

**Legacy of the “Dark Side”:
The Costs of Unlawful U.S. Detentions and Interrogations Post-9/11**

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Summary	2
Key Recommendations.....	5
Torture and the Global “War on Terror”	6
Renditions, Detentions, and Interrogations	7
Abuses at Guantánamo	10
Torture and other Inhumane Treatment.....	11
Failure to Close Guantánamo.....	12
Due Process Violations.....	13
Medical Abuses	17
Continuing Outcry over Detentions	18
Abuses Beyond Guantánamo	19
Lethal Targeting and Air Wars.....	19
Unlawful Detentions, Transfers, Harsh Interrogations.....	22
Afghanistan.....	23
Africa.....	24
Iraq.....	26
Violations of International and Domestic Law	27

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International Legal Standards.....	27
Domestic Law.....	30
Scant Accountability for Torture	30
Bare-Bones U.S. Investigations	31
Insufficient Accountability Abroad	34
International Criminal Court	35
Costs at Home and Abroad	36
Domestic Costs.....	37
No Justice for September 11 Victims and Families.....	38
Costs to U.S. Influence and the International Human Rights System.....	40
Post-9/11 Abuses by U.S. Security Allies	42
Mass Detentions and Flawed Trials	42
Abuses of Former Guantánamo Detainees	46
Few Consequences for Allies' Abuses.....	47
Recommendations	49

<i>Summary</i>

“We also have to work, though, sort of the dark side, if you will... if we’re going to be successful. That’s the world these folks operate in, and so it’s going to be vital for U.S. to use any means at our disposal, basically, to achieve our objective.”

– U.S. Vice President Dick Cheney, September 16, 2001³

Two decades after the attacks of September 11, 2001, and the arrival of the first terrorism suspects at Guantánamo Bay on January 11, 2002, many Americans may not recall details of the systematic abuses carried out by the United States Central Intelligence Agency (CIA) and U.S. military against hundreds if not thousands of Muslims detained as part of what President George W. Bush swiftly declared a global “War on Terror.” Yet for many people in countries outside the United States, memories of the U.S. government’s brutal treatment of detained Muslims remain potent. And some abuses continue, handing a recruitment card to Islamist armed groups and lowering the bar for treatment of terrorism suspects worldwide.

With the participation of at least 54 governments, the CIA secretly and extrajudicially transferred at least 119 foreign Muslims from one foreign country to another for incommunicado detention and harsh interrogation at various CIA black sites. At

³ The White House. (2001, September 16). “The Vice President appears on Meet the Press with Tim Russert.” <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916.html>.

least 39 of the men were subjected to “waterboarding,” “walling,” “rectal feeding”—a form of rape—and other forms of torture.⁴ The U.S. military also held thousands of foreign Muslim security detainees and prisoners-of-war—including some women and boys—at its detention centers abroad including Abu Ghraib in Iraq, Bagram Air Base in Afghanistan, and its naval base at Guantánamo, and also subjected many to physical and psychological abuse.⁵

As of January 2022, the U.S. was still detaining 39 of the nearly 800 men and boys it brought to Guantánamo from 2002 to 2008. Twenty-seven of those who remain have never been charged.⁶ Many lack adequate medical care and even access to their medical records, making the prison a living legacy of the rights violations spawned by 9/11.⁷ The military commission system created to prosecute suspects at Guantánamo is fundamentally flawed. As a result, the five prisoners accused of plotting the 9/11 attacks have yet to be brought to trial, depriving them of due process and the survivors and the families of the nearly 3,000 people who died in the attacks of their right to justice.⁸

Popular culture has often glossed over the cruelty and failures of these measures. For example, the 2012 blockbuster movie *Zero Dark Thirty* and a 2019 “interrogation” exhibit at the International Spy Museum in Washington, DC—only partially revised after an

⁴ United States Senate Select Committee on Intelligence. (2014). *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (“Torture Report”).* “Findings and Conclusions.” (pp. 2, 12). On foreign government’s participation see Singh, A. (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (pp. 61-62). Open Society Justice Initiative.

⁵ Regarding sexual violence against female detainees see: Iraqi women raped at Abu Ghraib: reports. (2013, August 22). *SBS News*. <https://www.sbs.com.au/news/iraqi-women-raped-at-abu-ghraib-reports>; Frank, T. (2018, March 23). Fatima Boudchar Was Bound, Gagged And Photographed Naked. John McCain Wants To Know If Gina Haspel's Okay With That. *Buzzfeed*. <https://www.buzzfeednews.com/article/thomasfrank/fatima-bouchar-was-bound-gagged-and-photographed-naked-john>. The Taguba Report, on abuses of detainees at Abu Ghraib, included reports of rape and other sexual violence by U.S. and Iraqi forces against male detainees; see Taguba, A. (2007). U.S. Army 15-6 Report of Abuse of Prisoners in Iraq. Regarding the alleged rape of an imprisoned Iraqi boy see also, Higham, S., & Stephens, J. (2004, May 21). New Details of Prison Abuse Emerge. *The Washington Post*. <https://www.washingtonpost.com/archive/politics/2004/05/21/new-details-of-prison-abuse-emerge/7346e4cb-47f8-42ab-8897-38a021a1bd0c/>.

⁶ *New York Times Database*. (2021, December 9). Guantánamo Docket. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>. Not all the 39 men still held at Guantánamo are among the 39 known to have been tortured by the CIA.

⁷ On health-related mistreatment see, Rosenberg, C. (2021, July 12). Defense Lawyers Move to Block Force-Feeding of Guantánamo Prisoner. *New York Times*. <https://www.nytimes.com/2021/07/12/us/politics/guantanamo-prisoner-force-feeding.html>; Roehm, S., Bradshaw, J., et al. (2019). Deprivation and Despair: The Crisis of Medical Care at Guantánamo. Physicians for Human Rights.

⁸ For casualty figures, see: National Commission on Terrorist Attacks Upon the United States. (2004). *The 9/11 Commission Report*. “Executive Summary.” (pp. https://govinfo.library.unt.edu/911/report/911Report_Exec.pdf1-2). For impact on victim-survivors and families, see, Rodriguez, J. (2016, January 14). Sister of 9:11 Victim: Guantánamo Will Never Deliver Justice. *Time*. <https://time.com/4178889/guantanamo-will-never-deliver-justice/>; Pitter, L. (2014, August 28). 13 Years On, Will 9/11 Ever Go to Trial? *Foreign Policy*. <https://www.hrw.org/news/2014/08/28/13-years-will-9/11-ever-go-trial>.

outcry by human rights activists and lawmakers—trivialized the abuses inflicted on suspects and suggested, erroneously, that the torture worked.⁹

Today, even when the U.S. decries unlawful practices abroad, it appears to have lost the moral authority that might compel other countries to curb them. Moreover, although President Barack Obama declared an end to secret detention and torture upon taking office in 2009, cruel and unlawful U.S. counterterrorism practices adopted in response to 9/11 continue to this day, as do their repercussions.

No U.S. government officials have been held accountable for creating, authorizing, or implementing the CIA's secret detention and torture programs. All but a heavily redacted summary of the landmark 2014 U.S. Senate Intelligence Committee report on the covert CIA program (the "Torture Report") remains classified. The portions that have been released make clear that the torture was as useless in producing actionable intelligence as it was brutal.¹⁰ Like Presidents Obama and Donald J. Trump before him, President Joseph R. Biden has shown no appetite for releasing the Torture Report, much less criminally investigating the architects of the Rendition, Detention, and Interrogation (RDI) program or other post-September 11 abuses. Biden also opposes allowing the International Criminal Court to include abuses by U.S. nationals in its investigation on grave human rights crimes in Afghanistan.

Abroad, the U.S. has continued abusive practices against terrorism suspects including transferring them to countries that torture, and, in at least some cases, unlawfully detaining them at U.S.-run sites abroad or at sea. Although such U.S. detention-related counterterrorism violations have dramatically decreased, Washington has replaced capture with kill, conducting air strikes—often with armed drones that have killed thousands of civilians, including outside recognized battlefields. Its counterterrorism campaign has spread to 85 countries with scant transparency or oversight.¹¹

⁹ The torture scenes in *Zero Dark Thirty* are controversial and historically dubious. See, Pitter, L. (2013, January 11), *Zero Dark Torture*. *Foreign Policy*. <https://www.hrw.org/news/2013/01/11/us-zero-dark-torture>. The film, starring Jessica Chastain, grossed more than \$132 million worldwide. That compares to the miniscule box office revenues for films that more realistically portrayed the harms of post-September 11 practices. These include *The Mauritanian* from 2021, which won actor Jodie Foster an Academy Award but grossed only \$4.3 million – its earnings may also have been hampered by the Covid-19 pandemic – and *The Report* from 2019, starring Adam Driver and John Hamm, which grossed \$232,305, according to the film industry database IMDb.com.

For information on the torture exhibit see, *Spy Museum Responds To Senators' Appeal To Modify Its Exhibit Misrepresenting CIA Torture Program*. (2020, January 9). Office of U.S. Senator Martin Heinrich. [https://www.heinrich.senate.gov/press-releases/spy-museum-responds-to-senators-appeal-to-modify-its-exhibit-misrepresenting-cia-torture-program-;](https://www.heinrich.senate.gov/press-releases/spy-museum-responds-to-senators-appeal-to-modify-its-exhibit-misrepresenting-cia-torture-program-) Small, Z. (2019, September 4). The International Spy Museum Seen Through the Eyes of a Human Rights Expert. *Hyperallergic*. <https://hyperallergic.com/514255/the-international-spy-museum-seen-through-the-eyes-of-a-human-rights-expert/>.

¹⁰ *Torture Report*. "Findings and Conclusions." (p. 2). See also Human Rights Watch. (2014, December 10). *US: Senate Report Slams CIA Torture, Lies*. <https://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies>

¹¹ Savell, S. (2021, February). *Costs of War: United States Counterterrorism Operations 2018–2020*. Brown University. <https://watson.brown.edu/costsofwar/papers/2021/USCounterterrorismOperations>.

Meanwhile, some U.S. allies in the fight against armed groups like Al Qaeda, the Islamic State (ISIS), and Boko Haram are carrying out torture and other crimes against terrorism suspects, including children, and detaining them inhumanely and, in many cases, indefinitely. Some allies have executed suspects following flawed trials.

This paper assesses the massive costs of U.S. extraordinary renditions, unlawful detentions, and torture after September 11—including to the victims and suspects, to U.S. taxpayers, and to U.S. moral authority and counterterrorism efforts worldwide, ultimately jeopardizing universal human rights protections for everyone. It argues that significant counterterrorism reforms, including closing the prison at Guantánamo, strengthening measures to protect civilians from death and harm, increasing transparency and accountability for the crimes the U.S. has committed, and addressing religious and racial biases, are critical steps toward mitigating the damage.

The Taliban's return to power and the U.S. military withdrawal from Afghanistan in August 2021 will test the U.S. government's legal rationale for indefinite law-of-war detentions at Guantánamo, as well as the Biden administration's commitment to adopting a more rights-respecting approach to counterterrorism. Thus far, Biden administration actions raise sobering questions about its commitment to ending the so-called "War on Terror." Measures of concern that we outline below include the Justice Department's willingness to side-step critical legal questions on habeas rights for the men held at Guantánamo and to block certain testimony related to CIA torture, and Biden's apparent intent to continue using lethal force outside recognized war zones with drone strikes and special forces raids euphemistically rebranded as "over the horizon" operations.¹²

Key Recommendations

Biden should take bold steps to repair the damage from abusive U.S. interrogations and detentions, starting with the closure of the U.S. prison at Guantánamo. Among other measures, the President should release the Torture Report, and authorize the attorney general to appoint a special prosecutor to hold abusers to account. Biden should increase transparency and accountability for other crimes and violations perpetrated in the name of countering terrorism, including unlawful air strikes and raids that kill and injure civilians both in and out of recognized war zones. He should officially apologize and provide redress to victims. Anything less not only inadequately addresses the suffering and death wrought by the U.S., but also risks perpetuating cycles of violence by fueling the narrative of groups like the Islamic State and Al Qaeda that the West is at war with Islam.

¹² Shiel, A., Street, J. & Watson, A. (2021, October 18). Insight Into Biden's Counterterrorism Thinking Suggests More of the Same. *Just Security*. <https://www.justsecurity.org/78652/insight-into-bidens-counterterrorism-thinking-suggests-more-of-the-same/>.

Torture and the Global “War on Terror”

On September 11, 2001, coordinated strikes by Al Qaeda members who hijacked four airliners killed nearly 3,000 people, surpassing Pearl Harbor as the deadliest attack on U.S. soil.¹³ Most of the dead were from the U.S. but more than 300 were from 84 other countries. The death toll continues to rise among first responders and attack survivors.¹⁴ On September 16, President George W. Bush declared a “crusade,” a “war on terrorism” – a term he swiftly amended to a “War on Terror” —against Al Qaeda and all terrorist groups, unleashing a series of events that lowered the bar for human rights protections around the world.¹⁵

On September 17, Bush issued a secret memo empowering the CIA to covertly capture and detain individuals “posing a continuing, serious threat of violence or death to U.S. persons and interests or planning terrorist activities.”¹⁶ A day later, Bush signed into law the 2001 Authorization for the Use of Military Force (AUMF), passed by Congress four days earlier. The AUMF granted the executive near-limitless and indefinite power to wage war against any “nations, organizations or persons” linked to the attacks—a power that Bush, as well as his successors Donald J. Trump and Barack Obama used as a blank check to wage a war without boundaries against groups such as Al Qaeda and the Islamic State (ISIS).¹⁷ Three weeks after enacting the AUMF, the U.S. led a coalition that invaded Afghanistan to rout out Al Qaeda leader Osama bin Laden, and his forces, after the ruling Taliban refused to hand him over to the U.S.¹⁸ On January 11, 2002, the first 20 men to be imprisoned at Guantánamo were flown to the base aboard a U.S. military plane. In March

¹³ National Commission on Terrorist Attacks Upon the United States. (2004). *The 9/11 Commission Report* (pp. 1-2). The death toll from the Japanese attack on Pearl Harbor in 1941 was 2,403. See: How many people died at Pearl Harbor during the attack? *PearlHarbor.Org*. <https://pearlharbor.org/faqs/how-many-people-died-at-pearl-harbor-during-the-attack/>.

¹⁴ Haelle, T. (2021, September 10). Health Effects of 9/11 Still Plague Responders and Survivors. *Scientific American*. <https://www.scientificamerican.com/article/health-effects-of-9-11-still-plague-responders-and-survivors/>.

¹⁵ The White House. (2001, September 16). *Remarks by the President Upon Arrival*. <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010916-2.html>. Four days later, on September 20, 2001, Bush declared, “Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated”: The White House. (2001, September 20). *Address to a Joint Session of Congress and the American People*. <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

¹⁶ *Torture Report*. “Findings and Conclusions.” (p. 9).

¹⁷ Bridgeman, T., Goodman, R., et al. (2021, March 5). Principles for a 2021 Authorization for Use of Military Force. *Just Security*. <https://www.justsecurity.org/74273/principles-for-a-2021-authorization-for-use-of-military-force/>.

¹⁸ Council on Foreign Relations. (2021). *The U.S. War in Afghanistan*. <https://www.cfr.org/timeline/us-war-afghanistan>.

2003, a U.S.-led coalition invaded Iraq, in what Bush justified in part as a mission to “end [Iraqi leader] Saddam Hussein's support for terrorism.”¹⁹

Renditions, Detentions, and Interrogations

The memo signed by Bush days after the 9/11 attacks led to the Rendition, Detention, and Interrogation RDI program, under which the CIA and, at the agency's behest, U.S. allies, covertly detained at least 119 Muslim terrorism suspects whom they had captured or abducted in Pakistan, Afghanistan and other foreign countries.²⁰ Often aided by foreign security agents, the CIA held or transferred the detainees to undisclosed prisons known as “black sites” that it operated in countries including Afghanistan, Lithuania, Romania, Poland, and Thailand, in an apparent attempt to keep them outside the reach of U.S. and international law. The CIA also secretly held prisoners inside U.S.-run military prisons including Guantánamo. A number of black sites or prisons holding the detainees were run by other foreign security services including in Afghanistan, Egypt, Jordan, and Morocco. The prisoners were held incommunicado in cruel, inhuman, or deeply degrading conditions for months or years.²¹

In addition, the CIA subjected at least 39 of these men to torture and other ill-treatment that it euphemistically referred to as “enhanced interrogation techniques,” according to the Senate Torture Report.²² These included forcing the detained men to maintain painful stress positions for hours, submerging their heads in water to the point of near suffocation (“waterboarding”), denying them sleep for days, “walling” (slamming a detainee's head into what was supposed to be a flexible wall), sensory deprivation, sexual assault including “rectal feeding” (forcing pureed food into a detainee's anus, a procedure that has no nutritional or medical value), forced nudity, and psychological abuse including threats of rape and other violence against them and their family members.²³ At least nine

¹⁹ Bush also justified the US-led invasion as a mission to “disarm Iraq of weapons of mass destruction,” which turned out not to exist, and to “free the Iraqi people.” The White House. (2003, March 22). *President Discusses Beginning of Operation Iraqi Freedom*. <https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html>.

²⁰ The 2014 Senate Intelligence Committee report says at least 119 people were detained; see *Torture Report*. “Findings and Conclusions.” (p. 3). An Open Society Justice Initiative report says at least 136 people were detained; see Singh, A. (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (pp. 15-16).

²¹ Blakeley, R., Black, C., Raphael, S. (2019). *CIA Torture Unredacted*. (pp. 17-19). The Rendition Project. <https://www.therenditionproject.org.uk/unredacted/the-report.html>.

²² *Torture Report*. “Findings and Conclusions.” (p. 12).

²³ *Ibid.* (pp. 3-4). See also Singh, A. (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (p. 16). Open Society Justice Initiative; and Brody, R. (2011). *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*. Human Rights Watch. Physicians for Human Rights has extensively documented medical abuses of detainees; see *CIA Torture Report Highlights Unnecessary Medical Procedure*. (2014, December 10). Physicians for Human Rights <https://phr.org/news/cia-torture-report-highlights-unnecessary-medical-procedure/>.

FBI agents were temporarily transferred to the CIA to participate in the interrogations, according to information that became public in November 2021.²⁴

The CIA also tortured opponents of then-Libyan leader Muammar Gaddafi before sending them back to Libya where they were abused anew, according to accounts by former detainees and documents from the CIA and United Kingdom's Secret Intelligence Service (MI6).²⁵ They also kidnapped an Egyptian cleric and sent him to Cairo, where he alleges he was repeatedly tortured and raped.²⁶

At least 54 governments participated to varying degrees in the RDI program, according to a comprehensive 2012 Open Society Foundations report. In addition to hosting CIA black sites, forms of assistance included detaining, interrogating, or abusing the prisoners, permitting the use of airspace and airports for CIA flights that secretly transferred the detainees across borders, and sharing intelligence.²⁷

The U.S. military also held thousands of foreign Muslim security detainees and Iraqi prisoners-of-war at detention centers it controlled abroad. The CIA operated black sites or had access to some of the detainees in these prisons as well, including at Guantánamo and in sections of Bagram Air Force Base in Afghanistan and Abu Ghraib in Iraq. Most of the prisoners were men, but the CIA or U.S. military also detained women and boys, some of whom were reportedly among those sexually abused.²⁸

From 2002 to 2005, the peak years of the U.S. detention and torture program, at least 17 people died wholly or partly from abuse while in the custody of the CIA or U.S.

²⁴ Rosenberg, C. (2021, November 19). F.B.I. Agents Became C.I.A. Operatives in Secret Overseas Prisons. *New York Times*. <https://www.nytimes.com/2021/11/19/us/politics/guantanamo-torture-fbi-cia.html>.

²⁵ Pitter, L. (2012, September 5). *Delivered into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya*. Human Rights Watch. <https://www.hrw.org/report/2012/09/05/delivered-enemy-hands/us-led-abuse-and-rendition-opponents-gaddafis-libya>.

