INTERROGATION OR EXPERIMENTATION? ASSESSING NON-CONSENSUAL HUMAN EXPERIMENTATION DURING THE WAR ON TERROR

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The prohibition against non-consensual human experimentation has long been considered sacrosanct. It traces its legal roots to the Nuremberg trials although the ethical foundations dig much deeper. It prohibits all forms of medical and scientific experimentation on non-consenting individuals. The prohibition against non-consensual human experimentation is now well established in both national and international law.

Despite its status as a fundamental and non-derogable norm, the prohibition against non-consensual human experimentation was called into question during the War on Terror by the CIA's treatment of "high-value detainees." Seeking to acquire actionable intelligence, the CIA tested the "theory of learned helplessness" on these detainees by subjecting them to a series of enhanced interrogation techniques.

This Article revisits the prohibition against non-consensual human experimentation to determine whether the CIA's treatment of detainees violated international law. It examines the historical record that gave rise to the prohibition and its eventual codification in international law. It then considers the application of this norm to the CIA's treatment of high-value detainees by examining Salim v. Mitchell*, a lawsuit brought by detainees who were subjected to enhanced interrogation techniques. This Article concludes that the CIA breached the prohibition against non-consensual human experimentation when it conducted systematic studies on these detainees to validate the theory of learned helplessness.*

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I. INTRODUCTION

The attacks of September 11, 2001 killed thousands of innocent people. In response, the United States began military operations in Afghanistan and counter-terrorism operations throughout the world. The attacks and the subsequent response eventually created a counter-terrorism regime that still exists seventeen years later, and one that will likely continue for decades.[1] This counter-terrorism regime opened previously-closed debates on human rights.[2] It contested the role of civil liberties in democratic societies. It raised questions about the proper treatment of detainees. It challenged basic assumptions about the prohibitions against torture and other cruel, inhuman,

1. *See generally* ROSA BROOKS, HOW EVERYTHING BECAME WAR AND THE MILITARY BECAME EVERYTHING: TALES FROM THE PENTAGON (2016); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS (2008).

2. *See generally* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008); LOUISE DOSWALD-BECK, HUMAN RIGHTS IN TIMES OF CONFLICT AND TERRORISM (2011); HELEN DUFFY, THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW (2d ed. 2015); LESSONS AND LEGACIES OF THE WAR ON TERROR: FROM MORAL PANIC TO PERMANENT WAR (Gershon Shafir et al. eds., 2012); RIGHTS VS. PUBLIC SAFETY AFTER 9/11: AMERICA IN THE AGE OF TERRORISM (Amitai Etzioni & Jason H. Marsh eds., 2003); JAMES RISEN, PAY ANY PRICE: GREED, POWER, AND ENDLESS WAR (2014).

or degrading treatment. And it caused the United States to revisit the prohibition against non-consensual human experimentation.[3]

The prohibition against non-consensual human experimentation has long been considered sacrosanct.[4] It traces its legal roots to the Nuremberg trials, although the ethical foundations dig much deeper. It prohibits all forms of medical and scientific experimentation on human beings without informed consent. The prohibition against non-consensual human experimentation is now well-established under national and international law.[5] Indeed, its status as a customary norm of international law is evidenced in an overwhelming number of sources.[6]

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3. Non-consensual human experimentation during the War on Terror has been subject to extensive analysis by the medical profession. *See, e.g.*, SARAH DOUGHERTY, PHYSICIANS FOR HUMAN RIGHTS, NUREMBERG BETRAYED: HUMAN EXPERIMENTATION AND THE CIA TORTURE PROGRAM (Claudia Rader ed., 2017); DAVID H. HOFFMAN ET AL., SIDLEY AUSTIN LLP, REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION: INDEPENDENT REVIEW RELATING TO APA ETHICS GUIDELINES, NATIONAL SECURITY INTERROGATIONS, AND TORTURE (2015); STEPHEN SOLDZ ET AL., ALL THE PRESIDENT'S PSYCHOLOGISTS: THE AMERICAN PSYCHOLOGICAL ASSOCIATION'S SECRET COMPLICITY WITH THE WHITE HOUSE AND US INTELLIGENCE COMMUNITY IN SUPPORT OF THE CIA'S "ENHANCED" INTERROGATION PROGRAM (2015). Non-consensual human experimentation has also been examined by the legal profession. *See, e.g.,* M. Gregg Bloche, *Interrogation Medicine?*, *in* LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES 354 (Michael Freeman et al. eds., 2014); M. Gregg Bloche, *Toward a Science of Torture?*, 95 TEX. L. REV. 1329 (2017); David Brennan, *Torture of Guantánamo Detainees with the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005 (2011); Jeffrey S. Kaye, *Isolation, Sensory Deprivation, and Sensory Overload: History, Research, and Interrogation Policy, from the 1950s to the Present Day,* 66 GUILD PRAC. 2 (2009); Jonathan H. Marks, *Doctors as Pawns? Law and Medical Ethics at Guantanamo Bay*, 37 SETON HALL L. REV. 711 (2007); Eric Merriam, *Legal But Unethical: Interrogation and Military Health Professionals*, 11 IND. HEALTH L. REV. 123 (2014); STEVEN H. MILES, OATH BETRAYED: TORTURE, MEDICAL COMPLICITY, AND THE WAR ON TERROR (2006); James Risen, *Report Finds Collaboration over Torture*, N.Y. TIMES, May 1, 2015, at A1.

4. *See generally* REBECCA DRESSER, SILENT PARTNERS: HUMAN SUBJECTS AND RESEARCH ETHICS (2016); ROBERT L. KLITZMAN, THE ETHICS POLICE? THE STRUGGLE TO MAKE HUMAN RESEARCH SAFE (2015); VICKI ORANSKY WITTENSTEIN, FOR THE GOOD OF MANKIND?: THE SHAMEFUL HISTORY OF HUMAN MEDICAL EXPERIMENTATION (2013); RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT (1986).

5. *See infra* Part II.

6. Scholars have addressed various aspects of human experimentation in the context of international law. *See, e.g.*, Sara Louise Dominey, *Ebola, Experimental Medicine, Economics, and Ethics: An Evaluation of International Disease Outbreak Law*, 44 GA. J. INT'L & COMP. L. 133 (2015); Kristen Farrell, *Human Experimentation in Developing Countries: Improving International Practices by Identifying Vulnerable Populations and Allocating Fair Benefits*, 9 J. HEALTH CARE L. & POL'Y 136 (2006); Kevin M. King, *A Proposal for the Effective International Regulation of Biomedical Research Involving Human Subjects*, 34 STAN. J. INT'L L. 163 (1998); Adam H. Laughton, *Somewhere to Run, Somewhere to Hide?: International Regulation of Human Subject Experimentation*, 18 DUKE J. COMP. & INT'L L. 181 (2007); John Lunstroph, *Regulating the Research Enterprise: International Norms and the Right to Bodily Integrity in Human Experiment Litigation*, 23 ISSUES L. & MED. 141 (2007); Benjamin Mason Meier, *International Criminal Prosecution of Physicians: A Critique of Professors Annas and Grodin's Proposed International Medical Tribunal*, 30 AM. J.L. & MED. 419 (2004); Benjamin Mason

Despite its status as a fundamental and non-derogable norm, the prohibition against non-consensual human experimentation was called into question during the War on Terror by the Central Intelligence Agency's (CIA) treatment of "high-value detainees" held in its Rendition, Detention, and Interrogation Program (RDI Program).[7] Soon after the 9/11 attacks, the CIA determined it needed to develop an interrogation program for captured Al-Qaeda operatives.[8] Two psychologists working with the CIA proposed testing the theory of learned helplessness on high-value detainees. The theory of learned helplessness posits that individuals who are conditioned to be passive and depressed in response to adverse treatment will be more likely to cooperate with interrogators.[9] If properly executed, the CIA believed the theory could be used in the RDI Program to promote cooperation by detainees. Working with the two psychologists, the CIA developed a set of "enhanced interrogation techniques" that were then used to test the theory on detainees.[10] In the CIA's study, the detainees' degree of cooperation represented the study's dependent variable, and each interrogation technique served as a distinct independent variable.[11]

The CIA began testing the theory on Abu Zubaydah, an alleged high-ranking Al-Qaeda operative, who was captured in Pakistan on March 28, 2002.[12] Zubaydah was subjected to several enhanced interrogation techniques, including waterboarding, stress positions, wall standing, and sleep deprivation.[13] Each interrogation session was carefully designed, executed, recorded, and studied. The CIA continued testing the theory on

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Meier, *International Protection of Persons Undergoing Medical Experimentation: Protecting the Right of Informed Consent*, 20 BERKELEY J. INT'L L. 513 (2002).

7. *See infra* Part III. The RDI Program was established after 9/11 to capture and detain suspected terrorists.

8. *See* JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 181–202 (2014); JOSE A. RODRIGUEZ, JR., HARD MEASURES: HOW AGGRESSIVE CIA ACTION AFTER 9/11 SAVED AMERICAN LIVES (2013); GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA'S TIME OF CRISIS (2008); *see* S. REP. NO. 113-288, at 11 (2014) [hereinafter SSCI REPORT].

9. *See* Maria Konnikova, *Trying to Cure Depression, But Inspiring Torture*, THE NEW YORKER, Jan. 14, 2015; Jane Mayer, *The Experiment*, THE NEW YORKER, July 11, 2005; Martin Seligman & Tamsin Shaw, *"Learned Helplessness" & Torture: An Exchange*, N.Y. REV. OF BOOKS, Apr. 21, 2016, at 60; Tamsin Shaw, *The Psychologists Take Power*, N.Y. REV. OF BOOKS, Feb. 25, 2016, at 38. The seminal work on the theory of learned helplessness was performed by Martin Seligman. *See* Lyn Y. Abramson & Martin E.P. Seligman, *Learned Helplessness in Humans: Critique and Reformulation*, 87 J. AB. PSYCH. 49, 49–70 (1978); Martin E. Seligman & Steven Maier, *Failure to Escape Traumatic Shock*, 74 J. EXPER. PSYCH. 1, 1–9 (1967).

10. SSCI REPORT, *supra* note 8, at 21, 32–34.

11. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY 77, 107–09 (1994) (describing the distinction between dependent and independent variables).

12. SSCI REPORT, *supra* note 8, at 46. The CIA subsequently determined Zubaydah was not a member of Al Qaeda. *Id.* at 410.

13. *Id.* at 40–46.

dozens of other high-value detainees, with further adjustments made as a result of extensive observations by medical and psychological personnel.[14]

This Article revisits the prohibition against non-consensual human experimentation and considers its applicability to the CIA's treatment of detainees.[15] Part II examines the development of the prohibition against non-consensual human experimentation. It begins with a review of the Nuremberg trials and examines subsequent efforts to codify the norm in international law. Based on this historical record, it then offers a clear definition of the prohibition against non-consensual human experimentation. Part III of this Article reviews the development and implementation of the CIA's RDI Program and the application of the theory of learned helplessness on detainees. While dozens of detainees were subjected to enhanced interrogation techniques, this section focuses on the CIA's treatment of Abu Zubaydah. Part IV then examines the groundbreaking case of *Salim v. Mitchell*, which involved a civil lawsuit filed against the two psychologists who developed the CIA interrogation program. Finally, Part V critically examines the RDI Program and its use of enhanced interrogation techniques to determine whether the CIA violated the prohibition against non-consensual human experimentation. Briefly stated, it did.[16]

II. REVISITING THE HISTORICAL RECORD

Human experimentation has existed for centuries.[17] And yet, formal standards requiring the informed consent of human subjects were neither

14. One of the two psychologists who developed and helped implement the enhanced interrogation techniques subsequently wrote a detailed account of his experiences. JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA (2016). A preliminary draft of the book identified James Mitchell as the "architect of the CIA interrogation program." In fact, a high-ranking CIA official acknowledged that Mitchell was "the architect of the CIA interrogation program." Rodriguez Dep. 53, March 7, 2017, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

15. Non-consensual human experimentation can also be classified as a discrete form of torture or other cruel, inhuman, or degrading treatment. It can also be designated as a war crime or crime against humanity. This Article examines the prohibition against non-consensual human experimentation and its consideration as a distinct violation of international law. *See generally* M. Cherif Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J. CRIM. L. & CRIMINOLOGY 1597 (1981).

16. The CIA has denied this allegation. According to an agency spokesperson, "[t]he C.I.A. did not, as part of its past detention program, conduct human subject research on any detainee or group of detainees. The entire detention effort has been the subject of multiple, comprehensive reviews within our government, including by the Department of Justice." James Risen, *Medical Ethics Lapses Cited in Interrogations*, N.Y. TIMES, June 7, 2010, at A6.

17. *See generally* ANDREW GOLISZEK, IN THE NAME OF SCIENCE: A HISTORY OF SECRET PROGRAMS, MEDICAL RESEARCH, AND HUMAN EXPERIMENTATION xi-xii (2003); SUSAN LEDERER, SUBJECTED TO SCIENCE: HUMAN EXPERIMENTATION IN AMERICA BEFORE THE SECOND WORLD WAR (1995); Jay Katz, *Human Sacrifice and Human Experimentation: Reflections at Nuremberg*, 22 YALE J.

required nor even common. Experiments were routinely performed on individuals who were unaware they were human subjects. While the ethical norms of the medical profession counseled physicians to "do no harm," these norms often failed to prevent harmful experiments on human subjects.[18] In fact, the norm against non-consensual human experimentation was not formally recognized by the international community until after the Second World War.[19] The historical record makes clear the norm developed in response to the medical and scientific experiments conducted by Nazi Germany.

