



## Salim v. Mitchell: A First in Accountability for Victims of the United States Torture Program

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***Salim v. Mitchell: A First in  
Accountability for Victims  
of the United States Torture  
Program***

Camilla Amato

**Abstract:**

*This comment aims to demonstrate that U.S. federal civil courts are capable of handling lawsuits involving torture abuses committed under the post-9/11 CIA torture program. This comment analyzes the court's decision in Salim v. Mitchell, a case that was brought by the ACLU on behalf of three torture victims, which, for the first time in U.S. history, was scheduled to go to trial. This comment uses the case to demonstrate that federal courts are able to handle torture violation claims that have been committed in the name of national security within the context of the war on terror. Indeed, when Salim v. Mitchell settled a week before trial, the settlement itself became a historic landmark for these victims. This comment explores the post-9/11 CIA torture program and provides an overview of the international and national laws concerning torture and other cruel, inhuman or degrading treatment, as a background for the argument that no law, domestic or international, permits the use of torture for any reason. The obstacles to universal jurisdiction and how they have rendered ineffective any attempts by foreign nations to bring accountability for CIA-related torture violations are also analyzed. Finally, the importance of the Alien Tort Statute, as a tool to bring justice in U.S. courts, will be discussed, concluding with the argument that accountability is still necessary to strengthen the rule of law, to avoid future abuses, and most importantly, to remedy the harm suffered by victims of torture.*

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## I. Introduction

*They first came for the Communists,  
and I didn't speak up because I wasn't a Communist.  
Then they came for the Jews,  
and I didn't speak up because I wasn't a Jew.  
Then they came for the trade unionists,  
and I didn't speak up because I wasn't a trade unionist.  
Then they came for the Catholics,  
and I didn't speak up because I was a Protestant.  
Then they came for me,  
and by that time, no one was left to speak up.*

Martin Niemöeller <sup>1</sup>

Over five years have passed since the U.S. Senate Select Committee on Intelligence (SSCI) released what is now known as the Torture Report, which describes the CIA's enhanced interrogation techniques and its use in the "War on Terror." Yet, despite the light shed on the illegal practice of many officials, the United States has refused to prosecute any individuals who contributed to the post-9/11 CIA torture program. Paradoxically, the only person who has ever been convicted by a U.S. court in relation to the post-9/11 CIA torture program has been John Kiriakou, former CIA officer, who was charged for publicly criticizing the CIA's illegal use of torture.<sup>2</sup>

Despite the general lack of accountability and the failure of the U.S. government to press criminal charges, victims have sought redress in federal civil courts. In 2015, the American Civil Liberties Union (ACLU) filed a lawsuit on behalf of three victims in the U.S. District Court for the Eastern District of Washington, against the two psychologists who designed and implemented the post-9/11 CIA torture program.<sup>3</sup> In this case, for the first time in history, the Justice Department did not try to derail the lawsuit, and the court did not dismiss the case on state secrecy grounds in its 2017 motion to dismiss hearing. Indeed, despite many attempts of the two

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<sup>1</sup> Martin Niemöeller, *First they came...* (ca 1946).

<sup>2</sup> John Kiriakou, *I Went to Prison for Disclosing the CIA's Torture. Gina Haspel Helped Cover it Up*, THE WASH. POST, Mar. 16, 2018.

<sup>3</sup> ACLU, *ACLU Sues Psychologists Who Designed and Ran CIA Torture Program*, ACLU.ORG (Oct. 13, 2015), <https://www.aclu.org/press-releases/aclu-sues-psychologists-who-designed-and-ran-cia-torture-program>.

psychologists to dismiss, the court consistently ruled that the plaintiffs had a valid claim.<sup>4</sup> Interestingly, until 2017, virtually all torture claim cases had been dismissed on the government's motion on state secrecy grounds. A few days before trial was scheduled, the ACLU announced a historic settlement and for the first time in history, victims of the post-9/11 CIA torture program obtained some justice.<sup>5</sup>

This comment aims to demonstrate that U.S. federal courts are capable of handling lawsuits involving the post-9/11 CIA torture program. Part one of this comment examines the case of *Salim v. Mitchell*, a historic landmark for victims of the post-9/11 CIA torture program. Part two analyzes the post-9/11 CIA torture program. Part three examines the international and national laws concerning torture and other cruel, inhuman or degrading treatment. Part four explores the concept of universal jurisdiction and the U.S. Alien Tort Statute, arguing that obstacles to universal jurisdiction (e.g. political pressure) have rendered attempts by foreign nations to bring accountability for U.S. torture violations ineffective. The research subsequently focuses on the potential of the Alien Tort Statute and its use and success in federal courts. Lastly, part five concludes with the argument that U.S. district courts have demonstrated the ability to handle CIA torture claims and should be recognized as a potential venue to prosecute these claims.

The right to be free from torture and other cruel, inhuman, or degrading treatment is one of the most fundamental and unequivocal human rights. Yet, many U.S. officials seem unaware of that absolute, indisputable prohibition.<sup>6</sup>

“As the United States confronts terrorism, legitimate national security needs, public anxiety, and the desire for retribution may give rise to the temptation to sacrifice certain fundamental rights. But that temptation must be vigorously resisted. The right not to be tortured or mistreated is not a luxury to be dispensed with in difficult times, but the very essence of a society worth defending.”<sup>7</sup>

## II. Argument

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<sup>4</sup> ACLU, *CIA Torture Psychologists Settle Lawsuit*, ACLU.ORG (Aug. 17, 2017), <https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit>.

<sup>5</sup> *Id.*

<sup>6</sup> HUMAN RIGHTS WATCH, *The Legal Prohibition Against Torture*, HRW.ORG (June 1, 2004), <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#>.

<sup>7</sup> *Id.*

**A. Salim v. Mitchell Demonstrates the Ability of U.S. Courts to Handle Post-9/11 CIA-Related Torture Violation Claims.**

In 2017, the ACLU settled a civil lawsuit against James Elmer Mitchell and John “Bruce” Jessen, the two psychologists who contracted with the CIA to design, implement, and personally oversee an experimental torture program. The ACLU filed the lawsuit in the United States District Court for the Eastern District of Washington on behalf of the plaintiffs Suleiman Abdullah Salim (Salim), Mohamed Ahmed Ben Soud (Soud) and Gul Rahman (Rahman), all foreign citizens who were able to bring the lawsuit pursuant to the Alien Tort Statute. The three plaintiffs had been kidnapped, tortured, and experimented upon by the CIA, and Rahman died as a result.<sup>8</sup> This case marked the first time in U.S. history where the government did not invoke the “state secret privilege” to shut down the case before it started and instead decided to consider “protective measures” to safeguard its interests while allowing the case to move forward.<sup>9</sup> This had never happened before and it meant that some torture survivors were finally going to have their day in court.<sup>10</sup> Less than three weeks before the jury trial was scheduled to begin on September 5, 2017, the ACLU announced that the case had settled. ACLU Attorney Dror Ladin stated it was a victory for their clients and for the rule of law, adding: “[t]his outcome shows that there are consequences for torture and that survivors can and will hold those responsible for torture accountable. It is a clear warning for anyone who thinks they can torture with impunity.”<sup>11</sup> Even though, the terms of the settlement remain confidential, this lawsuit is extremely important not only because it is the first time this type of case was not dismissed on state secrecy grounds, but also because it showed that federal courts are capable of handling torture violations claims that have been committed in the name of national security within the context of the war on terror.<sup>12</sup>

**1. The ACLU Files a Lawsuit on Behalf of Three Torture Victims Against Two Psychologists Who Designed and Implemented the Post-9/11 CIA Torture Program.**

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<sup>8</sup> Salim v. Mitchell, 268 F. Supp 3d 1132 (E.D.Wash. 2017).

<sup>9</sup> *Id.*

<sup>10</sup> Dror Ladin, *The Government's Unprecedented Position in CIA Torture Lawsuit is Very Good News*, ACLU.ORG (April 15, 2016), <https://www.aclu.org/blog/national-security/torture/governments-unprecedented-position-cia-torture-lawsuit-very-good-news>.

