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NOTES

THE CASE OF DETAINEES TORTURED¹ IN THE NAME OF NATIONAL SECURITY AND THE “WAR ON TERROR:” ARE THEY ENTITLED TO REPARATIONS?

Julie Dubé Gagnon *

ABSTRACT

Between 2001 and 2009, the United States of America (U.S.) allegedly committed acts of torture initiated at high levels of the government and carried out by the U.S. military, the CIA, and private contractors in territories under U.S. control (Guantanamo Bay, Iraq and Afghanistan), in secret prisons abroad allowed by a policy of extraordinary renditions. The grand majority of the torture victims are not U.S. citizens, nor residents of this country. This paper concludes that the alleged victims of torture have a right to reparations under international human rights law and that the U.S.’s responses to such allegations thus far do not comply with the requirements of the laws. In conclusion, this paper recommends what more should be done in order for the U.S. to comply with international norms regarding reparations.

INTRODUCTION

On March 7, 2011, the Obama Administration announced that it had ordered the Department of Defense to lift a stay on new charges in military commissions.² Obama’s decision to “look forward, not back” presents urgent and crying impunity dilemmas to hold accountable those responsible for a policy of torture [of detainees] conducted during President Bush’s war on terror. In fact, to date the Obama Administration has failed to investigate the crimes which amount to human rights violations committed during the reign of

¹ Torture, for the purposes of this paper, also includes other cruel and inhuman and degrading treatment.

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² See Scott Shane & Mark Landler, *Obama Clears Way to Guantanamo Trials*, N.Y. TIMES, Mar. 7, 2011, available at <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html>.

his predecessor even though President Obama himself condemned the use of torture in questioning detainees.³ To redeem itself, the U.S. must take action to hold accountable those who promoted a policy of torture and those who practiced it. But a question remains: how exactly should the U.S. respond to allegations of torture committed after 9/11 during the Bush Administration? The main forms of accountability for gross violations of human rights reflect internationally recognized rights to truth, justice, and reparations.⁴ Attempting to answer the previous question, this paper focuses on the third pillar of the accountability framework and argues that in order to obtain justice, the victims of torture need to receive reparations from the U.S. government. To this end, Part I presents a context for the torture allegations, defines who the torture victims are, and establishes that a particular interrogation technique, waterboarding, constitutes torture. Part II briefly presents the truth, justice, and reparations accountability legal framework under international law and discusses the legal obligations of the U.S. under the third pillar of this framework in order to offer redress to torture victims. Part III presents the unsatisfactory current position of the U.S., insofar as it has not offered any kind of remedy to the alleged torture victims, and how this stance does not comply with international norms. Part IV, subsequent to analyzing how the responses to the allegations of torture amount to breaches of international obligations, stresses what more should be done and recommends a few practical measures the U.S. should implement in order to satisfy the requirements of the law.

This paper argues that in order to discharge some of its international obligations in relation to victims' rights to reparation and to a larger extent, to truth, the U.S. needs to create a program for reparations.⁵ Without a mechanism for truth-telling, victims may feel that reparations are easy pay-offs in exchange for their silence. On the other hand, without reparations victims could feel that truth telling is an empty exercise which will not materially affect their lives.⁶ However, this paper focuses on attempting to define what the ideal reparation program should look like from a victim-centered perspective. Although these recommendations might be politically difficult to

³ See Comm. Against Torture, Legal Subcomm., Rep. on its 36th Sess., May 19, 2006, ¶ 22, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

⁴ See generally G.A. Res. 60/147, U.N. Doc. A/RES/60/147, (Mar. 21, 2006); H.R. Res. 2005/8, U.N. Doc. E/CN.4/RES/2005/81 (Apr. 21, 2005); Comm. On Human Rights, U.N. ESCOR. Rep. on its 61st Sess., Apr. 18, 2005, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005).

⁵ This paper assumes that the truth commission will recommend a reparations program. For a full analysis of what kind of truth commission should be implemented in the case of the U.S. allegations of torture, see generally Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT'L & COMP. L. 115 (2009); Kim D. Chanbonpin, "We Don't Want Dollars, Just Change": *Narrative Counter-Terrorism Strategy, An Inclusive Model For Social Healing, And The Truth About Torture Commission*, 6 NW J. L. & SOC. POL'Y 1 (2011).

⁶ See Landel, *supra* note 5, at 117.

achieve, the victims of the U.S. policy against terror are neither residents nor citizens of the U.S. and as such have no political power in this country.⁷

After briefly demonstrating that an interrogation technique (waterboarding) used by U.S. officials amounts to torture or cruel, inhuman, and degrading treatment as prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁸ and the International Covenant on Civil and Political Rights (ICCPR),⁹ it will be assumed that these acts were committed in some instances and that the U.S. is in violation of its international obligations to refrain from such acts. Since the focus of this paper is the duty to repair under international law, when it refers to torture, it also includes the use of cruel, inhuman, and degrading treatment.

I. CONTEXT, ALLEGATIONS, WHO WERE TORTURED AND WAS IT REALLY TORTURE?

First they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or a change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later.¹⁰

Canadian national Omar Khadr is not the only detainee in the custody of the U.S. at Guantanamo Bay who denounced such shocking treatment.

⁷ *Id.*

⁸ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. I § 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. Art. 1 of the CAT states: “For the purposes of this Convention, torture means 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 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.” *Id.*

⁹ International Covenant on Civil and Political Rights art. 7, Dec. 16, 1976, 999 U.N.T.S. 171. “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

¹⁰ Aff. Of Omar Ahmed Khadr, ¶ 59 (Feb. 22, 2008), available at http://www.michelleshephard.ca/docs/Affidavit_Khadr_Redacted_2008.pdf (taken by defense attorney while detained at Guantanamo Bay).

Between 2001 and 2009, the U.S. allegedly committed acts of torture and other cruel, inhuman, and degrading treatment initiated at high levels of the government carried out by the U.S. military, the CIA, and private contractors in territories under U.S. control (Guantanamo Bay, Iraq, and Afghanistan), in secret prisons abroad called “black sites” which are allowed by a policy of extraordinary renditions.¹¹ It is believed that there have been about eleven secret detention sites since September 2001 in various countries including six in the three countries listed above.¹² It is estimated that this seven-year program under the Bush Administration involved 150,000 to 200,000 persons, some 800 of whom were held in Guantanamo, and resulted in over 100 deaths.¹³ It has been proved that some of the tortured detainees under this program had no connection to terrorism and had been released due to wrongful imprisonment.¹⁴

The incidences of torture and ill-treatment committed in the above-mentioned detention centers have included beatings, deprivations of basic necessities, water-boarding, isolation, use of stress positions, forced nudity, and use of extreme temperatures to only mention a few.¹⁵ These practices have been publicly reported, deplored, and denounced by a vast array of intergovernmental and non-governmental organizations.¹⁶ Commentators have argued that a close examination of what occurred reveals a policy concealed under different labels and widespread and systematic practices that could not have been the work of a few individuals.¹⁷ According to a commentator, the acts of torture and other cruel, inhuman, and degrading treatment committed in

¹¹ See M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE?* xi (2010).

¹² See generally HUMAN RIGHTS FIRST, *BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT*, CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, (2005), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/06425-etn-by-the-numbers.pdf>.

¹³ See BASSIOUNI, *supra* note 11, at ix.

¹⁴ See Press Release, Attorney Gen., U.S. Dep’t of Justice, U.S. Transfers Three Guantanamo Bay Detainees to Albania, (Feb. 24, 2010), available at <http://www.justice.gov/opa/pr/2010/February/10-ag-186.html>.

