if issued in good faith, has done more damage to the reputation of the United States than anything since Vietnam."); Sands, "The Complicit General."
- 236 Bybee, *August 2002 Memo to Gonzales*, 1.
- 237 *Ibid.*
- 238 Acting Assistant Attorney General Daniel Levin later revised, in part, this interpretation of the definition. Levin, *Legal Standards*.
- 239 Beaver, *Legal Brief on Proposed Counter-Resistance Strategies*.
- 240 Bybee, *August 2002 Memo to Rizzo*.
- 241 Central Intelligence Agency, *Background Paper on CIA's Combined Use of Interrogation Techniques*, December 30, 2004; Steven G. Bradbury, *Application of 18 U.S.C. §§2340-2340A to Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees*, memorandum to John A. Rizzo, May 10, 2005.
- 242 *Ibid.*, 11.
- 243 *Ibid.*; Bradbury, *Application of 18 U.S.C. §§ 2340-2340A*; Bybee, *August 2002 Memo to Rizzo* (analyzing the use of specific, requested aggressive techniques in the interrogation of prisoner Abu Zubaydah).
- 244 Bybee, *August 2002 Memo to Gonzales*, 27-31.
- 245 Public Committee Against Torture in Israel v. Israel, HCJ 5100/94 (Sup Ct. 1999) (Isr.), paras. 24-30. The memorandum acknowledges the court's conclusion but improbably states that the decision is "still best read as indicating that the acts at issue did not constitute torture." Bybee, *August 2002 Memo to Gonzales*.
- 246 *Ireland v. the United Kingdom*, (1978) 2 EHRR 25, para. 96. See also Lawyers Committee for Human Rights (now Human Rights First), *Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties* (New York: Lawyers Committee for Human Rights, 2003), 104 n. 275 (discussion concerning the prohibited status of the five techniques used by the British and the subject of the litigation).
- 247 *Dikme v. Turkey*, (2000) ECHR No. 20869/92; *Selmouni v. France*, (1999) 29 EHRR 403; *Aydin v. Turkey*, (1997) 25 EHRR 251, para 86 (being blindfolded, stripped, beaten, and sprayed with cold water from high pressure jets is torture; rape is also torture); *Aksoy v. Turkey*, (1996) 23 EHRR 553 (hanging by the arms is torture). See also, *Cantoral-Benevides v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 69, para. 102 (2000) (finding that the threat of serious physical injury can be a form of psychological torture). International cases post-dating the August 2002 Bybee memo also reflect this broader interpretation of torture. See, e.g., *Gómez-Paquiyaury Brothers v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 110, paras. 67g–67i (2004) (finding that being beaten with the butt of a rifle is torture); *Urrutia v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 103, para. 92 (2003) (threats of physical harm are torture).
- 248 Depending on full information about the sequence of meetings among high level officials and their lawyers and the inception of aggressive interrogations by the CIA and others, the clear implication is that legal memoranda were developed as an ex post facto rationale for previously undertaken interrogations using the enumerated techniques. See, e.g., Editorial, "Dick Cheney's Version" ("...legal analysis cooked up after the White House had already decided to use long-banned practices like waterboarding"); Sifton, "The Torture Loophole" ("With the release of the new documents, it seems that later OLC opinions were drafted primarily to provide ex post facto legal justifications for torture that had already been implemented without authorization.").
- 249 The lawyers played an active role in the "war council." Michael Ratner, president of the Center for Constitutional Rights, argues that "government officials, including lawyers employed in the Office of Legal Counsel, a Justice Department office meant to serve as the 'constitutional conscience' of the Executive Branch, set out to manipulate the law to reach repugnant, illegal results that contravene the very ideals President Obama says must not be sacrificed." Editors, "The Memos: Torture Redefined," *Room for Debate*, *NYTimes.com*, <http://roomfordebate.blogs.nytimes.com/2009/4/16/the-memos-torture>.
- 250 However, even the memoranda that rescinded previous opinions were measured in their rejection of prior positions. For example, Levin's 2004 memo, although repudiating the narrow definition of torture in the August 1, 2002 memorandum to White House Counsel Alberto Gonzales, notes the finding that opinions concerning the legality of the CIA interrogation program remain valid. Levin, *Legal Standards*, 2 n. 8. A 2009 memorandum rescinding previous OLC memoranda only partially rescinds the legal analysis regarding "the allocation of authorities between the President and Congress in matters of war and national security." Steven G. Bradbury, *Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, memorandum for the files, January 15, 2009, 1.
- 251 For example, Jay Bybee is now a judge on the United States Court of Appeals for the Ninth Circuit. See Federal Judicial Center, "Judges of the United States Courts. Jay S. Bybee," <http://www.fjc.gov/public/home.nsf/hisj>. John Yoo is a law professor at Berkeley School of Law, UC Berkeley. UC Berkeley Law, "Faculty Profiles: John Yoo," <http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=235>. Steven Bradbury is partner at a law firm, Dechert LLP, "Steven G. Bradbury Joins Dechert LLP," July 13, 2009, press release, http://www.dechert.com/newsroom/newsroom.jsp?pg=news_release_detail&id=10948.
- 252 White House, Office of the Press Secretary, "Statement of President Barack Obama on Release of OLC Memos."
- 253 Sulakshana Gupta, "Stephen Rapp: Obama's Point Man on War Crimes," *Time*, September 14, 2009, <http://www.time.com/time/world/article/0,8599,1922094,00.html>.
- 254 For the various tribunals that the United States has supported, including ICTY, ICTR, Sierra Leone, and Lebanon, the United States usually has contributed between 20 and 40 percent of the overall annual budget. Recently, in the case of the Special Tribunal for Lebanon, President Barack Obama vowed to support UN moves to bring to justice the killers of Lebanese Prime Minister Rafik Hariri ahead of the fourth anniversary of the assassination and said: "The United States fully supports the Special Tribunal for Lebanon, whose work will begin in a few weeks, to bring those responsible for this horrific crime and those that followed to justice." Agence France Presse, "Obama Reiterates Support for Special Tribunal," *Daily Star* (Lebanon), February 13, 2009, http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=99325.
- 255 In April 1994, the U.S. Congress passed the Cambodian Genocide Justice Act. The act states that "it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity." See Cambodian Genocide Justice Act, Pub L. No. 103-236 (April 30, 1994).
- 256 On March 29, 2006, President Bush welcomed the news of former Liberian President Charles Taylor's capture in Nigeria. Speaking with Nigerian President Olusegun Obasanjo at the White House, Bush said he appreciated the Nigerian leader's decision to turn Taylor over to face charges. "The fact that Charles Taylor will be brought to justice in a court of law will help Liberia, and is a signal, Mr. President, of your deep desire for there to be peace in your neighborhood," he told Obasanjo. U.S. Department of State, "Bush Welcomes Nigeria's Capture of Charles Taylor: Discusses Sudan, Energy, Economic Development With President Obasanjo," press release, March 29, 2006. After Taylor's arrest, he was transferred to the Special Court for Sierra Leone for prosecution. Taylor's trial began in The Hague on January 6, 2008, and is currently ongoing. See Lauren Comiteau, "Charles Taylor Trial Starts," *Time*, January 7, 2008, <http://www.time.com/time/world/article/0,8599,1700945,00.html>.
- 257 These participants include President Gabrielle Kirk-MacDonald at the ICTY; Senior Judges Patricia Wald and Theodor Meron at the ICTY; Deputy Prosecutor David Tolbert at the ICTY, subsequently Registrar at the Special Tribunal for Lebanon; Chief Prosecutors David Crane and Steven Rapp in Sierra Leone; Brenda Hollis as a senior prosecutor at ICTY and leading the team that is prosecuting Charles Taylor at Special Court for Sierra Leone (with Nicholas Koumjian, formerly in East Timor); Christine Chung leading the Uganda investigation at the International Criminal Court; and Michael Johnson as Registrar of the Bosnia War Crimes Chamber, to name but a few.
- 258 Joel Roberts, "Bush: Saddam Must Stand Trial," *CBSNews.com*, December 15, 2003, <http://www.cbsnews.com/stories/2003/12/15/iraq/main588749.shtml>.
- 259 See International Center for Transitional Justice, "Dujail: Trial and Error?" briefing paper, November 2006, 4.
- 260 See, e.g., *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming judgment against former Salvadoran high-ranking military commander awarding compensatory and punitive damages to Salvadoran victims under the TVPA and the ATS for torture, extrajudicial killing, and crimes against humanity); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (former Chilean military officer found liable under TVPA and ATS for participating in a 1973 execution in Chile following the military coup); *Arce v. Garcia*, 434 F.3d 1254 (affirming judgment that former Salvadoran Minister of Defense and Director of the National Guard were civilly liable to plaintiffs, Salvadoran refugees, under the TVPA and ATS for torture committed during the military regime).
- 261 This was the first prosecution under the statute. U.S. Department of Justice, "Roy Belfast, Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges," news release, January 9, 2009.

- 262 Ibid.
- 263 Ibid.
- 264 Ibid.
- 265 No information currently is publicly available as to which specific cases will be the focus of the ordered preliminary inquiry. It is possible that some of the cases discussed in this section of the briefing paper may be the subject of the preliminary inquiry. See, e.g., Carrie Johnson, "Prosecutor to Probe CIA Interrogations," *Washington Post*, August 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/24/AR2009082401743.html> (referrals from the military and the CIA led to investigation of 20 cases; only one resulted in indictment; possible re-evaluation of these cases). Holder's statement indicated that his decision to appoint John Durham to conduct a preliminary investigation of violations of the law in connection with detainee interrogations was at least partly based on the DOJ Office of Professional Responsibility's report, which "recommends that the Department reexamine previous decisions to decline prosecution in several cases...." Department of Justice, "Statement of Attorney General Eric Holder."
- 266 In April 2006, Human Rights Watch (HRW), Human Rights First (HRF), and the New York University Center for Human Rights and Global Justice (CHRG) jointly issued a report based on their combined database of statistics regarding detainee abuse and accountability. See *By The Numbers, Findings of the Detainee Abuse and Accountability Project* (New York: HRW, HRF & CHRG, 2006). They found that over 400 personnel had been implicated in abuse cases investigated by military or civilian authorities. Only about a third faced any kind of disciplinary or criminal action, with commanders favoring weaker administrative actions instead of criminal prosecutions. For the seventy-nine persons who did face courts martial, fifteen had charges dropped or were still pending at the time of the report. Of the sixty-four completed, fifty-four were found guilty. Of those, forty were sent to prison, and three-quarters had sentences of less than one year. Ibid., 2, 24. In a recent press statement, Human Rights Watch noted that, "To date, the U.S. record on accountability for detainee abuse has been abysmal. [HRW] has collected information regarding some 350 cases of abuse involving more than 600 US personnel. Despite numerous and systematic abuses, not a single CIA official has been held accountable, and few military personnel have been punished." Human Rights Watch, "US: CIA Report Shows Need for Investigation of Torture and Abuse—Attorney General Should Carry Out Full Review," press release, August 24, 2009, <http://www.hrw.org/en/news/2009/08/24/us-cia-report-shows-need-investigation-torture-and-abuse>.
- 267 The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, reported to the Human Rights Council on his mission to the United States that, "...there have been chronic and deplorable accountability failures with respect to policies, practices and conduct that resulted in alleged unlawful killings, including possible war crimes, in the international operations conducted by the United States. The Government has failed to effectively investigate and punish lower-ranking soldiers for such deaths, and has not held senior officers responsible under the doctrine of command responsibility. Worse, it has effectively created a zone of impunity for private contractors and civilian intelligence agents by failing to investigate and prosecute them." UN General Assembly, Human Rights Council, Eleventh Session, *Annex to Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, On His Mission to the United States of America* (16-30 June 2008), UN Doc. A/HRC/11/2/Add.5, May 28, 2009, Summary, 3, paras. 48-60.
- 268 Adam Liptak, "First Baghdad Trial May Set Table for Later Ones," *New York Times*, May 11, 2004, <http://www.nytimes.com/2004/05/11/world/struggle-for-iraq-prosecution-first-baghdad-court-martial-may-set-table-for.html>.
- 269 Spec. Jeremy Sivitz had escorted a detainee to the cellblock where abuses were occurring and had taken pictures of a pile of naked and hooded men. He was charged with maltreatment of detainees, conspiracy to maltreat and dereliction of duty. Dexter Filkins, "First Trial Set to Begin May 19 in Abuse in Iraq," *New York Times*, May 10, 2004, <http://www.nytimes.com/2004/05/10/world/struggle-for-iraq-prosecution-first-trial-set-begin-may-19-abuse-iraq.html>. He agreed to testify against others and pleaded guilty to four counts, including dereliction of duty. He received a demotion, a one year sentence and a bad conduct discharge. He pleaded for forgiveness from the Iraqi people, the detainees, and the Army and admitted he had made a terrible mistake by not trying to stop the violence and not reporting it to his superiors. Dexter Filkins, "G.I. Pleads Guilty in Court-Martial for Iraqis' Abuse," *New York Times*, May 20, 2004, <http://www.nytimes.com/2004/05/20/world/struggle-for-iraq-court-martial-gi-pleads-guilty-court-martial-for-iraqis-abuse.html?pagewanted=all>. Spec. Armin Cruz, an Army intelligence analyst, pleaded guilty to charges of maltreatment and conspiracy to maltreat prisoners. He ordered three prisoners to crawl across a concrete floor, handcuffed them, and stepped on at least one of them. He received a demotion, an eight month sentence and a bad conduct discharge. He claimed that he had been traumatized as a result of seeing two fellow soldiers killed. Noimitsu Onishi, "Military Specialist Pleads Guilty to Abuse and Is Jailed," *New York Times*, September 12, 2004, <http://www.nytimes.com/2004/09/12/international/middleeast/12iraq.html>. Spec. Megan Ambuhl pleaded guilty to dereliction of duty and was demoted in rank and lost a half month's pay. Although she claimed to be a bystander as others in her unit committed abuses, she was convicted for her failure to shield prisoners from abuse. Douglas Jehl, "G.I. in Abu Ghraib Abuse is Spared Time in Jail," *New York Times*, November 3, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9904E4D61F3DF930A35752C1A9629C8B63>. Spec. Roman Krol pleaded guilty to conspiracy and maltreating detainees and was sentenced to ten months. Richard Oppel, Jr., "Judge Rejects Bid for Testimony from Top Officers in Abuse Trial," *New York Times*, October 23, 2004, <http://www.nytimes.com/2004/10/23/international/middleeast/23soldiers.html>.
- 270 Oppel, "Judge Rejects Bid for Testimony."
- 271 Associated Press, "Former Guard Pleads Guilty in Abuse Case," *New York Times*, February 2, 2005, <http://query.nytimes.com/gst/fullpage.html?res=990DE0D6123BF931A35751C0A9639C8B63>. Davis did not appear in any of the Abu Ghraib photographs. However, when he was questioned about the events on the cellblock, he lied to investigators. The day after being questioned, he admitted the truth regarding his role. Kate Zernike, "Reservist to Offer Guilty Plea in Jail Assault," *New York Times*, January 28, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9404E3DF143BF93A15752C0A9639C8B63>.
- 272 Kate Zernike, "At Abuse Hearing, No Testimony that G.I.s Acted on Orders," *New York Times*, August 7, 2004, <http://www.nytimes.com/2004/08/07/international/middleeast/07abuse.html>. Due to England's presence in a number of the Abu Ghraib photographs, her personal story became a touchstone and was widely reported. See, e.g., James Dao, "From a Picture of Pride to Symbol of Abuse," *New York Times*, May 7, 2004, <http://www.nytimes.com/2004/05/07/national/07SOLD.html>.
- 273 Associated Press, "Soldier Gets Closer to Abuse Retrial," *New York Times*, May 25, 2005, <http://www.nytimes.com/2005/05/25/international/middleeast/25abuse.html>.
- 274 David S. Cloud, "Private Gets 3 Years for Iraq Prison Abuse," *New York Times*, September 27, 2005, <http://www.nytimes.com/2005/09/28/national/28england.html>. England is no longer in prison. See Emma Brock, "What Happens in War Happens," *Guardian*, January 3, 2009, <http://www.guardian.co.uk/world/2009/jan/03/abu-ghraib-lyndie-england-interview>. See also Gary S. Winkler, *Tortured: Lynndie England, Abu Ghraib and the Photographs that Shocked the World* (Keyser, WV: Bad Apple Books, 2009).
- 275 Richard Oppel, "Guilty Plea by Sergeant in Abuse Case," *New York Times*, October 21, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9A0DE3DC113AF932A15753C1A9629C8B63&sec=&spon=&pagewanted=all>.
- 276 Frederick was released after three years. His release may have been due, in part, to his testimony in the trial of Lt. Col. Steve Jordan.
- 277 Edward Wong, "Sergeant is Sentenced to 8 Years in Abuse Case," *New York Times*, October 22, 2004, <http://www.nytimes.com/2004/10/22/international/middleeast/22abuse.html>.
- 278 Oppel, "Judge Rejects Bid for Testimony."
- 279 Eric Schmitt, "Iraq Abuse Trial is Again Limited to Lower Ranks," *New York Times*, March 23, 2006, http://www.nytimes.com/2006/03/23/us/23abuse.html?_r=1. Graner is the only person still serving time for the Abu Ghraib abuses.
- 280 Reuters, "Reservist Gets Six-Month Sentence for Abusing Iraqis at Abu Ghraib," *New York Times*, May 18, 2005, <http://www.nytimes.com/2005/05/18/international/middleeast/18harman.html>; Associated Press, "Soldier is Found Guilty in Abu Ghraib Abuse," *New York Times*, May 17, 2005, <http://www.nytimes.com/2005/05/17/national/17abuse.html>.
- 281 Reuters, "Reservist Gets Six-Month Sentence."
- 282 See Philip Gourevitch and Errol Morris, "Exposure: The Woman Behind the Camera at Abu Ghraib," *New Yorker*, March 24, 2008, http://www.newyorker.com/reporting/2008/03/24/080324fa_fact_gourevitch.
- 283 Eric Schmitt, "Army Dog Handler is Convicted in Detainee Abuse at Abu Ghraib," *New York Times*, March 22, 2006, <http://www.nytimes.com/2006/03/22/politics/22abuse.html>. The presence of military working dogs in interrogations in Iraq and Afghanistan had been established by summer 2003. See *Senate Armed Services Committee Report*, 159-160.
- 284 Schmitt, "Iraq Abuse Trial Is Again Limited."