<sup>11</sup> ACLU, *CIA Torture Psychologists Settle Lawsuit*, *supra* note 4.

<sup>12</sup> *Id.*

Plaintiff Salim is a Tanzanian citizen, who was captured by the CIA in Somalia, where he was working as a trader and fisherman. He was detained for more than five years, until being released without charges in 2008. Plaintiff Soud is a Libyan citizen who had fled Libya fearing prosecution by the Gaddafi regime and went to Pakistan, where he was captured by U.S. and Pakistani forces.<sup>13</sup> He is not the only innocent man who opposed the Gaddafi dictatorship who has been detained by the CIA and later released without charges.<sup>14</sup> After Soud arrived at COBALT, one of the CIA black sites, he was told “he was a prisoner of the CIA, that human rights ended on September 11, and that *no laws applied in prison*.”<sup>15</sup> Soud was detained by the CIA for over a year when he was then turned over the Libyan government, and imprisoned for another seven years until the Gaddafi regime was overthrown.<sup>16</sup> Plaintiff Rahman was born in Afghanistan, but living in Pakistan when he was detained by a U.S./Pakistani operation.<sup>17</sup> All three plaintiffs were subjected to numerous torture methods, including prolonged sleep deprivation, walling, stress positions, facial slaps, abdominal slaps, dietary manipulations, facial holds, cramped confinement, prolonged nudity, and waterboarding. Plaintiffs were kept in dark frigid cells, were not allowed to wash, and were fed meager meals once every other day. Salim and Soud continue to suffer repercussions from the torture, including debilitating pain, frequent nightmare and flashbacks, and other symptoms of post-traumatic stress disorder (PTSD).<sup>18</sup> On November 20, 2002, Rahman was found dead from hypothermia, dehydration, lack of food and immobility, after being chained, partially nude, in a stress position with temperatures around freezing (the practice of “short chaining”).<sup>19</sup>

Defendants James Elmer Mitchell and John “Bruce” Jessen are both U.S. citizens and psychologists. Defendant Mitchell was the chief psychologist at the Survival, Evasion, Resistance, and Escape (“SERE”) training program and between 2002 and 2005 he worked as an independent contractor for the CIA. Defendant Jessen also worked under contract with the CIA.

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<sup>13</sup> *Salim*, 268 F. Supp 3d at 1137.

<sup>14</sup> Matt Apuzzo, Sheri Fink & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, THE N.Y. TIMES, October 8, 2016.

<sup>15</sup> *Salim*, 268 F. Supp 3d at 1137 [emphasis added].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1137-1138.

<sup>18</sup> *Id.* at 1137.

<sup>19</sup> *Id.* at 1138.



Between 2005 and 2009, both defendants worked at Mitchell, Jessen & Associates in Washington, where they continued working under contract for the CIA. Defendants produced a white paper for the CIA entitled “Recognizing and Developing Countermeasures to Al-Qa’ida Resistance to Interrogation Techniques: A Resistance Training Perspective,”<sup>20</sup> which proposed measures to defeat resistance in interrogations, and justified the use of torture and other cruel, inhuman, and degrading treatment. The paper also introduced the idea of “learned helplessness,” a phrase that had been coined by American psychologist Martin E. P. Seligman at the end of the 1960s.<sup>21</sup> Dr. Seligman conducted research on dogs and learned that, by giving them electric shocks, they stopped resisting once they learned that they could not stop the shocks.<sup>22</sup> The same theory was applied to CIA detainees. The idea was that if the officials could make the men helpless, they would likely give up their secrets.<sup>23</sup> “The question of what ultimately happened to Dr. Seligman’s dogs never arose in the legal debate. They were strays, and once the studies were over, they were euthanized.”<sup>24</sup>

## **2. Plaintiffs’ Complaint Alleges the Defendants’ Extensive Involvement in the Post-9/11 CIA Torture Program.**

Plaintiffs’ complaint alleges that the defendants proposed to the CIA twelve torture methods. The CIA had initially agreed to only ten of them,<sup>25</sup> but shortly after, the Attorney General personally approved another method: waterboarding. Plaintiffs allege that defendants “personally conducted or oversaw” aspects of the interrogation of Abu Zubaydah, the first person to be detained by the CIA after the attacks in New York City on September 11, 2001 (“9/11”). Specifically, plaintiffs allege that defendants physically assaulted Mr. Zubaydah, forced him to confinement boxes, subjected him to waterboarding, declared his interrogation a “success” and recommended the CIA to use the same coercive methods “for future high value captives.”<sup>26</sup> Plaintiffs also allege that defendants invented the post-9/11 CIA torture program or “enhanced interrogation techniques,” including designing some of the instruments for torture. That

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<sup>20</sup> *Salim*, 268 F. Supp 3d at 1138-1139.

<sup>21</sup> Complaint at ¶ 25, *Salim*, 268 F. Supp 3d at 1138 (No. 2:15-CV-286-JLQ), 2015 WL 5936374, at \*13.

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

<sup>23</sup> *Salim*, 268 F. Supp 3d at 1140.

<sup>24</sup> See Apuzzo, et al., *supra* note 14.

<sup>25</sup> (1) Attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress position, (8) sleep deprivation, (9) use of diapers, (10) use of insects. See discussion *infra* Section II.B.

<sup>26</sup> *Salim*, 268 F. Supp 3d at 1139.

defendants further trained and supervised the CIA personnel to apply such program and that, while supervising the program, defendants assessed: “(1) whether prisoners had been tortured long enough to induce ‘self-helplessness;’ (2) what combinations and consequences of torture were most effective; and (3) had the prisoners become fully compliant.”<sup>27</sup> Defendants were paid over \$81 million for their services to the CIA.<sup>28</sup>

### 3. The Court Denies Plaintiffs and Defendants’ Motions for Summary Judgment.

Both parties moved for summary judgement. Defendants raised four primary arguments, all of which were dismissed by Judge Quackenbush:

“(1) the court lacks jurisdiction due to the Political Question Doctrine; (2) Defendants are entitled to derivative sovereign immunity; (3) the Alien Tort Statute does not confer jurisdiction over Plaintiffs’ claims; and (4) Defendants are not directly liable for violating the law of nations, nor liable for aiding and abetting or conspiracy.”<sup>29</sup>

Defendants also filed a motion to exclude the SSCI Report (discussed *infra*, Section II.B).

Plaintiffs’ sought summary judgment claiming that due to the undisputed facts, defendants were liable under the Alien Tort Statute “for aiding and abetting the torture and other cruel, inhuman, and degrading treatment suffered by Plaintiffs.”<sup>30</sup>

The court found that it did not lack jurisdiction under the political question doctrine. In 2004, the U.S. Supreme Court held in *Rasul v. Bush* that it had jurisdiction to consider challenges to the legality of detention of foreign nationals captured abroad and incarcerated at the Guantanamo Bay Naval Base.<sup>31</sup> Similarly, in *Hamdi v. Rumsfeld*, the Supreme Court held that “due process demands that a citizen held in the United States as an enemy combatant be given meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”<sup>32</sup>

The Washington court also dismissed defendants’ derivative sovereign immunity argument, finding that defendants had a significant role in designing the torture program, training CIA interrogators, and exercise discretion in its application. The court held that a “jury could

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<sup>27</sup> *Id.* at 1138-1139.

<sup>28</sup> *Id.* at 1144.

<sup>29</sup> *Id.* at 1145-1154.

<sup>30</sup> *Id.* at 1154.

<sup>31</sup> *Salim*, 268 F. Supp 3d at 1146 (citing *Rasul v. Bush*, 542 U.S. 466, 470 (2004)).