¹⁵ See e.g. Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT’L & COMP. L. 115 (2009); Kim D. Chanbonpin, “*We Don’t Want Dollars, Just Change*”: *Narrative Counter-Terrorism Strategy, An Inclusive Model For Social Healing, And The Truth About Torture Commission*, 6 NW J. L. & SOC. POL’Y 1, 22 (2011); for a complete list of interrogation techniques amounting in torture, see PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES* 4, 9 (June 2008), available at http://brokenlives.info/?page_id=69.

¹⁶ See BASSIOUNI, *supra* note 11, at 5. The organizations include the United Nations, the European Parliament, the International Committee of the Red Cross, Human Rights Watch, Human Rights First, Amnesty International, and the American Civil Liberties Union. Other reports originate from military Judge Advocates General and the U.S. Assistant Secretary of the Navy who opposed them as violating the Constitution, U.S. laws in Title 10 and Title 18 U.S.C., international humanitarian law and the CAT.

¹⁷ See CAROLYN PATTY BLUM, LISA MAGARRELL, & MARIEKE WIERDA, *PROSECUTING ABUSES OF DETAINEES IN US COUNTER-TERRORISM OPERATIONS* 21, 23 (2009), available at http://www.ictj.org/static/Publications/ICTJ_USA_CriminalJustCriminalPolicy_pb2009.pdf.

Guantanamo Bay, Afghanistan, Iraq, and other secret detention centers as part of the CIA extraordinary rendition program are a pattern of illegal practices that clearly reflect a policy.¹⁸ The state policy did not limit itself to inflicting torture on detainees—it also included a pattern of concealment and obfuscation, whose apparent design was to create a puzzled amount of legal memoranda (Torture Memos),¹⁹ including Presidential Executive Orders concerning interrogation methods by the CIA and the U.S. military.²⁰

But who exactly are the victims? They are alleged terrorists or proven terrorists, neither residents nor citizens of the U.S. For instance, Maher Arar, a Canadian engineer, was erroneously suspected of being a terrorist by the Canadian federal police. He was unlawfully arrested and sent to Syria by the U.S. where he was imprisoned and tortured. The Canadian government exonerated him and paid him more than 10 million Canadian dollars in compensation after a two-year inquiry.²¹ But on June 14, 2010, the U.S. Supreme Court denied Arar's petition for certiorari to review the Second Circuit Court of Appeals *en banc* decision dismissing his case,²² ending his chances before U.S. courts. He will never receive compensation by the U.S. government through judicial means.²³

Without analyzing every interrogation technique employed by U.S. officials, the answer to the question, whether the detainees were really tortured, is most likely to be positive. This postulation is based on the various reports and legal literature previously cited, the United Nation's (U.N.) assessment of U.S. practices,²⁴ and the appraisal of the U.S. regarding the meaning of torture perpetrated by other states.²⁵ In addition, following the Abu Ghraib

¹⁸ See M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE?* 3 (2010).

¹⁹ See e.g. the memorandum of from Alberto R. Gonzales on the Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban. *Memo 7. January 25, 2002*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen Greenberg, Joshue Dratel eds., 2005) [hereinafter *Memo 7*]. Attorney General John Ashcroft is responsible for a series of Justice Department memoranda that allowed the Department of Defense to circumvent domestic and international law and facilitated acts of torture. Alberto Gonzales, Counsel to the President, also issued a January 25, 2002, memorandum to President Bush urging the Bush Administration to declare captives exempt from the protections of the Geneva Conventions in order to pre-empt war crimes charges and justify the denial of rights and more extreme forms of interrogation. *Id.* This memorandum provided a presumed legal basis for the abuses in Guantanamo and Afghanistan, and, through General Miller's advice and actions, in Iraq. See also Katherine Gallagher, *Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1091-93 (2009).

²⁰ See BASSIOUNI, *supra* note 18, at 3.

²¹ See *id.* at xvi-xvii.

²² See generally *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

²³ *Id.*

²⁴ See Comm. Against Torture, Legal Subcomm., Rep. on its 36th Sess., May 19, 2006, ¶¶ 13-28, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006)..

²⁵ See U.S. State Department, *Iran: Country Report on Human Rights Practices 2005*, ¶ 6 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm>.

torture scandal, which broke in mid-2004, the leaked International Committee of the Red Cross (ICRC) report,²⁶ and the accounts of the released detainees detailed numerous incidents of detainees being repeatedly beaten with various objects; kept naked and shackled in dark cells; subjected to sensory deprivation; subjected to food, water and sleep deprivation; being exposed to loud music or extreme temperatures for prolonged periods of time; and various acts of humiliation including forcing naked, male detainees to stand against a wall with women's underwear on their head.²⁷ Indeed, the ICRC established that "[p]ersons deprived of their liberty [in U.S.-run detention facilities in Iraq] face the risk of being subjected to a process of physical and psychological coercion in some cases tantamount to torture."²⁸

For the purposes of this paper, the right of the victim to receive reparations is triggered by the demonstration that a human rights violation ("torture") was committed. Because the demonstration of all interrogation techniques would not be possible during this study, this paper focuses on how water-boarding, as a permitted technique under the torture memos, constituted torture. This does not mean that other interrogation techniques do not amount to torture.

The most notorious of the torture memos is dated August 1, 2002. The memo examines the legality under international law of interrogation methods to be used on "captured Al Qaeda operatives."²⁹ The Memo redefines torture and the obligations of the U.S. under international law.³⁰ Specifically, under this Memo, both the physical and mental thresholds for torture were heightened: physical pain "[m]ust be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," while mental pain "[m]ust result in significant psychological harm of significant duration, e.g. lasting for months or even years."³¹ The memo also includes a section on defenses, in which it is stated that "[u]nder the current circumstances certain justification defenses might be available that would potentially eliminate criminal liability [for one charged under the Torture Statute]."³² The fact that Article 2(2) of the CAT provides

²⁶ See generally Int'l Comm. Red Cross, *Report by the ICRC On the Coalition Forces' Treatment of Persons Held in Iraq* (Feb. 2004), www.icrc.org/eng/resources/documents/misc/5yrl67.html.

²⁷ See generally PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES* 4, 9 (June 2008), available at http://brokenlives.info/?page_id=69.

²⁸ See Int'l Comm. Red Cross, *supra* note 26, at ¶ 59.

²⁹ For the text of the Aug. 1 Memo see *Memo 14, August 1, 2002*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen Greenberg, Joshue Dratel eds., 2005) [hereinafter *Memo 14*]. This compilation also includes many of the notorious Memos.

³⁰ See Katherine Gallagher, *Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1091 (2009).

³¹ See *Memo 14, supra* note 29, at 196.

³² *Id.* at 207.

that there can be no exception to the prohibition against torture is dealt with only in a footnote.³³

Based on the legal advice contained in this memo, a list of interrogation techniques was developed for use on detainees captured in the so-called ‘war on terror.’ On December 2, 2002, then-Secretary of Defense Donald Rumsfeld approved interrogation techniques that included: (1) attention grasps, (2) wailings, (3) facial holds, (4) facial slaps, (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) water-boarding.³⁴

Water-boarding is a form of “mock” drowning.³⁵ It consists of strapping down an individual to a board and positioning the board in a way that puts the individual’s head lower than the chest. Then, a towel is placed over the mouth and nose, and water is poured on the cloth.³⁶ As the towel soaks, water starts passing through the individual’s nose and/or mouth.³⁷

The Bush Administration argued that water-boarding is simulated drowning.³⁸ On the other hand, journalist Christopher Hitchens, who decided to be subjected to water-boarding, stated that it is not “simulated”: “[y]ou feel that you are drowning because you are drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure.”³⁹

Physicians for Human Rights studied the effects of water-boarding.⁴⁰ They concluded that it causes a “shortage of oxygen in the body,” which provokes “tachycardia (rapid heartbeat), hyperventilation (rapid respiratory rate), and labored breathing (airway obstruction and breathlessness), [which] is almost unavoidable.”⁴¹ As a consequence, the technique could “[i]nduce the obstruction of blood flow to the heart (cardiac ischemia) or irregular heart beat (arrhythmia) in vulnerable individuals. Brief oxygen deprivation can cause

³³ See Gallagher, *supra* note 30, at 1092; Article 2(2) of the CAT reads: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

³⁴ See M. CHERIF BASSIOUNI, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION: IS ANYONE RESPONSIBLE?* 22 (2010); Memo 14, *supra* note 29, at 196–199.