- 285 Ibid; Josh White, "Detainee in Photo with Dog was 'High Value' Suspect," *Washington Post*, March 13, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200962.html> (includes photo).
- 286 Schmitt, "Army Dog Handler is Convicted;" Schmitt, "Iraq Abuse Trial is Again Limited."
- 287 Neil A. Lewis, "Court in Iraq Prisoner Case Hears Testimony of General," *New York Times*, May 25, 2006, <http://www.nytimes.com/2006/05/25/us/25abuse.html>. However, within days of Miller's visit in 2003, Lt. Gen. Sanchez issued orders that seemed to imply that the use of dogs was permitted. See Sanchez, *September 2003 Memo*, 5 ("Presence of Military Working Dog: Exploits Arab fear of dogs while maintaining security during interrogations.").
- 288 Associated Press, "Dog Handler Convicted in Abu Ghraib Abuse," *New York Times*, June 2, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9D01E0D71631F931A35755COA9609C8B63>. He was acquitted of several of the more serious charges. Ibid.
- 289 National Briefing, Mid-Atlantic: Maryland, "Abu Ghraib Sentence," *New York Times*, June 3, 2006, <http://query.nytimes.com/gst/fullpage.html?res=9905E5D91731F930A35755COA9609C8B63>.
- 290 The UCMJ does not explicitly provide for charges under a command responsibility theory of criminal liability, something criticized recently by the United Nations Special Rapporteur on Extrajudicial, Arbitrary or Summary Executions, Philip Alston. *Annex to Report of the Special Rapporteur*, para. 80. Under the UCMJ, breaches of command responsibility generally are charged under dereliction of duty, failure to obey orders, and conduct unbecoming an officer, although the penalties for these crimes tend to be light. Article 77, UCMJ, establishes liability for aiding and abetting. Based on this provision, a commander can be responsible as a principal when he or she "1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission or 2) causes an act to be done which if directly performed by him would be punishable by this chapter...." This has been read to allow vicarious liability of a co-conspirator. See *United States v. Jefferson*, 22 M.J. 315, 324 (C.M.A. 1986). See also Joint Service Committee on Military Justice, *Manual for Courts-Martial*, Part IV, (Washington DC, 2008), para. 1b(2) (b); Maj. Michael L. Schmidt, "Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations," *Military Law Review* 164 (2000): 155.
- 291 David Dishneau, "Split Verdict for Officer at Abu Ghraib," *Washington Post*, August 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/28/AR2007082801290.html>.
- 292 Paul von Zielbauer, "Army Colonel Is Acquitted in Abu Ghraib Case," *New York Times*, August 29, 2007, <http://www.nytimes.com/2007/08/29/world/middleeast/29abuse.html>.
- 293 Josh White, "Army Officer is Cleared in Abu Ghraib Scandal," *Washington Post*, January 10, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/09/AR2008010903267.html>. He remained in service and, at the time the article was published, he was on active duty at Ft. Belvoir. Ibid.
- 294 Thom Shanker and Dexter Filkins, "Army Punishes 7 With Reprimands For Prison Abuse," *New York Times*, May 4, 2004, <http://www.nytimes.com/2004/05/04/international/middleeast/04ABUS.html>.
- 295 Eric Schmitt, "No Criminal Charges for Officer at Abu Ghraib Interrogations," *New York Times*, May 12, 2005, <http://www.nytimes.com/2005/05/12/politics/12abuse.html>. Karpinski's career effectively was derailed, and she felt that she had been made a scapegoat. Janis Karpinski, interview by Amy Goodman, *Democracy Now*, Pacifica Radio, October 26, 2005, http://www.democracynow.org/2005/10/26/col_janis_karpinski_the_former_head. See also Nightline, "Head of Abu Ghraib Prison Speaks Out," *ABCNews.com*, May 12, 2005, <http://abcnews.go.com/Nightline/IraqCoverage/story?id=751870&page=1>.
- 296 Eric Schmitt, "Army Moves to Advance 2 Linked to Abu Ghraib," *New York Times*, June 29, 2005, <http://www.nytimes.com/2005/06/29/international/middleeast/29detain.html>.
- 297 Ibid. Maj. Gen. Fast currently serves as Deputy Director and Chief of Staff of the Army Capabilities Integration Center and the Deputy Chief of Staff, G9, of the United States Army Training and Doctrine Command. Army Capabilities Integration Center, "Leadership: Major General Barbara M. Fast," http://www.arcic.army.mil/lead_fast.htm.
- 298 Associated Press, "Criminal Cases Against U.S. Soldiers Stemming From Deaths of Iraqis," *USA Today*, August 2, 2006, http://www.usatoday.com/news/world/iraq/2006-07-09-us-cases_x.htm.
- 299 David Danzig, "Torture on Trial—HRF Observes Court Martial of Army Officer Accused in Death of Iraqi Major General," Human Rights First, http://www.humanrightsfirst.org/us_law/etn/trial/welshofer-011906d.asp; Josh White, "Army Interrogator Reprimanded in Iraqi's Death," *Washington Post*, January 24, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012301967.html>; Josh White, "Documents Tell of Brutal Improvisation by GIs," *Washington Post*, August 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/02/AR2005080201941.html>. Charges against three other soldiers were dropped after they agreed to testify against Welshofer.
- 300 CHRGI, HRF, and HRW, *By the Numbers*, 10.
- 301 Ibid., 10.
- 302 Neil Lewis, "Marine Found Guilty of Abusing Iraqis, Files Show," *New York Times*, December 15, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9905EEDD1730F936A25751C1A9629C8B63>.
- 303 CHRGI, HRF, and HRW, *By the Numbers*, 15.
- 304 Ibid., 10.
- 305 Ibid.
- 306 John R. Crook, ed., "Military Justice Proceedings Involving Offenses Against Iraqi and Afghan Civilians," *American Journal of International Law* 103 (April 2009): 358.
- 307 Ibid.
- 308 Ibid. See also Craig Whitlock, "Army Sergeant Pleads Guilty to Murder in Iraqi Prisoner Deaths," *Washington Post*, March 31, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/30/AR2009033001352.html>.
- 309 Crook, "Military Justice Proceedings," 358.
- 310 Ibid.
- 311 Ibid.
- 312 Reuters, "G.I. is Jailed for Killing Iraqi Detainees," *New York Times*, March 20, 2007, <http://www.nytimes.com/2007/03/20/us/20abuse.html>.
- 313 Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267 (hereinafter MEJA).
- 314 Associated Press, "Jury Acquits Ex-Marine in Iraqi Death," *Washington Post*, August 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/28/AR2008082803507.html?hpid=sec-nation>.
- 315 Ibid. See also Associated Press, "Ex-Marine is Cleared in Killing of Unarmed Iraqi Detainees," *New York Times*, August 29, 2008, <http://www.nytimes.com/2008/08/29/world/middleeast/29marine.html>.
- 316 Tony Perry, "Judge Dismisses Marines Contempt Charges," *Los Angeles Times*, September 25, 2008, <http://articles.latimes.com/2008/sep/26/local/me-marine26>.
- 317 BBC News, "U.S. Marine Cleared of Iraq Killing," *BBCNews.com*, April 9, 2009, <http://news.bbc.co.uk/2/hi/americas/7992943.stm>. The attorney for Sgt. Jermaine Nelson, the third defendant, is seeking a dismissal of charges based on these two acquittals. Mark Walker, "Military: Attorney Wants Charges Dropped Against Third Fallujah Defendant," *North County Times* (San Diego, CA), April 10, 2009, http://www.nctimes.com/news/local/military/article_77a0f0b1-c79a-506c-9dad-d98c0a2fd023.html.
- 318 Hina Shamsi, *Command's Responsibility*, ed. Deborah Pearlstein (New York: Human Rights First, 2006), 31-37. Investigations of the actions of Special Forces or SAP participants were a near impossibility. See, e.g., Seymour M. Hersh, "The General's Report," *New Yorker*, June 25, 2007. In a memorandum by a Criminal Investigation Division (CID) officer, the officer complained about the problems in investigating SAP due to their use of fake names and the loss of 70% of their files due to a computer problem. The torture-death of an Afghan soldier is an example in which CID recommended referral for criminal charges yet the Special Operations Command recommended administrative reprimands only. See Human Rights Watch, "News: U.S. Failure to Provide Justice to Afghan Victims," February 16, 2007, <http://www.hrw.org/en/news/2007/02/14/us-failure-provide-justice-afghan-victims>. Lt. Gen. Stanley McChrystal, the new commander of U.S. Coalition Forces in Afghanistan, previously was head of the *Joint Special Operations Command (JSOC)*, including for the base at Camp Nama. Soldiers stationed there confirmed reliable reports of abuse of detainees. See Human Rights Watch, *No Blood, No Foul*, 6-24. Few soldiers received anything other than administrative penalties for criminal accusations against them. Five Army Rangers were convicted in a court-martial for kicking and punching three detainees in September 2005 but received sentences of only 30 days to six months and demotion. See Eric Schmitt and Carolyn Marshall, "In Secret Unit's 'Black Room,' a Grim Portrait of U.S. Abuse," *New York Times*, March 19, 2006, <http://www.nytimes.com/2006/03/19/international/middleeast/19abuse.html>.
- 319 Shamsi, *Command's Responsibility*, 12-13, 30-31.
- 320 Tim Golden, "In U.S. Report, Brutal Details of Two Afghan Inmates' Deaths," *New York Times*, May 20, 2005, http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?_r=1.