<sup>32</sup> *Id.* at 1146 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004)).

find they were not acting merely and solely as directed by the Government.”<sup>33</sup> Case law suggests that “derivative sovereign immunity... is limited to cases in which a contractor ‘had no discretion in the design process and completely followed the government specifications.’”<sup>34</sup> Here, the court found that although the CIA may have had ultimate control, both defendants exercised “significant control during individual interrogations.” To illustrate, the court pointed to defendant Mitchell’s *own* book, which describes defendants’ role in designing and implementing the program.<sup>35</sup>

Further, the court found it had jurisdiction under the Alien Tort Statute, holding that the defendants’ conduct “touch[ed] and concern[ed] the United States with sufficient force to overcome the presumption against extraterritorial application of the ATS.”<sup>36</sup> The court also addressed the defendants’ last argument about aiding and abetting or conspiracy while debating the plaintiffs’ motion for summary judgement. The court held that because neither party demonstrated absence of material dispute of fact, neither party was entitled to judgement as a matter of law.<sup>37</sup>

Lastly, the court analyzed the defendants’ motion to exclude the SSCI Report (discussed *infra*, Section II.B) on the grounds that it is “hearsay.” The court acknowledged Federal Rule of Evidence 803(8)(A)(iii) provides that the hearsay rule does not apply to “factual findings from a legally authorized government investigation.”<sup>38</sup> In addition, the court used *U.S. v. Boeing Company*’s test to consider the trustworthiness of the report, concluding that the report did not, in fact, constitute hearsay.<sup>39</sup> The court denied the defendants’ motion to exclude on the grounds that defendants failed to meet their burden of proof to establish that the report was untrustworthy.

Both the defendants and plaintiffs’ motions for summary judgments were denied, making the case of *Salim v. Mitchell* outstanding because it marks the first time in U.S. history where survivors of the post-9/11 CIA torture program anticipated having their day in a U.S. court. Even

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<sup>33</sup> *Id.* at 1150.

<sup>34</sup> *Id.* (citing *Cabalce v. Thomas E. Blanchard & Associates*, 797 F.3d 727, 732 (9th Cir. 2015)).

<sup>35</sup> *Salim*, 268 F. Supp 3d at 1150; *see generally* JAMES E. MITCHELL, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORIST TRYING TO DESTROY AMERICA (Crown F., 2016).

<sup>36</sup> *Salim*, 268 F. Supp 3d at 1150 (citing *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 133 (2013)).

<sup>37</sup> *Salim*, 268 F. Supp 3d at 1158.

<sup>38</sup> FED. R. EVID. 803(8)(A)(iii).

<sup>39</sup> *Salim*, 268 F. Supp 3d at 1160-1161 (citing *U.S. v. Boeing Company*, 825 F3d 1138 (10th Cir. 2016)).

though it settled before trial, this case marks the first gesture of restitution for the victims of the post-9/11 CIA torture program.<sup>40</sup>

***B. The Post-9/11 CIA Torture Program: A Historical Background.***

In December 2014, the SSCI released the *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* ("SSCI Report"),<sup>41</sup> which became known to the international community as the "Torture Report"<sup>42</sup>. The executive summary features 499 pages describing the CIA program of "indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and [U.S.] values," commonly known as torture.<sup>43</sup> The full SSCI study totals more than 6,700 pages, but it remains classified, and it has only been provided to the White House, the CIA, the Department of Justice, the Department of Defense, the Department of State, and the Office of the Director of National Intelligence.<sup>44</sup>

The report provides substantial details on the history of the CIA's Detention and Interrogation Program, from its inception in 2001 to its termination in 2009. The SSCI Report also includes detailed descriptions of the techniques used against the 119 individuals who were held in CIA custody, a number that has been highly criticized as being a non-exhaustive list of all the individuals that were in fact subjected to the CIA's "enhanced interrogation techniques."<sup>45</sup> Lastly, the report acknowledges that the CIA itself determined from its own experience that coercive interrogations techniques have historically proven to be ineffective (they did not actually produce intelligence and likely resulted in false answers).<sup>46</sup> However this debate is irrelevant, as international and domestic laws are clear that no exceptional circumstances, whatsoever, could justify the use of torture.

Chairman of the SSCI, Senator Dianne Feinstein of California, explains in her introduction to the SSCI Report her hopes that U.S. government bodies will use the full report to

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<sup>40</sup> Larry Siems, *Inside the CIA's Black Site Torture Room*, THE GUARDIAN, Oct. 9, 2017.

<sup>41</sup> See SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288 (2014) [hereinafter SSCI REPORT].

<sup>42</sup> Jeremy Ashkenas, Hannah Fairfield, Josh Keller & Paul Volpe, *7 Key Points from the C.I.A. Torture Report*, THE N.Y. TIMES, Dec. 9, 2014.

<sup>43</sup> SSCI REPORT, *supra* note 41, at 4.

<sup>44</sup> *Id.* at 1.

<sup>45</sup> *Id.* at 12; see also LAURA PITTER ET AL., NO MORE EXCUSES: A ROADMAP TO JUSTICE FOR CIA TORTURE 77 (Hum. Rts. Watch, 2015).

<sup>46</sup> SSCI REPORT, *supra* note 41, at 3.

prevent future coercive interrogation practices and secret indefinite detentions.<sup>47</sup> Senator Feinstein reiterates the idea that the report should be used as a guideline for future programs to ensure that torture is not used by the U.S. government again.<sup>48</sup> She correctly notices that even in the wake of 9/11, the pressure, fear, and expectations of terrorist attacks do not “justify, temper, or excuse improper actions... in the name of national security.”<sup>49</sup> However, she fails to mention that by openly condemning the CIA and U.S. government torture practices that started taking place after 9/11, the SSCI Report not only highlighted the failure of the U.S. government to investigate and prosecute those involved in the program, a failure that it still very much relevant today, but it also provided victims with important evidence that could be used in trials, as demonstrated in *Salim v. Mitchell*.<sup>50</sup>

Following 9/11, former President George W. Bush obtained authorization from Congress to use force against those responsible for the attacks. On September 17, 2001 he secretly issued the Memorandum on Notification (MON) granting the CIA “unprecedented counter terrorism authority.” Shortly after, the CIA began developing a plan, which later became known as the “Rendition, Detention, and Interrogation” (RDI) program.<sup>51</sup> In March 2002, the CIA captured its first detainee under this new guidance, Abu Zubaydah.<sup>52</sup> With the help of psychologist contractors James Mitchell and Bruce Jessen, the CIA proposed twelve “enhanced interrogation techniques” (EITs)<sup>53</sup> namely: “(1) ... attention grasp, (2) walling, (3) facial hold, (4) facial slap, (5) cramped confinement, (6) wall standing, (7) stress position, (8) sleep deprivation, (9) waterboard, (10) use of diapers, (11) use of insects, and (12) mock burial.”<sup>54</sup> On July 24, 2002, “the attorney general verbally approved the use of 10 [of these] interrogation techniques,” which did not include waterboarding nor mock burial.<sup>55</sup> Nonetheless, shortly after on July 26, 2002, “the attorney general verbally approved the use of waterboard[ing].”<sup>56</sup> During the month of July 2002, “the CIA [also] anticipated that the president would need to approve the use of the CIA

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<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> See generally, *Salim*, 268 F. Supp 3d.

<sup>51</sup> SSCI REPORT, *supra* note 41, at 11.

<sup>52</sup> *Id.* at 22.

<sup>53</sup> *Id.* at 37.

<sup>54</sup> *Id.* at 32.

<sup>55</sup> *Id.* at 36.

<sup>56</sup> *Id.* at 36-37.

[EITs] before they could be used.” Consequently, the CIA prepared talking points for a briefing of the president. Although CIA records indicate that the talking points were not used to brief the president, on August 2, 2002, “the National Security Council legal advisor informed the [Director of Central Intelligence] DCI’s chief of staff that ‘Dr. Rice had been informed that there would be no briefing to the president on this matter,’ but that the DCI had policy approval to employ the CIA’s [EITs].”<sup>57</sup>

Before deciding whether these methods would be used on detainee Abu Zubaydah, the CIA sought guarantees from the Justice Department Criminal Division that it would not prosecute any personnel involved. When the Criminal Division refused, the CIA began working with attorneys in the Office of Legal Counsel (OLC) to “obtain memos that would authorize the techniques proposed.”<sup>58</sup> The requested memos were eventually issued in 2002, in what are now commonly known as the “torture memos.”<sup>59</sup> The principal author was OLC Deputy Assistant Attorney General John Yoo and they were signed by Assistant Attorney General Jay Bybee.<sup>60</sup> The torture memos examined international and domestic legal prohibitions on torture, discussed the legality of the techniques proposed, and approved the use of the “enhanced interrogation techniques” on detainee Abu Zubaydah.<sup>61</sup> The memos argued that the president was not bound by international law in the war on terror, specifically Common Article 3 of the Geneva Convention (discussed *infra*, Section II.C.1). Additionally, the torture memos introduced a new, much narrower, definition of torture<sup>62</sup> (which nonetheless would have still applied to the CIA EITs). Scholars have questioned the legality of these memos, reasoning (1) that there can be no legal claim that the president is not bound by the law against torture, (2) that no one has the authority to re-write the definition of torture contained in the Convention Against Torture<sup>63</sup> (noting that the “incredibly narrow definition of torture completely ignored the prohibition against other cruel, inhuman or degrading treatment or punishment, which would be obvious to anyone who

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<sup>57</sup> *Id.* at 38.