²⁶ Bergen, P. (2008, March-April). Exclusive: I Was Kidnapped by the CIA. *Mother Jones*. <https://www.motherjones.com/politics/2008/03/exclusive-i-was-kidnapped-cia/>.

²⁷ Singh, A. (2013). *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (pp. 61-62). Open Society Justice Initiative.

²⁸ Regarding sexual violence against female detainees see, Iraqi women raped at Abu Ghraib: reports. (2013, August 22). *SBS News*. <https://www.sbs.com.au/news/iraqi-women-raped-at-abu-ghraib-reports>; Frank, T. (2018, March 23). Fatima Boudchar Was Bound, Gagged And Photographed Naked. John McCain Wants To Know If Gina Haspel's Okay With That. *Buzzfeed*, <https://www.buzzfeednews.com/article/thomasfrank/fatima-bouchar-was-bound-gagged-and-photographed-naked-john>. The Taguba Report, on abuses of detainees at Abu Ghraib, included reports of rape and other sexual violence by U.S. and Iraqi forces against male detainees; see Taguba, A. (2007), *U.S. Army 15-6 Report of Abuse of Prisoners in Iraq*. Regarding the alleged rape of an imprisoned Iraqi boy see also Higham, S. & Stephens, J. (2004, May 21). New Details of Prison Abuse Emerge. *The Washington Post*. <https://www.washingtonpost.com/archive/politics/2004/05/21/new-details-of-prison-abuse-emerge/7346e4cb-47f8-42ab-8897-38a021a1bd0c/>.

military in Afghanistan, or the CIA and U.S. or British forces in Iraq.²⁹ Nine men died at Guantánamo, seven from what the U.S. military said were suicides, and two from natural causes.³⁰ The military called three deaths on June 10, 2006 a group suicide, but others have alleged they were homicides.³¹ Lawyers and family members of the others said they took their own lives in despair over indefinite confinement and abusive conditions.³²

Many of those who survived remain physically or psychologically scarred. In a 2016 investigation, *The New York Times* found that at least half of the 39 people known to have been subjected to CIA torture in the wake of 9/11, including many who are now free, continued to suffer from conditions such as depression, post-traumatic stress disorder, paranoia, or psychosis. Former detainees also described permanent headaches as well as nightmares and other sleep disturbances.³³

Bush administration officials deliberately sought to circumvent domestic and international legal prohibitions on torture—actions that warrant criminal investigations.³⁴ In 2002, the CIA even sought advance promises from the Justice Department’s Criminal Division that it would not prosecute its planned “aggressive interrogation” of one detainee.³⁵ When the Criminal Division refused the request, the CIA turned to another Justice Department division, the Office of Legal Counsel, which obligingly issued two memos advising that interrogation techniques only constituted torture under domestic or international law if they inflicted pain “equivalent in intensity to the pain accompanying

²⁹ Eleven detainees died from torture in Iraq and six in Afghanistan according to Miles, S. H., et al. (2005). Medical investigations of homicides of prisoners of war in Iraq and Afghanistan. *MedGenMed*, 7(3):4, How Many Detainees Died of Homicide by Torture? <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1681676/>. See also Allen, S.A. (2006). Deaths of Detainees in the Custody of U.S. Forces in Iraq and Afghanistan from 2002 to 2005. *MedGenMed*, 8(4): 46. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1868355/#R8>.

³⁰ Guantánamo Docket. *New York Times* database. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

³¹ Horton, S. (2010, March). The Guantánamo “Suicides.” *Harper’s Magazine*. <https://harpers.org/archive/2010/03/the-guantanamo-suicides/>; Hickman, J. (2014, December 12). What Happened When I Spoke Out About the CIA’s Guantánamo Black Site. *Time*. <https://time.com/3631602/senate-torture-report-cia-guantanamo-black-site/>.

³² Guantánamo detainee Adnan Latif, who two years before taking his life in 2012, wrote to his lawyer, “You are still looking for justice and seeking hearings... I am being pushed toward death;” See Tayler, L. (2012, September 17). *Guantanamo still a blight on U.S. record*. Human Rights Watch. <https://www.hrw.org/news/2012/09/17/guantanamo-still-blight-us-record>.

³³ Apuzzo, M. & Fink, S. & Risen, J. (2016, October 8). How U.S. Torture Left a Legacy of Damaged Minds. *New York Times*. <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>.

³⁴ In a series of reports beginning in 2005, Human Rights Watch has called for criminal investigations into the role of top Bush administration officials in the detainee abuse including then-President Bush, Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, CIA Director George Tenet, and Rizzo and other senior officials. See Brody, R. (2005). *Getting Away with Torture?: Command Responsibility for the U.S. Abuse of Detainees*. Human Rights Watch; and Brody, R. (2011). *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*. Human Rights Watch; as well as Pitter L and Haskell, L. (2015). *No More Excuses: A Roadmap to Justice for CIA Torture* (pp. 35-69). Human Rights Watch.

³⁵ Pitter, L. & Haskell, L. (2015, December 1). *No More Excuses*. (pp. 12). The CIA sought the Justice Department declination of prosecution for its interrogation of Abu Zubaydah. (See “Abuses at Guantánamo” chapter, section “Due Process Violations.”)

serious physical injury, such as organ failure, impairment of bodily function, or even death.”³⁶

By 2003, the late John Rizzo, then CIA acting general counsel and a torture program architect, was sufficiently confident of Office of Legal Counsel cover that he brushed aside concerns from a colleague that an undisclosed form of “pressure” during interrogation might violate the Geneva Conventions, a series of treaties providing minimum standards for humane treatment of civilians, prisoners of war, and soldiers who are otherwise unable to fight. The U.S. is among the 196 countries that have ratified the Geneva Conventions.³⁷ The Office of Legal Counsel “has demonstrated an ingenious ability to interpret over, under and around” the Geneva Conventions, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, “and other pesky little international obligations,” Rizzo wrote in a subsequently declassified memo.³⁸

Abuses at Guantánamo

Around the world, Guantánamo remains one of the most enduring symbols of the injustice, abuse, and disregard for the rule of law that the U.S. unleashed in response to the 9/11 attacks. Since January 11, 2002, the U.S. has held at least 780 foreign Muslim males there, 15 of them boys at the time of their capture. The U.S. military continues to detain 39 men rounded up in the wake of 9/11 at Guantánamo.³⁹ As of January 2, 2022, 27 of them had never been charged.⁴⁰

³⁶ Memos from Assistant Attorney General for the Office of Legal Counsel Jay Bybee and his deputy John Yoo, August 1, 2002. The first memo, quoted here, is known as “Bybee I.” Pitter, L. & Haskell, L. *No More Excuses*. (pp. 12-13); U.S. Department of Justice Office of Legal Counsel. (2002, August 1). Memorandum for Alberto R. Gonzales Counsel to the President.

<https://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>.

³⁷ The provision that the colleague raised with Rizzo involved the Fourth Geneva convention, which prohibits “physical or moral coercion” against prisoners, “in particular to obtain information from them or from third parties.” International Committee of the Red Cross. (1949, August 12). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*. Art. 31.

³⁸ Ladin, D. (2016, July 21). *In Secret Email, CIA’s Chief Lawyer Mocked ‘Pesky Little International Obligations.’* American Civil Liberties Union. (ACLU). <https://www.aclu.org/blog/national-security/torture/secret-email-cias-chief-lawyer-mocked-pesky-little-international>.

³⁹ Obama ended the RDI program in 2009. He transferred administration of US-run prisons in Iraq to the Iraqi government in 2010, and of US-run prisons in Afghanistan to Afghan authorities in 2014. See Shane, S. (2009, January 22). Obama Orders Secret Prisons and Detention Camps Closed. *New York Times*. <https://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html>; Parker, N. (2010, July 15). U.S. hands over last prison to Iraqi control. *Los Angeles Times*. <https://www.latimes.com/archives/la-xpm-2010-jul-15-la-fg-iraq-camp-handover-20100716-story.html>; *France 24*. (2014, December 11). U.S. transfers control of final prison to Afghanistan. <https://www.france24.com/en/20141211-usa-transfers-controls-ends-afghanistan-prison-taliban>.

⁴⁰ Guantánamo Docket. *New York Times*. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

Most of the detainees were handed over to the U.S. in the aftermath of 9/11 by Pakistan or the Northern Alliance, a coalition of anti-Taliban militias in Afghanistan.⁴¹ Bush's Vice President Dick Cheney called the Guantánamo detainees "the worst of the worst."⁴² But according to Jane Mayer's *The Dark Side*, Maj. Gen. (ret.) Michael Dunlavey, a former operational commander at Guantánamo, estimated that at least half the prisoners were held by mistake.⁴³ A Seton Hall University Law School study concludes that at least 55 percent of the prisoners held at Guantánamo never engaged in any hostile acts against the U.S. and only 8 percent had any association with Al Qaeda.⁴⁴ Many allege that they were taken into custody in return for bounties based on false evidence.⁴⁵

The late Defense Secretary Donald Rumsfeld infamously labeled the first men and boys to be sent to Guantánamo "unlawful combatants" who "do not have any rights under the Geneva Convention."⁴⁶ By holding these foreigners abroad, the Bush administration hoped to avoid U.S. jurisdiction and law, prompting legal challenges that resulted in landmark, if imperfect, rebukes by the Supreme Court.⁴⁷

Torture and other Inhumane Treatment

During the Bush presidency the U.S. military subjected the prisoners to torture and other ill-treatment that included placing them in stress positions, holding them in extended solitary confinement, threatening them with torture and death, siccing attack dogs on them,

⁴¹ Human Rights Watch. (2018, June 27). *Q&A: Guantanamo Bay, U.S. Detentions, and the Trump Administration*. <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration>; University of California Davis Center for the Study of Human Rights in the Americas. (2013, March 22). *Guantanamo's Children: The Wikileaks Testimonies*. Denbeaux, M. & Denbeaux, J. W., & Gregorek, J.W. (2006, February). *Report of Guantánamo detainees: A profile of 517 detainees through analysis of Department of Defense data*. Seton Hall Public Law Research Paper No. 46. (pp. 14-15).

⁴² Cheney: Gitmo holds 'worst of the worst.' (2009, June 1). *The Associated Press*. <https://www.nbcnews.com/id/wbna31052241>.

⁴³ Mayer, J. (2009). *The dark side: The inside story of how the war on terror turned into a war on American ideals* (p. 184). First Anchor Books.

⁴⁴ Denbeaux, M. & Denbeaux, J. W., and Gregorek, J.W. (2006, February). *Report of Guantánamo detainees: A profile of 517 detainees through analysis of Department of Defense data* (p. 15). Seton Hall Public Law Research Paper No. 46.

⁴⁵ See Bhutto, F. (2021, August 14). Nothing but Pitch Black Darkness. *Foreign Policy*. <https://foreignpolicy.com/2021/08/14/guantanamo-torture-afghanistan-pakistan-ahmed-rabbani-no-charge-trial-biden-obama-trump-reprieve/>; Amnesty International. (2006, September). *Pakistan: Human Rights Ignored in the 'War on Terror'* (pp. 12, 19); Denbeaux, M. & Denbeaux, J. W., and Gregorek, J.W. (2006, February). *Report of Guantánamo detainees: A profile of 517 detainees through analysis of Department of Defense data*. Seton Hall Public Law Research Paper No. 46 (pp. 14-15); Guantánamo inmates say they were sold. (2005, May 31). *The Associated Press*. <https://www.nbcnews.com/id/wbna8049868>.

⁴⁶ Seelye, K. Q. (2002, January 12). First 'Unlawful Combatants' Seized in Afghanistan Arrive at U.S. Base in Cuba. *New York Times*. <https://www.nytimes.com/2002/01/12/world/nation-challenged-prisoners-first-unlawful-combatants-seized-afghanistan-arrive.html>.

⁴⁷ See, *Boumediene v. Bush*, 553 U.S. 723 (2008). <https://www.supremecourt.gov/opinions/07pdf/06-1195.pdf>.

depriving them of sleep, and exposing them for prolonged periods to extreme heat, cold, and noise.⁴⁸

Many of the men transferred to Guantánamo—including more than half of those who remain—had already spent extended periods in secret CIA black sites.⁴⁹ One black site, which CIA agents nicknamed “Strawberry Fields” because detainees could conceivably remain there “forever,” was actually at Guantánamo, adjacent to the main prison compound.⁵⁰ (The CIA secretly placed four men it considered to be among its highest-value detainees, including two 9/11 suspects, in Strawberry Fields in 2003 after subjecting them to torture at other black sites. Six months later the agency secretly flew the four men back to farther-flung black sites, hoping to evade a Supreme Court ruling that would give prisoners at Guantánamo access to lawyers. In 2006, after media exposed the black site network, the men were again flown to Guantánamo and placed in the main prison compound, where they remain.⁵¹)

Failure to Close Guantánamo

Immediately after taking office Obama promised to close the prison at Guantánamo within one year, but backed down following opposition from Congress, and failed to pursue executive actions that could have bypassed congressional funding freezes on transferring prisoners to the U.S. for prosecution in federal courts.⁵²

Trump did not fulfill his campaign vow to “load up [Guantánamo] with some bad dudes.”⁵³ Nevertheless, he promptly reversed his predecessor’s order to close the prison at Guantánamo, failed to transfer any of the five men who had been cleared for release by the Obama administration, and only cleared one additional detainee for release.⁵⁴

⁴⁸ Committee on Armed Services in the United States Senate. (2008, November 20). *Inquiry into the Treatment of Detainees in U.S. Custody*.

⁴⁹ Georgetown University Bridge Initiative. (2020, July 18). *The Human Cost of Guantánamo Bay Detention Camp*. <https://bridge.georgetown.edu/research/factsheet-the-human-cost-of-guantanamo-bay-detention-camp/>.

⁵⁰ “Strawberry Fields Forever” is a popular song released by The Beatles in 1967. For a video see The Beatles. “Strawberry Fields Forever.” *Calderstone Productions*. https://www.youtube.com/watch?v=HtUH9z_Oey8.

⁵¹ Apuzzo, M. & Goldman, A. (2010, August 7). AP Exclusive: CIA flight carried secret from Gitmo. *Associated Press*. http://archive.boston.com/news/nation/washington/articles/2010/08/07/ap_exclusive_cia_flight_carried_secret_from_gitmo/?page=1.

⁵² For details on how the White House could end indefinite detention at Guantánamo and prosecute detainees in U.S. federal courts see Shamsi, H., Siemion, R., et al. (2020, September 11). *Toward a New Approach to National and Human Security: Close Guantanamo and End Indefinite Detention*. *Just Security*. <https://www.justsecurity.org/72367/toward-a-new-approach-to-national-and-human-security-close-guantanamo-and-end-indefinite-detention/>.

⁵³ Welna, D. Trump Has Vowed to Fill Guantanamo With ‘Some Bad Dudes’—But Who? *National Public Radio*. <https://www.npr.org/sections/parallels/2016/11/14/502007304/trump-has-vowed-to-fill-guantanamo-with-some-bad-dudes-but-who>.

⁵⁴ Rosenberg, C. (2020, October 9). 5 Were Cleared to Leave Guantánamo. Then Trump Was Elected. *New York Times*. <https://www.nytimes.com/2020/10/09/us/politics/guantanamo-prisoners-trump.html>.

Just weeks after taking office, President Joseph R. Biden initiated a review of operations at Guantánamo with the aim of closing the prison before his term ends.⁵⁵ However, as with his approach to lethal targeting, his administration's actions thus far raise the prospect that Biden will default to the status quo of flawed trials and indefinite detentions.

The day after Biden's inauguration, the Pentagon sought charges against three men held at Guantánamo whom it alleged were implicated in two sets of bombings in Indonesia—of Bali nightclubs in 2002 and a J.W. Marriott hotel in Jakarta in 2003—suggesting prosecutions at Guantánamo would continue.⁵⁶ The Biden administration also cleared eight men for transfer, bringing to 13 the number of detainees remaining at Guantánamo despite being approved to leave, three of them more than a decade ago.⁵⁷ However, as of January 2, 2022 it had only transferred one man, a Moroccan who had spent 19 years at Guantánamo without charge and had been cleared to leave in 2016.⁵⁸ At time of writing, the Department of Defense was building a second courtroom for military commission trials at Guantánamo, suggesting that the Biden administration has no plans to shut down operations there any time soon.⁵⁹

Due Process Violations

The Guantánamo detainees have been denied due process rights and redress for abuses. More than six years passed before the U.S. Supreme Court, in *Boumediene v. Bush* (2008), affirmed that the constitutional right of detained people to challenge the lawfulness of their detention applied to the men at Guantánamo, striking down amendments to the federal statute to eliminate habeas jurisdiction for any “enemy combatant” in U.S. custody.⁶⁰ However, the Supreme Court did not articulate a standard of review beyond directing lower courts to provide a “meaningful” opportunity for petitioners to challenge

⁵⁵ Spetalnick, M., Hunnicutt, T., & Stewart, P. (2021, February 12). Biden launches review of Guantanamo prison, aims to close it before leaving office. *Reuters*. <https://www.reuters.com/article/us-usa-biden-guantanamo-exclusive/biden-launches-review-of-guantanamo-prison-aims-to-close-it-before-leaving-office-idUSKBN2AC1Q4>.

⁵⁶ Rosenberg, C. (2021, January 21). Pentagon Official Approves Guantánamo Trial of 3 Men for Indonesia Bombings. *New York Times*. <https://www.nytimes.com/2021/01/21/us/politics/guantanamo-trial-indonesia-bombings.html>.

⁵⁷ Hauslohner, A. (2021, October 16). Prisoners cleared for transfer remain stuck in the military prison at Guantánamo. *Washington Post*. https://www.washingtonpost.com/national-security/guantanamo-detainees-transfers-biden/2021/10/16/0373ce48-2e83-11ec-985d-3150f7e106b2_story.html.

⁵⁸ Davies, G. (2021, July 20). Guantanamo detainee Abdul Latif Nasser speaks out after release. *ABC News*. <https://abcnews.go.com/US/guantanamo-detainee-abdul-latif-nasser-speaks-release/story?id=78940944#:~:text=%E2%80%9Cwas%20born%20again%20on%20July%2019.&text=I%20was%20born%20yesterday%20on,Eid%20together%20with%20my%20family.%E2%80%9D>.

⁵⁹ Rosenberg, C. (2021, December 29). Pentagon Building New Secret Courtroom at Guantánamo Bay. *New York Times*. <https://www.nytimes.com/2021/12/29/us/politics/pentagon-guantanamo-secret-courtroom.html>.

⁶⁰ *Boumediene v. Bush*, 553 U.S. 723 (2008).

the basis for their detention.⁶¹ Although lower U.S. district courts granted many Guantánamo detainees habeas relief, a federal appeals court reversed nearly all but one of those decisions that came before it and imposed a standard of review that made it virtually impossible for detainees to win their cases.⁶² In a closely watched case, the full federal appeals court heard oral arguments in September 2021 on the question of “meaningful” review.⁶³

The 10 men at Guantánamo who have been criminally charged include the five alleged September 11 co-conspirators, all of whom were tortured. They also include three men accused of links to the Bali and Jakarta bombings in 2002 and 2003.

The 27 men held without charge include Abu Zubaydah, the first “ghost prisoner” who, during four and a half years in CIA black sites before his transfer to Guantánamo, was waterboarded 83 times, held naked and in stress positions, deprived of sleep, confined in small, coffin-like boxes, deprived of solid food, and physically assaulted.⁶⁴ The U.S. has argued that releasing Zubaydah would constitute too great a risk to national security.⁶⁵ The two other men still held at Guantánamo are serving sentences after being convicted in flawed military commission system created for prisoners prosecuted there.⁶⁶

⁶¹ *Boumediene*, at 779.