A. The Nuremberg Trials

During the Second World War, German doctors and scientists conducted medical and scientific experiments on prisoners of war and other detainees.[20] These experiments were most often performed in concentration and extermination camps, including Auschwitz and Dachau, and were meant to aid the German war effort.[21] Some tests sought to improve medical care by trying new techniques on detainees. Other tests sought new treatment options for diseases. Thousands of individuals, including children, were subjected to horrific experiments. Along with the systematic extermination of Jews, gypsies, persons with disabilities, and other perceived "undesirables," the human experimentation performed by the Nazi regime during the Second World War represents one of the darkest moments in human history.

Human experimentation was first addressed by the International Military Tribunal at Nuremberg (IMT), which was convened to prosecute twenty-two leading Nazi military and political leaders. The IMT Charter listed three principal crimes: crimes against peace, war crimes, and crimes

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INT'L L. 401 (1997); Jochen Vollmann & Rolf Winau, *Informed Consent in Human Experimentation Before the Nuremberg Code*, 313 BR. MED. J. 1445 (1996).

18. *See generally* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 338–44 (2d ed. 1999); SHEILA A.M. MCLEAN, FIRST DO NO HARM: LAW, ETHICS AND HEALTH CARE (2006); Matthew Walter, *First, Do Harm*, 482 NATURE 148 (2012).

19. *See* SIR NIGEL RODLEY & MATT POLLARD, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 412–15 (3d ed. 2009); SHELDON RUBENFELD & SUSAN BENEDICT, HUMAN SUBJECTS RESEARCH AFTER THE HOLOCAUST (2014); George J. Annas, *The Legacy of the Nuremberg Doctors' Trial to American Bioethics and Human Rights*, 10 MINN. J.L. SCI. & TECH. 19, 20–23 (2009).

20. *See generally* ROBERT JAY LIPTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1988); ULF SCHMIDT, JUSTICE AT NUREMBERG: LEO ALEXANDER AND THE NAZI DOCTOR'S TRIAL (Richard Clogg ed., 2004); PAUL JULIAN WEINDLING, NAZI MEDICINE AND THE NUREMBERG TRIALS: FROM MEDICAL WAR CRIMES TO INFORMED CONSENT (2004).

21. *See generally* HORST H. FREYHOFER, THE NUREMBERG MEDICAL TRIAL: THE HOLOCAUST AND THE ORIGIN OF THE NUREMBERG MEDICAL CODE (Frank J. Coppa ed., 2004); PAUL WEINDLING, VICTIMS AND SURVIVORS OF NAZI HUMAN EXPERIMENTS: SCIENCE AND SUFFERING IN THE HOLOCAUST (2015).

against humanity. Count Three of the Indictment, issued on October 6, 1945, classified the scientific and medical experiments conducted by Nazi Germany as war crimes.[22] In his Opening Statement to the IMT, Justice Robert Jackson referenced the horrific experiments performed at Dachau, stating that "[h]ere Nazi degeneracy reached its nadir."[23] During the trial, the prosecution presented testimony and evidence of medical experimentation performed by Nazi Germany during the war. The Final Judgment of the Tribunal held that these experiments constituted murder and ill-treatment of both civilians and prisoners of war and were, therefore, war crimes.[24]

While the IMT addressed human experimentation, it did not conduct a full review of these claims. A full accounting of the human experimentation program would occur in subsequent military proceedings established under Control Council Law No. 10 by the Allied Powers.[25] Indeed, the United States determined that the first proceedings by a U.S. military tribunal would examine the role of the medical profession in the atrocities committed during the war.[26]

In *United States v. Brandt*, a U.S. military tribunal considered the criminal responsibility of several German doctors and other government officials who conducted medical and scientific experiments on non-consenting prisoners.[27] The twenty-three defendants were charged with committing crimes against humanity and war crimes. Specifically, Count Two of the Indictment charged the defendants with war crimes for conducting numerous forms of human experimentation on prisoners held in concentration camps, extermination camps, and medical facilities. Count Three charged the defendants with crimes against humanity for the same acts. The experiments conducted by the defendants on human beings included: high altitude experiments, hypothermia experiments, malaria

22. International Military Tribunal, Indictment Number 1, *in* 1 NAZI CONSPIRACY & AGGRESSION 13, 33–34 (1946). Count Four of the Indictment, which addressed crimes against humanity, incorporated many of the charges set forth in Count Three, which addressed war crimes.

23. Justice Robert H. Jackson, *Opening Address for the United States*, (Nov. 21, 1945) *in* 1 NAZI CONSPIRACY & AGGRESSION 114 (1946).

24. NAZI CONSPIRACY & AGGRESSION: OPINION AND JUDGMENT 61, 81–82 (1946). The Tribunal also classified the SS (Schutzstaffel) as a criminal organization in light of its complicity in human experimentation committed during the war. *Id*. at 98–100.

25. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945) *in* 3 Official Gazette Control Council for Germany 50–55 (1946).

26. *See generally* KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 50–53, 85–87 (2011); KIM CHRISTIAN PRIEMEL, THE BETRAYAL: THE NUREMBERG TRIALS AND GERMAN DIVERGENCE 245–55 (2016).

27. *See generally* Military Tribunal No. 1, *in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949). The case is also referred to as the Medical Case or the Doctors' Case.

experiments, jaundice experiments, typhus experiments, seawater experiments, mustard gas experiments, poison experiments, sulfanilamide experiments, incendiary gas experiments, and sterilization experiments.[28]

In his Opening Statement to the tribunal, U.S. prosecutor Telford Taylor acknowledged the defendants who committed these despicable crimes were professionals who acted "in the name of medical science."[29]

> They are not ignorant men. Most of them are trained physicians and some of them are distinguished scientists. Yet these defendants, all of whom were fully able to comprehend the nature of their acts, and most of whom were exceptionally qualified to form a moral and professional judgment in this respect, are responsible for wholesale murder and unspeakably cruel tortures.[30]

Taylor also emphasized the importance of promoting accountability for such acts and the need for an historical record "so that no one can ever doubt that they were fact and not fable . . . ."[31]

The trial lasted over seven months. Thousands of documents were submitted, and numerous witnesses testified at the trial.[32] Several prominent doctors and scientists testified on behalf of the prosecution about the requirements for medical and scientific research and the legality of non-consensual human experimentation.[33] They discussed the importance of seeking a subject's knowing and voluntary consent and that this was a necessary condition for human experimentation. They also addressed a doctor's obligation to minimize a subject's physical and mental suffering in any experiment.[34]

In its final judgment, the tribunal acknowledged the systematic nature of human experimentation in Nazi Germany.

> These experiments were not the isolated and casual acts of individual doctors and scientists working solely on their own responsibility, but were the product of coordinated policy-making and planning at high governmental, military, and Nazi Party levels, conducted as an integral part of the total war effort. They were ordered, sanctioned, permitted, or approved by persons in positions of authority who under all principles of

28. *Id*. at 11–16.

29. *Id*. at 27.

30. *Id*. at 28.

31. *Id*. at 27.

32. *See id*. at 92–909.

33. Military Tribunals No. 1, *in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 80–86 (1949) [hereinafter Brandt II].

34. During the trial, the defendants argued that U.S. medical practice also engaged in human experimentation without informed consent. HELLER, *supra* note 26, at 85-87; PRIEMEL, *supra* note 26, at 250-55.

> law were under the duty to know about these things and to take steps to terminate or prevent them.[35]

The tribunal determined these experiments were conducted on individuals who did not consent. "In no case was the experimental subject at liberty of his own free choice to withdraw from any experiment."[36] The tribunal also determined that the experiments caused extraordinary suffering. "In every one of the experiments the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death, either as a direct result of the experiments or because of lack of adequate follow-up care."[37] For these reasons, the tribunal concluded that the claims of non-consensual human experimentation constituted both crimes against humanity and war crimes.[38]

Sixteen defendants were found guilty, and seven were acquitted. The defendants who were found guilty were sentenced to death, life imprisonment, or prison terms ranging from ten to twenty-five years.[39] The U.S. Supreme Court declined to consider the defendants' petition for review, and the death sentences were implemented shortly after the Court's ruling.[40]

The U.S. military tribunal's decision in *Brandt* is particularly significant because the court acknowledged that basic principles must be observed in human experimentation. In particular, the tribunal enunciated a set of ten principles to satisfy moral, ethical, and legal concerns in cases of human experimentation:

> 1. The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. This latter element requires that, before the acceptance of an affirmative decision by the experimental subject, there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person, which may possibly come from his participation in the experiment. The duty and responsibility for ascertaining the quality of the consent rests

35. Brandt II, *supra* note 33, at 181.
36. *Id*. at 183.
37. *Id*.
38. *Id*. at 181.
39. *Id*. at 298–300.
40. *Id*. at 330; *see also* Brandt v. United States, 333 U.S. 836 (1948).

> upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.
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> 2. The experiment should be such as to yield fruitful results for the good of society, unprocurable by other methods or means of study, and not random and unnecessary in nature.
>
> 3. The experiment should be so designed and based on the results of animal experimentation and a knowledge of the natural history of the disease or other problem under study, that the anticipated results will justify the performance of the experiment.
>
> 4. The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury.
>
> 5. No experiment should be conducted, where there is an *a priori* reason to believe that death or disabling injury will occur; except, perhaps, in those experiments where the experimental physicians also serve as subjects.
>
> 6. The degree of risk to be taken should never exceed that determined by the humanitarian importance of the problem to be solved by the experiment.
>
> 7. Proper preparations should be made and adequate facilities provided to protect the experimental subject against even remote possibilities of injury, disability, or death.
>
> 8. The experiment should be conducted only by scientifically qualified persons. The highest degree of skill and care should be required through all stages of the experiment of those who conduct or engage in the experiment.
>
> 9. During the course of the experiment, the human subject should be at liberty to bring the experiment to an end, if he has reached the physical or mental state, where continuation of the experiment seemed to him to be impossible.
>
> 10. During the course of the experiment, the scientist in charge must be prepared to terminate the experiment at any stage, if he has probable cause to believe, in the exercise of the good faith, superior skill and careful judgement required of him, that a continuation of the experiment is likely to result in injury, disability, or death to the experimental subject.[41]

These principles are now known as the Nuremberg Code, and they have played a prominent role in the medical and scientific fields since their adoption.[42]

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41. Brandt II, *supra* note 33, at 181–82.

42. *See generally* NORBERT EHRENFREUND, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY 149 (2007); George J. Annas & Michael Grodin, *Medical Ethics and Human Rights: Legacies of Nuremberg*, 3 HOFSTRA L. & POL'Y SYMP. 111 (1999); Michael H. Kater, CENTRAL EUROPEAN HISTORY 118 (1994) (reviewing GEORGE J. ANNAS & MICHAEL A. GRODIN: THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION (1992)).

Several other criminal proceedings under Control Council Law No. 10 also addressed non-consensual human experimentation.[43] In *United States v. Milch*, the defendant, Erhard Milch, served as an Inspector General and Field Marshall in the German Air Force. He was charged by a U.S. military tribunal with several counts.[44] In Count Two, Milch was charged with war crimes for authorizing medical experiments at Dachau to assess the effects of low temperature and air pressure on human beings. In analyzing the illegal experimentation charge, the tribunal considered seven factors:

> 1. Were low-pressure and freezing experiments carried on at Dachau?
> 2. Were they of a character to inflict torture and death on the subjects?
> 3. Did the defendant personally participate in them?
> 4. Were they conducted under his direction or command?
> 5. Were they conducted with prior knowledge on his part that they might be excessive or inhuman?
> 6. Did he have the power or opportunity to prevent or stop them?
> 7. If so, did he fail to act, thereby becoming *particeps criminis* and accessory to them?[45]

The tribunal found the first two factors, which it defined as the *corpus delicti*, were met. According to the tribunal, the experiments, "performed under the specious guise of science, were barbarous and inhuman."[46] Despite this, the tribunal found Milch not guilty of war crimes because he did not personally participate in the experiments, direct that they be performed, or even know of them.[47] However, Milch was found guilty on several other counts, including the use of slave labor, and sentenced to life imprisonment.

Japan also conducted non-consensual human experimentation during the Second World War.[48] These experiments were similar to those carried

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43. *See also* United States v. Pohl, *in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 193, 986–88 (1949) (decision of U.S. military tribunal holding Oswald Pohl guilty of war crimes and crimes against humanity for allowing human experimentation on prisoners); Trial of Rudolf Hoess, *in* 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 11 (1948) (decision of Supreme National Tribunal of Poland holding Rudolf Hoess guilty for allowing human experimentation on Auschwitz prisoners).

44. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 360–64 (1949).

45. *Id*. at 774.

46. *Id*. at 775–76.

47. *Id*. at 777–79.