³⁵ See generally Physicians for Human Rights, *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality*, 17 (Aug. 2007), available at <http://physiciansforhumanrights.org>.

³⁶ See Christopher Hitchens, *Believe Me, It is Torture*, VANITY FAIR (Aug. 2008), <http://www.vanityfair.com/politics/features/2008/08/hitchens200808> (last visited Apr. 14, 2011).

³⁷ *Id.*

³⁸ See generally Mark Tran, *Cheney Endorses Simulated Drowning*, THE GUARDIAN (Oct. 27, 2006), available at www.guardian.co.uk/world/2006/oct/27/usa.guantanamo.

³⁹ Hitchens, *supra* note 36.

⁴⁰ Physicians for Human Rights, *supra* note 35, at 17; See also, Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468, 475–76 (2007).

⁴¹ *Id.* at 475–76.

neurological damage.”⁴² Additionally, Physicians for Human Rights argued that water-boarding “[c]an also cause severe psychological harm,” which can constitute torture.⁴³ Furthermore, the water-boarding experience is “[a]ssociated with the development of predominantly respiratory panic attacks, high levels of depressive symptoms, and prolonged posttraumatic stress disorder.”⁴⁴ Even Christopher Hitchens, who voluntarily subjected himself to the treatment and could stop it at any point, had some psychological consequences.⁴⁵ Finally, it is necessary to point out that key prisoners were subjected to water-boarding dozens and sometimes hundreds of times.⁴⁶

Water-boarding is a technique that has been previously condemned by the United States.⁴⁷ After the Second World War, military courts prosecuted Japanese interrogators as war criminals using this technique.⁴⁸ It has also been recognized as torture by civil courts,⁴⁹ as well as by a criminal court in Texas.⁵⁰ Additionally, as recent as 2006, the State Department considered water-boarding torture in its Iran Country Report.⁵¹

According to these findings and considering the severe physical and mental consequences that water-boarding produces, it would fall within the narrow and distorted definition of torture adopted by the 2002 Memo. Even so, internationally, the Committee against Torture has considered water-boarding torture.⁵² A similar conclusion emanated from the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,⁵³ and other respected scholars.⁵⁴ Therefore, this paper will also take the position that water-boarding amounts to torture. Having

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Christopher Hitchens, *Believe Me, It is Torture*, VANITY FAIR (Aug. 2008), <http://www.vanityfair.com/politics/features/2008/08/hitchens200808> (last visited Apr. 14, 2011).

⁴⁶ Scott Shane, *2 Suspects Waterboarded 266 Times*, N.Y. TIMES (Apr. 20, 2009), <http://www.nytimes.com/2009/04/21/world/21detain.htm>.

⁴⁷ See Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468, 475–76 (2007), for a comprehensive analysis.

⁴⁸ *Id.* at 477–82.

⁴⁹ See *Hilao v. Estate of Marcos*, 103 F.3d 789, 790 (9th Cir. 1996).

⁵⁰ See *United States v. Lee*, 744 F.2d 1124 (5th Cir. 1984).

⁵¹ See U.S. State Department, *Iran: Country Report on Human Rights Practices 2005*, ¶ 6 (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm>.

⁵² Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture to the United States*, ¶ 24, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

⁵³ See U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Addendum Mission to the United States of America*, ¶ 33, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (by Martin Scheinin).

⁵⁴ See Scott Horton, *Military Necessity, Torture, and the Criminality of Lawyers*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 169, 181 (Wolfgang Kaleck et al eds., Springer 2006); Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 506 (2007).

contextualized the allegations, identified the victims, and demonstrated the commission of torture in the case of water-boarding, the next section considers the legal obligations of the United States under international law in order to remedy such unlawful acts.

II. LEGAL OBLIGATIONS OF THE UNITED STATES AND RESPONSIBILITIES FOR REPARATIONS OF ACTS OF TORTURE UNDER INTERNATIONAL HUMAN RIGHTS LAW

International human rights law speaks of three fundamental rights of victims: the right to know, the right to justice, and the right to reparation.⁵⁵ In a nutshell, the right to know includes the right to the truth and the obligation to keep alive the memory of what occurred. The initial phase for acquiring truth can result in the creation of an extrajudicial commission of inquiry and taking prompt action in order to ascertain the preservation and access to archives of the period of violations.⁵⁶ The right to justice, for its part, means that measures are taken to fight impunity. Finally, the right to reparations are individualized actions implemented with the aim of granting reparations including restitution, compensation, and rehabilitation. The right to reparations also entails collective measures of satisfaction and guarantees of non-repetition.⁵⁷ This paper therefore focuses on the third pillar of the accountability framework for human rights violations in international law: reparations.

Reparations are intended to return the victim to the position in which he or she would have been if the violation had not occurred.⁵⁸ Roht-Arriaza argues that this restitution in kind is impossible to achieve.⁵⁹ Indeed, it is difficult to conceive of restoring life or a peaceful mental state when gross human rights violations have been committed. Because restitution *in integrum* is practically impossible, human rights lawyers can nonetheless work at obtaining reparations for the body to enable survival (material reparations) and reparations for the spirit to acquire a sense of justice and a safe decorum for generations to come (moral damages).⁶⁰ Roth-Arriaza stresses that reparations in the context of international law include restitution,⁶¹ which coincides with the concept of material reparations above. Reparations can also offer compensation, which refers to a payment for a harm suffered, or rehabilitation,

⁵⁵ See Commission on Human Rights, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005) (by Diane Orentlicher).

⁵⁶ See Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17(2) TORTURE J. 96, 103 n.31 (2007), available at http://www.irct.org/Files/Filer/TortureJournal/17_2_2007/art_04.pdf.

⁵⁷ *Id.*

⁵⁸ See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 158 (2004).

⁵⁹ *Id.*

⁶⁰ *Id.* at 159.

⁶¹ *Id.*

which involves practical measures such as medical and psychological care.⁶² Reparations can also take the form of satisfaction, truth-telling, and guarantees of non-repetition, which usually involves ending the violation.⁶³ According to Redress, an acclaimed non-governmental organization that advocates for the rights of torture victims, reparations will have a significant impact since most survivors will have suffered severe physical and psychological trauma, possible upheaval, and drastic change of circumstances.⁶⁴ The process of healing will normally require the survivor of torture to come to terms with his or her traumatic past. Obtaining closure for the events of the past may facilitate psychological recovery and instill greater confidence and a sense of the future, thereby contributing to the overall integration and healing process.⁶⁵

Despite the horrific human reality underlying acts of torture, a fundamental legal question remains: does a state (notably by the actions of his officials or employees individually), under international human rights law, incur civil liability towards victims of human rights violations? If such liability exists—meaning that the obligation to repair a wrong done by the state with monetary compensation—does the victim have a procedural right to enforce the liability? If such norms under international human rights law oblige states to repair, what are the specific legal responsibilities of the United States regarding this matter?