<sup>58</sup> PITTER ET AL., *supra* note 45, at 12.

<sup>59</sup> *Id.* at 13.

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.* at 13.

<sup>62</sup> *Id.*

<sup>63</sup> The Convention Against Torture is short for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See discussion *infra* Section II.C.1.

chose to read even the full name of the [Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment]”),<sup>64</sup> and (3) that the war on terror does not give the executive branch the ability to disregard the Geneva Conventions and commit war crimes.<sup>65</sup>

After the torture memos were issued, the CIA began opening secret detention centers around the world, or “black sites,” where they started using the “approved” enhanced interrogation techniques. After the death of Rahman in November 2002, the media began reporting on the US use of torture and, to counter these reports, the Bush administration started issuing a number of statements discounting any possibility that the US was using torture and emphasizing that all detainees were being treated humanely “even if they were not, in the administration’s view, protected by international law.”<sup>66</sup> This was an erroneous statement, as the CIA detainees were, in fact, protected under extensive international and domestic law (discussed *infra*, section II.C). In March 2004, reports and photographs emerged about detainee abuse by US military personnel at Abu Ghraib, causing a national scandal.<sup>67</sup> One of the torture memos leaked into the media and the CIA suspended the interrogation program “pending a legal and policy review.” Yoo was replaced by Jack Goldsmith, who strongly recommended that the CIA stop the use of waterboarding. Unsurprisingly, he was shortly thereafter replaced by Daniel Levin, who was then himself replaced temporarily by OLC deputy head, Stephen Bradbury. Bradbury issued two new memos authorizing the legality of the CIA enhanced interrogation techniques reasoning that the methods did not violate the U.S. Torture Statute nor the Convention Against Torture.<sup>68</sup>

In 2005, Congress passed the Detainee Treatment Act, which barred the use of cruel, inhuman, or degrading treatment or punishment against any detainee in US custody and required the Defense Department to follow the US Army Field Manual on Intelligence Interrogations when conducting interrogations, which was completely ignored by the CIA.<sup>69</sup> In 2006, the U.S. Supreme Court ruled in *Hamdan v. Rumsfeld* that Guantanamo detainees were entitled to the

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<sup>64</sup> Jeanne Mirer & the National Lawyer’s Guild, *White Paper on the Law of Torture and Holding Accountable Those Who are Complicit in Approving Torture of Persons in U.S. Custody*, 64 GUILD PRACTITIONER 162, 168 (2007).

<sup>65</sup> *Id.*

<sup>66</sup> PITTER ET AL., *supra* note 45, at 15.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.* at 18.

<sup>69</sup> *Id.* at 18-19.

protections provided under Geneva Conventions Common Article 3 and concluded that “violations of Common Article 3 are considered ‘war crimes.’”<sup>70</sup> The same year, President Bush issued the following statement, “I want to be absolutely clear with our people, and the world: The United States does not torture. It’s against our laws, and it’s against our values.”<sup>71</sup> Despite this statement, it took three more years before President Obama, on his second day in office, signed an executive order closing the CIA’s secret detention facilities and ending the “authorized” use of enhanced interrogation techniques.<sup>72</sup>

As of the writing of this comment, the U.S. government has not accounted for the CIA torture abuses, even though it has an obligation under international and domestic law to prosecute perpetrators and provide redress to the victims. If anything, it “has actively thwarted [victims’] attempts... to obtain redress and compensation in U.S. courts.”<sup>73</sup> With one exception: *Salim v. Mitchell*. In 2008, the Obama administration appointed prosecutor and Assistant U.S. Attorney John Durham to conduct an investigation on the CIA program following the 2007 CIA destruction of 92 videotapes depicting CIA officials interrogating and torturing detainees.<sup>74</sup> The investigation ended up closing on August 2012 without bringing any criminal charges and, ironically, no interviews of any of the victims of the post-9/11 CIA torture program either.<sup>75</sup> Considering the later findings of the SSCI, it is hard to believe this investigation was “thorough or credible.”<sup>76</sup> Specifically, problems with the Durham investigation arise out of the fact that it “focused only on CIA abuse that went beyond what was authorized [by the U.S. government].”<sup>77</sup> The fact that the government had indeed authorized the use of torture in violation of international and domestic law presented a fundamental problem, this inherent conflict “create[d] a legal escape hatch for what would otherwise be the illegal use of torture,”<sup>78</sup> as conduct which should

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<sup>70</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 642 (2006).

<sup>71</sup> *President Bush's Speech on Terrorism* (transcript), THE N.Y. TIMES, Sept. 6, 2006, [https://www.nytimes.com/2006/09/06/washington/06bush\\_transcript.html](https://www.nytimes.com/2006/09/06/washington/06bush_transcript.html).

<sup>72</sup> PITTER ET AL., *supra* note 45, at 19.

<sup>73</sup> PITTER ET AL., *supra* note 45, at 1-2.

<sup>74</sup> Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, THE N.Y. TIMES, Mar. 2, 2009; Peter Taylor, *'Vomiting and Screaming' in Destroyed Waterboarding Tapes*, BBC NEWS, May 9, 2012; Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogation*, THE WASH. POST, Dec. 7, 2007.

<sup>75</sup> PITTER ET AL., *supra* note 45, at 27.

<sup>76</sup> *Id.* at 2; see also UN Committee Against Torture, *Concluding observations on the third to fifth periodic reports of United States of America*, U.N. Doc. CAT/C/USA/CO/3-5 (Dec. 19, 2014).

<sup>77</sup> PITTER ET AL., *supra* note 45, at 27.

<sup>78</sup> *Id.*



have been investigated was beyond the Durham investigation's focus (i.e. within the U.S. authorization, but also constituting violation of domestic and international law).

In its 2015 report '*No More Excuses*,' Human Rights Watch (HRW) called for an independent and impartial investigation, with access to the full classified SSCI Report, into the U.S. Officials who played important roles "in the process of creating, authorizing, and implementing" the post-9/11 CIA torture program. According to HRW, the following officials should be investigated for torture, conspiracy to torture, and other crimes:

"CIA General Counsel John Rizzo, OLC Assistant Attorney General Jay Bee, OLC Deputy Assistant Attorney General John Yoo, and individual identified as 'CTC Legal' in the Senate [Report], CIA Director George Tenet, National Security Legal Advisor John Bellinger, Attorney General John Ashcroft, White House Counsel Legal Advisor Alberto Gonzales, Counsel to the Vice President David Addington, Deputy White House Counsel Timothy Flanigan, National Security Advisor Condoleezza Rice, Defense Department General Counsel William Haynes II, Vice President Dick Cheney, and President George W. Bush."<sup>79</sup>

In addition, the 2015 HRW Report also identified the two CIA psychologist contractors who designed and implemented the post-9/11 CIA torture program, James Mitchell and Bruce Jessen.<sup>80</sup>

Even though the SSCI Report reminded the world that after 9/11 the CIA tortured at least 119 people, the U.S. has still refused to prosecute any participant in the torture program. As seen above, as of today, the only victims who achieved some form of redress had to bring suit against the CIA psychologist contractors.<sup>81</sup> Perhaps, the HRW list could be used as guidance for future claims.