48. *See* JAPAN'S WARTIME MEDICAL ATROCITIES: COMPARATIVE INQUIRIES IN SCIENCE (Jing-Bao Nie et al. eds., 2010); Zachary D. Kaufman, *Transitional Justice Delayed Is Not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II Through a People's Tribunal*, 26 YALE L. & POL'Y REV. 645, 645 (2008); Sheldon H. Harris, *Japanese*

out by Nazi Germany. They included studies on the effects of bacteriological and chemical weapons on human beings, as well as surgery and vivisection. Perhaps the most notorious of these experiments were performed by Unit 731, a Japanese army unit stationed in occupied China during the war.[49] The International Military Tribunal for the Far East did not prosecute any individuals for human experimentation.[50] But, as information about the Japanese experimentation program emerged, calls for accountability grew among the Allied powers. As a result, several individuals were eventually prosecuted and convicted for these acts by U.S. and Soviet tribunals after the war.[51]

These post-war tribunals were significant for several reasons. They established that informed consent was required in cases of human experimentation. This principle would become the universal standard for all medical and scientific experimentation.[52] They determined that non-consensual human experimentation was a violation of international law and established that individuals could be subjected to criminal liability for committing such acts. These developments were soon codified in several post-war agreements.

B. The 1949 Geneva Conventions and Humanitarian Law

The impact of the Nuremberg trials on the development of international law was immediate, and diplomatic negotiations soon began to codify the lessons of Nuremberg. The 1949 Geneva Conventions, which comprise four treaties, were eventually adopted to address the treatment of armed forces and civilians in times of armed conflict.[53] References to the Nazi experience with human experimentation appear in both the *travaux préparatoires* and in each of the four treaties. All four treaties prohibit torture and inhuman

Biomedical Experimentation During the World War II-Era, *in* 2 MILITARY MEDICAL ETHICS 463, 465 (Thomas E. Beam ed., 2003).

49. *See generally* Tsuneishi Kei-ichi, *Reasons for the Failure to Prosecute Unit 731 and its Significance*, *in* BEYOND VICTOR'S JUSTICE? THE TOKYO WAR CRIMES TRIAL REVISITED 176 (Yuki Tanaka et al. eds., 2011); PETER WILLIAMS & DAVID WALLACE, UNIT 731: JAPAN'S SECRET BIOLOGICAL WARFARE IN WORLD WAR II (1989).

50. NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 63 (2008).

51. *See* PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951, at 79–80, 88–89, 152–54 (1979).

52. *See generally* Evelyne Shuster, *Fifty Years Later: The Significance of the Nuremberg Code*, 337 NEW ENGL. J. MED. 1436 (1997).

53. *See generally* THE 1949 GENEVA CONVENTIONS: A COMMENTARY (Andrew Clapham et al. eds., 2015).

treatment in times of armed conflict.[54] But, they also address human experimentation as a discrete act, although they do so in different ways.

The First and Second Geneva Conventions, which address members of the armed forces in the field and at sea respectively, prohibit biological experiments and prohibit creating conditions that expose individuals to contagion or infection.[55] According to the Commentary provided by the International Committee of the Red Cross (ICRC), these provisions were intended "to put an end for all time to criminal practices of which certain prisoners have been the victims, and also to prevent wounded or sick in captivity from being used as 'guinea-pigs' for medical experiments."[56] The ICRC Commentary adds that this provision is not meant to prevent therapeutic treatment that is necessitated by an individual's medical condition and a desire to improve that condition.[57] The First and Second Geneva Conventions also provide that torture and inhuman treatment, including biological experiments, constitute grave breaches which would subject perpetrators to criminal liability.[58] According to the ICRC Commentary, the memory of the atrocities committed against certain prisoners "led to these acts being included in the list of grave breaches."[59]

The Third and Fourth Geneva Conventions, which address prisoners of war and civilians, respectively, also prohibit physical mutilation and medical or scientific experiments, although the wording in each treaty is slightly different.[60] The Third Geneva Convention provides that prisoners of war may

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54. For an exhaustive review of state practice regarding the prohibition against non-consensual human experimentation in times of armed conflict, *see* 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE 2167-89 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

55. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art. 12, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention].

56. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 139 (Jean S. Pictet et al. eds., 1952) [hereinafter ICRC GENEVA I COMMENTARY]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 91 (Jean S. Pictet et al. eds., 1960) [hereinafter ICRC GENEVA II COMMENTARY].

57. ICRC GENEVA I COMMENTARY, *supra* note 56, at 139 ("Doctors must be free to resort to the new remedies which science offers, provided always that such remedies have first been satisfactorily proved to be innocuous and that they are administered for purely therapeutic purposes.").

58. First Geneva Convention, *supra* note 55, art. 50; Second Geneva Convention, *supra* note 55, art. 51; *see* Paola Gaeta, *Grave Breaches of the Geneva Conventions*, *in* Clapham, *supra* note 53, at 615.

59. ICRC GENEVA II COMMENTARY, *supra* note 56, at 269.

60. *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 13, 130, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 32, 147, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

not be subjected to "physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest."[61] Similarly, the Fourth Geneva Convention provides that protected persons may not be subjected to "mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person" or "to any other measures of brutality whether applied by civilian or military agents."[62] The ICRC Commentaries to the Third and Fourth Geneva Conventions indicate that these provisions were adopted in response to the atrocities committed during the Second World War and to ensure that such abuses were not repeated.[63] The Third and Fourth Geneva Conventions also provide that torture and inhuman treatment, including biological experiments, constitute grave breaches that would expose perpetrators to criminal liability.[64]

Common Article 3, which appears in all four Geneva Conventions, addresses basic rights in non-international armed conflicts.[65] This provision requires humane treatment of detainees, and prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."[66] While non-consensual human experimentation is not specifically mentioned in Common Article 3, the *travaux préparatoires* make clear that its provisions cover such treatment. According to the ICRC Commentary, the issue of human experimentation was considered and discussed during the negotiations, but the drafters concluded it was unnecessary to include such an explicit provision.[67]

The prohibitions set forth in the 1949 Geneva Conventions were affirmed and extended by the 1977 Protocols. Additional Protocol I, which addresses the protection of victims of international armed conflicts, provides

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61. Third Geneva Convention, *supra* note 60, art. 13.

62. Fourth Geneva Convention, *supra* note 60, art. 32.

63. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 141 (Jean S. Pictet et al. eds., 1960) [hereinafter ICRC GENEVA III COMMENTARY]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 224 (Jean S. Pictet et al. eds., 1958) [hereinafter ICRC GENEVA IV COMMENTARY].

64. Third Geneva Convention, *supra* note 60, art. 130; Fourth Geneva Convention, *supra* note 60, art. 147.

65. Lindsay Moir, *The Concept of Non-International Armed Conflict*, *in* Clapham, *supra* note 53, at 391.

66. *See, e.g.*, First Geneva Convention, *supra* note 55, art. 3.

67. ICRC GENEVA III COMMENTARY, *supra* note 63, at 39 ("At one stage of the discussions, additions were considered—with particular reference to the biological "experiments" of evil memory, practiced on inmates of concentration camps. The idea was rightly abandoned, since biological experiments are among the acts covered by (a). Besides, it is always dangerous to try to go into too much detail—especially in such a domain.").

that the physical or mental health and integrity of persons who are interned, detained, or otherwise deprived of liberty shall not be endangered by any unjustified act or omission.[68] In fact, an entire provision is devoted to this principle. Article 11 prohibits "any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty."[69] It specifically prohibits medical or scientific experiments on detained persons, except in cases where such experiments are indicated by the health of the detained person and which are consistent with medical standards.[70] Violations of these provisions are considered grave breaches.[71]

According to the ICRC Commentary on the Additional Protocols, Article 11 was drafted "to clarify and develop the protection of persons protected by the Conventions and the Protocol against medical procedures not indicated by their state of health, and particularly against unlawful medical experiments."[72] This obligation to protect applies to both the physical and mental health of detained persons. It would apply, for example, to medical experiments that affect the mental equilibrium of persons, including prolonged solitary confinement.[73] The ICRC Commentary also recognizes that "mental health and integrity can be particularly endangered by the practice known as 'brainwashing', i.e., the massive injection of propaganda by more or less scientific means."[74] The Commentary defines medical procedure "to mean any procedure which has the purpose of influencing the state of health of the person undergoing it."[75] To be authorized, a medical procedure must fulfill two conditions. First, "[i]t must be indicated by the state of the health of the person concerned."[76] Second, it "must be consistent with generally accepted medical standards . . . ."[77]

68. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 11(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

69. *Id.*

70. *Id.* art. 11(2)(b).

71. *Id.* arts. 11(4); 85(3).

72. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 150 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC ADDITIONAL PROTOCOL COMMENTARY].

73. *Id.* at 152.

74. *Id.*

75. *Id.* at 154.

76. *Id.* at 155.

77. *Id.*

Significantly, consent cannot justify medical procedures that do not fulfill these two conditions.[78]

Additional Protocol II, which addresses the protection of victims of non-international armed conflicts, contains similar provisions for protecting the physical or mental health and integrity of detained persons.[79] Article 5(2) requires that those who are responsible for the internment or detention of persons deprived of liberty in times of non-international armed conflict must ensure that the "physical or mental health and integrity" of detained persons "shall not be endangered by any unjustified act or omission."[80] "Accordingly, it is prohibited to subject [detained persons] to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances."[81] The ICRC Commentary indicates that the interpretation of Article 11(1) of Additional Protocol I and Article 5(2)(e) of Additional Protocol II "is identical and consequently reference can also be made to the commentary on Article 11 (*Protection of Persons*) of Protocol I."[82] Accordingly, the principles regarding human experimentation are similar in both international and non-international armed conflicts.

More recently, the Rome Statute of the International Criminal Court (Rome Statute) classifies human experimentation as both a grave breach of the 1949 Geneva Conventions and as a violation of the laws and customs of war.[83] Article 8(2)(a)(ii) of the Rome Statute grants the International Criminal Court (ICC) jurisdiction over grave breaches of the 1949 Geneva Conventions, including "[t]orture or inhuman treatment, including biological experiments."[84] Article 8(2)(b)(x) grants the ICC jurisdiction over other serious violations of the laws and customs of war committed in international armed conflict, including "physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or

78. *Id.* at 157.

79. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

80. *Id.* art. 5(2)(e).

81. *Id.*

82. ICRC ADDITIONAL PROTOCOL COMMENTARY, *supra* note 72, at 1391.

83. Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. *See generally* WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE (2d ed. 2016). While the definition of crimes against humanity does not specifically reference non-consensual human experimentation, commentators have pointed out such acts would likely be classified as such. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 238 (Otto Triffterer & Kai Ambos eds., 3d ed. 2016).

84. Rome Statute, *supra* note 83, art. 8(2)(a)(ii).

hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; . . ."[85] Article 8(2)(e)(xi) grants the ICC jurisdiction over the same conduct committed in non-international armed conflict.[86]

To assist the ICC, the Rome Statute authorized the adoption of a separate document to address the elements of crimes in more detail.[87] The ICC Elements of Crimes, which are read in conjunction with the Rome Statute, were adopted by the Preparatory Commission.[88] They offer additional details on the prohibitions regarding biological, medical, and scientific experimentation. For example, the following elements are identified with respect to conducting biological experiments, which is designated in Article 8(2)(a)(ii)-3 as a grave breach of the 1949 Geneva Conventions:

> 1. The perpetrator subjected one or more persons to a particular biological experiment.
> 2. The experiment seriously endangered the physical or mental health or integrity of such person or persons.
> 3. The intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person's or persons' interest.
> 4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
> 5. The perpetrator was aware of the factual circumstances that established that protected status.
> 6. The conduct took place in the context of and was associated with an international armed conflict.
> 7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[89]

The *travaux préparatoires* to the ICC Elements of Crimes provide additional insights into this provision.[90] For example, an initial proposal would have required death or serious bodily or mental harm to occur in order

85. *Id.* art. 8(2)(b)(x); *see also* U.N. Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Resolution 808,* Art. 2(b), U.N. Doc. S/25704, (May 3, 1993) (including identical language regarding biological experiments committed against protected persons, subsequently adopted as the Statute for the International Criminal Tribunal for Yugoslavia).

86. Rome Statute, *supra* note 83, art. 8(2)(e)(xi).

87. *Id.* art. 9(1).

88. International Criminal Court, Elements of Crimes, U.N. Doc. ICC-PIDS-LT-03-002/11_Eng (2011) [hereinafter ICC Elements of Crimes].

89. *Id.* art. 8(2)(a)(ii)-3.

90. *See* KNUT DÖRMAN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY 70–75 (2003).

to establish liability.[91] This high standard was rejected in favor of the lower standard now set forth in the provision which only requires that the health or integrity of a person is seriously endangered.[92] The *travaux préparatoires* also reveal that the provision on non-therapeutic experiments was heavily influenced by the language of the 1949 Geneva Conventions and the Additional Protocols.[93]

The ICC Elements of Crimes provide additional details regarding medical or scientific experiments, which are designated under Article 8(2)(b)(x)-2 as serious violations of the laws and customs of war committed in international armed conflict:

> 1. The perpetrator subjected one or more persons to a medical or scientific experiment.
> 2. The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.
> 3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
> 4. Such person or persons were in the power of an adverse party.
> 5. The conduct took place in the context of and was associated with an international armed conflict.
> 6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[94]

The ICC Elements of Crimes add that consent is not a defense to this crime.[95] In addition, they reveal that medical procedures are only permitted if they are "indicated by the state of health of the person concerned" and "consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty."[96] A similar provision applies with respect to non-international armed conflicts.[97]

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91. Preparatory Commission for the International Criminal Court, Proposal Submitted by the United States of America: Draft Elements of Crimes, art. 8(2)(a)(ii)-3, U.N. Doc. PCNICC/1999.DP.4/Add.2 (Feb. 4, 1999).