- 321 Shamsi, *Command's Responsibility*, 15.
- 322 *Ibid.*
- 323 Tim Golden, "Years After Two Afghans Died, Abuse Case Falters," *New York Times*, February 13, 2006, http://www.nytimes.com/2006/02/13/national/13bagram.html?_r=1.
- 324 Shamsi, *Command's Responsibility*, 15.
- 325 *Ibid.*
- 326 Golden, "Abuse Case Falters." At the trial of Spec. Willie Brand, who faced the most serious charges, he freely admitted striking Habibullah four times and Dilawar over thirty-seven times. He claimed, however, that he had been trained to do so to deal with recalcitrant detainees. One juror later stated "He had volunteered, and when they called upon him to perform in his duties in time of war; he did it without question." *Ibid.*
- 327 The last report available online prior to this paper's publication was Alicia A. Caldwell, Associated Press, "Witnesses: Feds Probe 2 Detainee Deaths," *USA Today*, July 31, 2007, http://www.usatoday.com/news/topstories/2007-07-31-2633026355_x.htm. At that time, three soldiers and an officer who were members of the military police company that had run Bagram were called as witnesses. *Ibid.*
- 328 No indication yet has been made public if this case is or will be one which will be re-examined by John Durham in the preliminary investigation ordered by the Attorney General. According to a statement by the Attorney General, "Among other things, the [Office of Professional Responsibility] report recommends that the Department reexamine previous decisions to decline prosecution in several cases related to the interrogation of certain detainees." Department of Justice, "Statement of Attorney General Eric Holder."
- 329 Human Rights Watch, *U.S. Failure to Provide Justice for Afghan Victims*. The United States Court of Appeals for the Fourth Circuit recently upheld the conviction but vacated the sentence and remanded for resentencing, on the grounds that the District Court had failed to explicitly state the basis for certain sentence enhancements. *United States v. Passaro*, 2009 U.S. App. LEXIS 17676 (4th Cir. Aug. 10, 2009).
- 330 Human Rights Watch, *U.S. Failure to Provide Justice for Afghan Victims*. See also Dana Priest, "CIA Avoids Scrutiny of Detainee Treatment," *Washington Post*, March 3, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>.
- 331 Shamsi, *Command's Responsibility*, 6-9.
- 332 *Ibid.*, 10.
- 333 *Ibid.*, 11-12. See also Jane Mayer, "A Deadly Interrogation," *New Yorker*, November 14, 2005.
- 334 Douglas Jehl and Tim Golden, "CIA to Avoid Charges in Most Prisoner Deaths," *New York Times*, October 23, 2005, <http://www.nytimes.com/2005/10/23/international/asia/23intel.html>.
- 335 David Johnston, "U.S. Inquiry Falters on Civilians Accused of Abusing Detainees," *New York Times*, December 19, 2006, <http://query.nytimes.com/gst/fullpage.html?res=990CE7D61331F93AA25751C1A9609C8B63&sec=&pagewanted=all>.
- 336 Deputy Assistant Attorney General Brian A. Benczkowski, letter to Sen. Richard Durbin, February 7, 2008. The letter is referenced in the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. *Annex to Report of the Special Rapporteur*, n. 84. No public information yet is available as to whether these cases will be re-evaluated by John Durham in the preliminary inquiry ordered by Attorney General Holder.
- 337 President, Speech, "Remarks at the National Archives and Records Administration," *Daily Compilation of Presidential Documents*, May 21, 2009, <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf>, 9. By "these photos," the President was referring to photographs that are the subject of FOIA litigation. The President stated that these were "photographs that were taken of detainees by U.S. personnel between 2002 and 2004." *Ibid.*, 7. Despite a prior agreement to release the photographs, the President announced that he was withholding their release and that the Justice Department would seek review by the US Supreme Court in order to prevent the photos from being released. Associated Press, "Obama Seeks to Block Release of Abuse Photos," *Msnbc.com*, May 13, 2009, <http://www.msnbc.msn.com/id/30725189/>. It is unknown what is depicted in this additional set of photographs, but they could provide additional photographic evidence of crimes and further evidence of systemic abuses throughout Afghanistan and Iraq. According to the ruling of the Second Circuit Court of Appeals, the 21 photographs the government seeks to withhold are from "at least seven different locations in Afghanistan and Iraq" and form part of Army Criminal Investigations Command (CID) investigation files relating to alleged mistreatment of detainees. *American Civil Liberties Union, et al. v. United States Department of Defense*, et al 543 F.3d 59, 63 (2d. Cir. 2008). "Army CID found probable cause to believe detainee abuse had occurred related to the photographs at issue here." *Ibid.*, 65. The government has conceded, "...that these photographs yield evidence of governmental wrongdoing." *Ibid.*, 74. The government filed a petition for certiorari with the U.S. Supreme Court in August 2009 in the case. Adam Liptak, "Obama About-Face Goes to High Court," *New York Times*, September 14, 2009, <http://www.nytimes.com/2009/09/15/us/15bar.html?hp>.
- 338 See, e.g., Cheney, "Remarks before the American Enterprise Institute."
- 339 See, e.g., Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739-2740, § 1004(a).
- 340 Under the Rome Statute crimes against humanity and war crimes are both conceived of as relating to a policy. UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF.183/9, 1998, Art. 7(2)(a), Art. 8(1).
- 341 The concept of command responsibility, as it emerged in the post World War II case-law, was a means of holding political and military leaders responsible for the acts of their subordinates. See in particular *In Re: Yamashita*, 327 U.S. 1 (1946); *United States v. List et al* ("Hostages Case"), 8 L.R.T.W.C. 34 (1949); and *United States v. von Leeb et al* ("High Command Case"), 12 L.R.T.W.C. 1 (1949). Command responsibility has been codified in the statutes of the ICTY, ICTR and the ICC. Under their definitions, commanders do not have the same responsibility as their subordinates but are responsible for breach of their duty or supervision when they fail to prevent or punish crimes. Three elements must exist for command responsibility: (i) the existence of a superior-subordinate relationship; (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (iii) the superior failed to take the necessary and reasonable steps to prevent the crime or punish the perpetrators. UN Security Council, *Statute of the ICTY*, art. 7(3); UN Security Council, *Statute of the International Criminal Tribunal for Rwanda*, November 1994, art. 6(3); UN General Assembly, *Rome Statute of the International Criminal Court*, Art. 28.
- 342 The Appeals Chamber of the ICTY, in *Prosecutor v. Tadić* made clear that joint criminal enterprise is a part of international criminal jurisprudence in its finding that "[T]he Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, perpetration or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held liable, subject to certain conditions." *Prosecutor v. Tadić*, Judgment, ICTY Appeals Chamber, para. 190, Case No. IT-94-1-A (July 15, 1999). Joint Criminal Enterprise has become a dominant form of charging crimes at the international tribunals, including the ICTR and the Special Court for Sierra Leone (SCSL). A definition of joint criminal enterprise is also found in Art. 25 (3)(d) of the ICC statute. In U.S. domestic law, this concept is similar to conspiracy and also to charges under the racketeering law, Racketeer Influenced and Corrupt Organizations Act, RICO (18 U.S.C. §1962). See n. 379 on U.S. conspiracy law.
- 343 According to the ICTY "aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present." *Prosecutor v. Tadić*, para 689 n. 153. According to the ICTR, aiding means giving assistance to someone, while abetting involves facilitating the commission of an act by being sympathetic thereto. *Prosecutor v. Akayesu*, Judgment, ICTR Trial Chamber, para 484, Case No. ICTR-96-4-T (September 2, 1998). It is sufficient to prove one or the other form of participation in order to establish aiding and abetting. *Prosecutor v. Kayishema and Ruzindana*, Judgment, ICTR Trial Chamber, paras. 196-197, Case. No. ICTR-95-1-T (May 21, 1999). See n. 380 on U.S. aiding and abetting law.
- 344 Katarina Gustafson, "Joint Criminal Enterprise," in *Oxford Companion to International Criminal Justice*, 391.
- 345 Department of Justice, "Statement of Attorney General Eric Holder," emphasis added.
- 346 In his appointment of Durham, Attorney General Holder expressly noted that the Office of Professional Responsibility's report regarding OLC memoranda on "enhanced interrogation techniques" recommended "that the Department reexamine previous decisions to decline prosecution in several cases related to the interrogation of certain detainees." *Ibid.* The OPR report is not yet publicly available but should shed further light on the reasons for this recommendation when (and if) it is released and the nature of the cases for which prosecution had been declined.

- 347 Ibid.
- 348 See Chapter 4.
- 349 See 28 U.S.C. § 547 (establishing duties and powers of U.S. Attorneys); U.S. Department of Justice, *United States Attorneys' Manual* (Washington DC, 1997), § 9.2-001. U.S. Attorneys are empowered to investigate suspected or alleged offenses against the United States (which they can do through a grand jury or through another federal investigative agency, such as the FBI for example), authorize, decline, or dismiss prosecutions; determine the manner of prosecuting; and decide trial related questions. Ibid. §§ 9-2.010, 9-2.020, 9-2.030, 9-2.170, 9-2.050.
- 350 This approach, in essence, was the recommendation of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. As his report on his mission to the United States stated, "...An office dedicated to investigation and prosecution of crimes by private contractors, civilian Government employees, and former military personnel should be established within the DOJ. The office should receive the resources and investigative support necessary to handle these cases. The DOJ should make public statistical information on the status of these cases, disaggregated by the kind, year, and country of alleged offence." UN General Assembly, Human Rights Council, Eleventh Session, *Annex to Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, On His Mission to the United States of America (16-30 June 2008)*, UN Doc. A/HRC/11/2/Add.5, 28 May 2009, para. 81.
- 351 The Attorney General's authority to create task forces derives from an amalgam of federal statutes that empower him both to perform DOJ's functions and to delegate powers to U.S. Attorneys at the local level. See 28 U.S.C. § 509 (save three minor exceptions, all functions of DOJ and its agencies are vested in the AG); 28 U.S.C. § 510 (AG can delegate any of his authority to an officer, employee or agency of DOJ); 28 U.S.C. § 515 (AG can authorize any attorney to conduct any kind of legal proceeding that U.S. Attorneys are authorized to conduct even if the attorney is not a resident of the district in which the proceeding is being brought).
- 352 A prominent example is the 2002 Corporate Fraud Task Force, which investigated Enron, among others. Executive Order no. 13271, 67 Fed. Reg. 46091-46092 (July 11, 2002).
- 353 See 28 U.S.C. §§ 509, 510, 515, describing the Attorney General's authority. Appointments can be pursuant to relevant federal regulations (see General Powers of a Special Counsel, 28 C.F.R. §§ 600.1-600.10, hereinafter the *Special Counsel Regulations* or the *Regulations*), or outside them. The *Special Counsel Regulations* of 1999 require the AG to appoint a Special Counsel from outside the government when three conditions are met: (1) he determines that a criminal investigation of a person or matter is warranted; (2) it would present a conflict of interest for DOJ to conduct the investigation, or any subsequent prosecution(s); and (3) the appointment of a Special Counsel would serve the public interest. See *Special Counsel Regulations*, 28 C.F.R. §§ 600.1, 600.3.
- 354 Department of Justice, Office of the Attorney General, "Discussion of Amended Regulations: Background," 64 Fed. Reg. 37038 (July 1999).
- 355 Notification and Reports by the Special Counsel, 28 C.F.R. § 600.8.
- 356 Appointment of Special Counsel should be made under the regulations rather than on an ad hoc basis, since the regulations provide greater protections for Special Counsel. For example, the regulations set out specific grounds for removal, while an ad hoc appointee is presumably removable for any reason and is thus less insulated from political pressures. For example, during the Watergate investigation, special prosecutor Archibald Cox, who had been appointed as Special Prosecutor through an ad hoc means, was discharged by then-President Nixon, leading to the so-called "Saturday Night Massacre." The concern raised over this dismissal eventually resulted in the creation of the first Independent Counsel statute. See Joseph S. Hall, Nicholas Pullen, and Kandace Rayos, "Independent Counsel Investigations," *American Criminal Law Review* 368 (Summer 1999): 09. The regulations also provide an important inter-branch check, since the Attorney General must explain to Congress any decision to override or remove the Special Counsel. 28 C.F.R. §§ 600.7(d), 600.9(a).
- 357 Joint Service Committee on Military Justice, *Manual for Courts Martial*, I-2. The commanding officer is typically the central figure in instigating the investigation and prosecution of criminal violations under the UCMJ. An analysis of these and other aspects of the military justice system is beyond the scope of this paper.
- 358 Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, noted that "While the U.S. military justice system has achieved a number of convictions for unlawful killings in Afghanistan and Iraq, numerous other cases have either been inadequately investigated or senior officers have used administrative (non-judicial) proceedings instead of criminal prosecutions. In cases in which criminal convictions were obtained, some sentences appear too light for the crime committed, and senior officers have not been held to account for the wrongful conduct of their subordinates." *Annex to Report of the Special Rapporteur*, para. 51 (citations omitted), paras. 52-55.
- 359 MEJA, 18 U.S.C. §§ 3261-3267.
- 360 See Article 2(a), UCMJ, 10 U.S.C. § 802. See also *United States ex rel Toth v. Quarles*, 350 U.S. 11, 14 (1955) (ruling that a soldier who violates military law while in the Armed Forces, but is discharged prior to any action taken towards a court-martial, is considered a civilian and may not be subjected to court-martial jurisdiction). Title 18 of the U.S. Code contains laws that extend U.S. criminal jurisdiction extraterritorially, including MEJA and 18 U.S.C. § 7, specifying special maritime and extraterritorial jurisdiction for crimes committed outside of the United States.
- 361 MEJA, 18 U.S.C. § 3267(1)(b).
- 362 War Crimes Act of 1996, 18 U.S.C. § 2441. Torture Act, 18 U.S.C. § 2340(a) ("Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.").
- 363 See 18 U.S.C. § 112; 18 U.S.C. § 1116; 18 U.S.C. § 1201.
- 364 18 U.S.C. § 2340.
- 365 18 U.S.C. § 2441. Under the UCMJ, there is no specific provision criminalizing "war crimes," as there is in federal civilian criminal law. Individuals may be prosecuted under related UCMJ offenses, such as assault or maltreatment, or murder. Non capital crimes falling under the rubric of "war crimes" also may be prosecuted through Article 134, the UCMJ's General Article.
- 366 18 U.S.C. § 113. This provision covers a broad range of offenses, including common law assault (an attempted battery or an act that puts another person in reasonable apprehension of bodily harm) and actual battery (requiring physical contact). See, e.g., *United States v. Estrada-Fernandez*, 150 F.3d 491, 494 n.1 (5th Cir. 1998) and *United States v. Anderson*, 425 F.2d 330 (7th Cir. 1970). Under military law, assault is proscribed by UCMJ, Art. 128.
- 367 18 U.S.C. § 1111 (defines murder as the unlawful killing of another human being with malice aforethought). See also UCMJ Art. 118.
- 368 18 U.S.C. § 1112, defines manslaughter as the unlawful killing of another without malice. Voluntary manslaughter is defined as a killing upon a sudden quarrel or heat of passion. (§ 1112(a)) and involuntary manslaughter requires a lesser mental state of gross negligence. See 2-41 Modern Federal Jury Instructions-Criminal § 41.02; *United States v. Bryant*, 892 F.2d 1466 (10th Cir. 1989), cert. denied, 496 U.S. 939 (1990).
- 369 18 U.S.C. §§ 2241-2244 covers a range of sexual crimes.
- 370 In this paper we do not discuss crimes against humanity. This is an international "system" crime which was first codified in the Nuremberg Statute and now is enumerated in the Rome Statute of the International Criminal Court (Art. 7). For the purposes of the ICC definition, torture or enforced disappearance (through extraordinary rendition) could be considered crimes against humanity should they be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." We do not address this issue, for two reasons: first, based on the information available, we are unable to confirm that the targets of such abuses were "civilian population;" and second, crimes against humanity are not specifically enumerated in federal criminal law or under the UCMJ. With regard to federal law, see David Scheffer, testimony, *No Safe Haven: Accountability for Human Rights Violators in the United States*, Hearing before the Senate Committee on the Judiciary, Subcommittee on Human Rights and the Law, 110th Cong., 1st Sess., November 14, 2007.
- 371 Articles 77 through 134 of the UCMJ contain the Code's punitive articles, including offenses that may be prosecuted under military law. Although there is not a specific provision for obstruction of justice within the punitive articles, this may be prosecuted under the General Article of the UCMJ, Article 134, or via related charges such as UCMJ Article 107 (False Official Statements). The UCMJ also does not include provisions labeled "war crimes" as such; rather, such crimes either are assimilated under General Article 134 or are addressed through other more specific charges, such as murder or maltreatment.
- 372 Article 93, UCMJ ("Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.").
- 373 Torture Act, 18 U.S.C. § 2340A(a), (b).
- 374 Torture Act, § 2340A(c).