***C. The Prohibition Against Torture is Widely Recognized Under International and Domestic Law.***

The prohibition against torture is firmly embedded in customary international law, international treaties signed and ratified by the United States, and in U.S. domestic law. At both international and national levels a critical element is the obligation to prosecute and punish perpetrators, "yet, no senior U.S. government official has even been prosecuted for torture" with

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<sup>79</sup> *Id.* at 2.

<sup>80</sup> *Id.*

<sup>81</sup> *See generally*, *Salim*, 268 F. Supp 3d.

respect to the post-9/11 CIA Torture Program.<sup>82</sup> A comprehensive analysis of the law on torture is essential to understand the magnitude of this prohibition at both international and national level, and its ultimate recognition as a universal norm or *jus cogens*.

**1. International Law Prohibits the Use of Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in All Circumstances.**

Following the abuses of World War II, the United Nations General Assembly (UNGA) enclosed the prohibition against torture in Article 5 of the 1948 Universal Declaration of Human Rights (UDHR), which provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>83</sup> Since then, the prohibition against torture and other ill treatments have been incorporated into the extensive network of international and regional human rights treaties.<sup>84</sup>

In 1949, states started ratifying the four Geneva Conventions, which demanded humane treatment during armed conflicts. The Geneva Conventions have been ratified by 196 states in the world, which made those treaties “the first in modern history to achieve universal acceptance.”<sup>85</sup> All four Geneva Conventions consider “torture or inhuman treatment...[and] willfully causing great suffering or serious injury to body or health” grave breaches.<sup>86</sup> In addition, Article 17 of the Third Geneva Convention on the Protection of Prisoners of War provides: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.”<sup>87</sup> Article 32 provides similar protection of civilian

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<sup>82</sup> William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT’L L. & POL. 1, 7 (2015).

<sup>83</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

<sup>84</sup> See generally, PITTER ET AL., *supra* note 45.

<sup>85</sup> ICRC, *A Milestone for International Humanitarian Law*, ICRC.ORG (Sept. 22, 2006), <https://www.icrc.org/en/doc/resources/documents/statement/geneva-conventions-statement-220906.htm>.

<sup>86</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-wrecked Members of Armed Forces at Sea, Art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention relative to the Treatment of Prisoners of War, art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; [collectively hereinafter Geneva Conventions].

<sup>87</sup> Third Geneva Convention, *supra* note 86, at art. 17.

persons. While Common Article 3, which applies in situations of non-international armed conflicts (NIACs), provides that people taking no active part in the conflict, “shall in all circumstances be treated humanely” and prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>88</sup>

The prohibition against torture is also incorporated in Article 7 of the 1976 International Covenant on Civil and Political Rights (ICCPR), which has been ratified by 153 countries, including the United States in 1992.<sup>89</sup> Independent experts of the Human Rights Committee (HRC) established the HRC to monitor the implementation of the ICCPR,<sup>90</sup> and determined that State parties are “obliged to investigate allegations of torture and the graver forms of other prohibited ill-treatment with a view of prosecuting the perpetrators. All victims of a violation... are expected to be compensated.”<sup>91</sup>

Finally, in 1984, states formally codified the prohibition against torture into specific rules with the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Convention Against Torture” or CAT), ratified by the United States in 1994.<sup>92</sup> In his transmittal message to the Senate, former President Reagan wrote that the U.S. ratification “will clearly express United States opposition to torture, *an abhorrent practice unfortunately still prevalent in the world today.*”<sup>93</sup> Article 1 of the Convention provides the definition of torture, explained as:

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official

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<sup>88</sup> Geneva Conventions *supra* note 86, at common art. 3.

<sup>89</sup> International Covenant on Civil and Political Rights, art. 7, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>90</sup> *Id.* at art. 28.

<sup>91</sup> Nigel S. Rodley, *The Prohibition of Torture: Absolute Means Absolute*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 110-112 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).

<sup>92</sup> G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 26, 1987) [hereinafter Convention Against Torture].

<sup>93</sup> Ronald Reagan, *Message to the Senate Transmitting the Convention Against Torture and Inhuman Treatment or Punishment*, THE AMERICAN PRESIDENCY PROJECT, May 20, 1988, <https://www.presidency.ucsb.edu/documents/message-the-senate-transmitting-the-convention-against-torture-and-inhuman-treatment-or> [emphasis added].

or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>94</sup>

Expanding on Article 1, Article 16 establishes the prohibition of:

“other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>95</sup>

The CAT not only describes and defines torture and other ill-treatments, but establishes their absolute prohibition. Significantly, Article 2.2 provides that, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>96</sup> In addition, Article 2.3 establishes that “[a]n order from a superior officer or a public authority may not be invoked as a justification for torture.”<sup>97</sup> The CAT details state parties’ obligation to investigate alleged offenders and requires the investigation to be prompt and impartial.<sup>98</sup> Additionally, it requires state parties to either extradite the alleged offender or “submit the case to its competent authorities for the purpose of prosecution.”<sup>99</sup> Lastly, the CAT establishes the Committee Against Torture (Committee), a group of ten independent experts whose goal is to ensure states comply with the Convention Against Torture.<sup>100</sup>

## **2. The U.S. Legal System Was Designed to Include the International Legal Framework.**

When the framers of the U.S. Constitution (“Framers”) met in 1787 to draft the document, they purposefully designed it to ensure that states would not violate the international treaties ratified by the federal government, nor the obligations those treaties create, with the introduction of the Supremacy Clause. Article VI provides that “[the] Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made*, or which shall be made, under the authority of the United States, shall be the *supreme law of the*

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<sup>94</sup> Convention Against Torture, *supra* note 92, at art. 1.

<sup>95</sup> *Id.* at art. 16.

<sup>96</sup> *Id.* at art. 2.2.

<sup>97</sup> *Id.* at art. 2.3.

<sup>98</sup> *Id.* at art. 12.

<sup>99</sup> *Id.* at art. 7.

<sup>100</sup> *Id.* at art. 17.

land[.]”<sup>101</sup> The Framers had major debates over the balance of power between states and the federal government, but they were unified on the idea that “the Constitution prohibited state government officers from violating national treaties obligations.”<sup>102</sup> The original understanding of the U.S. Constitution has changed since the 1950s and new ideas and debates have emerged on whether international obligations prevail over state law or over federal law. However, it remains clear that as a matter of international law, the federal government of the United States is obliged to comply with the aforementioned treaties.<sup>103</sup>

Lastly, it is indeed “[t]his universal condemnation [that] has led the international community to place torture in [the] narrow realm of *jus cogens* norms.”<sup>104</sup> The concept refers to the “peremptory principles or norms from which no derogation is permitted.”<sup>105</sup> In contrast to most areas of international law, “*jus cogens* norms have independent validity and status, separate and untouched by the consent and practice of states.”<sup>106</sup> The concept of *jus cogens* norms emerged out of the understanding and recognition that certain obligations are owed by states to the international community as a whole.<sup>107</sup> Hence, a violation of such values is a threat common to all people and threatens the “peace, security, and world order.”<sup>108</sup> The very nature of *jus cogens* norms has allowed certain values and interests to be recognized as superior to any other laws or agreements, whether national, international or customary, and “render[s] any attempt to derogate from them void *ab initio*.”<sup>109</sup> With the recognition of *jus cogens* the world, as community, understands that international order is based on a priority of values, rather than

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<sup>101</sup> U.S. CONST. art. VI, cl. 2 [emphasis added].

<sup>102</sup> DAVID SLOSS, *THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE* (Oxford Univ. Press, 2016).

<sup>103</sup> There is also a question on whether international treaties are binding on domestic government officials as a matter of domestic law. However, it is a much disputed issue and it would exceed the purpose of this paper for two reasons: (1) under international law, the U.S. is obliged to comply with the treaties it ratifies; and (2) the U.S. has indeed implemented the Convention Against Torture at the domestic level with the adoption of the Torture Act. Hence, at both international and national level, the U.S. is bound by its laws. If interested in the debate on whether international obligations prevail over state law and federal law, see David Sloss, *Domestic Application of Treaties*, in *OXFORD GUIDE TO TREATIES* (Hollis Duncan B. eds., Oxford Univ. Press, 2012); see also SLOSS, *DEATH OF TREATY SUPREMACY*, *supra* note 102.