92. *See* Triffterer & Ambos, *supra* note 83, at 337 ("[T]he concrete danger of the mentioned harm is sufficient for the crime to be completed, not only when the harm actually occurs. To know whether a person's health has been seriously endangered is a matter of judgment and a court should determine this not only on the basis of the conduct of the perpetrator, but also on the foreseeable consequences having regard to the state of health of the person subjected to them.").

93. DÖRMAN, *supra* note 90, at 71–73.

94. ICC Elements of Crimes, *supra* note 88, art. 8(2)(b)(x)-2.

95. *Id.* art. 8(2)(b)(x)-1 n.46.

96. *Id.*

97. *Id.* art. 8(2)(e)(xi)-1 n.69.

In sum, the prohibition against non-consensual human experimentation traces its origins to the Nuremberg tribunal. It has since been codified in international humanitarian law and now regulates state behavior in both international and non-international armed conflicts.

C. The International Covenant on Civil and Political Rights and Human Rights Law

The prohibition against non-consensual human experimentation is also codified in international human rights law. There is no reference to this norm in the Universal Declaration of Human Rights (UDHR), which was adopted by the U.N. General Assembly in 1948.[98] While the UDHR prohibits torture and other cruel, inhuman, or degrading treatment, it does not explicitly reference the prohibition against non-consensual human experimentation.[99] The *travaux préparatoires* reveal that the U.N. Commission on Human Rights, which was charged with drafting the UDHR, discussed whether to include such a provision in the document.[100] During the early stages of the negotiations, French diplomat Rene Cassin asked whether the drafters should take into consideration the issue of human experimentation in the provision addressing torture. "Do some humans have the right to expose others to medical experiments and do any have the right to inflict suffering upon other human beings without their consent, even for ends that may appear good?"[101] If a specific example of torture was included in the draft article, Ralph Lindsay Harry of Australia asked whether it would be necessary to provide other examples of torture.[102] Eventually, the drafters did not include a reference to non-consensual human experimentation in the final version of the UDHR because "it could be argued that the shorter version of the article had already implicitly made such experimentation unlawful."[103] As noted by Bodil Begtrup of Denmark, the prohibition against torture would cover cases such as when "the Nazis had used prisoners for medical experiments such as vivisection."[104] In fact, "[i]t should . . . be made perfectly clear that members

98. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

99. *Id.* art. 5.

100. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 42 (1999); Ann-Marie Bolin Pennegård, *Article 5*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 123 (Gudmundur S. Alfredsson & Asbjorn Eide eds., 1999).

101. U.N. Comm'n on Human Rights, Summary Record of the Third Meeting, at 13, U.N. Doc. E/CN.4/AC.1/SR.3 (June 13, 1947).

102. *Id.*

103. Ann-Marie Bolin Pennegård, *Article 5*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT 121, 123 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

104. U.N. Comm'n on Human Rights, Summary Record of the Hundred and Ninth Meeting of the Third Committee, at 213, U.N. Doc. A/C.3/SR.109 (Oct. 21, 1948).

of the Committee were unanimous in thinking that the practice of vivisection on persons whose consent had not been obtained constituted a violation of the most elementary human rights."[105]

The U.N. Commission on Human Rights was responsible for drafting both the UDHR and the International Covenant on Civil and Political Rights (ICCPR).[106] In fact, the drafting process for the UDHR overlapped with the early negotiations for the ICCPR. Accordingly, the UDHR delegates were aware that a provision on non-consensual human experimentation was under consideration during the ICCPR negotiations.

Article 7 of the ICCPR provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[107] According to the *travaux préparatoires*, the initial drafts considered by the U.N. Commission on Human Rights did not address human experimentation.[108] They focused only on the prohibition against torture and the corollary prohibition against cruel, inhuman, or degrading treatment. Early in the drafting process, the United Kingdom submitted a proposal to the Drafting Committee that "[n]o person shall be subjected to . . . any form of physical mutilation or medical or scientific experimentation against his will."[109] The Drafting Committee accepted the proposal, and it was revised on several occasions as a result of various proposals. By the end of the initial phase of the drafting process, the provision read, "[n]o one shall be subjected to any form of physical

105. *Id.*; *see also* U.N. Comm'n on Human Rights, Summary Record of the Hundred and Tenth Meeting of the Third Committee, at 217, U.N. Doc. A/C.3/SR. 110 (Oct. 22, 1948) (statement of the Venezuelan representative supporting the proposal of the Danish representative regarding medical experimentation).

106. *See* WILLIAM A. SCHABAS, *Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights*, *in* THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES VOLUME I, at lxxi–lxxv (2013).

107. International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. *See generally* MARC J. BOSSUYT, GUIDE TO THE "*TRAVAUX PRÉPARATOIRES*" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 147–60 (1987).

108. *See, e.g.*, U.N. Comm'n on Human Rights, Drafting Comm., Draft Outline of International Bill of Rights, U.N. Doc. E/CN.4/AC.1/3 (June 4, 1947); U.N. Comm'n on Human Rights, Drafting Comm., Text of Letter from Lord Dukeston, the United Kingdom representative on the Human Rights Commission, to the Secretary General of the United Nations, U.N. Doc. E/CN.4/AC.1/4 (June 5, 1947). The ICCPR was initially drafted by the U.N. Commission on Human Rights. On April 16, 1954, the Commission submitted its draft to the U.N. Economic and Social Council for further consideration. The ICCPR was finally adopted by the U.N. General Assembly on December 16, 1966.

109. U.N. Comm'n on Human Rights, Drafting Comm., First Session, Summary Record of the Tenth Meeting, at 3, U.N. Doc. E/CN.4/AC.1/SR.10 (June 20, 1947); U.N. Comm'n on Human Rights, Drafting Comm. on an Int'l Bill of Human Rights, Report of the Drafting Committee to the Commission on Human Rights, at 82, U.N. Doc. E/CN.4/21 (July 1, 1947).

mutilation or medical or scientific experimentation against his will."[110] Originally, this was proposed as a separate article to the ICCPR.[111] The provision was subsequently joined in a single article along with the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment.[112]

The *travaux préparatoires* reveal the provision regarding medical and scientific experimentation "was intended to prevent the recurrence of atrocities such as those committed in concentration camps during the Second World War."[113] According to Lebanese diplomat Charles Malik, this article should be considered in light of the atrocities committed by Nazi Germany. "The basic idea was to explain in an international instrument that the conscience of mankind had been shocked by inhuman acts in Nazi Germany and therefore a positive and condemnatory article was needed."[114] Indeed, the "confessions of German and Japanese war criminals had clearly shown the need to brand as a heinous crime the abuse of scientific and medical experimentation and to prevent its repetition."[115] Some country representatives questioned the need for a specific provision on medical and scientific experimentation when such action was presumably covered by the prohibition against torture and other cruel, inhuman, or degrading treatment.

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110. U.N. Comm'n on Human Rights, Drafting Comm., Second Session, Twenty-Third Meeting, at 2, U.N. Doc. E/CN.4/AC.1/SR.23 (May 10, 1948). At the conclusion of its initial work, the Drafting Committee forwarded some possible limitations to the Commission on Human Rights. "This list is as follows: (1) Compulsory vaccination (United States of America); (2) Legitimate medical and scientific experimentation in hospitals for the insane, with the consent of parent or guardian of the patient (United States of America); (3) Emergency operations undertaken to save the life of patient, where the patient is unable to give his consent or where a person empowered to give consent on behalf of the patient gives such consent (United States of America); (4) Other limitations may be developed later (United States of America)." U.N. Econ. & Soc. Council, Report of the Third Session of the Commission on Human Rights, at 17, U.N. Doc. E/800 (June 28, 1948).

111. U.N. Comm'n on Human Rights, Drafting Comm., Report of the Drafting Committee to the Commission on Human Rights, at 18–19, U.N. Doc. E/CN.4/95 (May 21, 1948).

112. *See* U.N. Comm'n on Human Rights, Sixth Session, Summary Record of the Hundred and Ninety-Ninth Meeting, at 19, U.N Doc. E/CN.4/SR.199 (May 31, 1950); U.N. Comm'n on Human Rights, Sixth Session, Summary Record of the Hundred and Eighty-Third Meeting, at 4–13, U.N. Doc. E/CN.4/SR.183 (May 17, 1950); U.N. Comm'n on Human Rights, Fifth Session, Summary Record of the Ninety-First Meeting, at 11–16, U.N Doc. E/CN.4/SR.91 (May 31, 1949).

113. U.N. Secretary General, Annotations on the Text of the Draft International Covenants on Human Rights, at 31, U.N. Doc. A/2929 (July 1, 1955).

114. U.N. Comm'n on Human Rights, Drafting Comm., Second Session, Twenty-Third Meeting, at 3, U.N. Doc. E/CN.4/AC.1/SR.23 (May 10, 1948).

115. U.N. Comm'n on Human Rights, Eighth Session, Summary of the Three-Hundred and Twelfth Meeting, at 4, U.N. Doc. E/CN.4/SR.312 (June 12, 1952); *see also* U.N. Comm'n on Human Rights, Sixth Session, Summary Record of the Hundred and Eighty-Second Meeting, at 3, U.N. Doc. E/CN.4/SR.182 (May 17, 1950) ("The covenant should include such an article specifically to prohibit the perpetration of crimes such as the Nazis had committed in Germany in the name of scientific experimentation.").

However, the majority of representatives believed a separate provision was necessary.[116] The matter was so important, they felt it required a separate provision, "even at the risk of repetition."[117]

The final version of Article 7 contains no exceptions to justify non-consensual human experimentation. Indeed, the ICCPR allows for no derogation of Article 7.[118]

The Human Rights Committee, which was established by the ICCPR to monitor treaty compliance among member states, has reaffirmed the prohibition against non-consensual human experimentation in several statements. In General Comment No. 7, for example, the Committee acknowledged Article 7's prohibition and indicated that "more attention should be given to the possible need and means to ensure the observance of this provision."[119] In addition, the Committee noted that special protection is necessary "in the case of persons not capable of giving their consent."[120] The Committee reaffirmed its position on non-consensual human experimentation in General Comment No. 20, indicating that special protections were necessary for "persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment."[121] Significantly, the Human Rights Committee indicated that states have an obligation to enforce the provisions of Article 7 "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[122]

The Human Rights Committee has also expressed concern about state practice that fails to consider the requirement of informed consent in cases of human experimentation. In its 2006 Concluding Observations on the United States, for example, the Committee raised significant concerns about U.S. policies and their failure to ensure consent in cases of human experimentation:

> The State party should ensure that it meets its obligation under article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation . . . . When there is doubt as to the ability of

116. U.N. Comm'n on Human Rights, Sixth Session, Summary Record of the One-Hundred and Forty-First Meeting, at 10, U.N. Doc. E/CN.4/SR.141 (Apr. 7, 1950). *See also* U.N. Comm'n on Human Rights, Sixth Session, Summary Record of the One-Hundred and Eighty-Third Meeting, U.N. Doc. E/CN.4/SR.183 (May 17, 1950).

117. U.N. Secretary General, *supra* note 113, at 31.

118. ICCPR, *supra* note 107, art. 4(2).

119. U.N. Secretary General, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 8, U.N. Doc. HRI/GEN/1/Rev.1 (July 29, 1994).

120. *Id*.

121. *Id*. at 31.

122. *Id*. at 30.

> a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.[123]

The Human Rights Committee expressed similar concerns in its 2001 Concluding Observations on the Netherlands:

> The State party should reconsider its Medical Research (Human Subjects) Act in the light of the Committee's concerns, in order to ensure that even high potential value of scientific research is not used to justify severe risks to the subjects of research. The State party should further remove minors and other persons unable to give genuine consent from any medical experiments which do not directly benefit these individuals (non-therapeutic medical research).[124]

Unlike the ICCPR, the prohibition against non-consensual human experimentation does not appear in the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture). The *travaux préparatoires* indicate the issue was considered during negotiations for the Convention against Torture, but it was ultimately excluded from the final text. During negotiations, the Swiss government proposed adding the following language to the definition of torture: "[i]t (the term 'torture') also means medical or scientific experiments that are not justified by a person's state of health and serve no therapeutic purpose."[125] The Portuguese government, which was concerned with the use of psychiatry for political purposes, proposed the following language: "the use of psychiatry for one of the objects referred to in paragraph 1 or the abuse of psychiatry with a view to prolonging confinement of any person subjected to a measure or penalty involving deprivation of freedom shall be regarded as torture."[126] Barbados proposed expanding the definition of torture to include "the use of more sophisticated weapons such as 'truth' drugs where no physical or mental suffering is apparent in the complainant."[127] These proposals were ultimately rejected, in part, because such specificity might allow some states to evade the broad nature of the norm against torture.[128]

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123. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee (United States of America), ¶ 31, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

124. U.N. Human Rights Comm., Concluding Observations of the Human Rights Committee (Netherlands), ¶ 7, U.N. Doc. CCPR/CO/72/NET (Aug. 27, 2001).