- 375 Amendments to the War Crimes Act that were passed in 2006 via the Military Commissions Act. The amendments and how they restricted the scope of the law retroactively are discussed further below.
- 376 War Crimes Act, § 2441.
- 377 See Chapter 4, above.
- 378 *Ibid.*
- 379 Conspiracy to commit a crime (such as torture) requires the following elements: two or more individuals who enter into an unlawful agreement; knowing and willing membership in the conspiracy on behalf of the accused; and the knowing commission of at least one of the overt acts charged, in furtherance of some objective of the conspiracy. See 18 U.S.C. § 371. In order to prove conspiracy, the prosecution must establish that: (1) two or more persons entered an unlawful agreement; (2) the accused knowingly and willfully became a member of the conspiracy, and (3) A member of the conspiracy knowingly committed at least one of the overt acts charged, further to some objective of the conspiracy. Under a “Pinkerton charge” a co-conspirator is liable as a principal for any and all substantive offenses committed in furtherance of the conspiracy while he is a member of it. *United States v. Pinkerton*, 328 U.S. 640, (1946). See *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1202-03 (9th Cir. 2000) (In order for the doctrine to be applied, the substantive crime must have been committed; it must have been committed in furtherance of the conspiracy; and, at the time it was committed, the accused was a member of the conspiracy).
- 380 Aiding and abetting entails the following elements: the commission of a crime by the principal; association by the accused with the crime; and participation in the crime by the accused with intent to make it succeed. See 18 U.S.C. § 2 which provides that aiding and abetting liability is available *in all federal criminal prosecutions* in which there has been: (1) the commission of a crime by the principal; (2) association by the accused with the crime, and (3) participation in the crime by the accused with intent to make it succeed. To be guilty of aiding and abetting, the accused must have shared the principal’s knowledge and criminal intent. *United States v. Gobbi*, 471 F.3d 302, 310 (1st Cir. 2006); *United States v. McDowell*, 498 F.3d 308, 314-16 (5th Cir. 2007) (shared knowledge extends to each element of the crime); *United States v. Spinney*, 65 F.3d 231, 235 (1st Cir. 1995) (if the accused is charged with aiding and abetting an armed bank robbery, it is not enough that the accused knew of the robbery. The accused also must have known that the principal was armed and intended to use that weapon during the robbery; *United States v. Hanson*, 41 F.3d 580, 582 (10th Cir. 1994) (mere suspicion that a crime is ongoing or likely to occur is not sufficient: an accused cannot unwittingly aid the commission of the crime). Shared intent is critically important when proof of the principal’s specific intent is required. For example, if the principal is charged with murder, a specific intent crime, then an aider and abettor must share that specific intent.
- 381 See discussion at n. 341.
- 382 Article 77, UCMJ. See discussion at n. 290.
- 383 Under Article 92(3), UCMJ, a person arguably could be convicted of dereliction of duty for abuses arising out of interrogation if it is established that: (1) The commander had a duty not to use unlawful methods of interrogation and/or allow subordinates to use unlawful methods); (2) The commander knew or reasonably should have known of such duties; and (3) The commander (by allowing his subordinates to use such unlawful methods) was wilfully derelict or negligently inefficient amounting to dereliction, in performance of those duties. For example, Lt. Col., Steven Jordan, was prosecuted for dereliction of duty (but later acquitted) for having failed to train and supervise soldiers under his control in following military policy on interrogation, resulting in the abuse of Iraqi detainees. See Ann Scott Tyson, “Army Officer Charged in Abu Ghraib Prison Abuse,” *Seattle Times*, April 29, 2006, <http://community.seattletimes.nwsources.com/archive/?date=20060429&slug=ghraib29>.
- 384 Under Article 92(2), UCMJ, a person arguably could be convicted of failing to obey orders for abuses arising out of interrogation if it is established that: (1) A lawful general order or regulation proscribing unlawful methods of interrogation was in effect, such as the Geneva Conventions, War Crimes Act, Torture Act and Army Field Manual, which mandate a ban on torture; (2) The commander had a duty to obey the order; and (3) by allowing his subordinates to use unlawful methods, the commander violated or failed to obey the order or regulation. This argument would be especially valid for abuses occurring after the issuance of orders for Iraq in the wake of the Abu Ghraib scandal, the enactment of the Detainee Treatment Act and/or the rescissions of OLC memoranda. Before these now-publicized corrections of U.S. policy, the commander’s responsibility lay elsewhere; that is, to eschew any orders that effectively ratified torture.
- 385 The Army Field Manual 27-10 states: “[c]ommanding officers of United States troops must ensure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.”
- 386 *CIA-IG Report*, para. 19. In paragraph 226, the IG noted particularly that, “The EITs used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights. This divergence has been a cause of concern to some Agency personnel involved with the Program.”
- 387 Detainee Treatment Act, § 1003.
- 388 *Ibid.*, 2740, §1004(a).
- 389 *Ibid.*
- 390 Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2636, § 8(b)(3).
- 391 “Torture Convention,” Art. 2(2); Detainee Treatment Act, § 1004(a).
- 392 War Crimes Act, § 2441.
- 393 The MCA also eliminated the war crime relating to fair trial, which is not as pertinent here. A 1997 amendment to the original law of the previous year, had included in the definition of war crime, any conduct “which constitutes a violation of common Article 3 of the international conventions signed at Geneva....” See Pub. L. No. 105-118, 111 Stat. 2436, § 583 (amending War Crimes Act of 1996.) Previously, the statute had only referred to “grave breaches” of the Geneva Conventions. See Pub. L. No. 104-192, 110 Stat. 2104. Common Article 3 provides, in pertinent part, that at a minimum: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment. Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, Art. 3.
- 394 Military Commissions Act, § 6(b).
- 395 *Ibid.* §6(c); Detainee Treatment Act, § 1003(a). See Executive Order no. 13440, 72 Fed. Reg. 40,707. The order was issued pursuant to § 6(a)(3) of the Military Commissions Act to govern “a program of detention and interrogation approved by the Director of Central Intelligence.” This order, unlike the MCA’s amendments to the WCA, is not retroactive to 1997, but provides that, where the Geneva Conventions Common Article 3 does apply, the CIA’s detention and interrogation program would run afoul of its provisions to the extent it contemplated violations of the reformed War Crimes Act and Detainee Treatment Act. Moreover, such a program would not be approved if it included “...willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield; or ...acts intended to denigrate the religion, religious practices, or religious objects of the individual.” Executive Order no. 13,440, Sec. 3(b)(i)(E) and (F).
- 396 There are no reported cases under the statute.
- 397 Detainee Treatment Act, § 1004(b) (“Counsel- The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a), with respect to any civil action or criminal prosecution arising out of practices described in that subsection, under the same conditions, and to the same extent, to which such services and payments are authorized under section 1037 of title 10, United States Code.”).
- 398 Military Commissions Act of 2006, § 8(a).
- 399 18 U.S.C. §§ 3281-3300.
- 400 *Toussie v. United States*, 397 U.S. 112, 115 (1970) (citing *Pendergast v. United States*, 317 U.S. 412, 418 (1943)); *United States v. Reitmeyer*, 356 F.3d 1313, 1317 (10th Cir. 2004).
- 401 18 U.S.C. § 3282(a) (“Except as provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”).

- 402 18 U.S.C. § 3286(a) (“Notwithstanding section 2383, no person shall be prosecuted, tried, or punished for any non-capital offense involving a violation of any provision listed in section 2332b(g)(5)(B)..., unless the indictment is found or the information is instituted within 8 years after the offense was committed.”); Torture Act, 18 U.S.C. § 2340A (listed under 18 U.S.C. § 2332b(g)(5)(B)). This section also includes conspiracy to murder, maim or kidnap persons abroad. 18 U.S.C. § 956(a)(1) (listed under 18 U.S.C. § 2332b(g)(5)(B)).
- 403 18 U.S.C. § 3286(b) (“Notwithstanding any other law, an indictment may be found or an information instituted at any time without limitation for any offense listed in section 2332b(g)(5)(B), if the commission of such offense resulted in, or created a foreseeable risk of, death or serious bodily injury to another person.”).
- 404 Ibid.
- 405 18 U.S.C. § 3281 (“An indictment for any offense punishable by death may be found at any time without limitation.”). Federal capital offenses are 18 U.S.C. § 924(j)(1) (murder while in possession of a firearm); 18 U.S.C. § 1111 (first degree murder within the special maritime or territorial jurisdiction of the U.S.); 18 U.S.C. § 2340A (torture where death results); 18 U.S.C. § 2441 (war crimes where death results); 18 U.S.C. § 2241 (aggravated sexual abuse); 18 U.S.C. § 2242 (sexual abuse); 18 U.S.C. § 2244 (abusive sexual contact); and other sections not relevant to this discussion.
- 406 War Crimes Act, § 2441(a).
- 407 *United States v. Ealy*, 363 F.3d 292 (4th Cir. 2004).
- 408 See UCMJ, Art. 43(b)(1).
- 409 UCMJ, Art. 43(a). Murder (Art. 118) and rape (Art. 120) are relevant examples of capital offenses under the UCMJ.
- 410 In international law, there is a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) but the United States is not a state party to that Convention. There is also some state practice to indicate that statutory limitations should not apply, but such practice has not been consistent enough to give rise to a customary international law prohibition on statutory limitations on such crimes. Jurisprudence under the American Convention on Human Rights has been much clearer in insisting that, among its states party, at least, barring prosecution of serious human rights violations by statutes of limitation or other means contravenes that regional human rights pact. See, e.g. *Barrios Altos Case*, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001). The United States has signed but not ratified the American Convention.
- 411 As early as 1792, George Washington’s Cabinet convened to debate the propriety of responding to a Congressional request for documents and papers with regard to a House inquiry into the conduct of a General St. Clair, under whose command hundreds of American troops were ambushed and killed by Native Americans. After deliberating, President Washington’s Cabinet decided that the inquiry and request for documents were both constitutionally legitimate, and that “the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would endanger the public.” See John C. Grabow, *Congressional Investigations: Law and Practice* (New York: Aspen Publishers, 1988), 20. In these deliberations, “the seeds of executive privilege...had been planted.” Kalah Auchincloss, “Congressional Investigations and the Role of Privilege,” *American Criminal Law Review* 43, (2006): 168 n.17.
- 412 See, e.g., Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 730-731 (D.C. Cir. 1974).
- 413 Presidential Records Act, 44 U.S.C. §§2201-2207, amended by Executive Order 13,489, 74 Fed. Reg. 4669 (January 2009) (hereinafter “Presidential Records Order”).
- 414 *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973). See also *In re Sealed Case (Espy)*, 121 F.3d 729, 754 (D.C. Cir. 1997), where the court held that two components are required to demonstrate a need for admission of the confidential information to override the president’s presumptive privilege: first, the information sought must be likely to contain important evidence; and second, the evidence must not be available with diligence elsewhere.
- 415 Classified Information Procedures Act, 18 U.S.C. appx. 3 §§ 1-16.
- 416 *United States v. North*, 713 F. Supp. 1452, (D.D.C. 1989).
- 417 Classified Information Procedures Act, §§ 3-4.
- 418 Classified Information Procedures Act, § 4.
- 419 See e.g. Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice—Prosecuting Terrorism Cases in the Federal Courts* (New York: Human Rights First, May 2008) (successful use of CIPA in trials of alleged terrorists).
- 420 See n. 189, 190.
- 421 *United States v. Nixon*, 418 U.S. 683, 707 (1974) (“the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III”). In international prosecutions this issue has already arisen, in a private complaint filed before the German public prosecutor against Donald Rumsfeld. The case was dismissed on the grounds that Rumsfeld, as a former high-level government official, was immune from prosecution for acts committed while in office; an appeal by the organizations involved also was dismissed. CCR, “Donald Rumsfeld Charged with Torture During Trip to France: Complaint Filed Against former Defense Secretary for Torture, Abuse at Guantanamo and Abu Ghraib,” press release, October 26, 2007, <http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>. Public Prosecutor to the Paris Court of Appeal, “Case of Donald Rumsfeld—contesting the decision of the Paris District Prosecutor (*Procureur de la Republique*) to dismiss the case, 16 November 2007,” February 27, 2008; CCR, “French War Crimes Complaint Against Donald Rumsfeld, et al.” <http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld>. International criminal law allows criminal prosecution of heads of state and other officials in international courts and tribunals, while such individuals may enjoy immunity of office in national courts. See, e.g., Ellen L Lutz & Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009), 222-223.
- 422 See discussion n. 286.
- 423 William George Eckhardt, “My Lai: An American Tragedy,” 2000, <http://www.law.umkc.edu/faculty/projects/trials/mylai/ecktragedy.html>.
- 424 Model Penal Code § 3.02 (Proposed Official Draft 1962). This model code is not a statement of federal law but does reflect general practice across the country to some extent.
- 425 Richard Cheney, interview by Chris Wallace.
- 426 *United States v. Sahakian*, 453 F.3d 905, 910 (7th Cir. 2006) (The rumor that there was a contract out on his life did not present an “imminent” danger to a prisoner such that he could present a necessity defense to charges of illegal weapons possession.) Under international criminal law too, necessity or duress must involve an *imminent threat to life or bodily harm* that requires an individual to commit a crime. In one of the post WW II US Military Tribunal cases, it was held that the defense of necessity is unavailable when the defendant is responsible for the situation or necessity or initiated it, or when the defendant’s conduct exceeded what was truly necessary given the circumstances. See *United States v. Carl Krauch*, et al. (IG Farben), 10 L. Rep. Trials War Crim. 1, 47-8, 7 USMT 1, 15 Ann. Digest 668, Case No. 218. (U.S. Mil. Trib., Nuremberg 1948).
- 427 Interview with Argentine human rights lawyer, Juan E. Méndez, President Emeritus of the ICTJ and former Commissioner of the Inter-American Commission of Human Rights.
- 428 *CIA-IG Report*, para. 264.
- 429 “The three [classified documents] that were released recently by the C.I.A.—the 2004 report by the inspector general and two memos from 2004 and 2005 on intelligence gained from detainees—fail to show that the [harsh interrogation] techniques stopped even a single imminent threat of terrorism.” Soufan, “What Torture Never Told Us.” “We now see that the best intelligence, which led to the capture of Saddam Hussein and the elimination of Abu Musab al-Zarqawi, was produced by professional interrogations using non-coercive techniques. When the abuse began, prisoners told interrogators whatever they thought would make it stop. Torture is as likely to produce lies as the truth. And it did.” Charles C. Krulak and Joseph P. Hoar, “Fear Was No Excuse to Condone Torture,” *Miami Herald*, Sept. 11, 2009, <http://www.miamiherald.com/opinion/other-views/story/1227832.html>.
- 430 For example, an unsigned memo from the Joint Personnel Recovery Agency (JPRA)—the agency responsible for the SERE program—warned against the use of torture, and that “the application of extreme physical and/or psychological duress (torture) has some serious operational deficits, most notably, the potential to result in unreliable information.” Joint Personnel Recovery Agency, *Operational Issues Pertaining to the Use of Physical/Psychological Coercion in Interrogation: An Overview*, July 2002, 2.
- 431 See Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions* (New York: ABCNY & CHRJ, NYU School of Law, 2004), 118.
- 432 “Torture Convention,” Art. 2(2).
- 433 Wayne R. Lafave, *Substantive Criminal Law, Volume 2*, § 10.4 (2d ed., 2008). Similarly, in international criminal law, a defense of self-defense is only valid in circumstances of imminence of an attack, proportionality in the response, and unlawfulness of the original attack. Jens Ohlin, “Self-Defence,” in *Oxford*