There are divergent opinions on whether or not there is an obligation on the part of the state under international law to provide reparations for individual victims of human rights violations, such as torture.⁶⁶ It has been argued that there is no norm of customary international law under which individuals are entitled to reparations because there is no specific duty to provide individual reparations in any human rights treaty.⁶⁷ Following the same paradigm, it has been argued that the number of victims who actually receive compensation and reparation for gross human rights violations is so minimal that it demonstrates that state practice does not follow the international norm of the right to reparations for individuals.⁶⁸ On the other side of the spectrum, more positive commentators have contended that the

⁶² *Id.*; see also Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT'L & COMP. L. 115, 132 (2009).

⁶³ See Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, princ. 19-23 Comm'n on Human Rights, Annex, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (by M. Cherif Bassiouni).

⁶⁴ See The Redress Trust, REPARATIONS FOR TORTURE 11 (April 2003), <http://www.redress.org/downloads/publications/AuditReportText.pdf>.

⁶⁵ *Id.*

⁶⁶ See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT'L & COMP. L. 115, 133 (2009).

⁶⁷ Christian Tomuschat, *Reparations for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 171-73 (2005).

⁶⁸ *Id.*

obligation to bestow reparations now constitutes customary international law and thus permits victims a right to reparations for human rights violations perpetrated by the state.⁶⁹

The right to reparations is also accounted for in the laws of war,⁷⁰ which mainly concern inter-state obligations. However, under international law it is not clear if the global war on terror is an armed conflict, in which the laws of war would apply.⁷¹ Because of this ongoing debate,⁷² the right to reparations in this paper is studied following international human rights law obligations only.⁷³

Part of the answer to the question raised above, however pessimistic and imperfect for idealist minds, rests in the preamble of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Human Rights Law and Serious Violations of International Humanitarian Law⁷⁴ (“Basic Principles”), which state that they “[d]o not entail new international or domestic legal obligations” but reflect “[e]xisting legal obligations under international human rights law and international humanitarian law” of states. Although the third sentence in Principle 15 speaks of a duty of states to provide reparation,⁷⁵ this proposition is decisively weakened by the introductory phrase: “[i]n accordance with its domestic laws

⁶⁹ See Landel, *supra* note 66; Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17(2) TORTURE J. 96, 116 (2007), available at http://www.irct.org/Files/Filer/TortureJournal/17_2_2007/art_04.pdf.

⁷⁰ See, e.g., Regulations concerning the Respecting the Laws and Customs of War on Land, Article 3, annexed to Hague Conventions [No. IV] Respecting the Laws and Customs of War on Land, October 18, 1907, annex Article 3, 36 Stat. 2277, 1 Bevans 631; Geneva Convention Relative to the Treatment of Prisoners of War, art. 148, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. (Both these dispositions enclose obligations to pay compensation for a breach of an obligation enshrined in the treaties.)

⁷¹ See generally Mary Ellen O’Connell, *When is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. Int’l & Comp. L. 535, no. 2, 2005. Compare Derek Jinks, *The Applicability of the Geneva Conventions to the “Global War on Terrorist,”* 46 VA. J. INT’L L., 165 (2005).

⁷² Four members of the US Supreme Court have treated the U.S. conflict with al Qaeda as an armed conflict of a non-international character, thus triggering the applicability of Common Article 3 of the Geneva Conventions. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–32 (2006) (plurality opinion).

⁷³ See Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 357–58 (2008); Jordan J. Paust, *Accountability for the Torture memo: Civil Liability of Bush, Cheney, et al. for Torture, Cruel and Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L., 359, 365–67 (2009), for a discussion of the applicability of the laws of war for torture victims seeking redress.

⁷⁴ See Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, princs. Preamble, ¶ 7 Comm’n on Human Rights, Annex, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (by M. Cherif Bassiouni) [hereinafter *Basic Principles*].

⁷⁵ See Fassbender, *supra* note 73, at 357; Principle 15 reads: “[a] state shall provide reparation to victims [...]” See also *Basic Principles*, *supra* note 74, princ. 15.

and international legal obligations.”⁷⁶ Commentators such as Tomuschat have noted that this clearly indicates:

*[n]o general obligation is deemed to enjoin states to make reparation, but that such commitment can only be derived from additional sources, either from national law or from principles and rules of international law which need to be identified specifically in any case at hand.*⁷⁷

Likewise, Principle 11 of the Basic Principles qualifies the language that a victim has a right to “adequate, effective and prompt reparation for harm suffered” preceded by “as provided for under international law.”⁷⁸ To add to the weakness of that statement, Principle 18 uses the word “should” instead of a harder “shall.”⁷⁹ In light of the aforementioned, it appears that no general firm obligation under the Basic Principles exists upon states to make reparation. This soft law document nonetheless demonstrates a tendency and desire of the international legal community to allocate such redress to victims of gross human rights violations.

Even if the weight of the Basic Principles is deceiving, it is pertinent to explore the duty to repair in cases of torture in other legal instruments. Indeed, a vast range of international normative laws assure the right to fair redress for victims of torture, including means for rehabilitation. As such, article 14 of the CAT reads:

Each State Party *shall* ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation

⁷⁶ *Id.*

⁷⁷ *Id.* See also Christian Tomuschat, *Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in *PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW* 569, 579 (Marcelo G. Kohen ed., 2007) (emphasis added).

⁷⁸ See Basic Principles, *supra* note 74, princ. 11.

⁷⁹ *Id.* princ. 18, which reads: “In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.” See also Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. Int’l Crim. Just. 347, 357 (2008); This is even weaker than an earlier draft of the Basic Principles submitted in 2000 by Special Rapporteur M. Cherif Bassiouni. Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, princs. 15,16, Comm’n on Human Rights, Annex, U.N. Doc. E/CN.4/2000/62 (Jan. 18, 2000) (by M. Cherif Bassiouni).

as possible. In the event of the death of the victim as a result of an act of torture, his dependants *shall* be entitled to compensation.⁸⁰

The United States ratified the CAT in 1994 but has provided reservations stating that articles 1 through 16, including article 14 stated above, are not “self-executing.”⁸¹ However, according to Paust, the reservation expressed by the United States in 1994 is valueless because both sentences of article 14 quoted above contain a duty phrased by a mandatory “shall” language that provides clarity regarding the immediate mandatory duty, and that is typically self-executing.⁸²

In addition, the Committee against Torture has stated that the United States “[s]hould recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction.”⁸³ It also expressed that the United States should “[e]nsure . . . that mechanisms to obtain full redress, compensation and rehabilitation are accessible to all victims of acts of torture or abuse, including sexual violence, perpetrated by its officials.”⁸⁴ In addition, the Committee stated that states should enact appropriate legislation to “render application for compensation viable.”⁸⁵

On his part, the U.N. Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation of Gross Violations of Human Rights and Fundamental Freedoms stated in 1996 that “[s]tates have a duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations.”⁸⁶ One year later, the U.N. General Assembly reiterated the principle that states are responsible for providing reparations for victims of gross violations of international human rights law which can be attributed either to action or omission by the state.⁸⁷

⁸⁰ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. I4, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT] (emphasis added).

⁸¹ Upon ratification of the CAT in 1994, the United States Government declared, *inter alia* “that the provisions of articles 1 through 16 of the Convention are not self-executing.” CAT, *supra* note 80, Reservations and Declarations, United States of America (III)(1).

⁸² See Jordan J. Paust, *Accountability for the Torture memo: Civil Liability of Bush, Cheney, et al. for Torture, Cruel and Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L., 359, n.3 (2009).

⁸³ Committee Against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture to the United States*, ¶ 14, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006).

⁸⁴ *Id.* ¶ 32.

⁸⁵ See Committee Against Torture, *O.R., H. M. and M. S. v. Argentina*, 9 (November 23, 1989), U.N. Doc. CAT/C/WG/3/DR/12 and 3/1988.