125. U.N. Secretary-General*, Question of the Human Rights of All Persons Subject to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 8, U.N. Doc. E/CN.4/1314 (Dec. 19, 1978).

126. *Id*. at 7.

127. *Id*. at 5.

128. *Id*. at 6; *see also* Nina Sibal (Chairman-Rapporteur), *Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 5, U.N. Doc. E/CN.4/L.1470 (Mar. 12, 1979).

The prohibition against non-consensual human experimentation can be found in various international instruments relating to medical or scientific research.

> *Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Biomedical Research*
>
> No research on a person may be carried out . . . without the informed, free, express, specific and documented consent of the person.[129]

> *Declaration of Helsinki on the Ethical Principles for Medical Research Involving Human Subjects*
>
> 6. The primary purpose of medical research involving human subjects is to understand the causes, development and effects of diseases and improve preventive, diagnostic and therapeutic interventions (methods, procedures and treatments). Even the best proven interventions must be evaluated continually through research for their safety, effectiveness, efficiency, accessibility and quality.
>
> 7. Medical research is subject to ethical standards that promote and ensure respect for all human subjects and protect their health and rights.
>
> 8. While the primary purpose of medical research is to generate new knowledge, this goal can never take precedence over the rights and interests of individual research subjects.
>
> 9. It is the duty of physicians who are involved in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects. The responsibility for the protection of research subjects must always rest with the physician or other health care professionals and never with the research subjects, even though they have given consent.[130]

> *Universal Declaration on Bioethics and Human Rights*
>
> 1. Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.
>
> 2. Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned. The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn

129. Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Biomedical Research, art. 14(1), Jan. 25, 2005, CETS No. 195.

130. World Med. Ass'n [WMA], *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects*, arts. 6–9, (June 1964).

> by the person concerned at any time and for any reason without any disadvantage or prejudice.[131]

Other sources—ranging from regional human rights agreements to instruments addressing the rights of vulnerable persons—reaffirm the universal status of this norm and its operation throughout the world.[132]

D. U.S. Law and Practice

The United States has its own troubling history of individuals being subjected to human experimentation without informed consent.[133] Because

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131. United Nations Educ., Sci. and Cultural Org. [UNESCO], *Universal Declaration of Bioethics and Human Rights*, art. 6, (Oct. 19, 2005).

132. *See* League of Arab States, Arab Charter on Human Rights, art. 9, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005) ("No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances."); Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, E.T.S. No. 164 ("Research on a person may only be undertaken if . . . the risks which may be incurred by that person are not disproportionate to the potential benefits of the research; . . . the persons undergoing research have been informed of their rights and the safeguards prescribed by law for their protection; [and] the necessary consent . . . has been given expressly, specifically and is documented."); Council of Europe, Committee of Ministers, Standard Minimum Rules for the Treatment of Prisoners, art. 22 (1973) ("The prisoners may not be submitted to medical or scientific experiments which may result in physical or moral injury to their person."); Convention on the Rights of Persons with Disabilities, art. 15(1), Dec. 13, 2006, 2515 U.N.T.S. 3 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation."); U.N. Convention on the Rights of Persons with Disabilities, General Comment No. 1 (2014), at 42, U.N. Doc. CPRD/C/GC/1 (May 19, 2014) (forced treatment by psychiatric and other health and medical professionals is a violation of the treaty); U.N. General Assembly, *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, Principle 22, U.N. Doc. A/RES/43/173 (Dec. 9, 1988) ("No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health."); G.A. Res. 37/194, U.N. Doc. A/37/51, at Principle 4, (Dec. 18, 1982) ("It is a contravention of medical ethics for health personnel, particularly physicians: (a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments; (b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.").

133. *See, e.g.*, Marie Constance Scheperle, *The Guatemala STD Inoculation Study as the Incentive to Change Modern Informed Consent Standards*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 425 (2012); Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 COLUM. J. GENDER & L. 357 (2011); JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1993); Jay Katz, *Human Experimentation and Human Rights*, 38 ST. LOUIS L.J. 7 (1993); Elliott J. Schuchardt, *Walking a*

of this, informed consent is now an integral component of all scientific and medical research in the United States.

Federal law on human experimentation traces its origins to the influential Belmont Report of 1979, which was drafted by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.[134] Its goal was to identify the basic ethical principles that should regulate human experimentation in the United States. The Report identified three such principles: respect, beneficence, and justice. The Report also acknowledged the role of the Nuremberg trials on the development of basic standards for human subject research. The Report served as the foundation for the subsequent Federal Policy for the Protection of Human Subjects, also known as the Common Rule, which was first published in 1981.[135]

The Common Rule provides detailed requirements regarding human subject research in the United States.[136] Research is defined as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge."[137] A human subject is defined as "a living individual about whom an investigator (whether professional or student) conducting research obtains (1) data through intervention or interaction with the individual, or (2) identifiable private information."[138] The Common Rule goes on to provide detailed requirements regarding informed consent. It also contains additional requirements when research involves prisoners, children, and pregnant women. The Common Rule applies to most federal agencies. The CIA is required to comply with its standards pursuant to a 1981 Executive Order, which provides that "[n]o agency within the Intelligence Community shall sponsor, contract for or conduct research on human subjects except in accordance with guidelines issued by the Department of Health and Human Services. The subject's informed consent shall be documented as required by those guidelines."[139]

Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm, 26 COLUM. J.L. & SOC. PROBS. 77 (1992).

134. THE NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1979).

135. *See generally* Jerry Menikoff et al., *The Common Rule, Updated*, 376 N. ENGL. J. MED. 613 (2017); RUTH R. FADEN & TOM L. BEAUCHAMP, A THEORY AND HISTORY OF INFORMED CONSENT (1986).

136. 45 C.F.R. § 46 (2018).

137. *Id*. at § 46.102(d).

138. *Id*. at § 46.102(f).

139. Exec. Order No. 12333, 3 C.F.R. § 2.10 (1981).

In 1992, the United States summarized its position on non-consensual human experimentation to the U.N. Human Rights Committee in fulfillment of its reporting requirements under the ICCPR:

> Non-consensual experimentation is illegal in the U.S. Specifically, it would violate the Fourth Amendment's proscription against unreasonable searches and seizures (including seizing a person's body), the Fifth Amendment's proscription against depriving one of life, liberty or property without due process, and the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment.[140]

In its submission to the Committee, the United States noted that experimentation on prisoners is regulated by the U.S. Constitution, federal statutes, and administrative regulations.[141] In fact, the federal government specifically prohibits medical experimentation on any inmates and there are strict regulations on research in prison settings.[142] The United States reaffirmed these principles in subsequent reports to the Committee.[143]

The prohibition against non-consensual human experimentation has been addressed in numerous U.S. cases, albeit with mixed results.[144] The Nuremberg Code is often referenced in these cases although its principles are not always applied. In *United States v. Stanley*, for example, James Stanley was subjected to non-consensual experimentation while serving in the U.S. Army. He was given LSD as part of a military experiment to study its effects on human beings.[145] After suffering harmful side-effects for several years, Stanley discovered he had been subjected to experimentation. He then filed a civil lawsuit against the United States seeking redress for his

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140. U.N. Human Rights Comm., Initial Reports of States Parties: United States of America, ¶ 178, U.N. Doc. CCPR/C/81/Add.4 (1994).

141. *Id.* ¶ 183.

142. *Id.* ¶¶ 183-87.

143. *See* U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America, ¶ 187, U.N. Doc. CCPR/C/USA/4 (May 22, 2012); U.N. Human Rights Comm., Third Periodic Reports of States Parties Due in 2003: United States of America, U.N. Doc. CCPR/C/USA/3 (Nov. 28, 2005).

144. Most cases that raise claims of non-consensual human experimentation focus solely on domestic law and do not address international law. *See, e.g.*, In re Cincinnati Radiation Litigation, 874 F. Supp. 796 (S.D. Ohio 1995); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979). However, some cases reference the Nuremberg Code and other international standards. *See also* White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998); Whitlock v. Duke University, 637 F. Supp. 1463 (M.D. N.C. 1986); Wentzel v. Montgomery General Hosp., Inc., 293 Md. 685 (1982); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980); In re Weberlist, 360 N.Y.S.2d 783 (N.Y. 1974).

145. United States v. Stanley, 483 U.S. 669, 671 (1987); *see generally* Michael J. O'Connor, *Bearing True Faith and Allegiance? Allowing Recovery for Soldiers Under Fire in Military Experiments that Violate the Nuremberg Code*, 25 SUFFOLK TRANSNAT'L L. REV. 649 (2002); Martha J. Burns, *They Fight to Protect Our Rights; Shouldn't We Do the Same for Them? Intramilitary Immunity in Light of* United States v. Stanley, 38 DEPAUL L. REV. 127 (1988); Richard W. McKee, *Defending an Indifferent Constitution: The Plight of Soldiers Used as Guinea Pigs*, 31 ARIZ. L. REV. 633 (1989).

injuries. The Supreme Court held that Stanley could not pursue his claim because federal statutes did not afford him a remedy and special factors counseled against recognizing a constitutional claim.[146] While the majority opinion did not address the status of non-consensual human experimentation, Justice Brennan took a different approach in his dissenting opinion. According to Justice Brennan, such actions were contrary to the lessons of history. "The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable."[147] He then cited the Nuremberg Code that was drafted by the U.S. military tribunal in *United States v. Brandt*.[148] Justice O'Connor echoed these concerns in her dissent, stating that "[n]o judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case."[149]

The case of *Abdullahi v. Pfizer, Inc.* considered the prohibition against non-consensual medical experimentation under international law.[150] The *Pfizer* litigation arose out of a vaccination program pursued by Pfizer in Nigeria that was designed to test a new antibiotic called Trovan on children.[151] According to the plaintiffs, the vaccination program was conducted without informed consent. After two weeks, the Pfizer team concluded the experiment and left the country without providing additional treatment. Several children died as a result of the experiments, and other children suffered blindness, paralysis, or brain-damage.[152]

In August 2001, the plaintiffs filed a federal lawsuit against Pfizer and based jurisdiction on the Alien Tort Statute (ATS).[153] The plaintiffs alleged that Pfizer "violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including themselves, without their consent or knowledge."[154] After several legal proceedings, the district court dismissed the lawsuit. While it found non-consensual human experimentation violated international law, the district court determined that

146. *Stanley*, 483 U.S. at 678–84.

147. *Id*. at 687 (Brennan, J., concurring in part, dissenting in part).

148. *Id*.

149. *Id*. at 709–10 (O'Connor, J., concurring in part, dissenting in part).

150. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 168 (2d Cir. 2009); *see generally* Erin Talati, *An Open Door to Ending Exploitation: Accountability for Violations of Informed Consent Under the Alien Tort Statute*, 155 U. PA. L. REV. 231 (2006); David M. Carr, *Pfizer's Epidemic: A Need for International Regulation of Human Experimentation in Developing Countries*, 35 CASE W. RES. J. INT'L L. 15 (2003).

151. *Abdullahi*, 562 F.3d at 169.

152. *Id*.

153. *Id*. at 168. Pfizer was also subject to civil and criminal proceedings in Nigeria. *Id*. at 206.

154. *Id*. at 168.

the claim was not actionable under the ATS because none of the applicable international norms authorized a private right of action.[155]

In July 2009, the Second Circuit reversed the district court's dismissal.[156] The court determined that customary international law prohibits medical experimentation on human subjects without their consent. The court cited several sources, including *United States v. Brandt*, the 1949 Geneva Conventions, and the ICCPR.[157] The court also referenced the Declaration of Helsinki, the Convention on Human Rights and Biomedicine, and the Universal Declaration on Bioethics and Human Rights.[158] The court found that the prohibition against non-consensual medical experimentation was universal, specific, and of mutual concern to the international community.

> This history illustrates that from its origins with the trial of the Nazi doctors at Nuremburg through its evolution in international conventions, agreements, declarations, and domestic laws and regulations, the norm prohibiting nonconsensual medical experimentation on human subjects has become firmly embedded and has secured universal acceptance in the community of nations.[159]

Accordingly, the plaintiffs had "pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent."[160] In 2011, the parties agreed to a confidential settlement, thereby ending the litigation in the United States.

In sum, the prohibition against non-consensual human experimentation has existed for over seventy years and has been codified in numerous international instruments. It is also recognized in U.S. law. While the norm is described in various ways, its core elements remain constant.

E. Defining the Prohibition against Non-Consensual Human Experimentation

The prohibition against non-consensual human experimentation can be defined by three core elements, which synthesize the basic principles of national and international law.[161]

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155. Abdullahi v. Pfizer, Inc., No. 01 Civ.8118(WHP), 2005 WL 1870811, at *14 (S.D.N.Y. Aug. 9, 2005), *rev'd*, 562 F.3d 163 (2d Cir. 2009).

156. *Abdullahi*, 562 F.3d at 169.

157. *Id*. at 178–84.

158. *Id*. at 181–83.

159. *Id*. at 183–84.

160. *Id*. at 187.