- Companion to International Criminal Justice*, 507.
- 434 See, e.g., *Fersner v. United States*, 482 A.2d 387 (D.C. Cir. 1984) (holding that defense of another based on a defendant's perception that another person is likely to suffer imminent bodily harm is a valid defense). Under § 3.05 of the Model Penal Code, the use of force for the protection of other persons is warranted when (a) the actor would be justified through self-defense (section 3.04) in using such force to protect himself against the injury he believes to be threatened to the person whom he seeks to protect; and (b) under the circumstances as the actor believes them to be, the person whom he seeks to protect would be justified in using such protective force; and (c) the actor believes that his intervention is necessary for the protection of such other person.
- 435 *Fersner v. United States*, 482 A.2d. at 391.
- 436 See, e.g., *State v. Coffin*, 991 P.2d 477, 486 (N.M. 1999) ("While it is true that a person may act in self-defense against multiple attackers in concert, this principle applies only to the extent that each accomplice poses an immediate danger of death or great bodily harm, thereby necessitating an act of self defense."); *State v. Brown*, 34 S.C. 41 (1891). Likewise, in international criminal law, a defense of self-defense is only valid in circumstances of imminence of an attack, proportionality in the response, and unlawfulness of the original attack. Ohlin, "Self-Defence," 507. In military law, defense of another is a special defense recognized under R.C.M. 916, but applies only to homicide, attempted homicide, assault with intent to kill and assaults under Articles 90, 91, or 128 of the UCMJ. See also *United States v. Alexander*, 2003 CCA LEXIS 45, 14-15 (U.S. Navy-Marine Ct. Crim. App. 2003), citing *United States v. Scott*, 40 M.J. 914, 917 (A.C.M.R. 1994); *United States v. Lanier*, 50 M.J. 772, 777-78 (Army Ct.Crim.App. 1999); *United States v. Ravenel*, 26 M.J. 344, 351 (C.M.A. 1988); *United States v. Straub*, 12 U.S.C.M.A. 156, 160 (C.M.A. 1961).
- 437 Two of the retracted OLC memoranda posit the ideas of a "national self defense" and a defense based on "necessity." See Yoo, *Military Interrogation of Alien Unlawful Combatants*, 74, 77; Bybee, August 2002 Memo to Gonzales, 39, 42.
- 438 Bybee, *August 2002 Memo to Gonzales*, 39, 42; Detainee Treatment Act of 2005, §1004(a); Military Commissions Act of 2006, 2636, §8(b)(3).
- 439 See, e.g., *United States v. Barker*, 546 F.2d 940, 952 (D.C. Cir. 1976) (Wilkey, J., concurring) ("but surely two laymen cannot be faulted for acting on a known and represented fact situation and in accordance with a legal theory espoused by this and all past Attorneys General for forty years.").
- 440 See *Lambert v. California*, 355 U.S. 225, 228 (1957); *Cheek v. United States*, 498 U.S. 192, 199 (1991).
- 441 See, e.g., *United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008); *Raley v. Ohio*, 360 U. S. 423, 426 (1959); *United States v. Barker*, 546 F.2d at 952 (Wilkey, J., concurring); *United States v. Duggan*, 743 F. 2d 59, 83-84 (2d Cir. 1984). Note that the court in *Duggan* declined to adopt the "apparent authority" exception espoused by Wilkey in *Barker*. See also, *Raley v. Ohio*, 360 U. S. at 426.
- 442 See, e.g., Fed. R. Crim. P. 12.3 (requiring advance notice to the prosecution if a defendant intends to admit to the act but raise a Public-Authority Defense to disprove intent).
- 443 See, e.g., *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970) (Defendant must show that reliance on the misleading information was reasonable, in the sense that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries); *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994) (A defense of public authority is applicable only if it is shown that reliance on governmental authority was reasonable as well as sincere) But c.f. *Cheek v. United States*, 498 U.S. 192, 200-203 (1991) (Given the statutory language and complexity of tax laws, defendant was entitled to acquittal if he could prove that he believed that his actions did not violate tax laws, even though the belief was unreasonable. *Cheek* has not been extended beyond criminal tax offenses. *United States v. Burrows*, 36 F.3d 875, 882-883, citing *United States v. Lorenzo*, 995 F.2d 1448, 1455 (9th Cir. 1993).
- 444 See *United States v. Carr*, 740 F.2d 339, 347 (5th Cir. 1984).
- 445 The techniques diverged drastically from prior guidance in the Army Field Manual, for instance. See U.S. Department of the Army, FM 34-52--*Intelligence Interrogation*, September 28, 1992. See also Cloonan, Kleinman & Alexander, "Independent Nonpartisan Commission" (former interrogators and an intelligence officer urging consistent application of U.S. law to those who developed the illegal interrogation policies developed during the Bush era); *CIA-IG Report*, paras. 231-32 ("During the course of this Review, a number of Agency officers expressed unsolicited concern about the possibility of recrimination or legal action resulting from their participation in the CTC Program. ...One officer expressed concern that one day, Agency officers will wind up on some 'wanted list' to appear before the World Court for war crimes...").
- 446 See Joint Service Committee on Military Justice, *Manual for Courts Martial*, R.C.M. 916(d); *Prosecutor v. Erdemovic*, ICTY Trial Chamber, 29 November 1996, Section 17, <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm>; *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973); *United States v. Calley*, 22 U.S.C.M.A. 534 (C.M.A. 1973).
- 447 See *Prosecutor v. Erdemovic*, para.15. See also "Charter of the International Military Tribunal - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis," Art. 8, U.N. Doc A/CN.4/5 (August 8, 1945) (hereinafter "London Agreement").
- 448 See *United States v. Calley*, 22 U.S.C.M.A. at 542 (finding that the superior orders defense is not applicable if the order is one which a person of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order is actually known to the accused to be unlawful).
- 449 For example, Master-at-Arms First Class William J. Kimbro, U.S. Navy Dog Handler, refused to participate in improper interrogations despite significant pressure from the MI personnel at Abu Ghraib. 1LT David O. Sutton, 229th MP Company, took immediate action and stopped an abuse at Abu Ghraib, then reported the incident to the chain of command. *Taguba Report*, 50.
- 450 The FBI interrogator Ali Soufan was successful in early rapport-based interrogations of Abu Zubaydah who was imprisoned and interrogated in secret CIA detention, likely in Thailand. Despite Soufan's success, a CIA contractor, James Mitchell, was brought in, who introduced mistreatment when Zubaydah failed to answer questions. Soufan repeatedly objected to the CIA techniques. The situation came to a head when Soufan discovered a coffin-like box which the CIA contractor, intended to use to confine Zubaydah. Soufan reported the abuses to his superior Pasquale D'Amuro, then the FBI assistant director for counterterrorism, who, in turn, informed then FBI Director Robert Mueller. Shortly thereafter, Mueller made the decision to pull the FBI out of CIA interrogations entirely. Michael Isikoff, "We Could Have Done This the Right Way:" How Ali Soufan, an FBI Agent, Got Abu Zubaydah to Talk Without Torture," *Newsweek*, May 4, 2009.
- 451 *CIA-IG Report*, 94 ("During the course of this Review, a number of Agency officers expressed unsolicited concern about the possibility of recrimination or legal action resulting from their participation in the CTC Program. ...One officer expressed concern that one day, Agency officers will wind up on some 'wanted list' to appear before the World Court for war crimes...").
- 452 "Torture Convention," Art. 2(3).
- 453 Department of Justice, "Department of Justice Releases Four Legal Counsel Opinions," press release, April 16, 2009, <http://www.usdoj.gov/opa/pr/2009/April/09-ag-356.html>.
- 454 Deborah Nelson, *The War Behind Me* (Philadelphia: Basic Books, 2008), 147. According to an essay by the former chief prosecutor of the My Lai cases, most of the members of the company involved had left the military, and a loss of UCMJ jurisdiction resulted. The DOJ declined to prosecute. Eckhardt, My Lai: An American Tragedy.
- 455 William George Eckhardt, "Chronology," *My Lai Courts Martial*, <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylaichron.html>.
- 456 Nelson, *The War Behind Me*, 147 (quoting Stephen Chucala).
- 457 Eckhardt, "Chronology."
- 458 Nelson, *The War Behind Me*, 171, citing Melvin R. Laird, "Iraq: Learning the Lessons of Vietnam: Setting the Record Straight," *Foreign Affairs* 84, no. 6 (November/December 2005).
- 459 University of Missouri-Kansas City School of Law, "Chronology," <http://www.law.umkc.edu/faculty/projects/ftrials/mylai/mylaichron.html>, and Eckhardt, *My Lai: An American Tragedy*. Calley recently expressed remorse for his crimes. Associated Press, "Ex-Officer Apologizes for Killings at My Lai," *New York Times*, August 23, 2009, <http://www.nytimes.com/2009/08/23/us/23mylai.html>.
- 460 Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: New York Times Company/Random House, 1970), 182.
- 461 International Center for Transitional Justice, "Indonesia: A Case of Impunity," June 30, 2008, <http://www.ictj.org/en/news/features/1792.html>. See also David Cohen, "Intended to Fail: The Trials Before the Ad Hoc Human Rights Court in Jakarta," paper written for the International Center for Transitional Justice, August 2003, <http://www.ictj.org/images/content/0/9/098.pdf>.
- 462 The Indonesian trials resembled an earlier historical example, the post World War I trials held by the Criminal Senate of the German Imperial Court of Justice at Leipzig. Proposals for international trials or surrender of alleged German war criminals to Allied countries came to naught, and instead the