⁶² For example, that appeals court, the U.S. Court of Appeals for the District of Columbia Circuit, held that the government can rely on facts derived entirely from hearsay. It also held that lower courts must apply a “conditional probability” analysis in which they must look at all evidence as a whole and could not discard portions they considered unreliable. See Pitter, L. (2018, December 20). *National Security and Court Deference: Ramifications and Worrying Trends*. Human Rights Watch. <https://www.hrw.org/news/2018/12/20/national-security-and-court-deference-ramifications-and-worrying-trends>.

⁶³ The case, which was heard by the U.S. Court of Appeals for the District of Columbia Circuit, is *Al-Hela v. Biden*. See Marimow, A., & Ryan, M. (2021, September 23.) Appeals court appears reluctant to say Guantánamo detainees have due process rights. *Washington Post*. https://www.washingtonpost.com/politics/courts_law/guantanamo-due-process-case/2021/09/29/09ad4982-206a-11ec-8200-5e3fd4c49f5e_story.html. On the issue of how the U.S. withdrawal from Afghanistan could affect the case, see Hafetz, J (2021, September 1). What the U.S. Withdrawal from Afghanistan Could Mean for Guantanamo Detainees and the Due Process Clause. *Just Security*. <https://www.justsecurity.org/77992/what-the-u-s-withdrawal-from-afghanistan-could-mean-for-guantanamo-detainees-and-the-due-process-claim/>.

⁶⁴ Guantánamo Docket. *New York Times*. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html>.

⁶⁵ Periodic Review Secretariat. (2020, March 5). *Unclassified Summary of Final Determination*. https://www.prs.mil/Portals/60/Documents/ISN10016/SubsequentHearing1/200305_UPR_ISN10016_SH1_FINAL_DETERMINATION_PRB.pdf.

⁶⁶ Eight men held at Guantánamo have been convicted but some were transferred out of the prison. Three convictions were thrown out, others were partially reversed. Only one Guantánamo detainee was transferred to a U.S. federal court for trial; he was found guilty. See Human Rights Watch (2018, June 27). *Q&A: Guantanamo Bay, U.S. Detentions, and the Trump Administration*. <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration>. The two men found guilty who were still at Guantánamo as of September 2021 are Majid Shoukat Khan, who pleaded guilty to war crimes in 2012 for serving as an Al-Qaeda courier; and Ali Hamza al-Bahlul, who was accused of being a media secretary for Osama bin Laden and was convicted in 2008 of three terrorism-related

Bush authorized the creation of the military commission system at Guantánamo in November 2001 to try “certain non-citizens in the war against terrorism.”⁶⁷ Despite subsequent reforms, including by Congress, the commissions remain fundamentally broken.⁶⁸ Among their many flagrant due process violations, the commissions have deprived defense counsel of the means to prepare an effective defense, prevented the accused from seeing all evidence introduced against them, and failed to adequately guarantee that information obtained via torture or ill-treatment would not be used as evidence. They have been plagued by recurrent allegations of government interference including eavesdropping on confidential client-attorney conversations.⁶⁹ Such irregularities would be grounds for dismissal in a U.S. federal court.

The pre-trial hearings at the military commission for the five men charged in connection with the 9/11 attacks have dragged on for 13 years, plagued by due process violations and prosecution efforts to use evidence derived from torture.⁷⁰ Presiding military judges have come and gone, and many were unqualified to oversee capital cases although the prosecution continues to seek the death penalty for all five men.⁷¹ The three men accused of connections to the Indonesia attacks were arraigned before a military commission only in August 2021, 18 years after they were apprehended, in proceedings marred by translation problems as well as defense allegations that the accused were tortured.⁷²

charges, but refused to participate in his military commission trial. Two of Bahul’s convictions were overturned. See Guantánamo Docket. ‘Convicted in military commissions system.’ *New York Times* database. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#convicted>.

⁶⁷ The White House, President George W. Bush (2001, November 13). *President Issues Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*. <https://www.mc.mil/Portals/0/MilitaryOrderNov2001.pdf>.

⁶⁸ United Nations Human Rights Office of the High Commissioner. ‘Disgraceful’ Guantánamo Bay detention facility must be closed now, say UN experts.

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26649&LangID=E>. One landmark Supreme Court ruling that forced reforms to the military commission systems was *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), which held that the original military commission system created by the Bush administration violated the Geneva Conventions and the U.S. Uniform Code of Military Justice. Another was *Boumediene v. Bush*, 553 U.S. 723 (2008), which held that the second iteration of the military commissions approved by Congress in response to *Hamdan v. Rumsfeld* denied Guantánamo detainees their *habeas corpus* rights to challenge their detention in federal courts, in violation of article 1, section 9 of the U.S. Constitution.

⁶⁹ Rosenberg, C. (2021, September 23). Secret Hearing Focuses on Hidden Microphones at Guantánamo Prison. *New York Times*. <https://www.nytimes.com/2021/09/23/us/politics/uss-cole-bombing-guantanamo.html>.

⁷⁰ Human Rights Watch. (2018). *Q&A: Guantanamo Bay, U.S. Detentions, and the Trump Administration*. <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration#q4>. The 9/11 defendants were first arraigned in 2008 and again in 2012.

⁷¹ As one journalist notes in a September 2021 article, the judge at that time, Colonel Matthew McCall, “is, depending on how you count, the fourth, seventh, or ninth to preside.” Davidson Sorkin, A. (2021, September 12). The Forever Trial at Guantánamo. *New Yorker*. <https://www.newyorker.com/magazine/2021/09/20/the-forever-trial-at-guantanamo>.

⁷² Rosenberg, C. (2021, 31 August). Three Guantánamo Detainees Charged in 2002 Bali Bombing. *New York Times*. <https://www.nytimes.com/2021/08/31/us/politics/guantanamo-bali-bombing.html>.

In 2013, a pre-trial hearing in the 9/11 case was disrupted when a red censorship light unexpectedly flashed and the audio feed to the courtroom's gallery was abruptly cut without advance notice to—much less permission from—the judge.⁷³ The unilateral cut-off was later traced to the CIA. In 2020, defense counsel in the 9/11 case accused the CIA of using a monitoring device in the courtroom to direct the prosecution, not exclusively to prevent spills of classified information. The defense lawyers only discovered the device accidentally as the judge had approved it without their knowledge in an *ex parte* session with the prosecution.⁷⁴

In another example, defense counsel inadvertently learned in 2016 that the judge in the 9/11 case had approved, also in an *ex parte* session with the prosecution, the destruction of a CIA black site where prisoners had been tortured as well as evidence inside it. The defense was under the impression that the judge had granted its request to block the site's destruction.⁷⁵

In 2020, the prosecution in the 9/11 case invoked national security privilege to block the defense from questioning James Mitchell, the psychologist who designed the CIA's so-called "enhanced interrogation techniques" with his partner Bruce Jessen, about portions of a book he published on the RDI program, even though the CIA had cleared that material for publication years earlier.⁷⁶

In October 2021, the graphic testimony of detainee Majid Khan about his torture at the hands of the CIA in three black sites in the early 2000s was so harrowing that a jury of U.S. military officials took the extraordinary move of writing a hand-written rebuke to the U.S. government, calling Khan's treatment "a stain on the moral fiber of America." The letter, from seven of the eight jurors, urged clemency for Khan even though he had pleaded guilty to terrorism-related charges including serving as an Al Qaeda courier.⁷⁷

Although the Biden administration has sought to curb some of the prosecution abuses, it has stopped short of robust reform. As of January 2, 2022, prosecutors had not fully retracted a motion they made the previous March that led the judge in the *USS Cole* case to rule that under certain conditions, a judge could consider statements obtained through torture in pretrial proceedings. (In September, a Pentagon appeals panel

⁷³ Schwartz, M. (2016, August 15). Documents Confirm CIA Censorship of Guantanamo Trials. *The Intercept*. <https://theintercept.com/2016/08/15/documents-confirm-cia-censorship-of-guantanamo-trials/>.

⁷⁴ Beugelmans, G. (2020, March 31). Navigating Issues of Secrecy and National Security at GTMO. *Pacific Council on International Policy*. <https://www.pacificcouncil.org/newsroom/navigating-issues-secrecy-and-national-security-gtmo>; see also Office of Military Commissions. (2020, February 19). *Unofficial/Unauthenticated Transcript of the R.M.C. 803 session* (pp. 32, 777-793). [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(TRANS19Feb2020-MERGED\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS19Feb2020-MERGED).pdf).

⁷⁵ Austin, K. (2016, July 26). *Dispatches: Guantanamo 9/11 Case Staggers On*. Human Rights Watch. <https://www.hrw.org/news/2016/07/26/dispatches-guantanamo-9/11-case-staggers>.

⁷⁶ Epstein, E. (2020, January 23). *The Absurdity of Guantanamo*. Human Rights Watch. <https://www.hrw.org/news/2020/01/23/absurdity-guantanamo>.

⁷⁷ Rosenberg, C. (2021, October 31). U.S. Military Jury Condemns Terrorist's Torture and Urges Clemency. *New York Times*. <https://www.nytimes.com/2021/10/31/us/politics/guantanamo-torture-letter.html>.

overtaken the judge's ruling regarding the case in question but did not resolve the broader issue of whether prosecutors can use evidence obtained through torture. The defendant's lawyers then filed a petition in a U.S. federal appeals court asking it to bar prosecutors and the military commission from any consideration of use of torture-tainted evidence. That case was pending at time of writing.)⁷⁸ Also of deep concern, the Biden administration, in another legal challenge involving a prisoner held since 2004 without charge, has reportedly evaded the question of whether the U.S. Constitution's guarantee of due process rights applies to foreign detainees at Guantánamo.⁷⁹

In a case heard in October 2021 by the U.S. Supreme Court, the Justice Department under Biden has sought to bar Mitchell and Jessen from testifying about the CIA torture of detainee Zubaydah. The testimony would be used in an investigation by the Polish government into the complicity of its nationals in abuse at a CIA black site in Poland. U.S. prosecutors have argued that the testimony would reveal "state secrets," even though, as noted above, both Mitchell and Jessen had previously testified about supervising "enhanced interrogation," Mitchell had written a book about it, and details of Zubaydah's torture have been widely reported in media.⁸⁰

Medical Abuses

Beyond due process violations, the men held at Guantánamo continue to be subjected to abuse including sporadic force-feeding during hunger strikes and medical

⁷⁸ Prosecutors asked the judge to remove from the record statements that the CIA had obtained while torturing a man subsequently charged with organizing the *USS Cole* bombing. However, they stopped short of asking the judge to vacate the essence of his ruling that on certain occasions a judge could consider torture-tainted information in interlocutory proceedings, even though U.S. and international law bar use of such information as evidence at trial. See Rosenberg, C. (2021, September 20). Appeals Panel Overturns Army Judge's Ruling on Torture. *New York Times*. <https://www.nytimes.com/2021/09/20/us/politics/torture-terror-guantanamo-bay.html>. On the petition for a writ of mandamus at the U.S. Court of Appeals for the District of Columbia Circuit see, Luban, D., Roehm, S., et al. (2021, December 1). The Biden Administration's Moment of Truth on Torture Evidence. *Just Security*. <https://www.justsecurity.org/79382/the-biden-administrations-moment-of-truth-on-torture-evidence/>.

⁷⁹ The Trump administration argued that the right to due process guaranteed under the fifth and 14th amendments to the U.S. Constitution did not apply to the foreign detainees at Guantánamo. Although the Biden administration reportedly has not endorsed that position, it stopped short of asserting that these Constitutional protections extended to the non-citizens at the U.S. military prison. See Goodman, R. (2021, July 12). What the U.S. Government Brief Should Have Said in Al-Hela: On Guantanamo and Due Process. *Just Security*. <https://www.justsecurity.org/77386/what-the-us-government-brief-should-have-said-in-al-hela-on-guantanamo-and-due-process/>; Savage, C. (2021, July 9). Biden Administration Punts on Due Process Rights for Guantánamo Detainees. *New York Times*. <https://www.nytimes.com/2021/07/09/us/politics/guantanamo-detainees-due-process.html>.

⁸⁰ Barnes, R. (2021, October 6). Supreme Court considers whether information widely known can be state secret. *Washington Post*. https://www.washingtonpost.com/politics/courts_law/supreme-court-guantanamo-zubaydah/2021/10/05/9546913e-261d-11ec-8d53-67cfb452aa60_story.html.

neglect even as their health needs become increasingly complex as they age.⁸¹ Many of the men who were tortured still suffer physically and psychologically. Yet their medical records lack details of their trauma histories, contributing to misdiagnoses and incorrect treatments, and the prison does not offer them torture rehabilitation services, according to a 2019 report by Physicians for Human Rights and the Center for Victims of Torture. Furthermore, the detention commander can override medical recommendations, and in some cases prosecution interests have trumped medical interests, “as with a detainee who was forced to attend court proceedings on a gurney writhing in pain while recovering from surgery,” the report found. Many of the men do not have access to their own medical records and even when they do, significant portions are often classified.⁸²

Continuing Outcry over Detentions

Protests over the government’s failure to close the prison at Guantánamo continue both in and outside the government.

In February 2021, eight independent UN human rights experts and 111 nongovernmental organizations marked the 19th anniversary of the opening of the Guantánamo Bay prison by calling on Biden to close the detention center and end indefinite military detention there without delay.⁸³ “Guantánamo embodies the fact that, for nearly two decades following the September 11, 2001 attacks, the U.S. government has viewed communities of color—citizens and non-citizens alike—through a security threat lens, to devastating consequences,” the organizations wrote. “This is not a problem of the past. Guantánamo continues to cause escalating and profound damage to the men who still languish there, and the approach it exemplifies continues to fuel and justify bigotry, stereotyping, and stigma. Guantánamo entrenches racial divisions and racism more broadly, and risks facilitating additional rights violations.”⁸⁴

In the past year, nearly 100 members of both houses of Congress have urged Biden to close the prison. Guantánamo is “a symbol of lawlessness and human rights abuses,” 24

⁸¹ Rosenberg, C. (2021, July 12). Defense Lawyers Move to Block Force-Feeding of Guantánamo Prisoner. *New York Times*. <https://www.nytimes.com/2021/07/12/us/politics/guantanamo-prisoner-force-feeding.html>; Physicians for Human Rights and The Center for Victims of Torture. (2019). *Deprivation and Despair: The Crisis of Medical Care at Guantánamo*.

⁸² Crosby, S., Porterfield, K., Xenakis, S. (2021, December 7). *Statement of Independent Medical Experts on “Closing Guantánamo: Ending 20 Years of Injustice” Before the Senate Judiciary Committee*. The Center for Victims of Torture. https://www.cvt.org/sites/default/files/attachments/u93/downloads/medical_experts_statement_12-7_sjc_gtmo_hearing_final.pdf. See also Physicians for Human Rights and The Center for Victims of Torture. (2019). *Deprivation and Despair: The Crisis of Medical Care at Guantánamo* (pp. 3-4, 9).

⁸³ United Nations Human Rights Office of the High Commissioner. ‘Disgraceful’ Guantánamo Bay detention facility must be closed now, say UN experts. <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26649&LangID=E>.

⁸⁴ Center for Constitutional Rights. (2021). *Sign-on Letter Urging President Biden to Close Guantanamo*. <https://ccrjustice.org/sign-letter-urging-president-biden-close-guant%C3%A1namo>.

senators wrote the president in April.⁸⁵ The prison's continued operation is "a fundamental betrayal of our values" that "undermines our ability to advocate for human rights and the rule of law," 75 representatives wrote in August.⁸⁶ During a rare congressional hearing in December on Guantánamo, eight Democratic senators, a retired military commander, and 9/11 victims' relatives expressed frustration over the Biden administration's stalled efforts. Sen. Richard J. Durbin (D-Ill.), the panel's chairman, said he was dismayed that "this hearing is even necessary." The Biden administration declined to even send a witness to testify.⁸⁷

Abuses Beyond Guantánamo

U.S. counterterrorism practices have changed dramatically since Bush left office but remain deeply problematic and, in many cases, unlawful. Although the CIA torture program ended with the Bush presidency, the U.S. has continued to engage to some degree since then in unlawful counterterrorism-related detentions, interrogations, or transfers to countries that torture. At the same time, Washington has replaced capture with kill, conducting air strikes, often with armed drones that have killed thousands of civilians, including outside recognized battlefields. The U.S. counterterrorism campaign has spread to 85 countries with scant transparency or oversight.⁸⁸

Lethal Targeting and Air Wars

One of the most dramatic developments since Bush left office is the ascent of lethal targeting of alleged terrorism suspects both in and outside of recognized war zones. The CIA and U.S. military have carried out thousands of attacks against alleged members of Al Qaeda and so-called "associated forces" in countries including Pakistan, Somalia, and Yemen, often with armed aerial drones and in some cases with special forces.

While the U.S. insists that the overwhelming majority of its drone strikes and other lethal targeting operations are lawful and conducted with utmost care and precision, it has failed to provide the transparency that would help impartial observers assess such claims.

⁸⁵ Durbin, D. et al. (2021, April 16). Letter to President Joseph Biden. Office of U.S. Senator Dick Durbin. <https://www.durbin.senate.gov/imo/media/doc/Senate%20Letter%20to%20Biden%20on%20Guantanamo%204-16-21%20-%20FINAL.pdf>.

⁸⁶ Price, D. et al. (2021, August 4). Letter to President Joseph Biden. Office of U.S. Rep. David E. Price. https://price.house.gov/sites/price.house.gov/files/GTMO%20Closure%20Letter_Schiff.Omar._Price%20%20808.04.2021%29.pdf.

⁸⁷ Hauslohner, A., & Demirjian, K. (2021, December 7). Senate Panel Hears Frustrations over Biden's Failure to Close Military Prison at Guantánamo. *Washington Post*. https://www.washingtonpost.com/national-security/guantanamo-prison-closure/2021/12/07/e42d4c40-578f-11ec-a808-3197a22b19fa_story.html.

⁸⁸ Savell, S. (2021, February). *Costs of War: United States Counterterrorism Operations 2018–2020*. Brown University. <https://watson.brown.edu/costsofwar/papers/2021/USCounterterrorismOperations>.

Independent estimates of civilian deaths from lethal counterterrorism strikes outside recognized war zones range from the high hundreds to the low 2,000s.⁸⁹

Bush began the lethal targeting program but it was Obama who embraced it, carrying out 563 strikes during his two terms, nearly 10 times the number as his predecessor.⁹⁰ “Turns out I’m really good at killing people,” Obama reportedly told aides in a quiet voice when assessing his achievements and compromises in 2011.⁹¹ Yet reports that many of these strikes appeared to have unlawfully killed civilians abounded during his presidency.⁹² Trump further ramped up the lethal attacks while scaling back Obama’s already insufficient safeguards.⁹³ In promising first steps, President Biden, during his first 11 months in office, dramatically curtailed drone strikes and apparent civilian casualties.⁹⁴ He has also initiated a review of U.S. lethal targeting policy as part of a broader assessment of ways to mitigate civilian harm during counterterrorism operations.⁹⁵ However, he does not appear to be contemplating an end to lethal targeting, based on his vow to conduct “over-the-horizon” responses to perceived terrorist threats by relying primarily on drone

⁸⁹ See, Foundation for Defense of Democracies. US Airstrikes in the Long War. *Long War Journal*. <https://www.longwarjournal.org/us-airstrikes-in-the-long-war>; Bergen, P. & Sterman, D. & Salyk-Virk, M. (2021, June 17). America’s Counterterrorism Wars. *New America*. <https://www.newamerica.org/international-security/reports/americas-counterterrorism-wars/>; and The Bureau of Investigative Journalism. *Drone Warfare*. <https://www.thebureauinvestigates.com/projects/drone-war>. For examples of U.S. failure to provide redress to civilian victims of lethal strikes, see Sperber, A. (2021, July 22). U.S. Airstrikes Have Torn Somali Families Apart. They’re Still Seeking Justice. *Vice World News*. <https://www.vice.com/en/article/m7exg8/us-airstrikes-have-torn-somali-families-apart-theyre-still-seeking-justice>; Feiger, L. & Turse, N. (2021, January 26). A Yemeni Family Was Repeatedly Attacked by U.S. Drones. Now, They’re Seeking Justice. *Vice World News*. <https://www.vice.com/en/article/3anj33/a-yemeni-family-was-repeatedly-attacked-by-us-drones-now-theyre-seeking-justice>.