⁸⁶ See U.N. Economic and Social Council, Revised set of Principles on the Right to Reparations for Victims of Gross Violations of Human Rights and Humanitarian Law, UN Doc. E/CN.4/Sub.2/1996/17 (24 May 1996), p. 7.

⁸⁷ See UN Economic and Social Council, Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (2 October 1997) (by Louis Joinet) available at <http://www.jstor.org/stable/1192202?seq=2>.

Other treaty-based duties of states exist regarding rights of individuals to an effective remedy, access to courts, and nonimmunity with respect to torture. Prominent among these are the right to a remedy,⁸⁸ enshrined in article 2 paragraph 3(a) of the ICCPR, which obliges each state party “[t]o ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy.”⁸⁹ Articles 9(5) and 14(6) add that anyone unlawfully arrested, detained, or convicted shall have an enforceable right to compensation or be compensated according to law. Unfortunately, the Human Rights Committee has not interpreted “effective remedy” as encompassing compensation: “[t]he Human Rights Committee does not recognize any firm rule on reparation . . . In particular, compensation is not seen as an integral element of reparation.”⁹⁰ Nonetheless, article 50 of the ICCPR further mandates that all of the “[p]rovisions of the present Covenant shall extend to all parts of the federal States without any limitations or exceptions.”⁹¹ Paust argues that this provision assures that rights and duties under the treaty apply with respect to the decisions and conduct in Washington D.C. as well as in judicial proceedings within the U.S. in which claims to fair compensation proceed.⁹²

The rights to an effective remedy and access to courts are also reflected in article 8 of the Universal Declaration of Human Rights,⁹³ which, following the opinion of Paust, mirrors patterns of generally shared expectations concerning customary roots of the right to an effective remedy in domestic courts for violations of human rights.⁹⁴ Rights to an effective remedy and access to courts are also necessarily part of the U.N. Charter-based obligations of all members to assure “[u]niversal respect for, and observance of, human rights.”⁹⁵

In the Inter-American System, the principles for reparations are enshrined in article 63 of the American Convention, which states that the court is entitled to decide that “[t]he consequences of the measure or situation that

⁸⁸ See Jordan J. Paust, *Accountability for the Torture memo: Civil Liability of Bush, Cheney, et al. for Torture, Cruel and Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT’L L., 359, 362 (2009).

⁸⁹ See International Covenant on Civil and Political Rights art. 2 (3)(a), 14, Dec. 16, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹⁰ See Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. Int’l Crim. Just. 347, 357 (2008). See also Christian Tomuschat, *Reparations in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in PROMOTING JUSTICE, HUMAN RIGHTS AND CONFLICT RESOLUTION THROUGH INTERNATIONAL LAW 569, 585 (Marcelo G. Kohen ed., 2007)

⁹¹ See ICCPR, *supra* note 89, art. 50. The US had no reservation with respect to Article 50 and it clearly operates directly within the US. See Paust *supra* note 88, at 362.

⁹² See Paust, *supra* note 88, at 362.

⁹³ See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 8 (Dec. 10, 1948). “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

⁹⁴ See Paust, *supra* note 88, at 364.

⁹⁵ U.N. Charter, arts. 55(c), 56.

constituted the breach of such right or freedom are remedied and that fair compensation is paid to the injured party.”⁹⁶ Article 25 of the American Convention goes further, entitling everyone to effective recourse for protection against acts that violate the fundamental rights recognized by the constitution “[o]r laws of the state or by the Convention,” even where the act is committed by persons acting in the course of their official duties.⁹⁷ The Inter-American Court of Human Rights has expressed in *Velasquez Rodriguez v. Honduras* that “[e]very violation of an international obligation which results in harm creates a duty to make adequate reparation.”⁹⁸

Although the U.S. has not ratified the American Convention, within the U.S., at Guantanamo, and elsewhere in the Americas, the U.S. is bound to take no action inconsistent with the object and purpose of the Convention.⁹⁹ According to Paust, such actions would necessarily include orders, authorizations, complicity, and other acts in violation of the human rights to freedom from torture and the right to “fair compensation” protected in the American Convention.¹⁰⁰ It could be argued following the Vienna Convention on the Law of Treaties that the obligation arises because the U.S. signed the treaty in 1977 while awaiting ratification.¹⁰¹ The U.S. is also bound by the American Declaration of the Rights and Duties of Man¹⁰² (American Declaration), which affirms that “[e]very individual who has been deprived of his liberty ... has the right to humane treatment” and “[e]very person may resort to the courts to ensure respect for his legal rights.”¹⁰³

From the foregoing, it could be argued that at present neither a rule of customary international law nor a treaty rule *directly* obliges a U.S. court to financially compensate victims of torture. However, it is clearly accepted in international law that the right to a remedy comprises two aspects: on the one hand, the procedural right of access to justice and, on the other hand, the substantive right to redress for injury suffered because of an act or acts

⁹⁶ See American Convention on Human Rights art. 63(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁹⁷ *Id.*, art. 25.

⁹⁸ See *Velasquez Rodriguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (Ser. C) No. 4. ¶ 25 (July 29, 1988).

⁹⁹ See Jordan J. Paust, *Accountability for the Torture memo: Civil Liability of Bush, Cheney, et al. for Torture, Cruel and Inhuman, and Degrading Treatment and Forced Disappearance*, 42 CASE W. RES. J. INT'L L., 359, 369 (2009).

¹⁰⁰ See *id.* at 364.

¹⁰¹ See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. “A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: a) it has signed the treaty . . . subject to ratification.”

¹⁰² See American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Off. Rec., OEA/Ser.L./V/I.4, rev. 1965). As a party to the Charter of the Organization of American States, Feb. 27, 1967, 2 U.S.T. 2394, the U.S. is bound by the American Declaration which is legally authoritative indicia of human rights protected through article 3(k) of the O.A.S. Charter. See Paust, *supra* note 99, at 369.

¹⁰³ See American Declaration of the Rights and Duties of Man, *supra* note 103, at art. I, XXV, XVIII.

committed in violation of rights contained in national or international law.¹⁰⁴ In addition, the obligation to offer a remedy by the state itself for a violation of an obligation is omnipresent in the legal instruments, be they soft law, customary international law, or treaty law. It is in this respect unquestionable that an emerging norm that obliges states—including the U.S.—to offer reparations to victims of torture, exists and it is on this premise that this paper will address the non-compliance of the U.S. with this duty.¹⁰⁵

III. WHAT HAS THE UNITED STATES DONE SO FAR IN TERMS OF REPARATIONS, AND HOW ITS RESPONSE TO ALLEGATIONS DOES NOT MEET INTERNATIONAL STANDARDS

The U.S. has not created any administrative mechanism to offer redress to victims of torture. Victims have attempted to find remedy through U.S. courts, but to date none have received compensation, although some cases are still to be decided.¹⁰⁶ This section briefly exposes how the civil immunity of U.S. officials for torture hinders victims' right to reparations. The current state of the law and the government's inactions violate the CAT's, ICCPR's, and international obligations to offer a remedy. To this end, it is argued that the U.S. violates international human rights law by not providing reparations to victims seeking legal redress before domestic courts and by the same fashion not permitting access to courts.

The U.S. has commissioned a number of reports to investigate allegations of torture. On May 25, 2004, then Secretary of Defense Donald Rumsfeld directed the Naval Inspector General, Vice Admiral Albert T. Church III, to conduct a comprehensive review of Department of Defense interrogation operations in Iraq, Afghanistan, and Guantanamo.¹⁰⁷ Also in 2004, an investigation was ordered into allegations of abuse by members of the 800th Military Police Brigade, including the abuse at Abu Ghraib Prison.¹⁰⁸ This report did not recommend that anyone be held criminally accountable. It did, however, recommend that various members of the army be reprimanded

¹⁰⁴ See Dinah Shelton, *The Right to Reparations for Acts of Torture: What Right, What Remedies?*, 17(2) TORTURE J. 96, 109 (2007), available at http://www.irct.org/Files/Filer/TortureJournal/17_2_2007/art_04.pdf.