- Allies proposed to Germany the names of those who should be charged before the German courts. Out of 45 names proposed, only 12 were tried in proceedings that commenced in May 1921. Out of 12, only six were sentenced, and sentences ranged between 10 months and 4 years. One major was convicted in spite of his defense that he was following the orders of a general who was acquitted. The failures of the Leipzig trials were a major impetus for setting up an International Military Tribunal at the end of WWII. Hankel Gerd, "Leipzig Supreme Court," in *Oxford Companion to International Criminal Justice*, 407-409.
- 463 Department of Justice, "Statement of Attorney General Eric Holder." The White House released a statement the same day: "The President has said repeatedly that he wants to look forward, not back, and the President agrees with the Attorney General that those who acted in good faith and within the scope of legal guidance should not be prosecuted. Ultimately, determinations about whether someone broke the law are made independently by the Attorney General." White House, "Statement from the Press Secretary on the Department of Justice Inquiry," press release, August 24, 2009, http://www.whitehouse.gov/the_press_office/Statement-from-the-Press-Secretary-on-the-Department-of-Justice-Inquiry/.
- 464 See CNN, opinion research poll, Sept. 10, 2009, <http://i2.cdn.turner.com/cnn/2009/images/09/10/rel12g.pdf> (49 percent believe it was a "good idea" and 50 percent believe it was a "bad idea" for Holder to appoint a special prosecutor to investigate whether the CIA employees used harsh interrogation procedures that went beyond the actions that the Bush administration had authorized); Gallup, "Americans Divided on Investigating Bush-Era Interrogations," opinion research poll, Sept. 4, 2009, <http://www.gallup.com/poll/122753/Americans-Divided-Investigating-Bush-Era-Interrogations.aspx?CSTS=alert> (47 percent approve of appointment of special prosecutor, while 49 percent disapprove); CBS News, "Terrorism: The War in Afghanistan and C.I.A. Interrogations," opinion research poll, Sept. 1, 2009, http://www.cbsnews.com/htdocs/pdf/poll_afghanistan_090109.pdf (50 Percent believe appointing a special prosecutor to investigate the CIA is a "good idea," with 38 percent believing it to be a "bad idea"); Rasmussen Reports, "49% Oppose Justice Department Prove of Bush-Era CIA," opinion research poll, August 27, 2009, http://www.rasmussenreports.com/public_content/politics/general_politics/august_2009/49_oppose_justice_department_probe_of_bush_era_cia (49 percent disagree with the appointment of a special prosecutor, while 36 percent agree).
- 465 See, e.g., Phillip E. Berryman (trans.), *Report of the Chilean National Commission on Truth and Reconciliation*, vol. 1. (Notre Dame & London: University of Notre Dame Press, 1993), 65-69. The Pinochet regime referred to its opponents—some armed, others political activists or supporters of the Allende government—as "terrorists," but the context was markedly different than the one the U.S. has faced not only because this was a false label but also because the perceived threat was internal. Nevertheless, the paradigm of arguing that national security demands that human rights be sacrificed is very similar.
- 466 Those efforts included the work of two truth commissions, the discovery of mass grave sites of some of the "disappeared," and several judicial investigations of extrajudicial killings and disappearances, including the judicial investigation that led to Pinochet's arrest in London, in 1998. Later, investigations about corruption and embezzlement by Pinochet himself also played a role in ending his impunity. Two truth commissions—one on deaths and disappearances and one on torture—played a significant role in shifting public opinion. By 2004, a Fundación Futuro poll showed that 81 percent of Chileans thought that processes like the Truth and Reconciliation Commission [on deaths and disappearances] helped to prevent recurrence of abuses. Fundación Futuro, "Estudio de Opinión Pública—Informe de la Comisión sobre Prisión Política y Tortura" ("Public Opinion Research—Commission Report on Political Prisoners and Torture"), December 2004.
- 467 See David Connett, John Hooper, and Peter Beaumont, "Pinochet Arrested in London," *Guardian* (Manchester, UK), October 18, 1998, <http://www.guardian.co.uk/world/1998/oct/18/pinochet.chile>.
- 468 Human Rights Watch, "Discreet Path to Justice?: Chile, Thirty Years After the Military Coup," September 2003, <http://www.hrw.org/legacy/background/americas/chile/chile0903.pdf>. See also Cristián Correa, "Waterboarding Prisoners and Justifying Torture: Lessons for the U.S. from the Chilean Experience," *Human Rights Brief* 14 (Winter 2007): 21-25.
- 469 United Nations Treaty Collection, "Chapter IV: Human Rights—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," http://treaties.un.org/LegalPages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-9&chapter=4&lang=en.
- 470 Article 5(2) of the Torture Convention states that, "Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article."
- 471 In 2005, German prosecutors declined to pursue a criminal investigation. See "Re: Criminal Complaint against Donald Rumsfeld et al.," Order of the Prosecutor General at the Federal Supreme Court, April 5, 2007, 1.
- 472 This second complaint was lodged in 2006 before the German Federal Prosecutor, but prosecution was declined on April 27, 2007. The groups appealed this decision, but the appeal was dismissed by the Stuttgart Regional Appeals Court. A motion for reconsideration was filed to an appeals court on May 25, 2009. CCR, "German War Crimes Complaint Against Donald Rumsfeld, et al.," <http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al.%3FphpMyAdmin=563c49a5adf3t4ddbfb89b>; Mark Landler, "12 Detainees Sue Rumsfeld in Germany, Citing Abuse," *New York Times*, November 15, 2006, <http://www.nytimes.com/2006/11/15/world/europe/15german.html>.
- 473 CCR, "Donald Rumsfeld Charged with Torture During Trip to France." The case was eventually dismissed on the grounds that Rumsfeld, as a former high-level government official, was immune from prosecution for acts committed while in office; an appeal by the organizations involved also was dismissed. Public Prosecutor to the Paris Court of Appeal, "Case of Donald Rumsfeld—triggering contesting (sic) the decision of the Paris District Prosecutor (*Procureur de la Republique*) to dismiss the case, 16 November 2007," February 27, 2008; CCR, "French War Crimes Complaint Against Donald Rumsfeld, et al.," <http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld>.
- 474 Marlise Simons, "Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials," *New York Times*, March 28, 2009, <http://www.nytimes.com/2009/03/29/world/europe/29spain.html>; CNN, "Judge OKs Probe of Torture Complaint Against Bush Officials," *CNN.com*, March 29, 2009, <http://www.cnn.com/2009/WORLD/europe/03/29/gonzales.spain.gitmo>.
- 475 Daniel Woolls, "Spanish Judge Opens Guantanamo Investigation," *Guardian* (Manchester, UK), April 29, 2009, <http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture>.
- 476 Elisabetta Povoledo, "Milan Judge Says C.I.A. Trial to Continue, With Restrictions," *New York Times*, May 20, 2009, <http://www.nytimes.com/2009/05/21/world/europe/21italy.html>; Nedra Pickler, Associated Press, "U.S. Will Pay for Lawyer in Italian Kidnapping Trial," *GoogleNews.com*, August 27, 2009, <http://www.google.com/hostednews/ap/article/ALeqM5h0HmqE7igbkDRzD-ROULYUOdM8TAD9ABEV8G0>.
- 477 Dafna Linzer, "Probe Leader Called a Tough Prosecutor," *Washington Post*, January 3, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/02/AR2008010203598.html?hpid=topnews>; Peter Lattman, "Mukasey Appoints Durham to Lead Probe Over CIA Tapes," *Wall Street Journal*, January 2, 2008, <http://blogs.wsj.com/law/2008/01/02/mukasey-appoints-durham-to-lead-probe-over-cia-tapes>.
- 478 Carrie Johnson, Jerry Markon and Julie Tate, "Inquiry Into CIA Practices Narrows," *Washington Post*, September 19, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/18/AR2009091802510.html?hpid=moreheadlines>; Daphne Eviatar, "Former FBI and DOD Interrogators Support Holder's CIA Probe and Want More," *Washington Independent*, August 24, 2009, <http://washingtonindependent.com/56238/former-fbi-and-dod-interrogators-support-holders-cia-probe-and-want-more>.

Annex: Detention-Related Abuses Occurring Across Multiple Locations¹

Abuses	Guantánamo	Afghanistan	Iraq	CIA Detention
<p>BEATINGS INCLUDING “WALLING”</p>	<ul style="list-style-type: none"> Some detainees reported physical assaults.² For example, a young detainee refused to accompany a guard to the interrogation room and was so severely beaten that he had to be hospitalized.³ Immediate Reaction Force (IRF) teams, a kind of in-house riot squad, regularly were called in to punish a detainee for even minor infractions, like keeping a piece of string in his cell. The IRF teams are known to beat, squash, smash, sit on, and beat detainees’ heads on the floor.⁴ According to some sources, this practice continues to be used at Guantánamo.⁵ 	<ul style="list-style-type: none"> Detainees were often assaulted while being transferred from their cells to the interrogation rooms.⁶ A detainee at Bagram reported an episode of abuse in which he was kicked repeatedly in the abdomen, causing painful swelling. It took him six months to recover, and during this time he was frequently denied medical attention.⁷ Another detainee at Kandahar reported that his guards beat him severely, including kicks to the head that caused the loss of four teeth and a swelling so large it had to be removed by camp doctors.⁸ 	<ul style="list-style-type: none"> Detainees were stripped, beaten, yelled at, spit on, and used as target practice for paintball.⁹ Soldiers punched, slapped, and kicked detainees, slammed them into walls and jumped on their naked bodies.¹⁰ A British interrogator reported seeing a detainee who had been beaten so severely by a Special Mission Unit Task Force that his back was nearly broken, his nose was broken, and he had two black eyes and multiple contusions on his face.¹¹ 	<ul style="list-style-type: none"> Some detainees, throughout the initial weeks or months of their imprisonment, suffered beatings several times a day consisting of punches, kicks, slaps, and beating with a cable.¹² One detainee reported that when interrogators perceived him to be uncooperative, he was placed against a wall and punched and slapped in the face, body, and head.¹³ Some detainees had collars placed around their necks that interrogators used to slam the detainees’ heads against the wall, a practice known as “walling.”¹⁴ Khaled el-Masri was brutally beaten while being transferred from the custody of Macedonian police to the hands of individuals who flew him to Afghanistan, where the CIA imprisoned him.¹⁵
<p>CONFINEMENT IN BOXES OR CAGES</p>	<p>In the first several months after the prison opened, prisoners were housed in open-air cages similar to dog kennels, which exposed them to the elements.¹⁶</p>	<ul style="list-style-type: none"> Detainees in Bagram were kept in cages and in compartments made of barbed wire and blankets.¹⁷ A detainee in Kandahar reported seeing another detainee tied up “like a package” with belts inside a coffin-like crate, which was sealed before the prisoner was carried away.¹⁸ 	<ul style="list-style-type: none"> A detainee in Abu Ghraib described his cell as a 1.5-by-2.5-meter cage with a smaller cage inside. He was at times locked in the smaller cage.¹⁹ 	<ul style="list-style-type: none"> Abu Zubaydah was placed in a cramped box in which he could not sit comfortably; this caused his existing wounds to open and bleed.²⁰ Interrogation plans also allowed for placing an insect in the box with the prisoner.²¹ Detainees were locked in a “dog box,” one cubic meter in size.²²

Abuses	Guantánamo	Afghanistan	Iraq	CIA Detention
<p>EXPLOITATION OF NEED FOR MEDICAL CARE AND MEDICAL PROFESSIONAL INVOLVEMENT IN TORTURE</p>	<ul style="list-style-type: none"> • One detainee reported being placed in isolation in a very cold cell without a blanket, where he was denied medical treatment despite regular vomiting and blood in his urine.²³ • As punishment for a hunger strike, Lakhdar Boumediene was placed in solitary confinement and denied treatment for a foot injury.²⁴ • Another detainee whose mental health deteriorated rapidly after imprisonment was restrained and given only water and blankets as “privileges.” While he was interrogated, he was also put on a sleep deprivation regimen; all of these caused further deterioration of his health.²⁵ • A detainee held in Camp X-Ray reported that medical personnel were present during IRF squad beatings to make sure there were no injuries.²⁶ 	<ul style="list-style-type: none"> • One prisoner who was held in Bagram and Kandahar developed a large black and blue swelling in his abdomen after being kicked during an interrogation. Although he was given surgery against his will, the swelling did not subside for six months, and he was given no medical care.²⁷ • Detainees reported receiving forced medication before interrogation sessions.²⁸ • While Murat Kurnaz was suspended five days by the arms in various positions, doctors repeatedly came to examine him.²⁹ 	<ul style="list-style-type: none"> • Soldiers allowed a guard, rather than a doctor, to stitch up a detainee’s wound when he was injured after being slammed against his cell wall.³⁰ • Detainees held at Abu Ghraib were denied medical care for wounds inflicted by soldiers.³¹ • While held in a U.S.-controlled camp, one detainee reported being denied necessary medicine for diabetes and angina.³² 	<ul style="list-style-type: none"> • Medical personnel were present and involved in the CIA interrogations of Khalid Sheikh Mohammed and Abu Zubaydah in a secret detention center in Thailand.³³ • American doctors were present in CIA detention sites and saw prisoners on a regular basis.³⁴
<p>EXTENDED ISOLATION</p>	<ul style="list-style-type: none"> • Detainees were kept in isolation in an extremely cold environment and short-shackled to the floor.³⁵ • Mohamed al-Qahtani was kept in isolation for six months.³⁶ • Camp 6 was modeled on U.S. “supermax” prisons. Detainees are kept in total isolation; they are locked in their rooms for a minimum of 22 hours a day, with the possibility of two hours of recreation time in a yard with no view to the outside.³⁷ 	<ul style="list-style-type: none"> • Detainees were routinely subject to extended isolation in prison camps at Kandahar and Bagram.³⁸ 	<ul style="list-style-type: none"> • Detainees were held in isolation for extended periods of time, up to two or three weeks. The conditions of isolation included being kept naked in very hot or very cold small rooms.³⁹ • In a small room at Abu Ghraib referred to as “the hole,” detainees were held in total isolation and total darkness.⁴⁰ 	<ul style="list-style-type: none"> • Detainees were kept in continuous solitary confinement throughout detention, most for more than three years.⁴¹ • Guards were typically masked and didn’t communicate with detainees.⁴²

Abuses	Guantánamo	Afghanistan	Iraq	CIA Detention
<p>EXTREMES OF LIGHT AND DARK</p>	<ul style="list-style-type: none"> • Detainees were subject to fluorescent lighting 24 hours a day.⁴³ • Conversely, some detainees noted that they were forced into total darkness, especially during isolation.⁴⁴ • A detainee who was subject to complete darkness in isolation during several months of interrogation reported that he began hearing voices.⁴⁵ • One detainee said the lights in his cell were left on continuously for the entire half-year he was kept in an isolated “brig.”⁴⁶ • During transfer to Guantánamo, detainees were forced to wear blackout goggles along with earmuffs or earplugs.⁴⁷ 	<ul style="list-style-type: none"> • Detainees were hooded when transferred to the prisons and during initial processing.⁴⁸ • An FBI interviewer reports finding a detainee sitting on the ground, blindfolded with ear coverings for sensory deprivation.⁴⁹ • Around-the-clock floodlights kept prisoners in Bagram awake.⁵⁰ 	<ul style="list-style-type: none"> • In some prison camps, some detainees were kept hooded during the first 24 hours of imprisonment, while others were hooded during interrogation or for extended periods while locked in their cells.⁵¹ • Some detainees were held in completely dark cells and were deprived of light at all times.⁵² 	<ul style="list-style-type: none"> • Detainees were hooded prior to transport and kept hooded throughout travel, ranging anywhere from one to 30 hours.⁵³ • Khaled el-Masri was held in Afghanistan in a dark cellar with no light source.⁵⁴
<p>FORCED NUDDITY</p>	<ul style="list-style-type: none"> • Removal of clothing was used during interrogation and as a form of punishment, akin to the removal of a comfort item.⁵⁵ • Detainees were regularly strip-searched as a part of interrogation and forced to stand naked in front of female interrogators.⁵⁶ • Military interrogators stripped Mohamed al-Qahtani in front of a woman during the course of his interrogation.⁵⁷ 	<ul style="list-style-type: none"> • A detainee held in Kandahar reported being stripped after his initial interrogation at the camp and was denied clothes thereafter.⁵⁸ • Prisoners at Kandahar and Bagram had their clothes cut off with scissors when they arrived at the prison. They were kept naked in front of each other and female soldiers.⁵⁹ 	<ul style="list-style-type: none"> • Prisoners were forced to strip and remain in their cells naked for days at a time.⁶⁰ • Detainees were regularly photographed and videotaped while naked.⁶¹ • Detainees were held in cells and marched around the camp naked in view of and escorted by female MPs.⁶² 	<ul style="list-style-type: none"> • Most of the detainees interviewed by the ICRC reported being forced to endure extended nudity, some for weeks or months at a time.⁶³
<p>MILITARY DOGS</p>	<ul style="list-style-type: none"> • Detainees were threatened with having guards’ dogs unleashed on them.⁶⁴ • During an interrogation of al-Qahtani, a dog was first agitated by its handler, and then brought into the interrogation room where it barked, snarled, and nearly bit him.⁶⁵ 	<ul style="list-style-type: none"> • Dogs were used during the movement of detainees and as a way of exerting control.⁶⁶ • Barking dogs were often present during detainee intake at prison camps.⁶⁷ 	<ul style="list-style-type: none"> • Unmuzzled military working dogs were used to frighten detainees. At least one detainee was bitten and severely injured by a dog.⁶⁸ • The use of dogs on detainees at Abu Ghraib was approved by officials and resulted in abusive use of dogs to frighten detainees.⁶⁹ 	<ul style="list-style-type: none"> • Inadequate information is currently available on the treatment of prisoners held at CIA “black sites” and the possible use of dogs in those facilities.