⁹⁰ The Bureau of Investigative Journalism. *Obama’s covert drone war in numbers: ten times more strikes than Bush*. <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

⁹¹ Hamby, P. (2013, November 4). 10 more secrets from campaign 2012. *CNN* <https://www.cnn.com/2013/11/04/politics/double-down-2012-campaign/index.html>. For an assessment of Obama’s drone strike program see also Zenko, M. (2017, January 20). Obama’s Final Drone Strike Data. *Council on Foreign Relations*. <https://www.cfr.org/blog/obamas-final-drone-strike-data>.

⁹² Zenko, M. (2017 January 20). *Council on Foreign Relations*.; See also, e.g., Tayler, L. (2013). *Between a Drone and Al-Qaeda: The Civilian of U.S. Targeted Killings in Yemen*. Human Rights Watch; and Tayler, L. (2014). *A Wedding That Became a Funeral*. Human Rights Watch.

⁹³ Shamsi, H. (2021, May 3). Trump’s Secret Rules for Drone Strikes and Presidents’ Unchecked License to Kill. *Just Security*. <https://www.aclu.org/news/national-security/trumps-secret-rules-for-drone-strikes-and-presidents-unchecked-license-to-kill/>. See also Sperber, A. (2021, July 22). U.S. Airstrikes Have Torn Somali Families Apart. They’re Still Seeking Justice. *Vice World News*. <https://www.vice.com/en/article/m7exg8/us-airstrikes-have-torn-somali-families-apart-theyre-still-seeking-justice>.

⁹⁴ Piper, I., & Dyke, J. (2021, December 22). How do the ‘forever wars’ look under President Biden? *Air Wars*. <https://airwars.org/news-and-investigations/how-do-the-forever-wars-look-under-president-biden/>.

⁹⁵ Savage, C. (2021, August 28). Afghanistan Collapse and Strikes in Somalia Raise Snags for Drone Warfare Rules. *New York Times*. <https://www.nytimes.com/2021/08/28/us/politics/biden-drones.html>.

strikes and occasional special forces operations in areas where the U.S. is not fighting a conventional ground war.⁹⁶

The targeted killing of terrorism suspects outside situations of armed conflict violates international human rights law unless the suspect poses an imminent threat to life and using lethal force is a last resort.⁹⁷ The laws of armed conflict, in contrast, permit deadly attacks on enemy combatants. But even then, opposing parties to the conflict must take all feasible steps to minimize civilian harm.

Notwithstanding the use of precision bombs and drones, the US-led military campaigns against ISIS in Iraq and Syria, and the Taliban and an ISIS branch in Afghanistan also appear to have unlawfully killed far more civilians than the Pentagon has acknowledged and with insufficient accountability, transparency, or redress. A series of *New York Times* investigations has provided some of the most compelling evidence. In its most sweeping findings, published in December 2021 and drawing from research including 1,300 pages of Pentagon documents obtained through Freedom of Information Act litigation, *The New York Times* alleged that since 2014, these air wars show a pattern of deeply flawed intelligence and rushed, imprecise targeting, resulting in the deaths of thousands of civilians, many of them children.⁹⁸

These findings bolstered a *New York Times* investigation from 2017, which found that one in five US-led coalition strikes against ISIS in Iraq during the Obama presidency resulted in civilian death. That rate is 31 times higher than that acknowledged by the coalition, which said 89 of its more than 14,000 airstrikes in Iraq resulted in civilian deaths, or about one of every 157 strikes.⁹⁹

⁹⁶ Shiel, A., Street, J. & Watson, A. (2021, October 18). Insight Into Biden's Counterterrorism Thinking Suggests More of the Same. *Just Security*. <https://www.justsecurity.org/78652/insight-into-bidens-counterterrorism-thinking-suggests-more-of-the-same/>.

⁹⁷ In June 2021, more than 100 non-governmental organizations sent a letter to Biden calling on him to end the lethal targeting outside recognized battlefields. See American Civil Liberties Union. (2021, June 30). *110+ Organizations to Biden: End U.S. Program of Lethal Strikes Abroad*. <https://www.aclu.org/press-releases/110-organizations-biden-end-us-program-lethal-strikes-abroad>.

⁹⁸ Khan, A. (2021, December 18). Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes. *New York Times*. <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>; and Khan, A. (2021, December 19). Airstrikes allowed America to wage war with minimal risk to its troops. *New York Times*. <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>.

⁹⁹ Regarding airstrikes in Iraq see Khan, A. & Gopal, A. (2017, November 16). The Uncounted. *New York Times*. <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>. On the civilian toll in the Iraqi city of Mosul alone see George, S., Abdul-Zahra, Q., Michael, M., and Hinnant, L. (2017, December 20). Mosul is a graveyard: Final IS battle kills 9,000 civilians. *AP News*. <https://apnews.com/article/middle-east-only-on-ap-islamic-state-group-bbea7094fb954838a2fdc11278d65460>. Regarding Afghanistan, see Watson Institute for International & Public Affairs. (2021, April). *Costs of War: Afghan Civilians*. Brown University. <https://watson.brown.edu/costsofwar/costs/human/civilians/afghan>; Turse, N. (2021, June 3). Pentagon Undercounts Civilian Casualties in New Report, Experts Say. *The Intercept*. <https://theintercept.com/2021/06/03/pentagon-civilian-casualties-report/>.

Under Trump's watch, a covert U.S. special force bombed dozens of women and children huddled in the open air, then bombed fleeing survivors during the battle of Baghuz that toppled ISIS's last holdout in Syria in 2019, a *New York Times* investigation revealed in November 2021. The coordinated strikes reportedly killed about 80 people, making it one of the largest civilian casualty tolls of the war against ISIS. The U.S. military stalled reviews of this apparent war crime and US-led coalition forces literally buried key evidence, bulldozing the site.¹⁰⁰ Weeks after *The New York Times* report, Biden's defense secretary ordered a review of the strike and cover-up but by the military itself, despite calls for an independent assessment.¹⁰¹

On August 29, 2021, the penultimate day of the U.S. pullout from Afghanistan, the U.S. military carried out a drone strike in Kabul that the chairman of the Joint Chiefs of Staff initially hailed as a "righteous" attack that appeared to have thwarted an imminent bombing by the Islamic State affiliate ISIS-Khorasan. But days later, following yet another exposé by *The New York Times*, the Pentagon acknowledged that the strike was a "tragic mistake" that instead killed 10 Afghan civilians, including seven children and an employee of a US-based aid organization.¹⁰² Compounding concern, the U.S. military's review of the botched strike remains classified. A one-page fact sheet on its findings asserts there is no basis for criminal proceedings, although it does not preclude the chain of command taking corrective measures and assessing accountability "as appropriate."¹⁰³ In December, the Pentagon announced that none of the U.S. military personnel involved in the strike would face any form of punishment.¹⁰⁴

Unlawful Detentions, Transfers, Harsh Interrogations

Obama, upon taking office, immediately issued an executive order to end U.S. secret detention and torture.¹⁰⁵ But he did not revoke CIA powers to temporarily detain suspects and transfer them to other countries for interrogation or prosecution. Instead, he pledged

¹⁰⁰ Philipps, D., & Schmitt, E. (2021, November 15). How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria. *New York Times*. <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>.

¹⁰¹ Schmitt, E., & Philipps, D. (2021, November 29). Pentagon Chief Orders New Inquiry Into U.S. Airstrike That Killed Dozens in Syria. *New York Times*. <https://www.nytimes.com/2021/11/29/us/politics/pentagon-airstrike-syria.html>.

¹⁰² Schmitt, C., & Cooper, H. (2021, November 3). Pentagon acknowledges Aug. 29 drone strike in Afghanistan was a tragic mistake that killed 10 civilians. *New York Times*. <https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html>.

¹⁰³ Fidell, E.R. (2021, November 5). The Missing Kabul Drone Strike Report. *Just Security*. <https://www.justsecurity.org/78914/the-missing-kabul-drone-strike-report/>.

¹⁰⁴ Schmitt, E. (2021, December 13). No U.S. Troops Will Be Punished for Deadly Kabul Strike, Pentagon Chief Decides. *New York Times*. <https://www.nytimes.com/2021/12/13/us/politics/afghanistan-drone-strike.html>. See also Human Rights Watch (2021, December 14). *US: End Impunity for Civilian Casualties*. <https://www.hrw.org/news/2021/12/14/us-end-impunity-civilian-casualties>.

¹⁰⁵ Shane, S. (2009, January 22). Obama Orders Secret Prisons and Detention Camps Closed. *New York Times*. <https://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html>.

to ensure that their treatment was humane.¹⁰⁶ While no evidence has emerged since then that the U.S. has reprised the horrific programs of the Bush presidency, deeply disturbing cases or allegations of abusive practices under Obama and Trump continue to surface, as well as one that carried into the Biden presidency.

Afghanistan

Many of the detention-related violations that continued after the Bush presidency took place in Afghanistan. In 2011, more than two years after Obama declared an end to torture and secret detention, his administration confirmed that terrorism suspects in Afghanistan were being secretly detained and interrogated for up to nine weeks, without access to a court or counsel, at several “temporary” detention centers run by the U.S. military’s elite Joint Special Operations Command, including one at Bagram air base. Former detainees alleged they were forced to strip upon arrival and held in solitary confinement in windowless, often excessively cold rooms with 24-hour lighting, and were denied contact with lawyers and family members.¹⁰⁷

BuzzFeed News revealed in 2016 that for at least 16 months in 2009 and 2010, the U.S. military subjected at least 58 detainees to “separation,” a procedure under which prisoners were held incommunicado from anyone except personnel such as U.S. guards, interrogators and medics, for up to 30 days at a time. The practice could amount to inhumane treatment in and of itself. At least 23 times, U.S. personnel combined “separation” with other problematic tactics to induce detainees to talk, according to U.S. military documents obtained by *BuzzFeed News*. The U.S. military blacked out the information it provided *BuzzFeed News* on the additional tactics it used. According to its official intelligence-gathering manual, interrogators may couple “separation” with techniques such as sleep restrictions and “Fear Up” – preying on detainees’ existing fears.^{108 109}

Under Obama, U.S. forces also handed over prisoners they captured to Afghan detention centers where the detainees were systematically tortured. Among other methods, captors subjected detainees to electric shocks, hung them by their wrists, beat them with cables or sticks, removed their toenails, twisted and wrenched their genitals,

¹⁰⁶ Johnston, D. (2009, August 24). U.S. Says Rendition to Continue, but With More Oversight. *New York Times*. https://www.nytimes.com/2009/08/25/us/politics/25rendition.html?_r=0.

¹⁰⁷ Dozier, K. (2011, April 8). CIA Afghan ‘Black Sites’ Replaced by Grey Areas. *Associated Press*. <https://www.nbcnews.com/id/wbna42495322>. See also Open Society Foundations Regional Policy Initiative on Afghanistan and Pakistan. (2010). *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*. Informative roundups of reporting on these practices under President Obama include Currier, C. & Lee, S. (2012, July 13). The Best Reporting on Detention and Rendition Under Obama. *ProPublica*. <https://www.propublica.org/article/the-best-reporting-on-detention-and-rendition-under-obama>.

¹⁰⁸ Watkins, A., & Rostam, A. (2016, July 13). Documents Raise Disturbing Questions About Detainee Abuse Under Obama. *BuzzFeed News*. <https://www.buzzfeednews.com/article/alimwatkins/documents-raise-disturbing-questions-about-detainee-abuse-un>.

¹⁰⁹ The manual is The Army Field Manual on Human Intelligence Collector Operations.

and threatened them with sexual abuse.¹¹⁰ Moreover, the CIA also continued to recruit, equip, train, and deploy Afghan paramilitary forces who summarily executed civilians during night raids, forcibly disappeared detainees, and attacked healthcare facilities for allegedly treating insurgent fighters, among other grave crimes, with no accountability—a practice that continued during the Trump presidency.¹¹¹

Africa

The Obama administration engaged in unlawful practices elsewhere including in Africa. In 2009 and 2010, Nigerian officials held an Ethiopian Al Qaeda suspect for four months, during which time he was interrogated first by a U.S. “dirty” team that ignored his Miranda rights, then by a “clean” team of U.S. agents.¹¹² According to a diplomatic cable, U.S. officials pressured Nigerian authorities to detain Ahmed.¹¹³ The U.S. then brought the suspect, Mohamed Ibrahim Ahmed, to New York where he pled guilty to terrorism-related charges in a federal court.¹¹⁴

In 2011, two Swedes and a U.K. citizen with ties to Somalia were arrested by Eritrean authorities in Djibouti, where U.S. interrogators were among those who questioned them for two months without charge. The men were then secretly indicted in absentia by a U.S. federal grand jury and flown by the FBI to New York, where they were convicted in 2016 of terrorism-related charges.¹¹⁵

¹¹⁰ United Nations Assistance Mission in Afghanistan and UN Office of the High Commissioner for Human Rights. (2011, Concur). *Treatment of Conflict-Related Detainees in Afghan Custody* (p. 3).

¹¹¹ *Afghanistan: CIA-Backed Forces Commit Atrocities*. Human Rights Watch. (2019, October 31). <https://www.hrw.org/news/2019/10/31/afghanistan-cia-backed-forces-commit-atrocities>.

¹¹² The Ethiopian suspect was initially misidentified in some media as Eritrean.; Whitlock, C. (2013, January 1). Renditions Continue Under Obama, Despite Due Process Concerns. *Washington Post*. https://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html; U.S. Attorney’s Office Southern District of New York. (2013, March 27). *Al Shabaab Operative Sentenced in Manhattan Federal Court to 111 Months in Prison for Conspiring to Support and Receive Military-Type Training from a Foreign Terrorist Organization*. Federal Bureau of Investigation. <https://archives.fbi.gov/archives/newyork/press-releases/2013/al-shabaab-operative-sentenced-in-manhattan-federal-court-to-111-months-in-prison-for-conspiring-to-support-and-receive-military-type-training-from-a-foreign-terrorist-organization>.

¹¹³ Goodluck Jonathan Remains Acting President of Nigeria. (2010, February 26, 16:37). *Wikileaks: Public Library of US Diplomacy*. https://wikileaks.org/plusd/cables/10ABUJA215_a.html.

¹¹⁴ In 2019, Ahmed was also convicted of trying to recruit fellow prisoners to ISIS. U.S. Attorney’s Office Eastern District of Texas. (2020, October 19). *Al-Qaeda Trained Jihadist Who Recruited Network of Terrorists to Kill Americans on Behalf of ISIS Sentenced to 300 Months*. U.S. Department of Justice. <https://www.justice.gov/usao-edtx/pr/al-qaeda-trained-jihadist-who-recruited-network-terrorists-kill-americans-behalf-isis>.

¹¹⁵ Whitlock, C. (2012, January 1). Renditions Continue Under Obama, Despite Due Process Concerns. *Washington Post*. https://www.washingtonpost.com/world/national-security/renditions-continue-under-obama-despite-due-process-concerns/2013/01/01/4e593aa0-5102-11e2-984e-f1de82a7c98a_story.html; U.S. Attorney’s Office Eastern District of New York. *Two Members of Al-Shabaab Sentenced to 11 Years For Conspiring To Provide Material Support to the Terrorist Organization*. U.S. Department of Justice. <https://www.justice.gov/usao-edny/pr/two-members-al-shabaab-sentenced-11-years-conspiring-provide-material-support-terrorist>.

In 2014, *The Nation* reported that CIA agents also regularly interrogated Al Shabab suspects in a basement prison in Somalia and kept Somali intelligence agents there on the agency payroll. The detainees included men illegally handed over to Somalia from neighboring Kenya, including in at least one case based on intelligence provided by the U.S., the report said. Former detainees told *The Nation* the prisoners were held in filthy, insect-infested, windowless cells, that they were never allowed outdoors, and that some prisoners had been held without charge or trial for months or years.¹¹⁶

In separate operations in 2011, 2013 and 2014, U.S. forces also apprehended three foreign men—one in international waters off Somalia and two in Libya—and secretly detained them for extended periods aboard military ships, interrogating them for intelligence purposes before separate U.S. law enforcement teams read them their Miranda rights and re-interrogated them for prosecution on terrorism-related charges. This two-tiered approach circumvented longstanding U.S. criminal and military procedural protections against government abuse, incommunicado detention, and torture.¹¹⁷ In the first case, a team of Federal Bureau of Investigation, CIA, and Defense Department personnel seized, secretly detained, and interrogated a Somali Al Qaeda suspect for more than two months aboard a U.S. Navy ship for intelligence purposes.¹¹⁸

Notably, the U.S. has extended this flawed dual-interrogation strategy to its “war on drugs,” detaining people it apprehends at sea on suspicion of drug smuggling for weeks or even months aboard ships dubbed “floating Guantánamos” before they are arraigned in domestic courts.¹¹⁹ In 2017, for example, the U.S. Coast Guard kidnapped and forcibly disappeared four Jamaican fisherman and kept them chained to the decks of four of its ships, incommunicado, for over a month.¹²⁰

¹¹⁶ Scahill, J. (2014, December 10). The CIA’s Secret Sites in Somalia. *The Nation*. <https://www.thenation.com/article/archive/cias-secret-sites-somalia/>. See also Gettleman, J., Mazetti, M., and Schmitt, E. (2011, August 10). U.S. Relies on Contractors in Somalia Conflict. *New York Times*. <http://www.nytimes.com/2011/08/11/world/africa/11somalia.html?pagewanted=all>.

¹¹⁷ Pitter, L. (2020). National Security and Court Deference: Ramifications and Worrying Trends. In K. Greenberg (Eds.), *Reimagining the National Security State: Liberalism on the Brink*. Cambridge University Press. <https://www.hrw.org/news/2018/12/20/national-security-and-court-deference-ramifications-and-worrying-trends#>.

¹¹⁸ Dilanian, K. (2011, July 6). Terrorism suspect secretly held for two months. *Los Angeles Times*. <https://www.latimes.com/world/la-xpm-2011-jul-06-la-na-somali-detainee-20110706-story.html>. In December 2011, the suspect pleaded guilty in U.S. federal court. See Weiser, B. (2013, March 25). Terrorist Has Cooperated With U.S. Since Secret Guilty Plea in 2011, Papers Show. *New York Times*. <https://www.nytimes.com/2013/03/26/nyregion/since-2011-guilty-plea-somali-terrorist-has-cooperated-with-authorities.html>.

¹¹⁹ Wessler, S. (2017, November 20). The Coast Guard’s ‘Floating Guantánamos.’ *New York Times Magazine*. <https://www.nytimes.com/2017/11/20/magazine/the-coast-guards-floating-guantanamos.html>.

¹²⁰ ACLU Sues Coast Guard for Kidnapping, Abusive Treatment of Jamaican Fisherman. (2019, June 12). *ACLU* <https://www.aclu.org/press-releases/aclu-sues-coast-guard-kidnapping-abusive-treatment-jamaican-fishermen>.