¹⁰⁵ This note does not discuss in full detail the U.S.'s obligations to bestow reparations to victims of torture under its domestic law. However, it will analyze how the current response of the U.S. courts does not satisfy international norms. For a complete discussion of the potential liability of the U.S. and its officials for torture under current domestic law, see Richard Henry Seamon, *U.S. Torture as Tort*, 37 RUTGERS L.J. 715 (2006).

¹⁰⁶ Many cases have presented petitions to be heard before the U.S. Supreme Court. The most recent one to have been rejected is *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 3409 (2010).

¹⁰⁷ See U.S. DEP'T OF DEFENSE, THE CHURCH REPORT (2005), available at www.defense.gov/news/mar2005/d20050310exe.pdf.

¹⁰⁸ See MAJOR GENERAL ANTONIO TABUGA, ARTICLE 15-6 INVESTIGATION ON THE 800TH MILITARY POLICE BRIGADE, 6 (Mar. 3, 2004), available at www.mobrien.com/twr/appendix_to_twr19v18.htm#taguba.

and various institutional reforms be implemented.¹⁰⁹ Human Rights First, among other important non-governmental organizations, reported that there had been around 600 criminal investigations into allegations of detainee abuse.¹¹⁰ Despite investigation efforts, impunity prevails and the victims' needs stay in the shadow. For example, at Abu Ghraib, it was found that the chain of command and military leaders had failed to properly supervise soldiers and issue guidance about detention and interrogation policies.¹¹¹ However, despite this modest effort, most of these investigations have not centered on victims, and to date no reparation mechanism has been implemented to address the needs of the torture victims.

As Roht-Arriaza points out, national courts can serve as the first opportunity for reparations in cases of human rights violations.¹¹² In fact, because of the inability of the government to properly address allegations of torture, victims have begun to sue before domestic courts. But a problem remains: U.S. officials cannot be held civilly liable under current domestic U.S. law. Therefore, no damages have been ordered to victims.¹¹³

In theory, victims are able to claim reparations under the Alien Tort Statute (ATS), which permits aliens to demand civil remedies in district courts for a tort "[c]ommitted in violation of the law of nations or a treaty of the United States."¹¹⁴ In *Filartiga v. Peña-Irala*, the court held that torture is a crime amounting to a violation of the law of nations and is therefore actionable under the ATS.¹¹⁵ At first hand, it appears that it would be possible for victims tortured by U.S. agents to bring civil claims against the persons involved, provided that they are in the U.S. and that the court can assert personal jurisdiction over them.¹¹⁶ Unfortunately, this theory has been tried in practice, and the U.S. government has repeatedly substituted itself for the defendants and invoked state secrecy or argued immunity for actions of individuals,¹¹⁷ consequently blocking any recourse claimants could have. This Department of

¹⁰⁹ *Id.* at 20–21, 44–48.

¹¹⁰ See ACT AGAINST TORTURE, STOP TORTURE AND INDEFINITE DETENTION! SHUT DOWN GUANTAMO NOW! 7 (last visited April 8, 2011), available at http://www.actagainsttorture.org/materials/Torture_Facts_booklet.pdf.

¹¹¹ See LT. GEN. ANTHONY JONES AND MAJOR GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE, 15-18 available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (last visited Apr. 8, 2011).

¹¹² See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 165 (2004).

¹¹³ See Richard Henry Seamon, *U.S. Torture as Tort*, 37 RUTGERS L.J. 715, 717 (2006). Cf. *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); See also *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009). None of the perpetrators of torture have been held civilly liable before U.S. courts and no damages have been bestowed.

¹¹⁴ See Alien Tort Statute, 28 U.S.C. § 1350 (2003).

¹¹⁵ See *Filartiga v. Peña-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

¹¹⁶ See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by U.S. Forces Since 9/11*, ILSA J. INT'L & COMP. L. 115, 135 (2009).

¹¹⁷ Seamon, *supra* note 113, at 725–26.

Justice (DOJ) litigation strategy has prevented all victims of abusive counterterrorism practices so far from obtaining compensation injuries.¹¹⁸

Following this trend, the courts apply what has been held in *Harlow v. Fitzgerald*, which bestows qualified immunity to government employees, exempting them “[f]rom liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹⁹ Under *Boumediene v. Bush*, the US Constitution does not grant rights to aliens outside U.S. jurisdiction,¹²⁰ and “no one acting in an official capacity could ever be found liable under qualified immunity because under United States law they cannot be said to have violated statutory or constitutional rights.”¹²¹

Article 14(1) of the CAT obliges the U.S. to “[e]nsure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”¹²² Upon ratification of the CAT, the U.S. articulated “[t]hat it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party.”¹²³ It is disbelieving that the U.S. complied with that obligation. In fact, the ATS provides a foreign citizen an enforceable right to compensation for an act of torture by a U.S. official or agent as a tort committed in violation of the law of nations or a treaty of the U.S.¹²⁴ None of the U.S. courts so far have reached the question whether the ATS applies to an act of torture possibly committed in Guantanamo or elsewhere.¹²⁵ The ATS does not itself provide for any territorial limitation, as a violation of the law of nations can be committed anywhere in the world. However, for acts of torture, the US has expressly limited a private right of action for damages to acts committed “in territory under the jurisdiction” of the U.S.¹²⁶ It was held, for instance, in *Rasul v. Myers* that Guantanamo is not a U.S. territory,¹²⁷ but the Supreme Court disagreed and later said that it exercises “complete jurisdiction and control” over Guantanamo.¹²⁸ The term “jurisdiction” referred to in article 2(1) of the CAT could cover any place over which a contracting party has effective control and authority. It is thus apparent that the ATS could find application for claims alleging torture at Guantanamo.¹²⁹

¹¹⁸ *Id.*

¹¹⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹²⁰ See *Boumediene v. Bush*, 476 F.3d 981, 991 (2007).

¹²¹ See Landel, *supra* note 116, at 135–36.

¹²² See CAT, *supra* note 80, at art. 14(1).

¹²³ *Id.* at art. 13.

¹²⁴ See Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 365 (2008).

¹²⁵ *Id.* at 365. See also *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

¹²⁶ See Fassbender, *supra* note 124, at 365.

¹²⁷ See *Rasul*, 563 F.3d at 535.

¹²⁸ See *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

¹²⁹ See Fassbender, *supra* note 124, at 365.

As Fassbender contends, a further question arises when assessing the possibility of torture victims to sue for ATS violations before a domestic court. Indeed, which definition of “an act of torture” should be applicable for the victim to obtain redress and have a right to compensation according to article 14(1) of the CAT?¹³⁰ There is the possibility of employing the definition of the term “torture” in article 1(1) of the CAT.¹³¹ Also, the reservations and understandings communicated by the U.S. when ratifying the CAT,¹³² restrict the scope of the definition of torture under article 1.¹³³ These understandings are reflected in the definition of torture set forth in the Torture Victim Protection Act (TVPA),¹³⁴ which contains the domestic definition of torture. In 2005 and 2006, the U.S. declared that “[t]he definition of torture accepted by the U.S. upon ratification of the Convention and reflected in the understanding issued in its instrument of ratification remains unchanged.”¹³⁵

However, as mentioned earlier, since another reservation of the U.S. declared Articles 1–16 of the CAT to be not self-executing, according to Fassbender, the definition of Article 1 of the CAT “is not directly applicable by a U.S. court when deciding an ATS case.”¹³⁶ Instead, a court would have to look at legislation implementing the CAT. According to the same author, with the exception of sections 2340 and 2340A of the U.S. Code, which criminalize acts of torture that occur outside the U.S.,¹³⁷ it is argued that there is no such implementing legislation.¹³⁸ In light of this brief assessment of the applicability of ATS and other domestic law remedies for torture victims, it is highly

¹³⁰ *Id.* at 366.