<p>Abuses</p>	<p>RELIGIOUS ABUSE</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> • Many accounts indicate guards desecrated the Qur'an by writing on it, throwing it, or stepping on it. One incident provoked a mass suicide attempt after an interrogator threw a detainee's Qur'an on the floor and stomped on it.⁷⁰ • During interrogation of one detainee, an interrogator would squat over the Qur'an provided to the detainee in order to elicit a reaction.⁷¹ • Detainees were deprived of clothing, sometimes in the presence of female guards, which violates Islamic teachings that proscribe nudity as an impure state.⁷² • Soldiers in Camp Delta banged on the cell doors with sticks while detainees tried to pray.⁷³ • Mohamed al-Qahtani was prevented from praying during interrogation. Interrogators used the opportunity to pray as a bartering tool in exchange for compliance.⁷⁴ 	<p>Afghanistan</p> <ul style="list-style-type: none"> • Detainees reported incidents of the desecration of the Qur'an at Kandahar and Bagram, including throwing it on the ground, sitting on it, and spitting in it. In one case, a soldier kicked the Qur'an into the hands of another soldier, who threw it into a latrine.⁷⁵ • Detainees were not allowed to pray together.⁷⁶ 	<p>Iraq</p> <ul style="list-style-type: none"> • Detainees report that they were forcibly shaved as punishment.⁷⁷ • One detainee reports being forced to pray while naked.⁷⁸ • Detainees at Abu Ghraib and other prisons in Iraq report desecration of the Qur'an such as ripping off the cover, dropping it on the ground or into dirty water.⁷⁹ 	<p>CIA Detention</p> <ul style="list-style-type: none"> • Access to the Qur'an was denied to all the detainees at points throughout their imprisonment, sometimes in response to their lack of cooperation with interrogators.⁸⁰ • Some detainees were not allowed to pray.⁸¹ • One detainee kept in constant light could not figure out the proper times to pray or the direction of Mecca.⁸²
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<p>Abuses SEXUAL ABUSE</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> Female guards frequently conducted full body searches of prisoners and/or watched as prisoners showered and toileted. One female interrogator performed a lap dance on a detainee.⁸³ Female interrogators acted in sexually provocative ways; they stripped in view of a detainee, inappropriately touched prisoners, and invaded their personal space.⁸⁴ At least one prisoner was forced to watch pornographic images.⁸⁵ Prisoners were threatened with homosexual rape.⁸⁶ One prisoner was forced to wear a bra and woman's thong on his head.⁸⁷ A female interrogator stroked a prisoner's arms, squeezed his genitals to cause pain, and bent his thumbs back during Ramadan, a month when it is forbidden for Muslims to touch people of the opposite gender.⁸⁸ A female interrogator assaulted a detainee by wiping dye from a red magic marker on the detainee's shirt and telling the detainee that the red stain was menstrual blood.⁸⁹ 	<p>Afghanistan</p> <ul style="list-style-type: none"> In Kandahar, a prisoner was forced to insert a finger into his own anus in front of female soldiers and other prisoners as he was being processed into the facility.⁹⁰ Detainees reported terrifying strip searches and body cavity searches, often in the presence of female soldiers, as well as female soldiers watching and laughing as detainees showered.⁹¹ 	<p>Iraq</p> <ul style="list-style-type: none"> Naked male detainees at Abu Ghraib were forced to wear women's underwear.⁹² Detainees were forced to assume sexually degrading positions.⁹³ Soldiers sodomized prisoners with chemical lights, nightsticks, or broomstick handles.⁹⁴ Soldiers forced men into sexual positions for photographing, including forced masturbation or arranging naked men in piles.⁹⁵ One soldier raped a female detainee.⁹⁶ A photograph captured one detainee being led on a leash by a female guard.⁹⁷ 	<p>CIA Detention</p> <ul style="list-style-type: none"> Al-Nashiri was threatened with sodomy and the arrest and rape of his family.⁹⁸ At least one detainee rendered to a foreign country was subject to genital mutilation.⁹⁹
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<p>Abuses</p>	<p>SLEEP DEPRIVATION</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> • Detainees were deprived of sleep through the use of flashing lights, loud music, fans, banging on cells, and other noises.¹⁰⁰ • Another technique for sleep deprivation, nicknamed the “frequent flyer program,” involved forcing the detainee to switch cells constantly in order to disrupt his sleep cycle and disorient him so that he would be unable to resist his interrogator.¹⁰¹ • One prisoner was subject to interrogation for 18 to 20 hours a day for 48 days, allowing for only four hours of rest.¹⁰² 	<p>Afghanistan</p> <ul style="list-style-type: none"> • Bright, flashing lights, loud music, and waking detainees up every 15 minutes during their sleep period were techniques used as punishment or as part of interrogation strategies.¹⁰³ 	<p>Iraq</p> <ul style="list-style-type: none"> • Detainees were subject to loud music or recordings of a baby crying, extended periods of being shackled in a standing position, sometimes while hooded, and being awakened repeatedly and taken in for interviews in order to prevent detainees from sleeping.¹⁰⁴ • A detainee at Abu Ghraib reported soldiers banging on cell doors.¹⁰⁵ • The soldier who placed the hooded detainee on a box with wires attached to fingers, toes, and penis reported that her job was to “keep detainees awake.”¹⁰⁶ 	<p>CIA Detention</p> <ul style="list-style-type: none"> • Detainees report being shackled with arms in the air, which prevented sleep.¹⁰⁷ • One detainee was suspended for two weeks with only two or three breaks to lie down.¹⁰⁸ • Stress positions were combined with lengthy interrogation sessions, loud music, and blasting cold air to deprive detainees of sleep.¹⁰⁹ • A detainee held in a CIA detention site in Afghanistan reported constant loud music and guards waking him up every half-hour.¹¹⁰
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Abuses	Guantánamo	Afghanistan	Iraq	CIA Detention
<p>STRESS POSITIONS, INCLUDING SUSPENSION</p>	<ul style="list-style-type: none"> • One detainee reported that when interrogated, he was forced to sit chained to a chair for 18 to 20 hours at a time, which caused extreme back pain.¹¹¹ • Detainees were short-shackled by their legs and arms to eyebolts in the middle of the floor, forcing them to crouch or lie in a fetal position for extended periods.¹¹² • Even after short-shackling ostensibly was banned in GTMO, detainees continued to report its use.¹¹³ 	<ul style="list-style-type: none"> • Detainees were restrained with their arms, behind their backs or chained to a wall for long periods of time.¹¹⁴ • Detainees report being suspended from their arms, sometimes with arms behind them, or hung upside-down for hours or even days.¹¹⁵ 	<ul style="list-style-type: none"> • The special operations facility at Camp Nama, contained a torture cell nicknamed the “Black Room.” It was a windowless, jet-black garage-sized space, barren except for several 18-inch hooks on the ceiling left over from Hussein’s era.¹¹⁶ It was outfitted with floor-to-ceiling speakers. Most detainees were held there in painful stress positions, subjected to sleep deprivation by use of strobe lights, cold water, and rap or rock music at deafening levels.¹¹⁷ • At Mosul, prisoners were routinely subject to forced kneeling in the mud, sometimes for hours longer than the approved time of 45 minutes.¹¹⁸ • Many detainees at Abu Ghraib reported stress positions. For example, one detainee was often shackled in his cell with one arm raised in the air and the other tied to his ankle. He was also lifted off the ground by his arms, which were tied behind his back. This type of suspension happened to him four or five times and resulted in dislocated shoulders.¹¹⁹ 	<ul style="list-style-type: none"> • Detainees were stripped naked and then shackled to the ceiling by their hands.¹²⁰ • This treatment might last continuously for several days or occur regularly over the course of several months.¹²¹ • Two detainees were shackled in this position for seven consecutive days at one point, and one noted that he was only given short respites from this position over the course of two to three weeks.¹²² • One detainee reported being kept chained to a chair in a seated position for two to three weeks, while being provided only with water and a nutrient drink.¹²³ • Detainees were painfully shackled or hung from a pole.¹²⁴

<p>Abuses</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> • The military regularly subjected detainees to temperature extremes by turning air conditioning up full blast and/or leaving detainees without blankets or other coverings.¹²⁵ • Detainees were left short-shackled to the floor in extremely cold rooms.¹²⁶ • Detainees were also kept short-shackled in very hot rooms, occasionally for days and without food, water, or access to hygiene facilities.¹²⁷ • At Camp X-Ray, the first unit built at Guantánamo, the cells had concrete floors and open-air sides composed of chain-link fencing, which exposed detainees to the elements.¹²⁸ 	<p>Afghanistan</p> <ul style="list-style-type: none"> • A detainee in Kandahar was kept with other prisoners in an extremely hot tent for the first 20 days of his imprisonment, which made him very sick.¹²⁹ • During the cold winters, the two-blanket ration was inadequate to protect detainees against the cold.¹³⁰ 	<p>Iraq</p> <ul style="list-style-type: none"> • FOB Tiger used a shipping container to detain prisoners with temperatures as high as 115 to 145 degrees Fahrenheit.¹³¹ • One FBI agent reported seeing a detainee shivering during an interrogation in a cold room with the air conditioner turned up.¹³² • Detainees at Abu Ghraib were held in isolation in very hot or very cold rooms.¹³³ • One detainee reported having his clothes soaked in water and being denied blankets once the temperatures began to drop.¹³⁴ 	<p>CIA Detention</p> <ul style="list-style-type: none"> • One detainee reports that clothes would be given and taken away from him, depending on his level of cooperation with interrogators.¹³⁵ • While nude, detainees were doused with cold water or placed in a cell that was kept extremely cold.¹³⁶ • Blankets were often denied to detainees.¹³⁷
<p>TEMPERATURE EXTREMES</p>				