As recently as July 2021, a British citizen who had been held without charge since 2019 in Somalia claimed that his Somali captors had subjected him to hooding, sensory deprivation and waterboarding, and that he was questioned between torture sessions by two people with American accents who refused to disclose their identities. The man said he believed his torturers wanted him to cooperate with the CIA. He also said he was questioned by the FBI as recently as June 2021.¹²¹

Iraq

The Trump administration also carried out unlawful renditions from northeast Syria to authorities in neighboring Iraq, despite the Iraqi government's well-documented record of torture and due process violations of terrorism suspects.¹²² In 2017 and 2018, the U.S. forcibly transferred at least 30 foreign ISIS suspects to Iraq. Two of the men alleged that after their transfer, Iraq's Counter Terrorism Service beat them, held them in stress positions, and applied electric shocks to their genitals.¹²³

The U.S. military in 2017 and 2018 unlawfully held a U.S. citizen in Iraq without charge, for more than a year, on suspicion of membership in ISIS. For the first four months, the man, known only as "John Doe," was held in secret with no access to an attorney. After multiple court interventions by the American Civil Liberties Union, including one to stop the U.S. from sending the man to Syria, where his life was at risk, a federal court ordered the man's voluntary release to an undisclosed third country.¹²⁴

In 2020, the Trump administration threatened to transfer two notorious British ISIS suspects to authorities in Iraq, if the U.K. government did not promptly agree to let them be prosecuted in the US.¹²⁵ The two men, part of an ISIS quartet of U.K. nationals implicated in summary executions known as "The Beatles," were being held by the U.S. military in Syria and Iraq. Britain's highest court two months later authorized the two suspects' transfer to

¹²¹ The man, who is using the alias David Taylor at his family's request, made the allegations in documents said by his lawyer to the U.K. Foreign Office. See Townsend, M. (2021, July 5). Foreign Office is 'complicit in British man's Somalia torture.' *The Guardian*. <https://www.theguardian.com/world/2021/jul/25/foreign-office-is-complicit-in-british-mans-somalia-torture>.

¹²² Jalabi, R. & de Carbonnel, A. (2019, May 29). Exclusive: Islamic State suspects sent by U.S. from Syria to Iraq. *Reuters*. <https://www.reuters.com/article/us-mideast-crisis-islamicstate-transfers/exclusive-islamic-state-suspects-sent-by-u-s-from-syria-to-iraq-idUSKCN1SZ0R1>; Human Rights Watch. (2018, October 31). *US: Detainees Transferred from Syria to Iraq*. <https://www.hrw.org/news/2018/10/31/us-detainees-transferred-syria-iraq>.

¹²³ Jalabi, R. & de Carbonnel, A. (2019, May 29). *Exclusive: Islamic State suspects sent by U.S. from Syria to Iraq*; Human Rights Watch. *US: Detainees Transferred from Syria to Iraq*. For information on flagrant fair trial violations in Iraqi terrorism courts, see also Human Rights Watch. (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq*. <https://www.hrw.org/report/2017/12/05/flawed-justice/accountability-isis-crimes-iraq>

¹²⁴ *ACLU Secures Release of American Citizen Unlawfully Detained by Trump Administration*. (2018, October 29). ACLU. <https://www.aclu.org/press-releases/aclu-secures-release-american-citizen-unlawfully-detained-trump-administration>.

¹²⁵ Tayler, L. (2020, August 28). "The Beatles" and the Bomber: Barr's Decisions on Executing Terrorists. *Just Security*. <https://www.justsecurity.org/72185/the-beatles-and-the-bomber-barrs-decisions-on-executing-terrorists/>.

the U.S. for prosecution in return for diplomatic assurances that the U.S. would forgo the death penalty.¹²⁶ One of the defendants pled guilty in September 2021 to helping torture and kill hostages and faces life without parole.¹²⁷

Violations of International and Domestic Law

Despite Bush administration protestations to the contrary, the U.S. program of extraordinary renditions, secret detentions, and torture following 9/11 brazenly flouted international and U.S. law. The detentions without charge and other abuses at Guantánamo, as well as many counterterrorism operations in other countries, also violate these laws and several appear to be war crimes.

International Legal Standards

The U.S. is party to several international treaties that prohibit under all circumstances torture and other cruel, inhuman, and degrading treatment. They include the International Covenant on Civil and Political Rights (ICCPR), which prohibits any limitations on the rights to life, and protection against torture and cruel, inhuman, and degrading treatment or punishment under any circumstances, even during states of emergency.¹²⁸ The ICCPR also prohibits arbitrary and indefinite detention without charge in violation of due process.¹²⁹ Prolonged incommunicado detention such as that at Guantánamo, Abu Ghraib, and other U.S.-controlled detention centers amounts to torture or other cruel, inhuman, and degrading treatment.¹³⁰

The Convention against Torture, to which the U.S. is also party, sets forth that “no exceptional circumstances whatsoever,” including war or the threat of war, may be invoked

¹²⁶ Goldman, A. & Savage, C. (2020, October 7). Islamic State ‘Beatles’ Jailers Are Charged in Abuse of Murdered Hostages. *New York Times*. <https://www.nytimes.com/2020/10/07/us/politics/beatles-islamic-state.html>; *January 2022 trial set for IS militants nicknamed ‘Beatles.’* (2021, March 5). Associated Press. <https://apnews.com/article/race-and-ethnicity-europe-trials-islamic-state-group-virginia-85d63d63fd82ef38bdd75fe2b7a213e7>.

¹²⁷ Schechter, A. (2021, September 2). ISIS ‘Beatle’ pleads guilty in U.S. court to helping torture, kill hostages, including Americans. *NBC News*. <https://www.nbcnews.com/politics/justice-department/isis-beatle-pleads-guilty-u-s-court-helping-torture-kill-n1278388>.

¹²⁸ The United Nations General Assembly. (1966). *International Covenant on Civil and Political Rights*. Arts. 6, 7.

¹²⁹ The United Nations General Assembly. (1966). *International Covenant on Civil and Political Rights*. Art. 9.

¹³⁰ The United Nations General Assembly. (1966). *International Covenant on Civil and Political Rights*. Arts. 7, 9. United Nations Human Rights Committee. (2014). *General Comment No. 35 (Liberty and security of person)*. UN document CCPR/C/GC/35. Art. 9, para 56. US: Prolonged Indefinite Detention Violates International Law. (2011, January 24). Human Rights Watch. <https://www.hrw.org/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law>.

as a justification for torture.¹³¹ The convention also prohibits transferring anyone to another country where there are substantial grounds to believe they face the risk of torture.¹³² It provides that any statement made as a result of torture shall not be invoked as evidence in any proceedings.¹³³

Moreover, the convention obligates countries that are parties to either submit cases of torture for prosecution or extradite torture suspects. It also grants countries universal jurisdiction, allowing domestic judicial authorities to prosecute torture suspects even if they are not their citizens or are not accused of committing torture on their territory.¹³⁴ This provision alone should have compelled successive U.S. administrations to open meaningful criminal investigations at the highest levels into the U.S. military and CIA use of torture and ill-treatment of detainees around the world.

International humanitarian law, or the laws of war, provide for the detention of prisoners-of-war and civilians who pose an imperative security risk. In addition, during non-international armed conflicts, such as the civil war in Afghanistan or other fighting between states and non-state armed groups, individuals who take up arms or are otherwise involved in rebel activity may be detained and prosecuted in accordance with domestic laws. However, the four Geneva Conventions of 1949, to which the U.S. is party, entitle anyone detained during armed conflict to basic protections, including against torture and other ill-treatment.¹³⁵ Common Article 3 to all four conventions explicitly extends protections against murder, mutilation, torture, cruel, humiliating, and degrading treatment, and fair trial violations to members of non-state groups.¹³⁶ The treatment of those the U.S. apprehended in connection to the armed conflict in Afghanistan violated the provisions on humane treatment under Common Article 3 and customary international humanitarian law. The treatment of those the U.S. apprehended in Iraq also violated the

¹³¹ UN General Assembly. (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Art. 2.

¹³² UN General Assembly. (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Art. 3.

¹³³ UN General Assembly. (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Art. 15.

¹³⁴ UN General Assembly. (1984). *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Art. 5.

¹³⁵ International Committee of the Red Cross. (1949, August 12). *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*. Art. 12; International Committee of the Red Cross. (1949, August 12). *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*. Art. 12; International Committee of the Red Cross. (1949, August 12). *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*. Arts. 17, 83, and 89; International Committee of the Red Cross. (1949, August 12). *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*. Art. 32.

¹³⁶ Geneva Conventions. (1949). Common Art. 3(1)(a), (c) and (d).

Third Geneva Convention, which states that prisoners of war must be humanely treated at all times.¹³⁷

But the Bush administration fought Geneva Convention protections for foreign detainees all the way up to the U.S. Supreme Court. More than four years passed before the Supreme Court affirmed in 2006 in *Hamdan v. Rumsfeld* that Common Article 3 applies to the U.S. conflict with Al Qaeda. The court also found that the structure of the military commissions created to try detainees at Guantánamo violated both the fair trial standards of Common Article 3 and the domestic Uniform Code of Military Justice and was unconstitutional.¹³⁸

The U.S. is seeking the death penalty for the five men charged in connection to the 9/11 attacks. International human rights law prohibits capital punishment following convictions in flawed proceedings.¹³⁹

The U.S. military and CIA counterterrorism strikes during situations of armed conflict have in many cases violated the laws of war. These laws permit attacks on enemy combatants, such as members of armed groups and other military objectives, but strictly prohibit attacks on civilians and civilian structures. Not all attacks that cause civilian deaths or injuries violate the laws of war—only those that target civilians, do not discriminate between civilians and combatants, or cause expected civilian loss excessive to the anticipated military gain. Parties to a conflict must take all feasible steps to minimize civilian harm.¹⁴⁰ Governments have an obligation to investigate both serious violations and grave breaches of the laws of war, and prosecute those responsible.¹⁴¹

Outside situations of armed conflict, governments have even greater obligations to protect human life. International human rights law allows law enforcement to use lethal

¹³⁷ Third Geneva Convention. Art. 13. The article further holds that “Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”

¹³⁸ *Hamdan v. Rumsfeld*, (No. 05-184) 415 F. 3d 33 (2006).

<https://www.supremecourt.gov/opinions/05pdf/05-184.pdf>.

¹³⁹ Human Rights Watch opposes the death penalty in all circumstances because it is inherently cruel and irreversible. The world is moving toward abolition of the death penalty, with 144 countries having ended capital punishment in law or in practice by the end of 2020. See Amnesty International. *Death Penalty*.

<https://www.amnesty.org/en/what-we-do/death-penalty/>.

¹⁴⁰ International Committee of the Red Cross (1977, June 8). *Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. Arts. 51, 52, 57; and International Committee of the Red Cross (1977, June 8). *Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*. Art. 13(2). The principle of distinction between civilians and combatants is a norm of customary international law including in armed conflicts in which one or more parties are non-state forces.

¹⁴¹ This obligation is set forth in numerous treaties and is considered customary international law. See International Committee of the Red Cross, Customary International Humanitarian Law Database, Rule 149. Responsibility for violations of International Humanitarian Law. https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_cha_chapter42_rule149.

force only as a last resort, such as when there is an imminent risk to human life and capture is not feasible.¹⁴²

Domestic Law

The rights and protections in such international treaties are also enshrined in the U.S. Constitution and domestic law. The Eighth and Fourteenth Amendments to the U.S. Constitution prohibit cruel and unusual punishments and due process violations. The Federal Anti-Torture Statute of 1994, enacted to comply with the Convention against Torture, extends U.S. federal jurisdiction over acts of torture committed abroad when the alleged offender is a U.S. national or is found within the U.S., irrespective of the nationality of the victim or the alleged offender.¹⁴³ The War Crimes Act of 1996 criminalizes grave breaches of the Geneva Conventions if either the victim or the perpetrator is a U.S. national or a member of the U.S. armed forces. Convicted war criminals can be punished with life imprisonment or death.

The Detainee Treatment Act of 2005 bars the use of cruel, inhuman, or degrading treatment or punishment against any person in U.S. custody.¹⁴⁴ An amendment to the 2016 National Defense Authorization Act (known as the McCain-Feinstein Amendment), aims to protect against U.S. torture and other ill-treatment of detainees by restricting interrogation techniques to those contained in the U.S. Army Field Manual on Human Intelligence Collector Operations, the government's important, albeit inadequate, guidelines for the U.S. military and CIA on lawful interrogation techniques.¹⁴⁵ The amendment also requires timely access by the International Committee of the Red Cross to detainees in U.S. custody.¹⁴⁶

Scant Accountability for Torture

The U.S. government has failed to hold accountable the key architects of post-9/11 unlawful renditions, detentions, and torture, despite clear and compelling evidence that

¹⁴² Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 112. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990). <http://hrlibrary.umn.edu/instreet/i2bpuff.htm>.

¹⁴³ Federal Anti-Torture Statute, 18 U.S.C. 2340A (1994). <https://www.justice.gov/archives/jm/criminal-resource-manual-20-torture-18-usc-2340a>.

¹⁴⁴ Detainee Treatment Act of 2005, Public Law 163-109, 119 Stat. 3136 (2006). <https://ihl-databases.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/b22319a0da00fa02c1257b8600397d29/%24FILE/Detainee%20Treatment%20Act%20of%202005%20.pdf>.

¹⁴⁵ See, Brandon, S., & Fallon, M. (2021, June 11). The Méndez Principles: The Need to Update the Army Field Manual on Interrogation for the 21st Century. *Just Security*. <https://www.justsecurity.org/76863/the-mendez-principles-the-need-to-update-the-army-field-manual-on-interrogation-for-the-21st-century/>.

¹⁴⁶ 114th Congress. *National Defense Authorization Act for Fiscal Year*, § 1045 (2016), <https://www.congress.gov/bill/114thcongress/senate-bill/1356/text>.

warrants criminal investigations of former Bush and top members of his administration, among others.¹⁴⁷ Although some efforts abroad are notable, they remain insufficient.

Bare-Bones U.S. Investigations

The Obama administration only investigated the CIA for torture and other abuse, probing more than 100 cases but ultimately declining to bring any charges.¹⁴⁸ The administration limited its investigations to instances in which interrogators exceeded legal authorizations, disregarding that the authorizations themselves were unlawful.¹⁴⁹

For example, the Obama Justice Department declined to bring charges against any CIA officials for deliberately destroying 92 videotapes in 2005 that contained direct evidence of torture.¹⁵⁰ It also declined to prosecute anyone for the deaths of two men in CIA custody after brutal interrogations in 2002 and 2003.¹⁵¹ One of those men, Gul Rahman, froze to death in November 2002 in a CIA black site dubbed “The Salt Pit” near Bagram in Afghanistan. Rahman died after his captors left him shackled to a cement wall in near-freezing temperatures, naked from the waist down. In the preceding days CIA interrogators had kept him awake for 48 hours, blasted him with noise, immersed him in complete darkness and isolation, and doused him with cold water, among other abuses.¹⁵² In fact, rather than prosecuting those officers responsible for Rahman’s death, four months later the CIA bestowed a “cash award” of \$2,500 to the officer who had ordered his shackling for his “consistently superior work.”¹⁵³ The CIA promoted or gave bonuses to several other staff members who participated in the torture program.¹⁵⁴

The other case involved Manadel al-Jamadi, who died in 2003 at Abu Ghraib. U.S. military and CIA interrogators subjected al-Jamadi to “blunt force trauma” that broke five of his ribs, then suspended him from a barred window by his wrists, naked from the waist down with a sandbag on his head, where after a half-hour he slumped over and stopped responding. Upon realizing al-Jamadi was dead, his captors packed his corpse in ice, wrapped it in plastic, stuck an intravenous drip into his arm and pretended he was on life

¹⁴⁷ Pitter, L & Haskell, L (2015). *No More Excuses: A Roadmap to Justice for CIA Torture*. Human Rights Watch; Brody, R. (2011). *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*. Human Rights Watch.

¹⁴⁸ *No More Excuses: A Roadmap to Justice for CIA Torture* (pp. 25-27).

¹⁴⁹ Prasow, A. (2021, January 25). Declassify the Post-9/11 Torture Program. *The Hill*. <https://www.hrw.org/news/2021/01/25/declassify-post-9/11-torture-program>.

¹⁵⁰ Mazzetti, M. & Savage, C. (2010, November 9). No Criminal Charges Sought Over C.I.A. Tapes. *New York Times*. <https://www.nytimes.com/2010/11/10/world/10tapes.html>.

¹⁵¹ Horton, S. (2012, August 31). Holder Announces Impunity for Torture-Homicide. *Harper’s Magazine*. <https://harpers.org/2012/08/holder-announces-impunity-for-torture-homicides/>.

¹⁵² Goldman, A. & Gannon, K. (2010, March 28). Death shed light on CIA ‘Salt Pit’ near Kabul: Handling of terror suspect led to inquiry by agency’s inspector general. Associated Press. <https://www.nbcnews.com/id/wbna36071994>.

¹⁵³ *Torture Report*. “Findings and Conclusions.” (pp. 54-55).

¹⁵⁴ Goldman, A. & Apuzzo, M. (2011, February 9). CIA officers make grave mistakes, get promoted. *NBC News*. <https://www.nbcnews.com/id/wbna41484983>.

support as they wheeled him out.¹⁵⁵ U.S. Army reservists posed for photographs with his ice-packed corpse, smiling with thumbs up.¹⁵⁶ In both the Rahman and al-Jamadi cases, the Justice Department claimed, astonishingly, that “the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt.”¹⁵⁷

Only small numbers of lower-level participants in U.S. military abuse have faced justice. Of the 27 soldiers and officers against whom U.S. Army investigators had recommended criminal charges for the torture and, in two cases, deaths of Bagram detainees, only 15 were prosecuted, in 2004 and 2005. Of these, only six were convicted—five in guilty pleas and one at trial. The most severe punishment was five months in a military prison.¹⁵⁸

Following the release in 2004 by the “60 Minutes” television program of some of the hundreds of photos documenting the rampant abuse of prisoners at Abu Ghraib, 11 U.S. soldiers were prosecuted and convicted in military trials, including two who posed with al-Jamadi’s corpse.¹⁵⁹ But the higher-ranked officers who knew of the abuses, and the private military contractors who also participated, evaded justice.¹⁶⁰

In 2017 the psychologists Jessen and Mitchell settled a lawsuit brought by the American Civil Liberties Union, paying an undisclosed sum to two torture victims and the family of Rahman.¹⁶¹

Rather than investigating and prosecuting government officials who participated in or advocated torture, Trump promoted some of them. Those he promoted include Gina Haspel, his second CIA director, who reportedly oversaw torture at the CIA’s first black site

¹⁵⁵ Shane, S. (2012, August 30). No Charges Filed on Harsh Tactics Used by the C.I.A. *New York Times*. https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?_r=1&pagewanted=1; Horton, S. (2012, August 31). Holder Announces Impunity for Torture-Homicide. *Harper’s Magazine*. <https://harpers.org/2012/08/holder-announces-impunity-for-torture-homicides/>.

¹⁵⁶ McChesney, J. (2005, October 27). The Death of an Iraqi Prisoner. *NPR*. <https://www.npr.org/templates/story/story.php?storyId=4977986>.

¹⁵⁷ Shane, S. (2012, August 30). No Charges Filed on Harsh Tactics Used by the C.I.A. *New York Times*. https://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?_r=1&pagewanted=1.

¹⁵⁸ Golden, T. (2006, February 13). The Bagram File: Years After 2 Afghans Died, Abuse Case Falter. *New York Times*. <https://www.nytimes.com/2006/02/13/national/13bagram.html>.

¹⁵⁹ Leung, R. (2004, April 27). Abuse of POWs by GIS Probed. *CBS News*. <https://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/>.

¹⁶⁰ Brig. Gen. Janis Karpinski, who commanded the forces at Abu Ghraib and other prisons run by the US-led coalition in Iraq at the time, was demoted and transferred after the scandal broke although the military did not officially state the detainee abuse as the reason. Karpinski claimed she was made a scapegoat. See, Head of Abu Ghraib Prison Speaks Out. (2009, August 14). *ABC News*. <https://abcnews.go.com/Nightline/IraqCoverage/story?id=751870&page=1>.