¹³¹ *See* CAT, *supra* note 80, at art. 1.

¹³² *Id.* Reservations and Declarations.

¹³³ *See* Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 365 (2008).

¹³⁴ Article 3(b) of the Torture Victim Protection Act defines torture: For the purposes of this Act, (1) the term “torture” means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and (2) “mental pain or suffering refers to prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) 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; (C) the threat of imminent death; or (D) the threat that another individual 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.” Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73.

¹³⁵ *See* Comm. against Torture, Second periodic report of the United States of America, Addendum, of May 6, 2005, ¶ 11, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006).

¹³⁶ *See* Fassbender, *supra* note 133, at 366.

¹³⁷ *See* 18 U.S.C. § 2340(3) (2006).

¹³⁸ *See* Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 366 (2008).

unlikely that the current system will allow aliens to recover damages and reparations from those responsible in American courts.¹³⁹

Victims of torture are also incapable of getting their international human rights recognized by a domestic court and of being awarded appropriate damages if those rights have been violated. Part of the problem stems from legislation that was passed in 2006. The Military Commissions Act¹⁴⁰ (MCA) bars alien “enemy combatants”,¹⁴¹ which includes current and former Guantanamo detainees, as well as others, from bringing suit in U.S. courts to challenge their treatment or to obtain damages for past mistreatment. This prohibition applies even to detainees who were brutally tortured and even in cases where U.S. officials have conceded error.¹⁴² Additionally, suits cannot be brought for violations of the Geneva Conventions because pursuant to the MCA, no one may invoke the Geneva Conventions as a source of rights in any civil action in a U.S. court against a current or former officer or agent of the U.S.¹⁴³

There are also more practical difficulties in pursuing reparations through the courts. Victims may not have access to lawyers,¹⁴⁴ or there may be difficulty in presenting evidence of torture, as some forms of beatings and other violence often do not leave physical marks.¹⁴⁵ As mentioned earlier, most victims are foreigners and find themselves to be powerless before the U.S. governmental. A commentator points out that the victims “remain relatively or absolutely poor, are weak, and [are] dependent in some measure on the perpetrators for welfare and reparations.”¹⁴⁶

In light of the difficulties for the victims of torture to seek redress in domestic courts, it is uncertain under the circumstances whether the U.S. complies with its obligations under the ICCPR (ratified by the U.S. in 1992).¹⁴⁷ Article 2(3)(a) and (b) of the ICCPR provides that each state party to the Covenant undertake:

¹³⁹ *Id.* at 367–69.

¹⁴⁰ See Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2602, available at www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf [hereinafter MCA].

¹⁴¹ *Id.* at §§ 948b(g), 950w § 5.

¹⁴² Human Rights Watch, *Fighting Terrorism Fairly and Effectively, Recommendations for President-Elect Barack Obama* 21 (November 2008), www.hrw.org/en/reports/2008/11/16/fighting-terrorism-fairly-and-effectively-0.

¹⁴³ MCA, *supra* note 142, § 950w § 5(a).

¹⁴⁴ See Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 169 (2004).

¹⁴⁵ See PHYSICIANS FOR HUMAN RIGHTS, *BROKEN LAWS, BROKEN LIVES* 4, 38 (June 2008), available at http://brokenlives.info/?page_id=69.

¹⁴⁶ See Elazar Barkan, *Reparation: A Moral and Political Dilemma*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 15 (Jon Miller & Rahul Kumar eds., 2007).

¹⁴⁷ See Jimmy Carter, *U.S. Finally Ratifies Human Rights Covenant*, CHRISTIAN SCIENCE MONITOR, (June 29, 1992), www.cartercenter.org/news/documents/doc1369.html. U.S. international obligations are not self-executing until they are enacted into domestic law.

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.¹⁴⁸

Thus, “a person who regards himself or herself as a victim of a violation of rights enshrined in the Covenant [ICCPR] shall have a right to have his or her claim determined by a competent authority of the respective state.”¹⁴⁹ Article 13 of the CAT provides for a similar obligation.¹⁵⁰ It is doubtful that the U.S. has so far complied with those provisions. For instance, in *Rasul v. Myers*,¹⁵¹ the Circuit Court evaded such a determination by referring the plaintiffs to the administrative remedies procedure under the Federal Tort Claims Act (FTCA),¹⁵² meaning that the plaintiffs needed to exhaust administrative remedies before bringing a claim before a civil court. The courts in *Rasul v. Myers* did not make use of the possibility of rendering a declaratory judgment, which constitutes another way under U.S. law to obtain damages.¹⁵³ The lawyers of the plaintiffs in this case, the Center for Constitutional Rights, were not aware that the U.S. Department of Defense or the military departments could constitute a “competent authority,” as they must be clearly established following Article 2(3) of the ICCPR.¹⁵⁴

Even if torture victims can in theory claim reparations before domestic courts, it has been demonstrated that so far, this available remedy is virtually

¹⁴⁸ International Covenant on Civil and Political Rights art. 2 (3), 14, Dec. 16, 1976, 999 U.N.T.S. 171.

¹⁴⁹ See Bardo Fassbender, *Can Victims Sue State Officials for Torture?*, 6 J. INT’L CRIM. JUST. 347, 360 (2008).

¹⁵⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 13, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.” *Id.*

¹⁵¹ See *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

¹⁵² See Federal Tort Claims Act, 28 U.S.C. § 2675(a) (2006): “An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing.” *Rasul v. Myers*, 563 F.3d at 23.

¹⁵³ See Douglass Cassel, Preliminary Draft, *Accountability of Bush Administration Officials for Violations of Gross Human Rights and Serious Violations of International Humanitarian Law, Progress and Prospects*, DUE PROCESS LAW FOUNDATION, March 9, 2009 (on file with the author).

¹⁵⁴ Fassbender, *supra* note 149, at 361.

impossible to obtain. The U.S. government, therefore, does not comply with its international obligations to offer reparations and must then create an administrative mechanism to ensure that victims have access to such redress.

IV. RECOMMENDATIONS FOR REPARATION MECHANISMS WHICH WOULD ENABLE THE U.S. TO COMPLY WITH INTERNATIONAL NORMS

While reparations cannot “repair” harms caused by the U.S. counterterrorism policy, they are an important part of the accountability mechanisms to be instituted. Victims, even if they are or were alleged terrorists, are human beings and shall not be subjected to torture under any circumstances.

As mentioned earlier, the tortured are neither American citizens nor residents and are most likely not on U.S. soil at the present time. It is therefore pertinent to note that historically, only one truth commission-like mechanism has ever been created for victims who were not citizens of the perpetrator country. The Tokyo Tribunal dealt with the issue of “comfort women” during the Second World War.¹⁵⁵ Even if not many precedents exist in the world relating with this type of issue, this paper nevertheless advocates for the implementation of an independent reparations mechanism.

As discussed in part III, it is presently difficult if not impossible for torture victims to be offered reparations through U.S. courts. In order to remedy this situation, as suggested by the lawyers of Maher Arar, Congress should pass legislation to eliminate impediments to recovery through civil litigation.¹⁵⁶ Even if the impediments to civil litigation are solved by Congress, only a limited number of victims are likely to have access to reparations through judicial means. Courts can only hear a small number of cases and the mere access to the legal system is extremely expensive. This is why President Obama also needs to work with Congress in order to create a truth commission that will recommend an administrative reparations program. This paper therefore suggests guidelines for the creation of a reparation program on the assumptions that a truth commission will have been instituted and that it recommended that such program take place.