161. Commentators have offered several definitions. *See, e.g.*, Triffterer & Ambos, *supra* note 83, at 336 ("The term [biological experiments] in its ordinary meaning covers conduct the primary purpose of which is to study the (unknown) effects of a product or situation (e.g. extreme cold or altitude) on the

First, the prohibition against non-consensual human experimentation applies to any systematic form of medical, psychological, scientific, or biological research or experimentation conducted on human beings. Research or experimentation refers to any form of physical or mental intervention or observation that seeks to acquire generalizable information from or about a human being. By requiring that research or experimentation be systematic, the definition makes clear it only applies to acts that are intentional and designed to elicit information from the subject. This element applies to all forms of research or experimentation regardless of how such acts are identified or captioned.

Second, the subject of the research or experimentation must provide informed consent. Such consent must be knowing, which requires the subject to understand all relevant information regarding the research or experimentation. Consent must also be voluntary. It must be provided by the subject without any form of coercion or fear of retaliation if consent is not provided. A narrow exception to informed consent may exist when a subject's medical condition creates a life-threatening emergency, and the subject is unable to provide consent.[162] However, such exceptions must be carefully regulated.

Third, the research or experimentation must be justified by the subject's medical or psychological condition and must be carried out in his or her individual interest. Research or experimentation may also be justified when it is designed to benefit society, and the subject is aware of this purpose and has provided informed consent.[163] On such occasions, the social benefits must be carefully weighed against the potential risks to the subject. Because assessing the social benefits of research or experimentation is subjective and can be easily manipulated, it must be carefully regulated and subject to independent review.

In addition to these core elements, the prohibition against non-consensual human experimentation is influenced by two other considerations.

First, vulnerable individuals are subject to additional protections. These individuals include children, prisoners, persons with disabilities, and other individuals with limited capacity or whose autonomy is otherwise

human body."); Bassiouni, *supra* note 15, at 1597 ("Human experimentation can be broadly defined as anything done to an individual to learn how it will affect him.").

162. *See* Catriona Macardle & Rachel Stanley, *Autonomy and Exception from Informed-Consent Research*, 11 AM. MED. ASS'N. J. ETH. 626, 626 (2009).

163. *See* Danielle M. Wenner, *The Social Value of Knowledge and International Clinical Research*, 15 DEV. WORLD BIOETHICS 76, 80 (2015).

affected.[164] These individuals may lack the resources or ability to make informed decisions. Accordingly, greater scrutiny is required to determine whether consent was knowingly made by a vulnerable person. Likewise, the voluntary nature of consent is also subject to greater scrutiny. For individuals whose autonomy is restricted, such as prisoners, even greater scrutiny is required to establish their decisions were voluntary and not influenced by coercion or fear of retaliation.

Second, medical and scientific professionals are subject to a higher standard when assessing whether human experimentation has occurred. As a general matter, these professions are governed by ethical standards that impose special obligations on their members.[165] They have an obligation to protect the health and dignity of patients and research subjects. They must also comply with detailed requirements when working with human beings in a professional capacity. For example, the American Medical Association (AMA) has a detailed Code of Medical Ethics that addresses such topics as informed consent and research ethics.[166] The American Psychological Association (APA) has developed a separate set of Ethical Principles and Code of Conduct for their discipline.[167] Similarly, the American Psychiatric Association has adopted the Principles of Medical Ethics especially applicable to psychiatry.[168] For these reasons, a rebuttable presumption that human experimentation has been conducted should apply when a medical or scientific professional is involved in the study of human behavior.

While the definition of non-consensual human experimentation is firmly established, the historical record identifies several possible points of contention. First, some treaties provide different standards depending on whether non-consensual human experimentation occurs in times of peace or armed conflict.[169] Second, some treaties provide different standards depending on whether a conflict is an international or non-international

164. *See generally Research Involving Human Subjects*, NATIONAL INSTITUTES OF HEALTH, https://humansubjects.nih.gov/.

165. *See* M. Gregg Bloche, *When Doctors First Do Harm*, N.Y. TIMES, Nov. 23, 2016, at A27.

166. COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (2008).

167. AM. PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (2017). In 2016, they added the following provision to the Code: "[p]sychologists do not participate in, facilitate, assist, or otherwise engage in torture, defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, or in any other cruel, inhuman, or degrading behavior that violates 3.04a [avoiding harm]." *Id.* at 3.04(b).

168. AM. PSYCHIATRIC ASS'N, THE PRINCIPLES OF MEDICAL ETHICS (2013); *see also* Brian H. Richardson, *"We Tortured Some Folks": Science, Ethics, and Government in the APA Torture Scandal*, 57 JURIMETRICS J. 81 (2016).

169. *Compare* Rome Statute, *supra* note 83, art. 8, *with* ICCPR, *supra* note 107, art. 7.

armed conflict.[170] Third, some treaties distinguish between biological and medical experimentation.[171] Finally, some treaties require human experimentation to cause death or seriously endanger the physical or mental health or integrity of the person.[172] Despite their inclusion in several treaties, these provisions do not change the core elements of the definition.

Significantly, these provisions only appear in international humanitarian law treaties; they do not appear in any human rights treaties. While the principle of *lex specialis* is sometimes used to apply the specific norms of humanitarian law over the general norms of human rights law in times of armed conflict, this approach is controversial.[173] Even if the principle of *lex specialis* is accepted, it is inapplicable here. To begin with, there is no reasonable basis for suggesting that the standards regarding human experimentation should differ because such experimentation is committed during an armed conflict or in a particular type of armed conflict.[174] There are no military, political, scientific, medical, or ethical reasons for making such distinctions. Even the negotiating records of the humanitarian law treaties fail to offer any meaningful justification for such distinctions. Neither the Nuremberg trials nor the Nuremberg Code contain distinctions regarding human experimentation conducted in times of peace or war or when conducted in international or non-international armed conflicts. Accordingly, it would be contrary to the historical record to offer different levels of protection to individuals based solely on the nature of the armed conflict or when it occurred. Moreover, the ICCPR's prohibition on non-consensual human experimentation contains no temporal or contextual restrictions. It is absolute and allows for no derogation.[175] While some human rights standards may be subject to derogation in times of national emergency, the prohibition against non-consensual human experimentation is not subject

170. *Compare* Additional Protocol I, *supra* note 68, art. 11, *with* Additional Protocol II, *supra* note 79, art. 5.

171. *Compare* First Geneva Convention, *supra* note 55, art. 12, *and* Second Geneva Convention, *supra* note 55, art. 12, *with* Third Geneva Convention, *supra* note 60, art. 13, *and* Fourth Geneva Convention, *supra* note 60, art. 32.

172. ICC Elements of Crimes, *supra* note 88, art. 8(2)(b)(x)-2.

173. *See, e.g.*, Silvia Borelli, *The (Mis)-Use of General Principles of Law:* Lex Specialis *and the Relationship between International Human Rights Law and the Laws of Armed Conflict*, *in* GENERAL PRINCIPLES OF LAW - THE ROLE OF THE JUDICIARY 265 (Laura Pineschi ed., 2015); Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian Law and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT'L REV. RED CROSS 599, 600 (2008).

174. *See, e.g.*, Vivienne Nathanson, *Medical Ethics in Peacetime and Wartime: The Case for a Better Understanding*, 95 INT'L REV. RED CROSS 189 (2013); *see also* CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 112 (2009).

175. ICCPR, *supra* note 107, art. 4.

to such derogation. It is an absolute prohibition. Finally, there is no meaningful distinction between biological and medical research. These terms are used interchangeably in the various treaties.

The prohibition against non-consensual human experimentation does not require death or serious danger to the physical or mental health or integrity of the subject. The norm is primarily designed to protect human dignity and personal autonomy. Accordingly, the consequences of experimentation are simply not relevant for purposes of determining whether non-consensual human experimentation has occurred. It would be counter-productive to include such a requirement because it would provide perpetrators with another way to justify experimentation. For example, perpetrators could argue that human experimentation did not violate international law because it did not kill or seriously endanger the subject, even if it caused significant pain and suffering. In fact, the Office of Legal Counsel raised this argument to justify the legality of enhanced interrogation techniques.[176] Its position was that interrogation techniques only constitute torture if they caused pain that is "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[177] Not surprisingly, this argument has been roundly discredited.[178]

A final consideration involves the relationship between non-consensual human experimentation and other international norms. Non-consensual human experimentation can be classified as a form of torture or other cruel, inhuman, or degrading treatment or punishment.[179] In fact, it appears along with torture and other cruel, inhuman, or degrading treatment or punishment in Article 7 of the ICCPR.[180]

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176. *See, e.g.*, Memorandum from Jay Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency on the Interrogation of Al Qaeda Operative (Aug. 1, 2002).

177. Memorandum from Jay Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, at 1 (Aug. 1, 2002).

178. *See* David Cole, *The Torture Memos: The Case Against the Lawyers*, THE N.Y. REV. OF BOOKS, Oct. 8, 2009; JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 142–76 (2007); José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175 (2006).

179. *See* U.N. General Assembly, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* ¶ 42, U.N. Doc. A/63/175 (July 28, 2008) (discussing the inclusion of scientific or medical experimentation as cruel, inhuman, or degrading treatment in the Convention on the Rights of Persons with Disabilities).

180. ICCPR, *supra* note 107, art. 7.

While it can be classified as a form of torture or other cruel, inhuman, or degrading treatment, non-consensual human experimentation is a distinct violation of international law. The *travaux préparatoires* for Article 7 of the ICCPR make this point clear. Non-consensual human experimentation was considered a unique harm that merited special recognition and specific condemnation. This assertion was made on several occasions throughout the diplomatic negotiations regarding Article 7. There is also a practical reason for considering the prohibition against non-consensual human experimentation as a distinct norm. While torture and other cruel, inhuman, or degrading treatment require the consent or acquiescence of a state actor, non-consensual human experimentation does not.[181] This is evident from the historical record. The Nuremberg Code contained no requirement of state action for purposes of establishing non-consensual human experimentation. More recently, the Second Circuit did not require state action in the *Pfizer* case when it concluded that a private corporation could be liable for violating the prohibition against non-consensual human experimentation.

This interpretation is also consistent with international humanitarian law, which classifies non-consensual human experimentation as a war crime and crime against humanity.[182] It is well-established that these acts can be committed by non-state actors. The Nuremberg trials did not address state action as a necessary element for prosecuting acts of non-consensual human experimentation. In fact, one of the defendants in the *Brandt* case, Adolf Pokorny, was identified by the U.S. military tribunal as a "private physician who had no official connection with the governmental medical services."[183] Pokorny was charged in the indictment with participating in criminal sterilization experiments, which constituted both war crimes and crimes against humanity.[184] More recently, the Rome Statute identified non-consensual human experimentation as a war crime, and civilians can be prosecuted for such acts.[185] It would be puzzling to hold civilians responsible for committing non-consensual human experimentation in times of armed conflict but innocent of such acts in times of peace.

Given the extraordinary level of international support against non-consensual human experimentation, it is not surprising that slight variations may exist among the various sources. Notwithstanding, the three core

181. *Compare* ICCPR, *supra* note 107, art. 7, *with* CAT, *supra* note 128, art. 1.

182. *See* Michael A. Grodin, et al., *Medicine and Human Rights: A Proposal for International Action*, 23 HASTINGS CTR. RPT. 8 (Aug. 1993).

183. Military Tribunal No.1, *supra* note 27, at 35.

184. Pokorny was ultimately acquitted because the tribunal concluded the prosecution had failed to establish his guilt beyond a reasonable doubt. *See id*. at 695.

185. Rome Statute, *supra* note 83, arts. 8(2)(a)(ii), 8(2)(b)(x), and 8(2)(e)(xi).

elements have found consistent support in international practice since the adoption of the Nuremberg Code.

III. THE CIA RENDITION, DETENTION, AND INTERROGATION PROGRAM

The role of the Central Intelligence Agency in the detention and interrogation of suspected terrorists was established soon after September 11, 2001.[186] The CIA's actions would come to define the U.S. counter-terrorism response.

A. Using the Theory of Learned Helplessness to Develop the Interrogation Program

Within days of the 9/11 attacks, the National Security Council met to discuss operations for capturing terrorist suspects around the world.[187] On September 17, 2001, President George W. Bush signed a classified Memorandum of Notification (MON) authorizing the Director of Central Intelligence to "undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities."[188] The MON "provided unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of the detention."[189] On October 8, 2001, the Director of the Central Intelligence Agency, George Tenet, delegated the capture and detention authority set forth in the MON to James Pavitt, the CIA's deputy director for operations, and Cofer Black, the CIA's chief of the Counterterrorism Center (CTC).[190]

Despite its new mandate, the CIA had relatively little experience interrogating detainees.[191] Accordingly, the CIA looked to various external resources to assist in developing an interrogation program. In Fall 2001, the CIA requested two psychologists, James Mitchell and Bruce Jessen, to write a paper on Al-Qaeda's interrogation resistance methods.[192] At the time,

186. Portions of this section appeared in William J. Aceves, *United States v. George Tenet: A Federal Indictment for Torture*, 48 N.Y.U. J. INT'L L. & POL. 1 (2015).

187. *See* RON SUSKIND, THE PRICE OF LOYALTY 186 (2004); BOB WOODWARD, BUSH AT WAR 74–92 (2002).

188. SSCI REPORT, *supra* note 8, at 11 (Executive Summary).

189. *Id.*; *see also* MAYER, *supra* note 1, at 38–39.