¹⁶¹ *CIA Torture Psychologists Settle Lawsuit*. (2021, August 17). ACLU. <https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit>.

in Thailand and played a key role in destroying the videotaped evidence of torture.¹⁶² Michael Pompeo, Trump's second Secretary of State and first CIA director, as a member of Congress defended the torture program as "within the law."¹⁶³ During his confirmation hearings for CIA director, Pompeo acknowledged that "enhanced interrogation techniques" were illegal under the 2015 McCain-Feinstein Amendment, but not that they also violated U.S. and international law at the time the Bush administration authorized them and the CIA used them.¹⁶⁴ Trump in 2018 nominated Marshall Billingslea to oversee the State Department's human rights work although as a Bush administration official he had advocated harsher interrogation methods for men detained at Guantánamo.¹⁶⁵ After the Senate deadlocked over Billingslea's nomination, at least in part because of his record on torture, Trump appointed him to a position not requiring Senate approval.¹⁶⁶

Nine years after the release of the heavily redacted summary of the 6,700-page Torture Report—less than one-tenth of the total text—Biden has shown no more inclination than his two predecessors to release the full contents.¹⁶⁷ His administration has also deflected questions on CIA abuse from the UN Committee Against Torture, the body that monitors countries' compliance with the Convention Against Torture. "[F]or reasons of privacy, the United States is not in a position to disclose the information sought with regard to Central Intelligence Agency (CIA) detained persons rendered to other countries," reads a U.S. submission to the committee from September 2021.¹⁶⁸

Keeping the report classified prevents the public from fully understanding the torture program, shields the identities of the torturers, impedes the ability of torture

¹⁶² Pitter, L. (2018, March 25). Gina Haspel is the wrong choice to head the CIA. *The Hill*.

<https://thehill.com/opinion/national-security/379877-gina-haspel-is-the-wrong-choice-to-head-the-cia>.

¹⁶³ Ackerman, S. (2017, January 12.). Mike Pompeo confirmation hearing for CIA director: the key points. *The Guardian*. <https://www.theguardian.com/us-news/2017/jan/12/mike-pompeo-cia-director-confirmation-hearing-live-key-points>. Pompeo's news release containing that quote has since been deleted.

¹⁶⁴ Human Rights Watch. (2017). *US: Reject Pompeo for CIA Director*. (2017).

<https://www.hrw.org/news/2018/03/25/gina-haspel-wrong-choice-head-cia>.

¹⁶⁵ Prasow, A & Epstein, E. (2019, September 27). Trump's Human Rights Pick is Torture Apologist. *The Progressive*. <https://progressive.org/op-eds/trumps-human-rights-pick-torture-apologist-epstein-prasow-190927/>.

¹⁶⁶ DeBonis, M. (2019, November 29). Top human rights post goes vacant as Trump nominee confronts links to post-9/11 torture program. *Washington Post*.

https://www.washingtonpost.com/powerpost/top-human-rights-post-goes-vacant-as-trump-nominee-confronts-links-to-post-911-torture-program/2019/11/29/e1a99644-113d-11ea-bf62-eadd5d11f559_story.html. In 2020, Trump nominated Billingslea for another ranking position requiring Senate approval. See Borger, J. (2020, March 4). Trump picks official involved in Bush era torture program as his nuclear envoy. *The Guardian*. <https://www.theguardian.com/us-news/2020/mar/04/trump-nuclear-talks-envoy-marshall-billingslea>. But the Senate did not take up the nomination.

¹⁶⁷ Prasow, A. (2021, January 25). Declassify the post-9/11 torture program. *The Hill*. <https://www.hrw.org/news/2021/01/25/declassify-post-9/11-torture-program>.

¹⁶⁸ ACLU. (2021, September 24). *Submission to the Committee against Torture of the Sixth Periodic Report on the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Para. 63.

https://www.aclu.org/sites/default/files/field_document/21.09.24_usa_cat_report_on_6th_periodic_report.pdf.

victims to access medical records relating to their abuse, and further prolongs arguments over national security classifications during pre-trial hearings at Guantánamo.

Insufficient Accountability Abroad

Several other countries have provided compensation to former detainees held by the CIA or the U.S. military in cases where their own authorities also committed wrongdoing, or have prosecuted some of those implicated in these abuses. Though foreign countries have done more than the US, their responses—most court-ordered—have also in many cases been insufficient.¹⁶⁹

Significantly, the European Court of Human Rights has found that five European countries—Macedonia, Poland, Italy, Romania, and Lithuania—violated provisions in the European Convention on Human Rights by collaborating with the CIA’s RDI program. The violations included the prohibition on torture and ill-treatment and the right to liberty and security. The court ordered the countries to pay damages to their 20 known victims.¹⁷⁰

The U.K. has paid more than \$28.8 million USD to Iraqi victims to settle complaints linked to numerous, well-documented war crimes and other abuses that it committed as a partner in the U.S.-led invasion of Iraq.¹⁷¹ However, the U.K. has only prosecuted its military forces for one of these crimes, the beating to death of Basra hotel receptionist Basa Mousa in British custody.¹⁷² The U.K. government shelved an independent inquiry into its forces’ involvement in post-9/11 extraordinary renditions and torture.¹⁷³ It also shut down

¹⁶⁹ Pitter, L. & Haskell, L. (2015). *No More Excuses: A Roadmap to Justice for CIA Torture*. (pp. 107-8). Human Rights Watch.

¹⁷⁰ European Court of Human Rights. *El-Masri v. the former Yugoslav Republic of Macedonia; Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland; Nasr and Ghali v. Italy; Al Nashiri v. Romania; and Abu Zubaydah v. Lithuania*. <https://hudoc.echr.coe.int/eng>. See also Parliamentary Assembly. (2014, July 24). *Timeline: The Council of Europe’s investigation into CIA secret prisons in Europe*. <https://pace.coe.int/en/news/5722>.

¹⁷¹ Cobain, I. (2020, August 26). UK government says payouts for Iraq abuse claims ‘too many to count.’ *Middle East Eye*. <https://www.middleeasteye.net/news/iraq-british-soldiers-abuse-payouts-count-uk-government>. For a partial list of probable war crimes committed by UK forces in Iraq see International Criminal Court (2020, December 9). *Office of the Prosecutor, Situation in Iraq/UK – Final Report*. <https://www.icc-cpi.int/itemsDocuments/201209-otp-final-report-iraq-uk-eng.pdf>. Despite abundant evidence the Court declined to investigate, concluding – incorrectly in the view of this article’s authors – that the U.K. was willing to investigate and prosecute the cases itself. See Baldwin, C. (2020, December 18). *The ICC Prosecutor Office’s Cop-Out on UK Military Crimes in Iraq*. *OpinioJuris*. <http://opiniojuris.org/2020/12/18/the-icc-prosecutor-offices-cop-out-on-uk-military-crimes-in-iraq/>.

¹⁷² Six defendants were cleared of wrongdoing and the seventh, a corporal, was sentenced to one year in prison after pleading guilty to inhumane treatment. He was cleared of manslaughter. Baldwin, C. (2019, November 19). *Don’t Shield Suspected UK War Criminals from Justice*. Human Rights Watch. <https://www.hrw.org/news/2019/11/19/dont-shield-suspected-uk-war-criminals-justice>.

¹⁷³ Cobain, I. (2015, July 6). Why did the Gibson inquiry into rendition disappear? *The Guardian*. <https://www.theguardian.com/commentisfree/2015/jul/06/gibson-inquiry-rendition-david-cameron-uk-torture>; Human Rights Watch. (2013, December 21). *Broken Promise on Torture Inquiry*. <https://www.hrw.org/news/2013/12/21/uk-broken-promise-torture-inquiry>.

the principal investigation team into alleged crimes by U.K. forces in Iraq before it had completed its work, following pressure from some media and members of parliament.¹⁷⁴

In 2017 Canada apologized and paid \$10.5 million CA (\$8.1 million USD) in damages to Omar Khadr, a former child soldier who was 15 when U.S. forces captured him in 2002 during a firefight in Afghanistan.¹⁷⁵ Khadr, who was severely wounded, was held for three months at Bagram and for a decade at Guantánamo, during which time he alleges that he was brutally tortured.¹⁷⁶ In 2010, Canada's Supreme Court found that Khadr's rights were violated when Canadian intelligence officials interrogated him at Guantánamo.¹⁷⁷

In 2009 and 2012, Italy convicted a total of 25 alleged CIA agents and one U.S. Air Force colonel for the kidnapping in Milan of an Egyptian cleric known as Abu Omar, who was then handed over to Egypt via Germany and allegedly tortured for four years while held without trial.¹⁷⁸ Because the convictions were in absentia, none of the Americans convicted served prison time.¹⁷⁹

International Criminal Court

Both the Trump and Biden administrations have sought to thwart any accountability for international crimes by U.S. forces before the International Criminal Court (ICC). In

¹⁷⁴ The investigations unit was the Iraq Historic Allegations Team. See United Kingdom: Human Rights Watch. (2020, December 10). ICC Prosecutor Ends Scrutiny of Iraq Abuses. <https://www.hrw.org/news/2020/12/10/united-kingdom-icc-prosecutor-ends-scrutiny-iraq-abuses>.

¹⁷⁵ Austen, I. (2017, July 7). Canada Apologizes and Pays Millions to Citizen Held at Guantánamo Bay. *New York Times*. <https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html>.

In 2010, Khadr pleaded guilty at Guantánamo to throwing a grenade that killed a U.S. soldier in Afghanistan, but later said he made the plea under duress. In 2012 he returned to Canada to serve the remainder of his sentence. He was released in May 2015.

¹⁷⁶ Becker, J. (2015, May 8). Omar Khadr's ordeal: *When a war crime isn't a war crime*. Human Rights Watch. <https://www.hrw.org/news/2015/05/08/omar-khadrs-ordeal-when-war-crime-isnt-war-crime>.

¹⁷⁷ Wherry, A. (2017, July 4). Why will Omar Khadr receive \$10.5M? Because the Supreme Court ruled his rights were violated. *Canadian Broadcasting Corporation News*. <https://www.cbc.ca/news/politics/omar-khadr-settlement-analysis-aaron-wherry-1.4189472>.

¹⁷⁸ Abu Omar's legal name is Hassan Mustafa Osama Nasr. Italy/US: Italian Court Rebukes CIA Rendition Practice. (November 4, 2009). Human Rights Watch. <https://www.hrw.org/news/2009/11/04/italy/us-italian-court-rebuked-cia-rendition-practice>; Sunderland, J. (2014, March 12). *Dispatches: Italy Stands Alone on Justice for CIA Abuses*. Human Rights Watch. <https://www.hrw.org/news/2014/03/12/dispatches-italy-stands-alone-justice-cia-abuses>.

¹⁷⁹ While some countries allow for trials in absentia, Human Rights Watch believes that fairness requires that the accused be present in court during a trial to put forward a defense. If an accused is apprehended following a trial in which he was convicted in absentia, the verdict rendered in absentia should be quashed and a completely new trial held. One agent was extradited to Italy after entering Portugal but was allowed to leave the country after serving most of a community service sentence. She was among four of the Americans including the Air Force pilot to receive full or partial clemency. See Barry, C. (2019, October 29). *Ex-CIA agent convicted in kidnap skips Italian justice*. Associated Press. <https://apnews.com/article/b22a5ec9711645c291404073e7113524>; *Italy pardons U.S. pilot convicted in CIA rendition case* (2013, April 5). *Reuters*. <https://www.reuters.com/article/us-italy-pardon/italy-pardons-u-s-pilot-convicted-in-cia-rendition-case-idUSBRE9340U620130405>.

2020, Trump imposed unprecedented sanctions on ICC staff including the prosecutor at the time, after the court's judges authorized an investigation into alleged war crimes and crimes against humanity in connection with the conflict in Afghanistan that could have included abuses by U.S. nationals.¹⁸⁰ In April, the Biden administration lifted the U.S. sanctions against the court's members but made clear it continued to oppose the court's jurisdiction over U.S. nationals and personnel in Afghanistan.¹⁸¹ In a move castigated by critics as capitulation to political pressure from Washington, the new ICC prosecutor, Karim Khan, announced in September that he had sought permission from one of the court's pre-trial chambers to proceed with the investigation but that he intended to focus only on grave crimes allegedly committed by the Taliban and ISIS-K and "deprioritize" those allegedly committed by the U.S. military, CIA, and forces of the former Afghan government.¹⁸² Khan's action risks not only perpetuating impunity for apparent U.S. war crimes but also undermining the already fragile legitimacy of the ICC, the world's only permanent court entrusted with prosecuting the most serious international crimes including war crimes and crimes against humanity.

As a court of last resort, the ICC can only intervene in cases where a state is unable or unwilling to carry out investigations and prosecutions. Only if the U.S. were to change course and genuinely seek criminal accountability for the grave abuses committed by the U.S. military, CIA, and contractors in relation to the Afghanistan conflict would it be in a position to legitimately challenge the ICC jurisdiction in those cases.¹⁸³

Costs at Home and Abroad

The corrosive repercussions of the Bush-era detention and interrogation abuses continue to this day, both at home and abroad. They have cost U.S. taxpayers trillions of dollars and militarized police responses at home. They have robbed victims of 9/11 and other extremist armed attacks of justice and shattered the lives of foreign men who were brutally detained for years without charge. They have given cover to foreign governments to carry out their own unlawful detention and torture with impunity and to dismiss U.S. human rights diplomacy as hypocrisy. They have shaken the foundations of the international human rights system, jeopardized the safety of U.S. citizens abroad, and handed a propaganda tool to armed groups like Al Qaeda and ISIS.

¹⁸⁰ Human Rights Watch. (2020, December 14). *U.S. Sanctions on the International Criminal Court*. <https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court>.

¹⁸¹ Toosi, N. (2021, April 02). Biden lifts sanctions on International Criminal Court officials. *Politico*. <https://www.politico.com/news/2021/04/02/icc-sanctions-reversed-biden-478731>. The U.S. has never ratified the Rome Statute of the International Criminal Court and has consistently opposed its jurisdiction over U.S. citizens or personnel.

¹⁸² Amnesty International (2021, October 5). *ICC Prosecutor's statement on Afghanistan jeopardises his Office's legitimacy and future*. <https://hrij.amnesty.nl/afghanistan-icc-prosecutors-statement-on-afghanistan-jeopardises-his-offices-legitimacy-and-future/>.

¹⁸³ Human Rights Watch (2021). *Essential Proposals to the Biden Administration to Advance International Justice*. <https://www.hrw.org/news/2021/06/24/essential-proposals-biden-administration-advance-international-justice>.

Domestic Costs

The “War on Terror” has cost U.S. taxpayers trillions of dollars and the detention component has easily run into the billions. Because much information on U.S. unlawful detention and interrogation is classified, the true cost of those practices to taxpayers remains elusive. Nevertheless, a few studies underscore the enormous sums involved.

U.S. taxpayers are spending \$540 million a year just to detain prisoners at Guantánamo, which comes to nearly \$13 million annually per prisoner, according to a 2019 investigation by *The New York Times*.¹⁸⁴ This estimate includes the cost of nearly 2,000 guards, health care for aging detainees whose medical needs are complicated by the abuse they suffered in CIA black sites or in Guantánamo itself, and the military commissions. The true costs could be far higher as the estimate does not include classified expenses, such as the CIA presence at the base.

By 2018, the “War on Terror” had cost U.S. taxpayers nearly \$3 trillion, according to a study by the Stimson Center think tank.¹⁸⁵ Brown University’s Costs of War project, the publisher of this paper, in September 2021 estimated the figure to be more than \$5.84 trillion, or \$8 trillion counting estimated future care for veterans through 2050.¹⁸⁶ The studies do not include breakdowns for detentions abroad.

While outside the scope of this paper, the fallout on the domestic criminal justice system has also been extensive. Across the U.S., the September 11 attacks ushered in warrantless surveillance, allowing the government to obtain citizens’ most sensitive data without any suspicion of wrongdoing.¹⁸⁷ They spurred further militarized approaches to policing and religious, racial, and ethnic profiling in predominantly Muslim, Black, and brown communities.¹⁸⁸ They also ushered in abusive investigations, prosecutions, and detention conditions for Muslim American terrorism suspects.

¹⁸⁴ Rosenberg, C. (2019, September 16). The Cost of Running Guantánamo Bay: \$13 Million Per Prisoner. *New York Times*. <https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html>.

¹⁸⁵ Stimson Center (2018). *Counterterrorism Spending: Protecting America While Promoting Efficiencies and Accountability*.

¹⁸⁶ Brown University. Watson Institute for International & Public Affairs. (2021, September 1). Costs of War Project: *U.S. Budgetary Costs of Post-9/11 Wars Through FY2022*.

<https://watson.brown.edu/costsofwar/figures/2021/BudgetaryCosts>.

¹⁸⁷ Goitein, E. (2011, August 25). *Rolling Back the Post 9-11 Surveillance State*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/analysis-opinion/rolling-back-post-911-surveillance-state>. See also ACLU (n.d.). *Surveillance Under the USA/Patriot Act*. <https://www.aclu.org/other/surveillance-under-usapatriot-act>.

¹⁸⁸ Alimahomed-Wilson, S. (2019). When the FBI Knocks: Racialized State Surveillance of Muslims. *Critical Sociology*, Vol. 45(6). doi/10.1177/0896920517750742.; Patel, F. & Koushik, M. (2017). *Countering Violent Extremism*. Brennan Center for Justice. <https://www.brennancenter.org/our-work/research-reports/countering-violent-extremism>. See also Paton, D., Brunton, D. Dixon A., et al. (2017). Stop and Frisk Online: Theorizing Everyday Racism and Digital Policing in the Use of Social Media for Identification of Criminal Conduct and Associations. *Social Media + Society*. <https://journals.sagepub.com/doi/10.1177/2056305117733344>.

A 2014 report by Human Rights Watch found a pattern of sting operations against Muslim Americans that facilitated or invented targets' willingness to act, imposed unnecessarily restrictive detention conditions—including prolonged solitary confinement and curtailed pretrial communications that possibly impeded suspects' ability to assist in their own defense—and resulted in excessive prison sentences. These practices “have alienated the very communities the government relies on most to report possible terrorist threats and diverted resources from other, more effective ways of responding to the threat of terrorism,” Human Rights Watch said.¹⁸⁹

No Justice for September 11 Victims and Families

The U.S. government's reliance on deeply flawed military commissions, along with other due process failures, has not only violated the rights of the men held at Guantánamo. It also has deprived survivors of the 9/11 attacks and families of the dead of their right to justice. While the 9/11 case remains mired in pretrial hearings, with the latest judge saying the actual trial will not commence until at least late 2022, U.S. federal courts have prosecuted hundreds of defendants on terrorism-related charges, including in complex and high-profile cases such as the first World Trade Center bombing in 1993.¹⁹⁰ To be sure, terrorism-related prosecutions in U.S. federal court have their share of flaws.¹⁹¹ But had the September 11 defendants been prosecuted in federal court from the start, their trials almost certainly would have concluded years ago.

Survivors and family members of 9/11 victims struggle even to have their day in court in pretrial proceedings. Seats are limited at the small courthouse at Guantánamo, so survivors and relatives of the dead must enter a lottery to attend a hearing in person. Their only other option is to watch the proceedings through closed circuit television channels at a small number of U.S. military bases or at the Pentagon. While some relatives of 9/11 victims laud the military commissions, others have expressed frustration at the delays, and others still, including some members of the group 9/11 Families for Peaceful Tomorrows, have said that the problematic proceedings contribute to their anguish.¹⁹²

¹⁸⁹ Human Rights Watch. (2014). *Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions*; Poirot, C. (2020, December 8). The Anatomy of a Federal Terrorism Prosecution: A Blueprint for Repression and Entrapment. *Columbia Human Rights Law Review*. <http://hrlr.law.columbia.edu/hrlr-online/the-anatomy-of-a-federal-terrorism-prosecution-a-blueprint-for-repression-and-entrapment/>.

¹⁹⁰ Suspects convicted of terrorism-related offenses in U.S. federal courts include Osama bin Laden's son-in-law Sulaiman Abu Ghaith, for conspiring to kill U.S. nationals in 2014; Dzhokhar Tsarnaev, for the Boston Marathon bombing in 2013; Umar Farouk Abdulmutallab, for the attempted “underwear bombing” of a passenger jet in 2009; Richard Reid, for the attempted “shoe bombing” of a passenger jet in 2001; Ramzi Yousef, for the World Trade Center bombing in 1993; and Faisal Shahzad, for the attempted Times Square car bombing in 2010.

¹⁹¹ See, Human Rights Watch. (2014). *Illusion of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions*.