<sup>104</sup> Aceves, *supra* note 82, at 18.

<sup>105</sup> JOSEPH GABRIEL STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 59 (7th ed. 1972).

<sup>106</sup> Lorna McGregor, *Addressing the Relationship between State Immunity and Jus Cogens Norms: A Comparative Assessment*, in *INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES* 71 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).

<sup>107</sup> Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L. L. 491, 494 (2008).

<sup>108</sup> See McGregor, *supra* note 106.

<sup>109</sup> *Id.* at 70-71.

sources, which reflect a hierarchy of norms.<sup>110</sup> While debates arise on which norms reach the top of this hierarchy, the prohibition against torture and other cruel, inhuman or degrading treatment has universally been recognized as a *jus cogens* norm. Acts that violate *jus cogens*, such as torture, are subject to universal jurisdiction, meaning that any states in the world is able to exercise its jurisdiction over the alleged offender regardless of where the violation took place, the nationality of the victim, or the nationality of the offender themselves.<sup>111</sup> Universal jurisdiction is analyzed in greater detail in section II.D.1 below.

### 3. U.S. Law Prohibits the Use of Torture.

The prohibition against torture is codified in the U.S Constitution, numerous state practices, and in domestic legislation. “Recognizing the potential for abuse during interrogations, U.S. courts have constructed special rules to diminish the likelihood of coerced testimony[,]” and guarantee due process in the criminal justice system.<sup>112</sup> Specifically, the U.S. Constitution’s Fourth Amendment establishes the right of individuals to be free from unreasonable searches and seizures.<sup>113</sup> The major idea behind the Fourth Amendment is the right to be protected from abuses by law enforcement. Similarly, the Fifth Amendment provides the right against self-incrimination.<sup>114</sup> It contemplates the idea that a defendant has the right to remain silent while in custody and during interrogations, and renders coerced statements inadmissible evidence at trial because they are not trustworthy. Since 1966, it also grants rights under *Miranda* when police take an individual into custody, namely the rights to remain silent and to assistance of counsel.<sup>115</sup> The Court in *Miranda* sought to address the recurrent law enforcement practice of using physical force to extract confessions.<sup>116</sup> Lastly, the Eighth Amendment establishes the right of individuals to be free from cruel and unusual punishments.<sup>117</sup> As the prohibition against torture has been accepted worldwide as *jus cogens*, it should certainly fall within ‘cruel and unusual punishment.’

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<sup>110</sup> Bianchi, *supra* note 107.

<sup>111</sup> See HUMAN RIGHTS WATCH, *supra* note 6.

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

<sup>113</sup> U.S. CONST. amend. IV.

<sup>114</sup> U.S. CONST. amend. V.

<sup>115</sup> See generally, *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>116</sup> *Id.* at 456 (“given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring...Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.”)

<sup>117</sup> U.S. CONST. amend. VIII.

In 1991, before the U.S. ratified the Convention Against Torture, Congress adopted 28 U.S.C. §1350, the Torture Victim Protection Act of 1991 (TVPA), which establishes a private right of action against individuals who commit acts of torture or extrajudicial killing conducted “under actual or apparent authority, or color of law, of [a] foreign nation.”<sup>118</sup> Additionally, in the U.S., the international Convention Against Torture is implemented by 18 U.S.C. §2340 or the Torture Act,<sup>119</sup> signed by former President Bill Clinton on April 30, 1994. The Torture Act entered into force on November 20, 1994. The Torture Act defines torture as: “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>120</sup> It also describes “severe mental pain or suffering” as including:

“prolonged mental harm caused by or resulting from...the intentional infliction or threatened infliction of severe physical pain or suffering;... the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; ... the threat of imminent death; or...the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality[.]”<sup>121</sup>

The Torture Act creates liability for individuals who commit or attempt to commit torture with fines, imprisonment or both. In addition, if the conduct results in the death of the victim, the Torture Act provides that the perpetrator should be punished by either life imprisonment or the death penalty.<sup>122</sup> The Torture Act also provides that the U.S. has jurisdiction over acts of torture when the alleged offender is a national of the United States (b)(1) or the alleged offender is present in the United States, irrespective of the individual’s nationality of either the victim or the

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<sup>118</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350) [hereinafter TVPA]. (It is important to note that the TVPA has been extensively and successfully used by foreign plaintiffs to sue human rights perpetrators in federal courts when the *Kiobel* “touch and concern” test (*see supra* text accompanying note 36) has prevented them from suing under the Alien Tort Statute.)

<sup>119</sup> Torture Act, Pub. L. 103-236, title V, §506(c) (1994) (codified at 18 U.S.C. §2340); *see also*, Karen Hoffmann, *Redress for ‘Some Folks’: Pursuing Justice for Victims of Torture Through Traditional Grounds of Jurisdiction*, 46 GA. J. INT’L & COMP. L. 97, 105 (2017).

<sup>120</sup> Torture Act, *supra* note 119.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

offender. (b)(2).<sup>123</sup> Finally, in 1998, Congress adopted 22 U.S.C. §2151, the Torture Victims Relief Act of 1998, which provides funding for torture victim treatment centers domestically and abroad.<sup>124</sup>

“There can be no serious doubt that the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment is not only a rule based on treaties, but also a rule of general or customary international law.”<sup>125</sup> Even though the U.S. has argued that “unlawful enemy combatants” are furnished no privileges under the Geneva Conventions, “accountability and redress for the torture U.S. officials committed and endorsed is required by U.S. and international law.”<sup>126</sup> Ultimately, it is undeniable that the international community recognizes that torture and other cruel, inhuman, or degrading treatment cannot be tolerated under any circumstances.

***D. The Alien Tort Statute has Proven to be a Successful Tool for Aliens Bringing Civil Law Suits in U.S. Courts.***

**1. Universal Jurisdiction Has Proven to be Ineffective and Controversial in Post-9/11 Torture Claims.**

Scholars have discussed the idea of universal jurisdiction for years and although its actual enforceability is still subject to debate, the underlying principle is well recognized:<sup>127</sup> universal jurisdiction allows states to prosecute offenders of gross violations even if the state lacks the “nexus” with the crime, offender, or victim.<sup>128</sup> As Professor Schachter observes, “[t]he implicit assumption is that the right to exercise jurisdiction is not based on the treaties, but on the general principles of international law.”<sup>129</sup> In addition, Restatement (Third) of Foreign Relations Law suggests that “[a]n international crime [such as torture] is presumably subject to [the] universal jurisdiction” of all states.<sup>130</sup>

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<sup>123</sup> *Id.*

<sup>124</sup> Torture Victim Relief Act, Pub. L. 105-320 (1998) (codified at 22 U.S.C. §2151).

<sup>125</sup> Rodley, *supra* note 91, at 198.

<sup>126</sup> Hoffmann, *supra* note 119, at 104.

<sup>127</sup> Peter Weiss, *The Future of Universal Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 29 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).

<sup>128</sup> Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

<sup>129</sup> *Id.* (citing O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 240-265 (1985) (“discussing the extent to which a state may apply its domestic law to events and persons outside of its territory in circumstances affecting the interests of the state”).

<sup>130</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §404 reporter’s note 1 (Tent. Draft No. 6, 1985).