190. SSCI REPORT, *supra* note 8, at 13 (Executive Summary).

191. Declaration of Jose Rodriguez at 7, Salim v. Mitchell, CV-15-0286-JLQ (E.D. Wash. 2016) [hereinafter Rodriguez Declaration].

192. MITCHELL & HARLOW, *supra* note 14, at 51–58; SSCI REPORT, *supra* note 8, at 20–21. Mitchell and Jessen were referenced in the SSCI report by pseudonyms (Grayson Swigert and Hammond Dunbar).

Mitchell was working as an independent contractor for the CIA, and Jessen was employed by the Department of Defense (DOD). Both Mitchell and Jessen had experience working in the DOD's Joint Personnel Recovery Agency, which was responsible for managing the military's Survival Evasion Resistance and Escape (SERE) training program.[193] The U.S. Army, Navy, and Air Force use the SERE program to train military personnel on survival tactics in hostile territory.[194] Mitchell and Jessen believed that various techniques used in the SERE program could be repurposed for use in an interrogation program for Al-Qaeda detainees.[195]

In December 2001, Mitchell and Jessen submitted their paper, *Recognizing and Developing Countermeasures to Al-Qa'eda Resistance to Interrogation Techniques: A Resistance Training Perspective*, to the CIA.[196] The paper assessed an Al-Qaeda document known as the Manchester Manual, which purported to offer various strategies for resisting interrogations.[197] Mitchell and Jessen assessed these strategies and considered ways of countering them through psychological assessment based on their experience training U.S. military personnel. In Spring 2002, Mitchell's contract with the CIA was modified to reflect additional responsibilities, including providing psychological consultations to the CIA and making recommendations on interrogation methods.[198] Jessen soon resigned his DOD position and began working with Mitchell as an independent contractor for the CIA.[199]

In July 2002, Mitchell met with several CIA officials to discuss interrogation techniques that could be used against Al-Qaeda detainees.[200] At this meeting, Mitchell suggested the possibility of using interrogation techniques that were used in the SERE program. He indicated that the goal in using these techniques would be to "dislocate the subject's expectations and overcome his resistance and thereby motivate him to provide the

193. MITCHELL & HARLOW, *supra* note 14, at 44.

194. *See* U.S. DEP'T OF DEFENSE, NO. 1300.21, DEPARTMENT OF DEFENSE INSTRUCTIONS (2001), http://www.dtic.mil/whs/directives/corres/pdf/130021p.pdf.

195. MITCHELL & HARLOW, *supra* note 14, at 10, 42–49.

196. [Redacted], Recognizing and Developing Countermeasures to Al Qaeda Resistance to Interrogation Techniques: A Resistance Training Perspective (2001). The majority of this paper is classified. Brief excerpts were subsequently disclosed in an April 2002 cable. *See* Subject: Eyes Only – Countermeasures to Al-Qa'ida Resistance to [redacted] (Apr. 12, 2002).

197. MITCHELL & HARLOW, *supra* note 14, at 11.

198. Rodriguez Declaration, *supra* note 191, at 3.

199. Declaration of John "Bruce" Jessen in Support of Defendants' Motion for Summary Judgment at 2, Salim v. Mitchell, CV-15-0286-JLQ (E.D. Wash. 2016).

200. Rodriguez Declaration, *supra* note 191, at 6. At the time of this meeting, Rodriguez served as the Director of the CIA's Counterterrorism Center, which is a division of the CIA's National Clandestine Service. *Id*. at 1.

information . . . ."[201] This process could produce "a range of mental states in the subject, including, but not limited to, fear, learned helplessness, compliancy, or false hope."[202] Subsequently, Mitchell and Jessen identified a series of specialized interrogation techniques that could be used against Al-Qaeda detainees to achieve learned helplessness.[203] These techniques were the subject of extensive discussions within the CIA and were addressed at a follow-up meeting on July 8, 2002.[204] Eventually, Mitchell and Jessen proposed ten "enhanced interrogation techniques" to the CIA for review and approval.[205]

> • The **attention grasp** consists of grasping the detainee with both hands, with one hand on each side of the collar opening, in a controlled and quick motion. In the same motion as the grasp, the detainee is drawn toward the interrogator.
>
> • During the **walling** technique, the detainee is pulled forward and then quickly and firmly pushed into a flexible false wall so that his shoulder blades hit the wall. His head and neck are supported with a rolled towel to prevent whiplash.
>
> • The **facial hold** is used to hold the detainee's head immobile. The interrogator places an open palm on either side of the detainee's face and the interrogator's fingertips are kept well away from the detainee's eyes.
>
> • With the **facial or insult slap**, the fingers are slightly spread apart. The interrogator's hand makes contact with the area between the tip of the detainee's chin and the bottom of the corresponding earlobe.
>
> • In **cramped confinement**, the detainee is placed in a confined space, typically a small or large box, which is usually dark. Confinement in the smaller space lasts no more than two hours and in the larger space it can last up to 18 hours.
>
> • **Insects** placed in a confinement box involve placing a harmless insect in the box with the detainee.
>
> • During **wall standing**, the detainee may stand about 4 to 5 feet from a wall with his feet spread approximately to his shoulder width. His arms are stretched out in front of him and his fingers rest on the wall to support all of his body weight. The detainee is not allowed to reposition his hands or feet.
>
> • The application of **stress positions** may include having the detainee sit on the floor with his legs extended straight out in front of him with his arms raised above his head or kneeling on the floor

201. *Id*. at 6.

202. *Id*.

203. MITCHELL & HARLOW, *supra* note 14, at 46.

204. Cable from [redacted] to [redacted], Subject: Eyes Only – Increased Pressure in the Next Phase of the Abu Zubaydah Interrogations (July 8, 2002).

205. MITCHELL & HARLOW, *supra* note 14, at 52–53; *see also* Memorandum from [redacted] to [redacted], Subject: Description of Physical Pressures (July 9, 2002).

> while leaning back at a 45 degree angle.
>
> • **Sleep deprivation** will not exceed 11 days at a time.
>
> • The application of the **waterboard** technique involves binding the detainee to a bench with his feet elevated above his head. The detainee's head is immobilized and an interrogator places a cloth over the detainee's mouth and nose while pouring water onto the cloth in a controlled manner. Airflow is restricted for 20 to 40 seconds, and the technique produces the sensation of drowning and suffocation.[206]

According to Mitchell, these ten techniques "would lend themselves to a Pavlovian process" that would condition compliance from detainees.[207] These techniques were eventually approved by the CIA.[208] While they were not considered "enhanced interrogation techniques," several other techniques were also proposed for use against detainees, including solitary confinement, water dousing, dietary manipulation, sensory deprivation, environmental manipulation, and forced nudity.[209]

Mitchell has indicated the CIA interrogation program was "psychologically based."[210] Specifically, it consisted of two distinct "naturally occurring learning processes."[211] The first process was known as classical conditioning and required "detainees to experience fear and emotional discomfort when they thought about being deceitful."[212] To achieve this, the interrogation program had to "pair the naturally occurring discomfort and distress of the EITs [enhanced interrogation techniques] with the urge to deceive."[213] The second process was called avoidance conditioning and required "detainees to experience a sense of relief when they cooperated."[214]

To succeed, precise timing was essential to the interrogation program. Mitchell noted that "[o]verusing or underusing EITs or using them at the

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206. INSPECTOR GENERAL, CENTRAL INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001 – OCTOBER 2003) 15 (2004) (emphasis added).

207. MITCHELL & HARLOW, *supra* note 14, at 56.

208. Mitchell and Jessen had also proposed two other techniques that were not designated as enhanced interrogation techniques: the use of diapers on detainees and mock burials. Memorandum from [redacted] to [redacted], Subject: Description of Physical Pressures (July 9, 2002). However, many detainees were eventually placed in diapers.

209. CENTRAL INTELLIGENCE AGENCY, OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION 8 (Dec. 2004).

210. MITCHELL & HARLOW, *supra* note 14, at 45–46.

211. *Id*. at 153.

212. *Id*.

213. *Id*.

214. *Id*. at 154.

wrong time disrupted conditioning for the desired response."[215] This became evident after the enhanced interrogation techniques had been used on various detainees. As the program developed, Mitchell and Jessen also discovered that conditioning could occur even without the actual use of enhanced interrogation techniques. Detainees began associating certain objects with the enhanced interrogation techniques. They soon became conditioned to be fearful and compliant at the sight of these objects. For example, a towel was often used by interrogators to "wall" detainees by slamming them against flexible walls that were placed in interrogation rooms. This resulted in detainees associating a towel with the walling technique. "We took advantage of this learning phenomenon to create an opportunity to use fewer EITs later by making the rolled-up towel we used to protect the detainees during walling an object that evoked fear."[216]

According to a subsequent CIA background paper on interrogation techniques, Al-Qaeda detainees were well trained and able to resist standard interrogation techniques.[217] Accordingly, the interrogation process needed to overwhelm the detainee's resistance. "Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD [high-value detainee] behavior, to overcome a detainee's resistance posture."[218] Thus, the goal of interrogation "is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner."[219] Interrogation techniques were divided into three categories: conditioning, corrective, and coercive techniques. Conditioning techniques set the baseline level of treatment "to demonstrate to the HVD that he has no control over basic human needs."[220] These techniques included forced nudity, sleep deprivation, and dietary manipulation.[221] Corrective techniques were used "to correct, startle, or to achieve another enabling objective with the detainee."[222] These techniques included the insult slap, abdominal slap, facial hold, and attention grasp.[223] Finally, coercive techniques placed the detainee in more physical and psychological stress. These techniques included walling, water dousing,

215. *Id.*

216. *Id*. at 157.

217. CENT. INTELLIGENCE AGENCY, BACKGROUND PAPER ON CIA'S COMBINED USE OF INTERROGATION TECHNIQUES 1, 17 (2004).

218. *Id.* at 1.

219. *Id.*

220. *Id.* at 4.

221. *Id.* at 5.

222. *Id.*

223. CENT. INTELLIGENCE AGENCY, *supra* note 217, at 5.

stress positions, wall standing, and cramped confinement.[224] In addition to these interrogation techniques, detainees were exposed to white noise, loud sounds, and constant light during the interrogation process.[225]

B. Implementing the Interrogation Program: The Study of Abu Zubaydah

The theory of learned helplessness was first tested on Abu Zubaydah at the CIA's black site in Thailand.[226] At the time, Zubaydah was believed to be a high-ranking Al-Qaeda official with extensive knowledge of Al-Qaeda operations.[227] After Zubaydah was stabilized from injuries suffered during his capture, he was transferred from Pakistan to a CIA detention facility in Thailand where he received further medical treatment.[228] He was initially interrogated by FBI officers, but interrogation authority was soon transferred exclusively to the CIA.[229] According to Tenet, "[i]t was at this point that we got into holding and interrogating high-value detainees—'HVDs,' as we called them—in a serious way."[230] As the CIA finalized its interrogation plans, Zubaydah was held in isolation for several weeks.[231]

On August 4, 2002, the CIA began using enhanced interrogation techniques on Zubaydah.[232] Mitchell and Jessen played a primary role in Zubaydah's interrogation. In fact, they personally subjected Zubaydah to various enhanced interrogation techniques, including waterboarding.[233] The following account describes Zubaydah's first interrogation session.

> At 1150 hours security personnel went into the cell and shackled and hooded subject and removed subject's towel. When this was accomplished IC SERE psychologist (ICSP) entered the cell. IC SERE psychologist placed a rolled towel behind subject's neck and backed subject up to the cell wall. The IC SERE psychologist removed subject's hood. Performed an attention grab and had subject watch while the large confinement box was brought into the cell and laid on the floor. The IC SERE psychologist

224. *Id.* at 7–8.

225. *Id.* at 4.

226. SSCI REPORT, *supra* note 8, at 40–47.

227. Subsequent accounts have made clear that Zubaydah was not a member of Al Qaeda. *See* Charlie R. Church, *What Politics and the Media Still Get Wrong About Abu Zubaydah*, LAWFARE, Aug. 1, 2018, https://www.lawfareblog.com/what-politics-and-media-still-get-wrong-about-abu-zubaydah.

228. SSCI REPORT, *supra* note 8, at 27.

229. *See generally* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ (2009).

230. TENET, *supra* note 8, at 241.

231. SSCI REPORT, *supra* note 8, at 27–30.

232. *Id*. at 40.