¹⁹² Varon, J. (2021). *We Are Pushing Biden to Close Guantanamo*. Peaceful Tomorrows. <https://peacefultomorrows.org/we-are-pushing-biden-to-close-guantanamo/>; Rodriguez, J. (2016, January 14). Sister of 9:11 Victim: Guantánamo Will Never Deliver Justice. *Time*. <https://time.com/4178889/guantanamo-will-never-deliver-justice/>.

“What has slowly been revealed—year after year—is the lack of care and foresight invested in getting this right,” the group’s co-founder, Colleen Kelly, whose brother was killed on 9/11, told us. “There’s an emotional and psychological cost to the lack of accountability, and the use of a military commission system that has lost all legitimacy. ... But the biggest cost I suspect is occurring in ways we are not yet aware of—what happens to a nation’s collective conscience and moral compass when those responsible for horrific wrongdoing are never held accountable? This slow erosion of justice is eating away at our soul, and my heart.”¹⁹³

Elizabeth Miller, whose father was killed on 9/11, said the torture of defendants left her doubtful that justice can ever be served. “Losing my father was a traumatic experience,” she said, “but the actions that the U.S. has taken following 9/11, that’s the wound that will never heal.”¹⁹⁴

Leila Murphy, whose father was killed on 9/11, said she became upset attending pre-trial hearings at Guantánamo because the prosecution team repeatedly told her and the other family members in attendance that they were fighting for her rights as a victim, yet did not consult her on their strategy—including their pursuit of the death penalty, which she opposes on principle. “Being there as a victim really hits home that nobody is actually advancing your interests,” she said. Instead, she said, she felt her name was “used” to “justify acts that you have no relationship with or control over and don’t want to happen.”¹⁹⁵

The use of military commissions and other due process failures have stalled accountability for other mass-casualty attacks as well. For example, nearly a decade has passed since the arraignment of a man held at Guantánamo who is accused in the bombing of the *USS Cole* that killed 17 U.S. sailors off the coast of Yemen in 2000.¹⁹⁶

Under pressure from families of 9/11 victims and a bipartisan group of U.S. lawmakers, Biden in September ordered the FBI and other relevant government agencies to release within six months long-classified documents relating to the attacks.¹⁹⁷ The families and members of Congress have said they believe the documents will detail connections between the government of Saudi Arabia and the 19 alleged hijackers, 15 of whom were Saudi.¹⁹⁸ The first released document, from 2016, shows a closer relationship than had been previously disclosed between the hijackers and two Saudis, including one

¹⁹³ Epstein, E. Telephone interview with Colleen Kelly. (2021, July 15).

¹⁹⁴ Epstein, E. Telephone interview with Elizabeth Miller. (2021, July 21).

¹⁹⁵ Epstein, E. Telephone interview with Leila Murphy. (2021, July 21).

¹⁹⁶ See entry on Abd al-Rahim al-Nashiri in Guantánamo Docket. *New York Times*. <https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html#detainee-10015>.

¹⁹⁷ Biden orders declassification of 9/11 investigation documents. (2021, September 3). *Al Jazeera*. <https://www.aljazeera.com/news/2021/9/3/biden-orders-declassification-of-9-11-investigation>.

¹⁹⁸ See, *Menendez, Schumer, Blumenthal, Gillibrand, Booker, Murphy Introduce September 11th Transparency Act*. <https://www.menendez.senate.gov/newsroom/press/menendez-schumer-blumenthal-gillibrand-booker-murphy-introduce-september-11th-transparency-act>.

with diplomatic status, but does not directly link those attackers to the Saudi government.¹⁹⁹ Biden's move, while welcome, is only one modest step toward closing the post-9/11 accountability and transparency gaps.

Costs to U.S. Influence and the International Human Rights System

The U.S. unlawful renditions, detentions, and interrogations since 9/11 and its failure to end impunity for these crimes undermine the very human rights principles that Washington historically championed and that Obama and Biden pledged to re-embrace. These practices also threaten the international treaties and monitoring bodies that the U.S. was deeply involved in creating in the aftermath of World War II with the aim of upholding rights for everyone. By flouting the Geneva Convention prohibitions on inhumane treatment of prisoners and unlawfully attacking civilians, expanding the so-called War on Terror to groups that did not exist at the time of 9/11 and to areas far from any recognized battlefield, circumventing minimum due process standards enshrined in the ICCPR, equivocating on consideration of torture-tainted evidence despite the Convention Against Torture's clear prohibition on its use in proceedings, failing to respond to questions from the Committee Against Torture on CIA abuse, and bullying the International Criminal Court rather than genuinely investigating grave abuses abroad by its own military and intelligence agents, the U.S. has made it easier for other countries to deflect international condemnation of their own serious human rights violations.

Of course, many countries practiced abhorrent detention and brutal interrogation and flouted international legal standards and institutions long before 9/11. But by institutionalizing these practices over three successive presidencies, the U.S. has signaled to the rest of the world and to its own security and intelligence services that the universal rights it purports to champion are dispensable when countering Islamist armed groups.

Not surprisingly, this has undercut the U.S. government's credibility when it calls out other countries for carrying out their own abuses.

"The devil preaches!" wrote the editor-in-chief of state-owned *Al-Ahram*, Egypt's largest daily, in a 2010 editorial excoriating the Obama administration for urging greater freedoms in the Arab world while failing to close Guantánamo.²⁰⁰ Fast-forward to the Biden presidency and *Al-Ahram* was still promoting that narrative. "At a time when the U.S. directed accusations against Egypt," a pro-government member of parliament wrote in an *Al-Ahram* column, "it ignores the countless violations in Iraq, Afghanistan, Abu Ghraib prison, Guantanamo Bay and others!"²⁰¹

¹⁹⁹ Sullivan, L. (September 12, 2021). *Biden Declassifies Secret FBI Report Detailing Saudi Nationals' Connections To 9/11*. National Public Radio. <https://www.npr.org/2021/09/12/1036389448/biden-declassifies-secret-fbi-report-detailing-saudi-nationals-connections-to-9->

²⁰⁰ Saraya, O. (2010, November 22). The Devil Preaches! (الشيطان يعظ!) *Al-Ahram*. <https://www.osamasaraya.com/article/1229>.

²⁰¹ al-Haddad, A. (2021, March 15). What Human Rights Violations are They Talking About? (عن أى انتهاكات ؟) *Al-Ahram*. <https://gate.ahram.org.eg/News/2634057.aspx>.

In June 2021, following a meeting with Biden, Russian President Vladimir Putin deflected a media question about Russia's human rights record by raising the continuing U.S. operation of the prison at Guantánamo.²⁰²

Cuba has also jumped on abuse at Guantánamo to deflect U.S. criticism of Cuban rights abuses including its persecution of political prisoners. "There is one place in Cuba where torture occurs," read the headline of a column in the official Communist Party mouthpiece *Granma*, following the graphic testimony of Guantánamo detainee Majid Khan in October on his torture in CIA black sites years earlier. "The country that threatens Cuba... has no moral authority to demand anything from anyone. Do as I say and not as I do—a saying that seems fit the empire's actions perfectly."²⁰³

China has long used the so-called War on Terror and the detention of 22 Muslim Uyghurs from Xinjiang province at Guantánamo to justify its mass surveillance, internment, and indoctrination program against Uyghurs and other Turkic Muslims, which Human Rights Watch has found to be crimes against humanity.²⁰⁴ In 2019, Shohrat Zakir, the official overseeing camps unlawfully detaining as many as 1 million Uyghurs in Xinjiang, similarly criticized U.S. legislation calling for the camps' closure as hypocritical in light of U.S. counterterrorism measures and detentions at Guantánamo.²⁰⁵

²⁰² Niedzwiadek, N. (2021, June 16). Biden derides Putin's 'ridiculous' wehereaboutism. *Politico*. <https://www.politico.com/news/2021/06/16/biden-derides-putins-ridiculous-whataboutism-494885>.

²⁰³ Capote, R.A. (2021, November 8). There is one place in Cuba where torture occurs. *Granma*. <https://en.granma.cu/cuba/2021-11-08/there-is-one-place-in-cuba-where-torture-occurs>.

²⁰⁴ Cain, G. (2021, July 12). How the War on Terror Enabled China's Surveillance Dystopia. *The Daily Beast*. <https://www.thedailybeast.com/how-the-war-on-terror-enabled-chinas-surveillance-dystopia>; Griffiths, J. (2021, May 15). The Uyghurs were locked up by the U.S. in Guantanamo. Now they're being used as an excuse for China's crackdown in Xinjiang. *CNN*. <https://www.cnn.com/2021/05/15/china/xinjiang-guantanamo-uyghurs-intl-hnk/index.html>. The 22 Uyghurs were captured in 2001. The U.S. transferred them from Guantánamo to third countries between 2006 and 2014. None had been charged with a crime. See Savage, C. (2013, December 31). U.S. Frees Last of the Chinese Uighur Detainees From Guantánamo Bay. *New York Times*. <https://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html>. Some of the released Uyghurs are still trying to be reunited with their families. See, e.g., Cecco, L. (2020, October 7). 'It breaks my heart': Uighurs wrongfully held at Guantánamo plead to be with families. *The Guardian*. <https://www.theguardian.com/us-news/2020/oct/07/uighur-men-guantanamo>. For more information on atrocities against Uyghurs see Wang, M. (2021). "Break Their Lineage, Break Their Roots": *Chinese Government Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims*. Human Rights Watch.

²⁰⁵ Telegraph Reporters. (2019, December 9). Governor of China's Xinjiang province accuses U.S. of hypocrisy over Uighur bill. *The Telegraph*. <https://www.telegraph.co.uk/news/2019/12/09/governor-chinas-xinjiang-province-accuses-us-hypocrisy-uighur/>. See also *Associated Press*. (2019, December 11). *China: Guantanamo report shows U.S. hypocrisy*. YouTube. <https://www.youtube.com/watch?v=zsHX2ffwdPs>. The 22 Uyghurs were captured in 2001. The U.S. transferred them from Guantánamo to third countries between 2006 and 2014. None had been charged with a crime. See Savage, C. (2013, December 31). U.S. Frees Last of the Chinese Uighur Detainees From Guantánamo Bay. *New York Times*. <https://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html>. Some of the released Uyghurs are still trying to be reunited with their families. See, Cecco, L. (2020, October 7). 'It breaks my heart': Uighurs wrongfully held at Guantánamo plead to be with families. *The Guardian*. <https://www.theguardian.com/us-news/2020/oct/07/uighur-men-guantanamo>.

Post-9/11 Abuses by U.S. Security Allies

Many of the countries that carry out enforced disappearances, unlawful indefinite detentions, torture, and fundamentally flawed trials in the name of national security are close U.S. counterterrorism allies. While in some cases, the U.S. has sought to curb these abuses, often to little avail, in others it has shown a willingness to overlook them.

Mass Detentions and Flawed Trials

In northeast Syria, the Kurdish-led Syrian Democratic Forces, which partnered with the U.S.-led International Coalition Against ISIS to rout ISIS from its so-called caliphate, has for more than 2.5 years held about 45,000 foreign ISIS suspects and family members in deeply degrading, life-threatening and in many cases inhumane conditions, with no access to courts to challenge the legality and necessity of their detention. Most of the foreigners are Iraqi while nearly 14,000 others are men, women, and children from nearly 60 countries as far flung as Australia, Canada, France, Egypt, Morocco, South Africa, Trinidad and Tobago, Tunisia, and the U.K. Of the non-Iraqi foreigners, nearly 12,000 are women and children held in locked camps, while the rest are men and boys held in severely overcrowded prisons.²⁰⁶ Only a few countries, including Russia, Kazakhstan, Tajikistan, and Uzbekistan, have brought home significant numbers of detainees.²⁰⁷ While there are no allegations that the detaining forces are conducting abuses of the kind that blighted the Bush presidency, the inaction of countries whose nationals are held in northeast Syria risks creating a Guantánamo 2.0 with an exponentially larger number of detainees, most of them children. Allies have for the most part ignored repeated calls by Washington for them to repatriate their nationals. Few have taken up the U.S. military's offers to help them do so.²⁰⁸

In Iraq, more than 50,000 people were detained as of September 2021 for links to ISIS or other terrorism-related charges and half were sentenced to death, according to the country's Ministry of Justice.²⁰⁹ At least 20,000 were detained since 2013.²¹⁰ The prisoners

²⁰⁶ Human Rights Watch. (2020). *"Bring Me Back to Canada": Plight of Canadians Held in Northeast Syria for Alleged ISIS Links*; Human Rights Watch (2021, March 23). *Thousands of Foreigners Unlawfully Held in NE Syria*. <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria#>.

²⁰⁷ Human Rights Watch. (2020). *"Bring Me Back to Canada": Plight of Canadians Held in Northeast Syria for Alleged ISIS Links*; Human Rights Watch (2021, March 23). *Thousands of Foreigners Unlawfully Held in NE Syria*. <https://www.hrw.org/news/2021/03/23/thousands-foreigners-unlawfully-held-ne-syria#>.

²⁰⁸ Ryan, M., & Loveluck, L. (2021, October 15). Biden administration attempts to overcome reluctance of nations to repatriate Islamic State fighters from Syria. *Washington Post*. https://www.washingtonpost.com/national-security/islamic-state-prisoners-repatriation/2021/10/15/f8e722b2-2a91-11ec-92bd-d2ffe8570c7d_story.html. See also Hooper, S. (2020, November 17). U.S. offers to repatriate foreign nationals held in northeast Syria. *Middle East Eye*. <https://www.middleeasteye.net/news/us-offers-repatriate-foreign-nationals-held-northeastern-syria>.

²⁰⁹ *Bas News*. (2021, September 6). Nearly 50,000 people in Iraqi prisons over suspected terrorism links. https://www.basnews.com/en/babat/711221?_cf_chl_jschl_tk__=pmd_9VK9rodKfKZc6zk5EPkVw5XYIukFglG8gsSs5sfG.Lc-1631001194-0-gqNtZGzNAeWjcnBszQi9.

²¹⁰ Human Rights Watch. (2017, December 5). *Iraq: Flawed Prosecution of ISIS Suspects*. <https://perma.cc/DY6A-NWB3>.

reportedly include more than 700 foreigners.²¹¹ Many defendants were reportedly detained because their names appeared on inaccurate wanted lists or because they were family members of listed suspects.²¹² The detainees include more than 900 children.²¹³ At least 280 of those convicted of terrorism had been executed as of January 2021.²¹⁴

Many defendants have been convicted of membership in or support for ISIS rather than for specific crimes.²¹⁵ Not one has been convicted of grave international crimes, for example for the mass conversions, sexual enslavement, and killings of Yazidis, which amount to war crimes and may be crimes against humanity or part of a genocide.²¹⁶

Defendants are often held incommunicado in inhuman conditions.²¹⁷ Defense lawyers' access to their clients' case files is severely restricted.²¹⁸ Convictions are largely based on secret testimony or confessions.²¹⁹ The courts can convict children as young as nine years old.²²⁰

Judges have routinely handed out life sentences or even the death penalty to lower-level foot soldiers or cooks, mechanics, and cleaners.²²¹ They have been observed issuing such sentences without first considering defendants' testimony that their confessions were

²¹¹ "The judiciary reveals the number of foreigners accused of terrorism during the current year," National Iraqi News Agency, (2018, December 31); "Foreigners Accused of Terrorism." Copy on file with authors.

²¹² Revkin, M. (2018). After the Islamic State: Balancing Accountability and Reconciliation in Iraq in *The Limits of Punishment: Transitional Justice and Violent Extremism* (p. 58). United Nations University; Human Rights Watch (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq* (p. 23).

²¹³ United Nations Assistance Mission in Afghanistan and Office of the United Nations High Commissioner for Human Rights. (2021, August). *Human Rights in the Administration of Justice in Iraq* (p. 6).

²¹⁴ Abdul-Zahra, Q. & George, S. (2018, March 21). Iraq holding more than 19,000 because of IS, militant ties. *Associated Press*. <https://perma.cc/K3Z9-AGWW>. France 24. (2021, January 25). *Iraq hangs three convicted of 'terrorism': security source*. <https://www.france24.com/en/live-news/20210125-iraq-hangs-three-convicted-of-terrorism-security-source>.

²¹⁵ Revkin, M. (2018). After the Islamic State: Balancing Accountability and Reconciliation in Iraq. In *The Limits of Punishment: Transitional Justice and Violent Extremism* (p. 55); Taub, B. (2018, December 24). Iraq's Post-ISIS Campaign of Revenge. *The New Yorker*. <https://perma.cc/PN5N-D8PV>; Human Rights Watch. (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq* (p. 27).

²¹⁶ Radhakrishnan, A. No Justice for Yazidi Women Yet: Why Not? *PassBlue*. <https://perma.cc/7MAG-9XHH>.

²¹⁷ McKernan, B. (2017, July 19). Shocking photos emerge of suspected Isis fighters held like battery chickens in overcrowded prison. *The Independent*. <https://www.independent.co.uk/news/world/middle-east/isis-fighters-prison-photos-crowded-chicken-factory-images-iraq-mosul-a7849686.html>.

²¹⁸ Taub, B. (2018, December 24). Iraq's Post-ISIS Campaign of Revenge. *The New Yorker*. <https://perma.cc/PN5N-D8PV>; United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights. (2021). *Human Rights in the Administration of Justice in Iraq* (pp. 12-13).

²¹⁹ Taub, B. (2018, December 24). Iraq's Post-ISIS Campaign of Revenge. *The New Yorker*. <https://perma.cc/PN5N-D8PV>; Human Rights Watch. (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq* (pp. 21, 31, 47-48, 50-51); Revkin, M. (2018). After the Islamic State: Balancing Accountability and Reconciliation in Iraq in *The Limits of Punishment: Transitional Justice and Violent Extremism* (p. 58).

²²⁰ Human Rights Watch. (2018, June 21). *Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials*. <https://perma.cc/XL86-ZPM8>.

²²¹ Human Rights Watch. (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq* (p. 30).

extracted through torture, or that their affiliation with ISIS was involuntary, or even their only way to survive in areas the group controlled.²²² Iraq has not prosecuted widely reported war crimes by Iraq armed forces and allied militia.²²³

Nigeria has held at least 6,500 Boko Haram suspects in military prisons, some for up to nine years without charge.²²⁴ The security forces also detained more than 3,600 children for months or years for alleged Boko Haram ties. The children were held incommunicado and often without charge in severely overcrowded and squalid detention centers, and have alleged that they were beaten and lacked enough food. Half of the children reportedly were released in 2019 and 2020.²²⁵

After years of inaction, the Nigerian authorities prosecuted more than 1,660 alleged Boko Haram members in three mass trials in 2017 and 2018, resulting in approximately 360 convictions. Most of the other cases were dismissed for lack of evidence, and scores were adjourned. Sentences ranged from 3 to 60 years in prison.²²⁶ The government has repeatedly postponed further prosecutions.

Federal High Court judges conducted the mass trials but in makeshift courts on a remote military base, making them inaccessible to victims and family members. Defendants described being held incommunicado in overcrowded military barracks for months or years without charge. They said torture was widespread and that some prisoners were dying of hunger, thirst, and inadequate medical care.²²⁷

Most of those convicted were lower-level suspects found guilty of membership or providing non-violent support to Boko Haram for acts such as repairing vehicles, washing clothes, supplying food, or failing to provide the government with information about the group despite the risks of reprisal.²²⁸

²²² Revkin, M. (2018). After the Islamic State: Balancing Accountability and Reconciliation in Iraq. In *The Limits of Punishment: Transitional Justice and Violent Extremism* (pp. 56-57); Taub, B. (2018, December 24). Iraq's Post-ISIS Campaign of Revenge. *The New Yorker*. <https://perma.cc/PN5N-D8PV>; Mironova, V. (2019). Who Are the ISIS People? *Perspectives on Terrorism* (pp. 32, 35). Terrorism Research Initiative. <https://perma.cc/Z8RX-SMBK>.