Universal jurisdiction is a potential tool for states to be agents acting in the interests of the international community, by investigating and prosecuting states or individuals responsible for conduct amounting to core international crimes.<sup>131</sup> Defenders of the principle argue it is a crucial mechanism for “bringing justice to victims, deterring state or quasi-state officials...and establishing a minimum international rule of law by substantially closing the ‘impunity gap’ for international crimes.”<sup>132</sup> Unfortunately, it seems that the mere existence and occasional recognition of universal jurisdiction does not enable states to effectively act as agents for the international community,<sup>133</sup> as there are recognized obstacles to actual application of the doctrine. At the end of the 1980s, Doctor Randall noted at least three: (1) states may not have custody of the offenders, (2) “states may fail to prosecute criminals within their territory due to political and foreign policy considerations,” and (3) modern universal jurisdiction is still evolving.<sup>134</sup> Professor Hall identifies similar obstacles to universal jurisdiction, adding to Doctor Randall's list the practical obstacles of “inadequate knowledge of the forum state’s criminal procedures by those filing criminal complaints or civil suits,” and obtaining evidence abroad. Lastly, Professor Hall suggests “the backlash against universal jurisdiction since the high-water mark in 1999 of the second decision on the merits by the House of Lords in the *Pinochet* case” is likely the biggest obstacle to actual enforceability of universal jurisdiction.<sup>135</sup> Persuading states to extradite accused persons might prove to be particularly difficult, so the first obstacle might still be resolved by prosecuting perpetrators *in absentia*. With respect to Randall’s third obstacle, it may somehow be irrelevant within the torture realm, as the prohibition of torture has been universally recognized.<sup>136</sup> However, political considerations and the backlash against universal jurisdiction since 1999, seem to create an insurmountable barrier to the use of this doctrine today. Despite the unequivocal expansion of the principle of universality, states do not often exercise

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<sup>131</sup> Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. OF INT’L L. 1 (2011).

<sup>132</sup> *Id.*

<sup>133</sup> AMNESTY INTERNATIONAL, A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD - 2012 UPDATE 2 (Amnesty International Publications 2012).

<sup>134</sup> Randall, *supra* note 128, at 840.

<sup>135</sup> Christopher Keith Hall, *Universal Jurisdiction: Developing and Implementing an Effective Global Strategy*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 86 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).

<sup>136</sup> See discussion *infra* Section II.C.

universal jurisdiction<sup>137</sup> and when they do, they are often influenced by political pressure. In particular, the power of the United States relative to other nations tends to influence judicial attitudes towards international law.<sup>138</sup>

Despite these barriers, “many commentators have called for universal jurisdiction to be invoked as a legal basis” to prosecute perpetrators U.S. torture.<sup>139</sup> Yet invoking universal jurisdiction has undoubtedly proven to be controversial and, worse yet, often ineffective in post-9/11 CIA torture violations claims.<sup>140</sup> Doctor Hoffman provides a satisfying list of European countries that have tried to invoke universal jurisdiction to provide accountability for U.S. torture, and also notes the limited results that resulted after the United States leveraged political pressure.<sup>141</sup> Specifically, Spanish Judge Garzon’s investigation of the “Bush Six” was hindered by Spanish lawmakers after the U.S. informed the investigation would have an “enormous impact on [their] bilateral relationship.”<sup>142</sup> Similarly, several criminal complaints were filed in Belgian courts against former President Bush, U.S. Secretary of State General Powell, U.S. Vice President Cheney, and U.S. General Schwarzkopf. However, after intense pressure from the U.S., including the suggestion that the U.S. would advocate to move the NATO headquarters from Belgium, Belgium passed a law stating that “only the public prosecutor could initiate a suit with no connection to Belgium.”<sup>143</sup> Likewise, Germany’s prosecutor dismissed a complaint brought by an Iraqi torture victim against Donald Rumsfeld because Germany received “immense pressure from the U.S. government”<sup>144</sup> to do so. Nonetheless, at the international level there might be unconventional ways for courts to prosecute these claims. For example, the Italian Supreme Court entered a criminal conviction against U.S. and Italian officials for their involvement in extraordinary rendition operations.<sup>145</sup> Despite the fact that certain U.S. officials may be deterred from traveling to Europe in light of this decision, “for victims of U.S. torture,

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<sup>137</sup> Randall, *supra* note 128, at 840.

<sup>138</sup> Hall, *supra* note 135.

<sup>139</sup> Hoffmann, *supra* note 119, at 114.

<sup>140</sup> *Id.* at 118.

<sup>141</sup> *Id.*

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

<sup>143</sup> *Id.* at 119.

<sup>144</sup> *Id.* at 120.

<sup>145</sup> See generally STEVE HENDRICKS, A KIDNAPPING IN MILAN: THE CIA ON TRIAL (W.W. Norton & Co., 2010).

keeping its perpetrators out of Europe[,] while possibly satisfying on some level, provides neither accountability nor redress.”<sup>146</sup>

## **2. The Alien Tort Statute is a Successful Type of “Self-Help Universal Jurisdiction” in the United States.**

The universal jurisdiction analysis above suggests that the power of the United States, relative to the other countries in the world, influences judicial attitudes across the globe. As a result, in situations “where the political branches to not hesitate to interfere with the judicial ones,”<sup>147</sup> it is paramount for citizens to exercise pressure through different routes: the Alien Tort Statute (ATS) is one of them. The ATS grants U.S. federal district courts “original jurisdiction of any civil law action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>148</sup>

Describing the ATS, Professor Weiss emphasizes the paradox that “the United States, enemy number one of the International Criminal Court, is also the country whose judiciary – including, as of [2004], the Supreme Court – has been most hospitable to the exercise of this kind of *self-help universal jurisdiction*.”<sup>149</sup> Since the Center for Constitutional Rights “resuscitated” the ATS “from its 200-year slumber” in the landmark case *Filartiga v. Pena-Irala*,<sup>150</sup> in fact, it has become “one of the most successful instruments for exposing torture, disappearance, and other grave human rights violations committed outside the United States, through civil suits brought in American courts.”<sup>151</sup> In 2013, the Supreme Court in *Kiobel* significantly limited human rights litigation holding that, “the ATS does not apply to human rights violations committed in other countries, unless there is strong connection to the United States.”<sup>152</sup> Nonetheless, the ATS would still apply in cases like *Salim v. Mitchell*, where the perpetrators are U.S. citizens and, therefore, their conduct would touch and concern the United

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<sup>146</sup> Hoffmann, *supra* note 119, at 122-123.

<sup>147</sup> Weiss, *supra* note 127, at 35.

<sup>148</sup> Alien Tort Statute, 18 U.S.C. §1350.

<sup>149</sup> Weiss, *supra* note 127, at 35 [emphasis added].

<sup>150</sup> See generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

<sup>151</sup> Weiss, *supra* note 127, at 35.

<sup>152</sup> THE CENTER FOR JUSTICE AND ACCOUNTABILITY, *Justice in U.S. Courts for Atrocities Overseas: Preserving the Alien Tort Statute – Kiobel v. Shell*, CJA.ORG, <https://cja.org/what-we-do/litigation/amicus-briefs/kiobel-v-shell/>; see also *Kiobel*, 569 U.S. at 124-125.

States with sufficient force to overcome the presumption against the extraterritorial application of the ATS.<sup>153</sup>

In *Filartiga v. Pena-Irala*, Judge Kaufman engaged in an extensive review of the literature, conventions, and case law, condemning torture as a violation of international law. He held,

“In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights...humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest...Indeed, for the purpose of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.”<sup>154</sup>

In addition to its condemnation of the use of torture, *Filartiga* is significant because it provided “the model for a series of ATS suits by alien plaintiffs claiming violations of their internationally recognized human rights against foreign officials acting under the color of governmental authority.”<sup>155</sup> The framework calls for the court to establish, beyond a reasonable doubt, that (1) the offender is a U.S. national or present in the territory of the United States, (2) the act was “committed by a person acting under the color of the law,” (3) the perpetrators committed those acts whilst in the offender’s custody or control, (4) the perpetrator “specifically intended to inflict severe pain or suffering,” and (5) the acts have been committed outside the United States.<sup>156</sup> Weiss notes many advantages for torture victims proceeding through the ATS:

“(1) they can initiate the litigation instead of having to persuade a public prosecutor to do so; (2) once commenced, they can control the litigation through lawyers of their choice; (3) they can introduce all the admissible evidence at their disposal, including that which public prosecutors might be reluctant to use for political reasons; (4) last, but not least, they can receive compensation for the injury done to them or their murdered relatives.”<sup>157</sup>

Since *Filartiga*, there has been a trend towards bringing violations of international law under the ATS.<sup>158</sup> Indeed, Congress’ express intent in enacting the ATS was to provide aliens access to U.S. courts to hold U.S. citizens accountable for violations of international norms. This

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<sup>153</sup> *Salim*, 268 F. Supp 3d at 1150.

<sup>154</sup> *Filartiga*, 630 F.2d at 890.