It has been argued that “truth commissions are sometimes not best equipped to make recommendations for reparation programs” because they oftentimes only receive a small amount of testimonies and cannot obtain independent evidence of the alleged violations.¹⁵⁷ But this does not imply that

¹⁵⁵ See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT’L & COMP. L. 115, 118 (2009), citing Philip Brator, *Did NHK Balk at Covering War Tribunal*, JAPAN TIMES, Apr. 7, 2002, available at www.search.japantimes.co.jp/cgi-bin/fd20020407pb.html.

¹⁵⁶ See Amnesty Int’l, *USA: Torture in Black and White, but Impunity Continues*, AI Index AMR 51/055/2009 (April 17, 2009). See also *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

¹⁵⁷ See Morgane Landel, *Proposals for a Truth Commission and Reparations Program for Victims of Torture by US Forces Since 9/11*, 16(1) ILSA J. INT’L & COMP. L. 115, 136 (2009).

the truth commission will be responsible for the implementation of the reparations nor should it decide on the amount of compensation allocated in each case. In fact, the truth commission could be responsible for recommending the creation of a reparations fund or for setting the levels for reparations according to the violation.¹⁵⁸ This, however, should not exclude from the eligibility of receiving such funds the victims who have not testified before the truth commission.

Reparations can either be bestowed collectively or individually. Here, the reparations program should be individualized because, as the International Center for Transitional Justice argues, reparations underscore the importance of each human being that has suffered and recognize each individual as bearers of rights under international human rights law.¹⁵⁹ Because most torture victims are not physically in the U.S., it would be virtually impossible to implement collective reparations. “However, this is not to say that there cannot be collective reparation of a symbolic nature, such as memorials in location of notorious prisons or monuments to the victims.”¹⁶⁰

In attempting to award individual reparations, the difficulty will most probably be for the eventual program to evaluate the amount of damages to which each individual is entitled. When assessing torture, there are subjective and objective factors to take into consideration. The objective factor is the treatment itself while the subjective factors are the characteristics of the victim, such as age, gender, cultural beliefs, and religion, among others.¹⁶¹ Thus, some treatments might amount to torture if inflicted on some persons but might not be considered as such if inflicted on others.¹⁶² An example from the “enhanced interrogation techniques” may be the insect placed in a confinement box if the detainee has a phobia of that insect.

Thus, there is likely to be different degrees of suffering and long-term harm for each victim. The question is whether the reparations program “should make differentiations on an individual basis and recognize that some people have suffered more than others or simply agree on a lump sum for each person it considers to have been the victim of torture.”¹⁶³ “In addressing this challenge, the Chilean Commission on Political Imprisonment and Torture recognized as victims those people who could provide some evidence about their detention and simply presumed that most of them suffered torture, given the conditions of detention attested to unanimously by all the victims that did give testimony. Additionally, the Commission could not make distinctions among victims, because it was impossible to compare situations on an

¹⁵⁸ *Id.*

¹⁵⁹ See Lisa Magarrell, *Reparations in Theory and Practice*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE 5 (Oct. 2007), available at www.ictj.org/static/Reparations/0710.Reparations.pdf.

¹⁶⁰ Landel, *supra* note 157, at 137.

¹⁶¹ See Amnesty Int’l, *supra* note 156.

¹⁶² *Id.*

¹⁶³ Magarrell, *supra* note 159, at 137.

objective basis.”¹⁶⁴ Instead, it assumed that everyone who had been held in custody by officials under the mandate of Pinochet was subject to torture and, as such, awarded the same compensation to all.¹⁶⁵ The advantage of having to make individual assessments about the level of harm suffered is that it will allow each victim to have his case decided on the basis of his own individual circumstances. The disadvantage is that it may be difficult for victims to show by independent means the extent of their injuries. In fact, since the victims were all detainees under the custody of the U.S. government, they were most likely all treated by medical doctors that also worked for the state, the “violator” of the rights. Clearly, victims will be able to testify about what happened, but it will be difficult to show their harm by independent means. Additionally, it is quite difficult to prove mental harm. A solution for this would be to make findings on a civil standard of proof, which requires the same access to information as the criminal standard.¹⁶⁶

A commentator suggests that a “scale of reparations should be set for various degrees of violations such as the amount of time someone has spent in custody and the type of abuse he has suffered.”¹⁶⁷ Once the future commission makes a finding about a detainee that, for instance, he was tortured by being water-boarded and sexually assaulted on a few occasions, the program could “then apply the scale of reparation to determine how much that person is owed.”¹⁶⁸ There are understandable problems with this method “in that it puts a monetary value on human rights violations.”¹⁶⁹ This might be a value judgment, but “if the program can set up a framework with a monetary value for all types of violations then it will not only be easier to administer the reparations fund but also it will create some certainty for victims who will be able to know how much money they may be entitled to.”¹⁷⁰

Another contentious issue about the reparations program is its financing. Most countries that have implemented administrative reparations mechanisms after the commission of mass atrocities have been faced with this problem.¹⁷¹ Where should the state divert the money from? It is very likely that there may be opposition in the U.S. to diverting resources away from the population and social programs. In the end, the victims are or were alleged

¹⁶⁴ *Id.* at 8–9.

¹⁶⁵ See Comisión Nacional sobre Prisión Política y Tortura, *Informe de la Comisión*, 524 (2005), available at www.comisiontortura.cl/filesapp/12_cap_ix.pdf.

¹⁶⁶ See Landel, *supra* note 157, at 139.

¹⁶⁷ *Id.* at 138.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ For instance, Guatemala instituted the *Programa Nacional de Resarcimiento* after the country’s thirty-six-year-long civil war, which, in theory, bestows reparations to victims of the armed conflict. Unfortunately, the program constantly lacks funding, and victims are left without adequate compensation in many cases. See *Null Execution of the Budget of the National Compensation Program (the compensation does not reach victims or their families)*, MUTUAL SUPPORT GROUP (March 25, 2010) available at <http://gam.org.gt/comunic/2010/Abr/comunicado060410-3.pdf>.

terrorists. A similar situation occurred in Peru when the government had to comply with the Inter-American Court of Human Rights decision in the *Castro-Castro* case.¹⁷² The victims were alleged terrorists from the *sendero luminoso* movement, and it has been said that the government was reluctant to comply with the reparations ordered by the court because of the contested nature of who the victims were. However, one way of dealing with this issue would be to give the truth commission power to seize assets of perpetrators or require them to pay damages, such as permitted by the International Criminal Court (ICC).¹⁷³ This would have the second aim of ensuring that perpetrators are held responsible for their actions. The ICC statute of course reflects a situation where someone has been found guilty of a crime before an international criminal court. That money could go into a common fund to be allocated by the truth commission in accordance with its findings regarding the victims. This however, also presents numerous problems. From whom exactly do you seize the assets? The military officer who was executing an order from the higher governmental officials? Former President Bush? The truth commission would therefore have to establish exactly who is accountable for the violations and to what extent they collaborated in the implementation of the policy of torture.

The challenges to create such a reparations mechanism are great; however, the U.S. is not a poor country and does have the means to provide redress to the victims. The issue is whether there is political will to implement such a program. Civil society has, in this sense, a role to play. Citizens of the U.S. should pressure Congress and the Obama administration in order to see these recommendations realized. Because the U.S. is acting in such *flagrant délit* of its international human rights law obligations, it should have the audacity to redeem itself.

¹⁷² See *Miguel Castro-Castro Prison v. Peru*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 160, (Nov. 25, 2006).

¹⁷³ See Rome Statute of the International Criminal Court art. 75(2), July 17, 1998, 2187 U.N.T.S. 3.