²²³ Human Rights Watch. (2017). *Flawed Justice: Accountability for ISIS Crimes in Iraq* (pp. 67-69).

²²⁴ Jimoh, A. (2018, April 25). 'G receives final report of Presidential committee on Boko Haram detainees. *Daily Trust*. <https://perma.cc/SD97-T29C>; Amnesty International. (2019). *Willingly Unable* (p. 17); Felbab-Brown, V. (2018). "In Nigeria, We Don't Want Them Back": Amnesty, Defectors' Programs, Leniency Measures, Informal Reconciliation, and Punitive Responses to Boko Haram. In *The Limits of Punishment* (p. 82).

²²⁵ Human Rights Watch. (2019, September 10). *Nigeria: Military Holding Children as Boko Haram Suspects*. <https://www.hrw.org/news/2019/09/10/nigeria-military-holding-children-boko-haram-suspects>; United Nations Security Council. (2020, December 11). *Public Statement by Chair of Security Council Working Group on Children and Armed Conflict*. <https://www.un.org/press/en/2020/sc14382.doc.htm>.

²²⁶ Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects*. <https://perma.cc/U5LW-C57Q>.

²²⁷ Amnesty International. (2019). *Willingly Unable* (p. 20).

²²⁸ International Criminal Court, Office of the Prosecutor. (2018, December 5). *Report on Preliminary Examination Activities 2018* (paras 216, 237-238); Human Rights Watch. (2018, September 17). *Nigeria:*

The courts lacked official interpreters and many defendants did not see a lawyer until the day of the trial.²²⁹ Convictions were based solely on coerced confessions.²³⁰ Proceedings lasted mere minutes.²³¹ Most charges lacked specific details, and judges at times failed to consider whether the accused had joined or supported Boko Haram involuntarily.²³² The courts ordered most of the defendants whose cases were dismissed to nevertheless undergo “rehabilitation” despite the lack of evidence against them.²³³ Only 10 members of the Nigerian military reportedly have been prosecuted for serious counterterrorism-related offenses.²³⁴

Nigerian soldiers and security agents have carried out rape and other acts of sexual violence against women and children detained for links to Boko Haram, including many who were abducted by the group, with no accountability. Soldiers reportedly have demanded sex from the women in exchange for food, soap, and other necessities, and the promise of freedom.²³⁵

In Somalia, intelligence agencies have held children incommunicado, beaten or threatened them, forced them to sign confessions, and denied them lawyers during trial if they suspect them of links to Al Shabab, even when the group abducted the children and forced them to fight.²³⁶

Egypt’s systematic counterterrorism abuses include mass detention and torture of civil society members in squalid prisons in the name of countering the Muslim Brotherhood, a group Egypt brands as terrorist; apparent extrajudicial executions disguised as shootouts with Muslim Brotherhood “terrorists”; war crimes against

Flawed Trials of Boko Haram Suspects. <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>.

²²⁹ Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects.*; Amnesty International. (2019). *Willingly Unable* (p. 5, 18-20).

²³⁰ Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects.* <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>; *Willingly Unable* (p. 19-20).

²³¹ Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects.* <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>; *Willingly Unable* (p. 20).

²³² Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects.* <https://www.hrw.org/news/2018/09/17/nigeria-flawed-trials-boko-haram-suspects>.

²³³ Human Rights Watch. (2018, September 17). *Nigeria: Flawed Trials of Boko Haram Suspects.* See also *Nigeria jails 45 Boko Haram suspects in mass trial held in secret.* (2017, October 13). *Reuters.* <<https://perma.cc/T4S7-V7DR>>; and BBC. (2018, February 19). *Nigeria's Boko Haram crisis: court frees 475 suspects.* <https://perma.cc/TC5R-N6R3>.

²³⁴ Amnesty International. (2019). *Willingly Unable* (p. 19).

²³⁵ Amnesty International. (2019, April 29). *Nigeria: Children and women face sexual violence in Borno prisons.* <https://www.amnesty.org/en/latest/news/2019/04/nigeria-children-and-women-face-sexual-violence-in-borno-prisons/>.

²³⁶ Bader, L. (2018). *“It’s Like We’re Always in a Prison”: Abuses Against Boys Accused of National Security Offenses in Somalia.* Human Rights Watch.

inhabitants of North Sinai, home to an ISIS affiliate; and executions of defendants following flawed mass terrorism trials.²³⁷

The Egyptian government's dismissal of basic rights extended to its abuse of a visiting American man whom its security forces arrested in 2013, apparently by mistake, in a crackdown on an anti-government sit-in. Despite repeated appeals from Washington to release the man, Egypt held him for more than five years without trial. A year after his conviction on bogus charges in a flawed mass trial, the man died in an Egyptian prison in 2020 after going on hunger strike.²³⁸

Abuses of Former Guantánamo Detainees

Despite diplomatic assurances between Washington and receiving governments for humane treatment, many foreign authorities have abused the men whom the U.S. transferred to third countries or their countries of nationality after detaining them for years without charge at Guantánamo.²³⁹

At least 19 men – one Russian and 18 Yemenis—whom the U.S. ostensibly transferred for “rehabilitation” to the United Arab Emirates between 2015 and 2017 have told family members that the Emiratis detained them without charge in undisclosed locations. The Yemeni men even said they preferred returning to Guantánamo to remaining in the UAE.²⁴⁰ In 2021, the UAE transferred the 18 Yemenis to their war-torn homeland, apparently against their will.²⁴¹ One of the men reportedly was so severely traumatized he did not recognize family members and once home fled, only to be kidnapped by the Houthis, an armed group fighting UAE-backed forces in Yemen.²⁴² The remaining man held by the UAE, a Muslim Tartar and former soldier and ballet dancer who fled Russia for fear

²³⁷ Human Rights Watch has extensively documented systematic abuse in Egypt. See, eMagdi, A. (2021, June 28) *Egypt's Execution Frenzy Has to Stop*. <https://www.hrw.org/news/2021/06/28/egypts-execution-frenzy-has-stop>; (2021, September 7). *Egypt: 'Security Forces Dealt with Them': Suspicious Killings and Extrajudicial Executions by Egyptian Security Forces*; and (2019, May 28). *Egypt: Serious Abuses, War Crimes in North Sinai*. <https://www.hrw.org/news/2019/05/28/egypt-serious-abuses-war-crimes-north-sinai>.

²³⁸ The detained U.S. citizen was Mustafa Kassem. See Epstein, E. (2020, February 13). *Guantanamo's Ugly Taint on U.S. Diplomacy*. *Just Security*. <https://www.justsecurity.org/68642/guantanamos-ugly-taint-on-u-s-diplomacy>.

²³⁹ See, Baker, S. (2021, November 23). 'I'm Living in Guantanamo 2.0': Former Prisoner Says His Life Is Still Hell After Release. *Military.com*. <https://www.military.com/daily-news/2021/11/23/im-living-guantanamo-20-former-prisoner-says-his-life-still-hell-after-release.html/>.

²⁴⁰ Michael, M. (2020, October 22). *Sent from Gitmo to UAE, detainees fear final stop: Yemen*. *AP News*. <https://apnews.com/article/afghanistan-united-arab-emirates-prisons-taliban-only-on-ap-d5e8096a268e842c6e32d8b41a9e2f16>.

²⁴¹ The UAE sent the first six Yemenis home in July. See Magdy, S. (2021, July 31). *UAE sends 6 Gitmo detainees to Yemen amid concerns*. *AP News*. <https://apnews.com/article/joe-biden-middle-east-africa-yemen-d77ecfc5cc02de4bd49618765eda0777>; MacDougall, C. (2021, July 20). *The UAE sent the other 18 Yemenis home in October*. Adayfi, M. (2021, November 29). *Yemeni former Guantanamo detainee disappears day after release*. *Middle East Monitor*. <https://www.middleeastmonitor.com/20211127-yemeni-former-guantanamo-detainee-disappears-day-after-release/>.

²⁴² Magdy, S. *AP News*; MacDougall, C. *AP News*; Adayfi, M. *Middle East Monitor*.

of persecution, reportedly faces forcible repatriation to Russia despite grave risks of abuse there.²⁴³

In 2021 several UN independent human rights experts called on the UAE to not forcibly repatriate the Russian and Yemeni detainees, noting that they face “a risk of torture and ill-treatment” in their countries of origin.²⁴⁴

Men repatriated from Guantánamo have also been treated harshly by authorities in their countries of nationality. Mohamedou Ould Slahi of Mauritania, for example, was repatriated from Guantánamo in 2016 after the U.S. held him for more than 14 years without charge. Under reported pressure from the U.S., Mauritania for three years refused to provide Slahi with a passport he had sought to travel abroad for medical treatment.²⁴⁵ Slahi suffered from back pain resulting from an operation at Guantánamo.²⁴⁶

Few Consequences for Allies’ Abuses

Successive U.S. presidents since 9/11 have further lowered the bar for other countries by making tepid attempts at best to impose consequences for counterterrorism allies’ abuses. The U.S. continues to provide well over \$1 billion annually in aid to Egypt, nearly all of it security assistance, and senior officials have largely refrained from robust condemnations of President Abdel Fattah al-Sisi although he has ushered in the country’s worst human rights abuses in decades. In September 2021 the Biden administration froze \$130 million in aid until Egypt meets certain—undisclosed—human rights benchmarks, far short of the freeze of up to \$300 million that Congress had approved.²⁴⁷

²⁴³ Guantanamo Detainee Doesn’t Want to Be Sent Home to Russia Because It’s Too Dangerous. *The Daily Beast*. <https://www.thedailybeast.com/ravil-mingazov-former-guantanamo-detainee-doesnt-want-to-be-sent-home-to-russia-because-its-too-dangerous>.

²⁴⁴ United Nations Human Rights Office of the High Commissioner. (2021, July 2). *UAE: UN experts condemn forced return of ex-Guantanamo inmate to Russia despite torture risk*. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27255&LangID=E>. Abuse of terrorism suspects and Guantánamo detainees in Yemen and Russia is well documented. See, the Human Rights Watch reports Tayler, L. (2019). *No Direction Home: Returns from Guantánamo to Yemen*, Human Rights Watch; and Bogart, C. (2007). *The “Stamp of Guantánamo:” The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States*.

²⁴⁵ Rahman, A. (2021, April 4). Guantánamo’s cruelty is medieval. It’s a horror story. And it’s true. *Middle East Monitor*. <https://www.middleeastmonitor.com/20210404-guantanamos-cruelty-is-medieval-its-a-horror-story-and-its-true/>.

²⁴⁶ Human Rights Watch. (2019, June 13). *Mauritania: Allow Ex-Guantanamo Detainee to Travel*. <https://www.hrw.org/news/2019/06/13/mauritania-allow-ex-guantanamo-detainee-travel#>.

²⁴⁷ Editorial Board. (2021, November 10). Biden fails to deliver his promised hard line on Egypt’s abuses (editorial). *Washington Post* <https://www.washingtonpost.com/opinions/2021/11/10/biden-fails-deliver-his-promised-hard-line-egypts-dictator/>. See also Project for Middle East Democracy. (2021, November 23). Joint Letter - Biden Administration’s U.S.-Egypt Strategic Dialogue was a Human Rights Failure. <https://pomed.org/joint-letter-biden-administrations-u-s-egypt-strategic-dialogue-was-a-human-rights-failure>.

In contrast to the Trump White House, the Biden administration has called out Saudi Arabia on its deplorable human rights record, which also includes unlawful detentions and torture of activists and others falsely labeled terrorism suspects, and flawed mass terrorism trials and executions.²⁴⁸ Notably, it also has temporarily frozen a large sale of offensive weapons to Riyadh over human rights concerns. But in November it approved \$650 million in missiles and missile launchers to the kingdom for “defensive purposes.”²⁴⁹ Moreover, the U.S. has sidestepped calls for sanctions against the de facto Saudi leader, Crown Prince Mohammed bin Salman, notwithstanding a U.S. intelligence assessment that he approved the killing of the journalist Jamal Khashoggi.²⁵⁰

Torture as a Boon to Armed Extremist Groups

Islamist armed groups have also profited from U.S. abuses since 9/11, making these practices not only unconscionable and unlawful but also counterproductive. ISIS has used these abuses as a propaganda tool to both lure recruits and justify its own abhorrent acts, for example by putting hostages from the U.S. and other countries in orange jumpsuits, such as those worn by prisoners at Guantánamo, before executing them.²⁵¹

As a group of U.S. security, intelligence, and interrogation professionals wrote in a joint statement upon the release of the Torture Report summary, torture can “serve as a foundational theme for recruiting campaigns designed to attract others to violent extremism” and “invites reciprocity” by armed groups holding U.S. captives. For those being subjected to abuse, “[t]orture and other forms of abusive or coercive techniques often serves to strengthen an individual’s resolve to resist [and] deepen his commitment to a cause,” they said.²⁵²

²⁴⁸ Blinken speaks to Saudi minister, repeats U.S. call for rights progress. (2021, August 9). *Reuters*. <https://www.reuters.com/world/middle-east/blinken-speaks-saudi-minister-repeats-us-call-rights-progress-2021-08-09/>.

²⁴⁹ U.S. Congress allows Saudi Arabia weapons sale to proceed. (2021, December 8). *Al Jazeera* <https://www.aljazeera.com/news/2021/12/8/us-congress-allows-weapons-saudi-arabia-weapons-sale-to-proceed>.

²⁵⁰ Gardner, F. (2021, July 14). *Khashoggi murder: U.S. softens towards Saudi leader*. *BBC*. <https://www.bbc.com/news/world-middle-east-57760786>. For information on Saudi Arabia’s abuses of detainees see, e.g., Human Rights Watch. (2021, July 11). *Saudi Arabia: New Details of Alleged Torture Leaked*. <https://www.hrw.org/news/2021/07/11/saudi-arabia-new-details-alleged-torture-leaked>; Human Rights Watch. (2021, May 23). *Saudi Arabia: Repression Rages on Despite Releases*. <https://www.hrw.org/news/2021/05/23/saudi-arabia-repression-rages-despite-releases>. For information on executions for terrorism see, e.g., *Associated Press*. (2021, June 15). *Saudi Arabia Executes Man Accused of Participating in a Rebellion*. <https://www.voanews.com/middle-east/saudi-arabia-executes-man-accused-participating-rebellion>.

²⁵¹ See, Islamic State releases video depicting another beheading. (2014, September 2). *Reno Gazette Journal*. <https://www.rgj.com/story/news/2014/09/02/islamic-state-video-beheading/14971295/>.

²⁵² See, Human Rights First. (2014, October 1). *Statement of National Security, Intelligence, and Interrogation Professionals*. <http://www.humanrightsfirst.org/resource/statement-national-security-intelligence-and-interrogation-professionals>.

To be sure, a range of reasons, many unrelated to U.S. acts or policies, have compelled people to join armed groups such as Al Qaeda, ISIS, Boko Haram and Al Shabab. But abuses by U.S. forces have undoubtedly fueled grievances within marginalized Muslim communities and contributed to the Islamist armed extremist narrative that the U.S. and its Western allies are waging a crusade against Muslims.²⁵³

“Perceived U.S. abuses of and lack of due process for detainees at Abu Ghraib and Guantanamo Bay” remains “a key driver” of foreign terrorist fighters to Iraq and is “undermining international confidence in the United States’ ability to conduct an effective war on terrorism that remains true to American values,” a confidential U.S. diplomatic cable warned as far back as 2006.²⁵⁴

Torture is also ineffective, prompting its victims to say anything, even if it is false, to get their torturers to stop the pain.²⁵⁵ As the declassified summary of the Torture Report notes, at no time did the CIA’s coercive interrogation techniques produce intelligence of an imminent threat. Rather, according to the CIA’s own memos, those held in CIA black sites in response to 9/11 who provided significant accurate intelligence did so prior to or without having been subjected to “enhanced interrogation techniques.” Conversely, multiple CIA detainees fabricated information under and following torture, resulting in faulty intelligence including on critical issues such as terrorist threats.²⁵⁶

Recommendations

It is not too late for the U.S. to mitigate some of the damage from its unlawful detentions, torture, and other violations of the rights of both victims and suspects. The Biden administration should promptly implement measures aimed at ending crimes and violations perpetrated under the rubric of the War on Terror, including unlawful air strikes and raids that kill or injure civilians both in and out of recognized war zones. Those reforms should include increasing transparency and accountability when operations go awry.

Biden should stand firm on his vow to close the U.S. prison at Guantánamo and end the deeply flawed military commissions system. He should send the prisoners who cannot

²⁵³ Human Rights First. (2017). *Al Qaeda and ISIS Use of Guantanamo Bay Prison in Propaganda and Materials*; Johnson, D. & Mora, A, and Schmidt, A. (2016). *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America.* *Foreign Affairs*; Sengupta, S. & Masood, S. (2005, May 21). Guantánamo Comes to Define U.S. to Muslims. *New York Times*. <https://www.nytimes.com/2005/05/21/world/asia/guantanamo-comes-to-define-us-to-muslims.html>.

²⁵⁴ Regional CT Strategy for Iraq and its Neighbors: Results and Recommendations from March 7-8 Com Meeting. (2006, March 18). *Wikileaks*, para 8(a). https://wikileaks.org/plusd/cables/06KUWAIT913_a.html.

²⁵⁵ See, e.g., United Nations Human Rights Office of the High Commissioner. (2017, October 11). *Torture during interrogations – Illegal, immoral and ineffective.* <https://www.ohchr.org/EN/NewsEvents/Pages/TortureDuringInterrogations.aspx>; and “Torture does not work.” (2017). *Nature Human Behavior* 1, 0077. <https://www.nature.com/articles/s41562-017-0077.pdf>.

²⁵⁶ *Torture Report*. “Findings and Conclusions.” (pp. 2-3).

be prosecuted home—or to third countries should repatriation present risks of torture or other ill-treatment. The president should press Congress to lift the ban on transferring the rest to the U.S. for prosecution in federal courts without using torture-tainted evidence, and, for those convicted, to serve their sentences in federal prisons.

If he cannot garner sufficient support from Congress, Biden should use his executive authority to empower the Justice Department to pursue plea agreements in federal courts, through videoconferencing if necessary. In addition, Biden should declassify the RDI program as well as the entire Torture Report, redacting only what is strictly necessary to protect national security, to help provide a full public accounting. Biden should provide redress and rehabilitative services for victims. The President should also acknowledge wrongdoing and apologize to victims of torture and other unlawful practices.

Furthermore, Biden should direct the attorney general to appoint a special prosecutor to conduct a thorough, independent, and credible investigation into U.S. government detention practices and interrogation methods since 9/11, with an eye toward prosecutions. The investigation should examine the role of U.S. officials, no matter their position or rank, who participated in, authorized, ordered, or had command responsibility for torture or ill-treatment and other unlawful detention practices, including enforced disappearance and rendition to torture.

The U.S. Congress should create an independent, impartial commission to investigate enforced disappearances, extraordinary renditions, torture, and other abuses of detainees in U.S. custody since 9/11. Such a commission should hold hearings, have full subpoena power, compel the production of evidence, and have authority to recommend appointing a special prosecutor to investigate possible criminal offenses, if the attorney general has not yet opened such an investigation.

Judicial authorities in other countries should exercise universal jurisdiction, or other forms of jurisdiction as provided under international and domestic law, to prosecute nationals from the U.S. or elsewhere alleged to be involved in serious international crimes against detainees since 9/11. Governments that participated in the RDI program should also ensure impartial and independent criminal investigations into the roles of their own nationals and prosecute those implicated in crimes.

Unless it conducts genuine investigations domestically, the U.S. should encourage inclusion of abuses by U.S. nationals in the International Criminal Court's investigation of grave crimes in Afghanistan.

While these steps will be politically challenging, they are the only option, should the U.S. wish to uphold the rule of law and its proclaimed values, and protect fundamental rights including the right to life. The only victors in maintaining the status quo are governments seeking justification for unlawful practices in the name of security, and groups like Al Qaeda, ISIS, and their offshoots, which point to U.S. abuses to underscore their narrative that the West is at war with Islam.