<p>Abuses</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> • Detainees reported being threatened by interrogators,¹³⁸ including transfer to countries with well-known records of human rights abuses.¹³⁹ • One prisoner was presented with false documents stating that his mother would be transferred to Guantánamo for interrogation if he did not give them the information they wanted.¹⁴⁰ • One detainee was told that if he didn't talk, he would "disappear down a deep dark hole" where worse things than physical torture would happen, his documents would be shredded, and no one would know where he had gone.¹⁴¹ • Chinese intelligence officials were granted access to interrogate Uighur detainees, who were subjected to sleep deprivation throughout the process. This was carried out by the Chinese interrogators or by U.S. military personnel at the behest of the Chinese.¹⁴² 	<p>Afghanistan</p> <ul style="list-style-type: none"> • Threats of physical or mental torture or death and harm to family members were used to frighten detainees.¹⁴³ • One detainee reported being forced to pile on top of other naked detainees and threatened with death if he moved.¹⁴⁴ • At least four detainees were threatened with death at gunpoint.¹⁴⁵ 	<p>Iraq</p> <ul style="list-style-type: none"> • Male detainees were threatened with rape.¹⁴⁶ • One detainee was threatened with a loaded 9-mm pistol.¹⁴⁷ • Detainees report being told their wives or children would be raped and tortured while women's and children's voices were audible in the background.¹⁴⁸ 	<p>CIA Detention</p> <ul style="list-style-type: none"> • Detainees report being threatened with various forms of ill-treatment, including waterboarding, electric shocks, infection with HIV, sodomy, and the arrest and sexual assault of family members.¹⁴⁹ • An interrogator threatened Abd al-Rahim al-Nashiri by racking a handgun close to his head and firing up a power drill while al-Nashiri stood hooded and naked.¹⁵⁰ • CIA interrogators also threatened detainees with the death of their families or led them to believe family members would be raped or otherwise abused.¹⁵¹
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<p>Abuses</p>	<p>TORTURE-OTHER EXTREME FORMS</p>	<p>Guantánamo</p> <ul style="list-style-type: none"> • Mohamed al-Qahtani was subject to multiple abusive interrogation techniques at once. Twenty-hour interrogation sessions were combined with stress positions, cold temperatures, forced physical training, and dousing with cold water. Interrogations involved humiliation techniques such as being led by a dog leash and forced to perform dog tricks, stripping in front of a woman, being straddled by a female interrogator, being forced to wear a bra and women's underwear on his head, forced prayer to an idol shrine, being told he had homosexual tendencies, threats to tell other prisoners he became aroused during searches, and being forced to dance with a male interrogator.¹⁵² 	<p>Afghanistan</p> <ul style="list-style-type: none"> • A former Guantánamo prisoner who was held in Afghanistan described the use of water torture, electric shock, and other extreme forms of torture in detention centers. While imprisoned in Kandahar, he was personally forced to endure water torture, electric shock, hanging by his arms for five days, and severe beatings.¹⁵³ • While detained at Bagram, Mohamed Jawad was thrown down a stairwell while hooded and shackled.¹⁵⁴ 	<p>Iraq</p> <ul style="list-style-type: none"> • FBI agents report being present during water torture in which prisoners had water forced down their throats while cuffed and on their knees.¹⁵⁵ • One detainee was placed naked and hooded on a box with wires attached to his fingers, toes, and penis to simulate electric torture.¹⁵⁶ • FBI agents also reported actual electrical torture, possibly using a Taser.¹⁵⁷ • Soldiers broke chemical lights and poured the phosphoric liquid on detainees.¹⁵⁸ • Detainees were burned by being placed on hot surfaces such as truck beds or jeep hoods. Resulting injuries were sometimes so severe that the detainees required prolonged hospitalization in military custody.¹⁵⁹ 	<p>CIA Detention</p> <ul style="list-style-type: none"> • Three detainees described being waterboarded, which involves strapping the detainee to an inclined board, placing a cloth over the entire face, and pouring water onto the cloth in order to cause the sensation of drowning.¹⁶⁰ • Government sources indicated that one prisoner was waterboarded 83 times and another for 183 times, far in excess of even what was authorized for the CIA interrogation program.¹⁶¹ • Waterboarding was combined with other abusive practices such as nudity in the presence of female interrogators.¹⁶²
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Abuses	Guantánamo	Afghanistan	Iraq	CIA Detention
DEATH	<ul style="list-style-type: none"> Although there are no reports of killings in Guantánamo, the circumstances of detainee deaths in the facility remain mysterious. One detainee died of colon cancer, a treatable form of cancer had it been detected and treated earlier with proper medical screening.¹⁶³ Five suicides have occurred at Guantánamo, about which very little public information has been released.¹⁶⁴ 	<ul style="list-style-type: none"> Two deaths in Bagram occurred in December 2002. Military intelligence agents and police inflicted multiple beatings and blunt-force strikes to the bodies of Dilawar and Habibullah, who both died as a result. The killings were graphically described in nearly 2,000 pages of documents.¹⁶⁵ In June 2003, Abdul Wali, an Afghan farmer who had voluntarily turned himself in to U.S. authorities to clear his name, was beaten and died three days later. CIA contractor David Passaro had interrogated Wali, and according to prosecutors, beat him with his hands and a flashlight and kicked him very forcefully in the groin.¹⁶⁶ In March 2003, U.S. soldiers mistakenly arrested a group of eight Afghan National Army soldiers. They were taken to the U.S. base at Gardez. U.S. soldiers severely beat the soldier-prisoners, and one died as a result. The others exhibited heavy bruises and described being punched, kicked, hung upside down, hit with sticks and cables, soaked in cold water, and forced to lie in the snow. They were also subject to electroshocks.¹⁶⁷ Another Afghan detainee died at Gardez in September 2004. The U.S. military claimed he died of snakebite, but his family claims that the body was bruised.¹⁶⁸ 	<ul style="list-style-type: none"> One high-ranking general from Hussein's air force was violently beaten, put into a sleeping bag head-first, wrapped with a cord, and rolled from side to side while a soldier sat on him. He died as a result.¹⁶⁹ In another incident, only after relatives submitted photographs of the bruises, cuts, and marks on the body of a former Iraqi army officer did DOJ indicate that the death was a homicide.¹⁷⁰ The body of one victim was depicted in one of the Abu Ghraib photographs. Navy SEALs and the CIA captured Manadel al-Jamadi; they detained and tortured him in a small area known as the "Romper Room" at the Baghdad Airport. He was transferred to Abu Ghraib as a "ghost prisoner." CIA agents ordered military police to suspend him while he was hooded. When guards attempted to reposition him, they found his body hanging limp and gushing blood. His body was packed in ice and wrapped in a body bag in order to facilitate the next day's charade of putting him into an orange uniform, laying him on a gurney with an IV, and wheeling him out as if he were ill.¹⁷¹ One detainee died of asphyxiation during an interrogation. Evidence of blunt-force trauma to his arms and legs was discovered upon examination of the body.¹⁷² Several other detainees are documented to have died in custody.¹⁷³ 	<ul style="list-style-type: none"> In December, 2002, a CIA official, working at a secret facility near Kabul, referred to as the "Salt Pit," ordered a detainee to strip naked, dragged him around on the rocky ground, and left him restrained and naked overnight in the cold. He died that night, probably as a result of hypothermia.¹⁷⁴

ANNEX ENDNOTES

- 1 Abuses are listed in alphabetical order, with a panel for detainee deaths appearing last. The locations in this chart track the order in which they appear in the text of the paper. Examples included in this chart are representative, but in no way inclusive of all of the recorded abuses or all abuses that detainees experienced in any location.
- 2 Office of the Inspector General, Oversight and Review Division, *A Review of the FBI's Involvement and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq*, May 2008, 174-179 (hereinafter *FBI Report*); Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact* (Cambridge: Physicians for Human Rights, 2008), 47, 57, 63.
- 3 Laurel Fletcher & Eric Stover, *The Guantanamo Effect: Exposing The Consequences of U.S. Detention and Interrogation Practices* (Berkeley and Los Angeles: University of California Press, 2009), 75. This incident triggered a hunger strike. *Ibid.*, 75.
- 4 Physicians for Human Rights, *Broken Laws*, 57.
- 5 Jeremy Scahill, "Little Known Military Thug Squad Still Brutalizing Prisoners at Gitmo Under Obama," *Alternet.org*, 15 May 2009, http://www.alternet.org/rights/140022/little_known_military_thug_squad_still_brutalizing_prisoners_at_gitmo_under_obama/; Jonathan Goetz & Britta Sandberg, "Freed Guantanamo Detainees Claim Abuse Continues Under Obama," *San Francisco Sentinel*, 21 July 2009, <http://www.sanfranciscosentinel.com/?p=35790>.
- 6 Fletcher & Stover, *Guantanamo Effect*, 33.
- 7 Physicians for Human Rights, *Broken Laws*, 62.
- 8 *Ibid.*, 47.
- 9 Human Rights Watch, "No Blood, No Foul: Soldiers' Accounts of Detainee Abuse in Iraq," (New York: Human Rights Watch, 2006), 11, 19.
- 10 Major General Antonio Taguba, Article 15-6, *Investigation of the 800th Military Police Brigade*, report of inquiry made at the request of Lt. Gen. Ricardo S. Sanchez, January 2004, 16. (Hereinafter *Taguba Report*).
- 11 Senate Armed Services Committee, *Inquiry Into the Treatment of Detainees in U.S. Custody* (hereinafter *Senate Armed Services Committee Report*), 110th Cong., 2d sess., 2008, 163.
- 12 International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* (hereinafter *ICRC 2007 Detainee Report*), February 2007, 13; Center for Human Rights and Global Justice, *On the Record: U.S. Disclosures on Rendition, Secret Detention and Coercive Interrogation* (New York: NYU School of Law, 2008), 15.
- 13 *ICRC 2007 Detainee Report*, 13.
- 14 *Ibid.*, 12. This technique is called "walling." Steven G. Bradbury, Memorandum, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, 30 May 2005, 7 (hereinafter *Bradbury Memo of May 30, 2005*).
- 15 James Meek, "They Beat Me from All Sides," *Guardian*, 14 January 2005, <http://www.guardian.co.uk/world/2005/jan/14/usa.germany>.
- 16 Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantanamo Bay, Cuba* (New York: Center for Constitutional Rights, 2006), 14.
- 17 Physicians for Human Rights, *Broken Laws*, 51, 62.
- 18 Murat Kurnaz, *Five Years of My Life: An Innocent Man in Guantanamo* (New York: Palgrave Macmillan, 2008), 65.
- 19 Physicians for Human Rights, *Broken Laws*, 25.
- 20 *ICRC 2007 Detainee Report*, 14.
- 21 Jay S. Bybee, *Interrogation of Al Qaeda Operative [Abu Zubaydah]*, Memorandum for John Rizzo, August 1, 2002, 3.
- 22 Center for Human Rights and Global Justice, *On the Record*, 15.
- 23 Physicians for Human Rights, *Broken Laws*, 63.
- 24 Goetz & Sandberg, *Freed Guantanamo Detainees Claim Abuse Continues Under Obama*.
- 25 Physicians for Human Rights, *Broken Laws*, 8.
- 26 *Ibid.*, 57.
- 27 *Ibid.*, 62.
- 28 Ian Pannell, "Ex-Detainees Allege Bagram Abuse," *BBC News*, 24 June 2009, http://news.bbc.co.uk/2/hi/south_asia/8116046.stm.
- 29 Kurnaz, *Five Years of My Life*, 73-76.
- 30 *Taguba Report*, 17.
- 31 Physicians for Human Rights, *Broken Laws*, 8, 37.
- 32 *Ibid.*, 33.
- 33 *Bradbury Memo of May 30, 2005*, 8; Sheri Fink, "Do CIA Cables Show Doctors Monitoring Torture?," *Salon.com*, 28 May 2009, <http://www.salon.com/news/feature/2009/05/28/torture/>.
- 34 Center for Human Rights and Global Justice, *Surviving the Darkness: Testimony from the U.S. "Black Sites"* (New York: NYU School of Law, 2007), 21-29.
- 35 Fletcher & Stover, *Guantanamo Effect*, 63-65.
- 36 Albert T. Church III, *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques*, March 7, 2005, 169 (hereinafter *Church Report*).
- 37 Amnesty International, *USA: Cruel and Inhuman: Conditions of Isolation for Detainees at Guantanamo Bay* (New York: Amnesty International, 2007), <http://www.amnestyusa.org/document.php?id=ENGAMR510512007&lang=e>.
- 38 *FBI Report*, 227.
- 39 *Senate Armed Services Committee Report*, 216.
- 40 *Ibid.*
- 41 *ICRC 2007 Detainee Report*, 7; Special Rapporteur Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, report prepared for the Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, Doc. 11302 rev., 49. The CoE Report describes initial four month regimens of isolation that included no exposure to natural light, interaction only with masked, silent guards, constant white noise, shackling, forced nudity, intermittent delivery and inadequate amounts of food, among other abuses.
- 42 *ICRC 2007 Detainee Report*, 8.
- 43 Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment*, 17.
- 44 *Ibid.*
- 45 *Senate Armed Services Committee Report*, 140.
- 46 *FBI Report*, 81.
- 47 Fletcher & Stover, *Guantanamo Effect*, 37.
- 48 *FBI Report*, 223.
- 49 *Ibid.*
- 50 Fletcher & Stover, *Guantanamo Effect*, 27.
- 51 *FBI Report*, 254.
- 52 *Ibid.*, 256.
- 53 *ICRC 2007 Detainee Report*, 6.
- 54 David Charter, "An Innocent Man's Five Months in CIA 'Salt Pit,'" *Times*, (London), 6 December 2005, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article746129.ece.
- 55 *FBI Report*, 199-200. Comfort items were such basics as blanket, mattress, toothbrush or the Qu'ran. Camp Delta Standard Operating Procedures (March 1, 2004) § 4-20.
- 56 Department of Defense, *Schmidt-Furlow Report, Army Regulation 15-6: Final Report Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility*, 1 April 2005, 19-20 (hereinafter *Schmidt-Furlow Report*).
- 57 *FBI Report*, 102.
- 58 Physicians for Human Rights, *Broken Laws*, 3.
- 59 *Ibid.*, 47; Fletcher & Stover, *Guantanamo Effect*, 24-29.
- 60 *Taguba Report*, 16; *FBI Report*, 251.
- 61 *Taguba Report*, 16.
- 62 *Senate Armed Services Committee Report*, 213.
- 63 *ICRC 2007 Detainee Report*, 14.
- 64 Physicians for Human Rights, *Broken Laws*, 63.
- 65 *FBI Report*, 84.
- 66 *Ibid.*, 230.
- 67 Fletcher & Stover, *Guantanamo Effect*, 25.
- 68 *Taguba Report*, 17.
- 69 Josh White, "Detainee in Photo with Dog Was a 'High-Value' Suspect," *Washington Post*, 13 March 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/03/12/AR2006031200962_pf.html.
- 70 Fletcher & Stover, *Guantanamo Effect*, 55.
- 71 *FBI Report*, 83.
- 72 Physicians for Human Rights, *Broken Laws*, 47.
- 73 Physicians for Human Rights, *Broken Laws*, 58.
- 74 Department of Defense, *Interrogation Log Detainee 063*, 23 Nov. 2002-11 Jan 2003, <http://www.time.com/time/2006/log/log.pdf>.
- 75 Fletcher & Stover, *Guantanamo Effect*, 30.
- 76 Physicians for Human Rights, *Broken Laws*, 83.
- 77 *FBI Report*, 261.
- 78 Physicians for Human Rights, *Broken Laws*, 42.
- 79 Richard A. Serrano & John Daniszewski, "Dozens Have Alleged Qu'ran's Mishandling," *Los Angeles Times*, 22 May 2005, <http://www.latimes.com/>

- news/printedition/front/la-fg-Qu'ran22may22,1,1859563,print.story?coll=la-headlines-frontpage.
- 80 ICRC 2007 Detainee Report, 20.
- 81 Ibid.
- 82 Center for Human Rights and Global Justice, *Surviving the Darkness*, 25.
- 83 Church Report, 174-176; Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment*, 24.
- 84 Physicians for Human Rights, *Broken Laws*, 63; Fletcher & Stover, *Guantanamo Effect*, 66.
- 85 FBI Report, 102-3.
- 86 Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment*, 25.
- 87 Schmidt-Furlow Report, 19-20.
- 88 FBI Report, 175.
- 89 Church Report, 55.
- 90 Physicians for Human Rights, *Broken Laws*, 47.
- 91 Ibid., 51; Fletcher & Stover, *Guantanamo Effect*, 22.
- 92 Taguba Report, 16.
- 93 Ibid., 19.
- 94 Tony Lagouranis and Allen Mikaelian, *Fear Up Harsh: An Army Interrogator's Dark Journey Through Iraq* (New York: NAL Caliber 2007), 137.
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