<sup>155</sup> Weiss, *supra* note 127, at 35.

<sup>156</sup> Aceves, *supra* note 82, at 97.

<sup>157</sup> Weiss, *supra* note 127, at 35.

<sup>158</sup> George Slyz, *International Law in National Courts*, 28 N.Y.U. J. INT’L L. & POL. 65, 90 (1995).

appears to follow Weiss's advice: "[o]ne way to take politics out of the quest for justice is for the victims to become prosecutors in civil cases."<sup>159</sup> This is exactly what the ACLU, on behalf of Salim, Soud, and Rahman, successfully did.

***E. U.S. District Courts Can Help Close the Impunity Gap for U.S. Torture Violations.***

**1. Proper Accountability for the Past is Needed.**

At the beginning of his presidency, former President Obama said, "[n]othing will be gained by spending our time and energy laying blame for the past."<sup>160</sup> He was unequivocally wrong. Not only does the absolute prohibition against torture and other cruel, inhuman or degrading treatment, which imposes an unequivocal obligation on the United States to investigate, prosecute, and provide repair, remedy and restitution to victims require examination of the past, but proper accountability for past gross human rights violations, such as torture, is essential for a variety of other reasons.

First, proper accountability is necessary to avoid undermining global respect for the rule of law,<sup>161</sup> to refrain from weakening "the meaning of the peremptory norm against torture,"<sup>162</sup> and avoid future abuses.<sup>163</sup> Second, these parties must be held accountable so the U.S. might "regain its stature in the international community, and truly uphold [the U.S.] commitment to honor international human rights,"<sup>164</sup> and avoid spreading the dangerous view that the intelligence agencies, responsible for protecting the nation's security, are beyond the reach of the law.<sup>165</sup> Third, the U.S. should model accountability for other nations, to avoid providing ready excuses for countries unwilling to prevent and prosecute torture,<sup>166</sup> and to strengthen global efforts to fight terrorism.<sup>167</sup> Fourth, and most importantly, accountability is essential to provide victims with the redress they deserve.<sup>168</sup>

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<sup>159</sup> Weiss, *supra* note 127, at 35.

<sup>160</sup> Fault Lines, *The Dark Prisoners: Inside the CIA's Torture Programme*, ALJAZEERA.COM (Sept. 13, 2016), <https://www.aljazeera.com/indepth/features/2016/03/dark-prisoners-cia-torture-programme-160326051331796.html>.

<sup>161</sup> PITTER ET AL., *supra* note 45, at 4.

<sup>162</sup> Hoffmann, *supra* note 119, at 106.

<sup>163</sup> PITTER ET AL., *supra* note 45, at 4.

<sup>164</sup> Hoffmann, *supra* note 119, at 112.

<sup>165</sup> *Id.* at 107 (citing Jameel Jaffer, *Those Who Approved Torture Shouldn't Be Above the Law*, MSNBC (Dec. 14, 2014), <http://www.msnbc.com/msnbc/those-who-approved-torture-shouldnt-be-above-the-law>).

<sup>166</sup> PITTER ET AL., *supra* note 45, at 4.

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

<sup>168</sup> Hoffmann, *supra* note 119, at 107.

Perhaps the Obama administration did reflect on the past, by deciding not to invoke, for the first time in history, the state secret privilege, which allowed *Salim v. Mitchell* to move forward. However, it nonetheless failed to adequately account for the post-9/11 CIA torture program and the U.S. officials involved. As Weiss suggests, the best way to start closing this impunity gap for torture violations might be to empower victims to become prosecutors in civil actions.<sup>169</sup>

## 2. U.S. Courts are Optimal Venues to Seek Redress for Torture Abuses.

At the international level, the use of universal jurisdiction by foreign countries in an attempt to bring redress to several victims of the post-9/11 CIA torture program, has proved to be controversial and often ineffective. In the majority of cases, the United States' political pressure on other governments prevented foreign courts from asserting their jurisdiction over U.S. perpetrators. The only successful foreign prosecution was conducted by Italy, whose Supreme Court convicted, *in absentia*, 25 U.S. officials for their involvement in extraordinary rendition operations. However, most have remained "beyond the reach of Italian law by not traveling to Europe," and several of those convicted have now been pardoned,<sup>170</sup> which leaves victims with minimal redress.

However, at the domestic level, the ideal venue for prosecution would obviously be the criminal courts of the United States. Ideally, a special prosecutor would be appointed to investigate the torture policies and hold accountable those responsible. By declassifying the SCCI Report, the United States openly admitted to the use of torture as part of its investigations practice, and as a result is under international and domestic obligation to prosecute those responsible. However, Professor Davis mentions that it is nearly impossible to conceive of prosecuting a former president.<sup>171</sup> After the Bush administration, in fact, the Obama administration (besides issuing the executive order that formally closed the CIA's RDI program and appointing prosecutor Durham to conduct his ineffective investigation) failed to provide redress to the victims of the torture program. The Trump administration is unquestionably on the

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<sup>169</sup> Weiss, *supra* note 127, at 35.

<sup>170</sup> Elisabetta Povoledo, *Italy Reduces Sentence for E.x.-C.I.A. Officer Sought in Rendition Case*, THE N.Y. TIMES, Feb. 28, 2017.

<sup>171</sup> Hoffmann, *supra* note 119, at 109.

same, if not worst, track. The Trump administration has explicitly threatened to reopen the CIA black sites and reintroduce the use of torture.<sup>172</sup>

Nonetheless, *Salim v. Mitchell* demonstrates that victims have some form of redress in domestic civil courts. As the case demonstrates, the ATS framework provides an optimal venue for future prosecutions in U.S. district courts. *Salim v. Mitchell* is a historic landmark for victims of the post-9/11 CIA torture program. Despite not holding a full trial, the settlement held perpetrators accountable for their abuses. In the words of Director of ACLU National Security Project Hina Shamsi, “[g]overnment officials and contractors are on notice that they cannot hide from accountability for torture.”<sup>173</sup> Indeed, the *Salim v. Mitchell* settlement changed the legal landscape by demonstrating domestic courts are “fully capable of handling lawsuits involving abuses committed in the name of national security.”<sup>174</sup>

The two psychologists likely “avoided a trial that would have brought into full light of an American courtroom what happened in” the CIA black sites, by settling the lawsuit.<sup>175</sup> Nonetheless, for the first time in history victims of the torture program won against a system that previously failed to provide any accountability for post-9/11 CIA torture victims. The lawsuit not only forced the U.S. to declassify and release 274 new documents during pre-trial discovery, which provided “the fullest picture yet of what the three men suffered in that secret CIA dungeon,”<sup>176</sup> but most importantly it helped spread awareness by making their stories public. While U.S. officials may prefer to close the book on this dark period of U.S. history, there is new hope for torture victims to find redress.

### III. Conclusion

*Salim v. Mitchell* demonstrates the ability of U.S. federal courts to handle torture violation claims, and provides a guiding light to remedy the harm suffered by the victims of the post-9/11 CIA torture program. Through examining the historical background of the post-9/11 CIA torture program, this comment articulates the universally accepted prohibition against torture, which is firmly embedded in customary international law, international treaties signed

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<sup>172</sup> *Id.*

<sup>173</sup> See ACLU, *CIA Torture Psychologists Settle Lawsuit*, *supra* note 4.

<sup>174</sup> *Id.*

<sup>175</sup> Siems, *supra* note 40.

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

and ratified by the United States, and in U.S. domestic law. It further assesses the obstacles to applying universal jurisdiction, and highlights the Alien Tort Statute as an effective alternative mechanism for the exercise of a “self-help universal jurisdiction” within U.S. federal courts. The research suggests that U.S. courts are the optimal venue to seek redress for victims of the post-9/11 CIA torture program because *Salim v. Mitchell* shows it may be the last refuge of hope for victims in a world where the U.S. has otherwise failed to fulfill its duty to prosecute torture perpetrators. “Accountability and prosecution of the perpetrators of these atrocious human rights violations is a necessity: a necessity if we are ever to have a world free from torture.”<sup>177</sup>

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<sup>177</sup> Michael Ratner, *Litigating Guantanamo*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 2011 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., Springer, 2007).