233. Jessen Dep. at 148, January 20, 2017, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ); Defs.' Answer and Affirm. Defenses, at 16, June 21, 2016, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

> then demanded that subject, per REF B guidance, provide detailed and verifiable information on operations planned against the U.S., to include names, phones [sic] numbers, email addresses, weapons caches, and safehouses of anyone supporting terrorist operations in the U.S.
>
> . . .
>
> Subject appeared apprehensive. Subject said he had already provided the required information and denied having additional information. Subject received insult slap and face grab at each point that he denied having additional information. As his denials were expected, subject was again hooded while security officers stood the box upright and secured it to the cell bars. Subject was backed into the box and provided the container for his waste, water, and toilet paper. Subject's hood was removed and he was told this was his new home until he was prepared to provide detained and verifiable information on operations planned against the U.S. This verbal demand serves as a bridge to the next session of interrogation and is what subject is left to think about during his confinement. Subject was then shut into the large confinement box. The first session lasted approximately ten minutes.[234]

The CIA recorded several of these interrogation sessions.[235] The videos showed Zubaydah being subjected to various interrogation techniques, including waterboarding.[236] These recordings were later destroyed at the request of Jose Rodriguez, the Director of the CIA's Counterterrorism Center.[237] The destruction of the recordings would lead to an internal investigation although no charges were ever filed.[238]

Zubaydah was subjected to enhanced interrogation methods for nineteen consecutive days. During this time, he "spent a total of 266 hours (11 days, 2 hours) in the large (coffin size) confinement box and 29 hours in the small confinement box, which had a width of 21 inches, a depth of 2.5 feet, and a height of 2.5 feet."[239] Zubaydah was told "the only way he would leave the facility was in the coffin-shaped confinement box."[240] During his interrogation sessions, Zubaydah often became "hysterical" and he frequently "cried," "begged," "pleaded," and "whimpered."[241] After one waterboarding session, Zubaydah became unresponsive, "with bubbles

234. Cable from [redacted] to [redacted], Subject: Eyes Only – Details re Initial Cycle of Interrogations of 04 August 02 of Abu Zubaydah 2–3 (Aug. 4, 2002) (on file with The Torture Database), https://www.thetorturedatabase.org/files/foia_subsite/28_0.pdf.

235. SSCI REPORT, *supra* note 8, at 43–45.

236. *Id*. at 44.

237. *See* RODRIGUEZ, *supra* note 8, at 181–218.

238. Mark Mazzetti & Charlie Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, N.Y. TIMES, Nov. 10, 2010, at A12.

239. SSCI REPORT, *supra* note 8, at 42.

240. *Id*.

241. *Id*. at 42–43. The interrogation sessions also had a profound impact on CIA personnel. *Id*. at 44–45.

rising through his open, full mouth" and required medical intervention to regain consciousness.[242]

After nineteen days of subjecting Zubaydah to enhanced interrogation techniques, the CIA concluded the program had been successful. According to the interrogation team, "we have successfully broken subject's willingness to withhold threat and intelligence information. He is presently in a state of complete subjugation and total compliance."[243] The interrogation team did not believe Zubaydah had any specific threat information. While such conclusions could never be definitive, the interrogation team was confident that Zubaydah had revealed all available and relevant information.[244]

Zubaydah remained in CIA custody for four years.[245] He was detained at CIA facilities in Afghanistan, Thailand, and Poland. On September 5, 2006, Zubaydah was transferred to Guantanamo and placed in DOD custody. In a March 2007 appearance before a Combatant Status Review Tribunal at Guantanamo, Zubaydah described his treatment by the CIA as torture.[246]

From October 6 through 11, 2006, the International Committee of the Red Cross (ICRC) was allowed to visit the U.S. detention facilities at Guantanamo.[247] During the visit, the ICRC met with government personnel and toured the facilities. In addition, they met privately with several detainees. Following the visit, the ICRC prepared a confidential report (ICRC Report) on the detention of 14 high-value detainees. The ICRC Report was based on private interviews conducted with the detainees. The report was submitted to the United States on February 14, 2007.[248]

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242. *Id*. at 43–44.

243. Cable from [redacted] to ALEC, Subject: Eyes Only – Status of the Aggressive Interrogation Phase; Transition Into Maintenance and Long Term Debriefing, at 1, (Aug. 23, 2002), https://www.aclu.org/sites/default/files/field_document/80-5._exhibit_e.pdf.

244. *Id*. at 2.

245. Zubaydah's presence in the CIA's RDI Program was publicly revealed on December 26, 2002. *See* Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

246. Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016, 22–27 (Mar. 27, 2007), https://www.aclu.org/sites/default/files/pdfs/safefree/csrt_abuzubaydah.pdf. Large portions of Zubaydah's testimony, including descriptions of specific interrogation techniques, were redacted.

247. INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY, 3 (Feb. 14, 2007) [hereinafter ICRC REPORT]. The ICRC Report was confidential and was not supposed to be released without the approval of the ICRC. *Id.* at 1.

248. Letter from Geoff Loane, Head of Regional Delegation, International Committee of the Red Cross to John Rizzo, Acting General Counsel, Central Intelligence Agency (Feb. 14, 2007) (on file with The New York Review of Books), https://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

Each detainee interviewed by the ICRC had been in CIA custody prior to their transfer to Guantanamo.[249] They were interviewed separately and outside the presence of U.S. government officials. The ICRC noted the similar stories offered by each detainee with respect to their capture, detention, and treatment. Indeed, "the consistency of the detailed allegations provided separately by each of the fourteen adds particular weight to the information provided . . . ."[250] Each of the detainees was subjected to solitary confinement and incommunicado detention.[251] The ICRC identified several additional forms of ill treatment, including suffocation by water, prolonged stress standing positions, beatings by use of a collar, beating and kicking, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, threats of ill-treatment, forced shaving, and deprivation/restriction of solid food.[252] The detainees were also deprived of open air, exercise, and appropriate hygiene facilities, and their access to the Qur'an was restricted.[253]

The ICRC Report provides details regarding the treatment of several detainees, including Abu Zubaydah.[254] Verbatim transcripts of the ICRC interview with Zubaydah corroborate the descriptions provided in the SSCI Report.[255] Zubaydah described being slapped repeatedly in the face, slammed against the walls of his detention room, placed in a small wooden box, forced into stress positions, and being waterboarded.[256] According to Zubaydah, "I was told during this period that I was one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people."[257]

The ICRC stated in its report that the forms of mistreatment suffered by the detainees, both in isolation and in combination, amounted to torture as well as cruel, inhuman, or degrading treatment.[258] The ICRC also found that the CIA detention program "amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law."[259] More broadly, the ICRC expressed great concern with the coordinated and

249. ICRC REPORT, *supra* note 247, at 4.

250. *Id.* at 5.

251. *Id.* at 7.

252. *Id.* at 8–9.

253. *Id.* at 9.

254. *Id.*

255. Verbatim transcripts of these interviews were provided in Annex I to the ICRC Report. ICRC REPORT, *supra* note 247, at 28–37.

256. *Id*. at 29–31.

257. *Id.* at 31.

258. *Id.* at 5, 24.

259. *Id.* at 24.

systematic nature of the detention program. "When understood in their totality, the undisclosed detention regime to which these persons were subjected becomes all the more disturbing."[260]

Concerns with the RDI Program were also voiced within the CIA. Indeed, personnel in the CIA's Office of Medical Services (OMS) expressed concern that non-consensual human experimentation was occurring and that OMS may be implicated in such acts. For example, OMS Guidelines required OMS personnel to collect and analyze data from interrogation sessions "[i]n order to best inform future medical judgments and recommendations."[261] And yet, some OMS personnel expressed concerns "that studying the results of CIA interrogations would amount to human experimentation."[262] Two senior CIA officers who conducted an operational assessment of the RDI Program expressed similar concerns. They argued it would not be possible to assess the effectiveness of the CIA's enhanced interrogation techniques without violating the "Federal Policy for the Protection of Human Subjects."[263]

It is unclear how many individuals the CIA detained as part of the RDI Program. The SSCI Report indicated the CIA detained at least 119 individuals although an accurate count was simply not possible because some CIA records remained classified and other records are unclear.[264] Detainees were held in several locations throughout the world, designated by the SSCI Report as Detention Sites Cobalt (Afghanistan), Grey (Afghanistan), Brown (Afghanistan), Orange (Afghanistan), Blue (Poland), Green (Thailand), Black (Romania), and Violet (Lithuania).[265] The majority of detainees were held at Detention Site Cobalt (also known as the Salt Pit), which was located outside of Bagram Air Base in Afghanistan. According to the SSCI Report, 39 of the 119 detainees were subjected to enhanced interrogation techniques.[266] Of the 39 detainees, 17 of them were subjected to enhanced interrogations between January 2003 and August 2003.[267]

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260. *Id.* at 5.

261. OMS Guidelines, *supra* note 209, at 20.

262. SSCI REPORT, *supra* note 8, at 126.

263. *Id*. at xxii.

264. *Id*. at 14. According to a July 20, 2007 memorandum from the Office of Legal Counsel, the CIA had custody of ninety-eight detainees between March 2003 and July 2007. The memorandum indicated that the CIA had used "enhanced techniques" on approximately thirty detainees. Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., to John A. Rizzo, Acting Gen. Counsel, Central Intelligence Agency 5 (July 20, 2007).

265. SSCI REPORT, *supra* note 8, at 57, 61, 97.

266. *Id*. at 96.

267. Report of the SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM: FINDINGS AND CONCLUSIONS, S. REP. NO. 113–288, at 12 (2014) [hereinafter SSCI II REPORT].

By the time Mitchell and Jessen had completed their work for the CIA, their private consulting company had been paid over $81 million.[268] Individually, they had each been paid well over $1.2 million for their services. In addition, their contracts with the CIA included an indemnification agreement that would cover expenses associated with any potential civil or criminal prosecutions.[269]

IV. SUING THE ARCHITECTS OF THE INTERROGATION PROGRAM

Since 9/11, several victims of the RDI Program have filed lawsuits seeking to hold the United States accountable for their wrongful detention and mistreatment. Each lawsuit was dismissed on procedural grounds.[270] But the *Salim* litigation would be different.

A. *Salim v. Mitchell*

On October 13, 2015, two individuals (Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud) who had been subjected to CIA detention and interrogation and the personal representative of a third individual (Gul Rahman) who had died while being subjected to similar treatment filed a civil lawsuit in federal district court for the Eastern District of Washington against Mitchell and Jessen.[271] According to the complaint, the plaintiffs were subjected to aggressive interrogation techniques.[272]

> Plaintiffs Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud were kidnapped by the CIA and tortured and experimented upon in accordance with Defendants' protocols. They were subjected to solitary confinement; extreme darkness, cold, and noise; repeated beatings; starvation;

268. Memorandum from the CENTRAL INTELLIGENCE AGENCY, CIA COMMENTS ON THE SENATE SELECT COMMITTEE ON INTELLIGENCE REPORT ON THE RENDITION, DETENTION, AND INTERROGATION PROGRAM 49 (June 2013). In 2005, Mitchell and Jessen formed a private company, Mitchell, Jessen, and Associates, which provided various services to the CIA, including consulting, security, and interrogation services.

269. Exhibit 2 to Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 6, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

270. *See, e.g.*, William J. Aceves, *Constitutional Barriers and the Perils of Impunity*, *in* LESSONS AND LEGACIES OF THE WAR ON TERROR 49, 52 (Gershon Shafir et al. eds., 2013).

271. Complaint, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ). The plaintiffs were represented by the American Civil Liberties Union and several private attorneys. *See* Sheri Fink & James Risen, *Psychologists Open a Window on Brutal C.I.A. Interrogations*, N.Y. TIMES, (June 21, 2017), https://nyti.ms/2sR3niN.

272. At the outset of the litigation, the ACLU sent a letter to Attorney General Loretta Lynch requesting that the United States not intervene in the litigation. *See* Letter from Steven R. Shapiro, ACLU Legal Director, to The Hon. Loretta Lynch, Att'y Gen. (Nov. 5, 2015). While the United States was not a party to the litigation, it did participate in several proceedings in order to protect the confidentiality of various documents. *See, e.g.*, Statement of Int. of the United States, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

> excruciatingly painful stress positions; prolonged sleep deprivation; confinement in coffin-like boxes; and water torture. Plaintiffs Salim and Ben Soud suffered lasting psychological and physical damage from this torture. Gul Rahman was tortured in many of the same ways, including after Defendant Jessen trained and supervised CIA personnel to apply these methods. Shortly after that training, Mr. Rahman died as a result of hypothermia caused by his exposure to extreme cold, exacerbated by dehydration, lack of food, and his immobility in a stress position. His family has never been officially notified of his death and his body never returned to them.[273]

The complaint asserted jurisdiction under the Alien Tort Statute and raised three causes of action: torture and other cruel, inhuman, or degrading treatment, war crimes, and non-consensual human experimentation.[274] The complaint alleged that Mitchell and Jessen had designed the CIA's interrogation program by relying "on experiments from the 1960s in which researchers taught dogs 'helplessness' by subjecting them to uncontrollable pain."[275] With respect to the claim of non-consensual human experimentation, the complaint asserted the defendants pursued a theory "that prisoners could be reduced through abusive treatment to a state of 'learned helplessness' and thereby rendered passive, compliant, and unable to resist their interrogators' demands for information."[276] The complaint further alleged Mitchell and Jessen developed a set of techniques to condition the detainees and achieve learned helplessness.[277] To determine whether the interrogation techniques were effective, the defendants had to assess them in a systematic manner.

> Defendants implemented an experimental protocol that required assessments of whether (1) prisoners had been tortured long enough to induce a state of "learned helplessness" or additional torture was necessary; (2) certain combinations and sequences of torture techniques were most effective at overcoming "resistance"; and (3) whether detainees became fully compliant with interrogators' demands once they had been reduced to a state of learned helplessness.[278]

The plaintiffs raised several distinct theories of liability. According to the complaint, Mitchell and Jessen were directly liable because they engaged in non-consensual human experimentation by seeking to induce a state of learned helplessness on the plaintiffs. "Defendants monitored, recalibrated,

273. Complaint, Salim v. Mitchell, *supra* note 271, at 2–3.

274. The Alien Tort Statute is codified at 28 U.S.C. § 1350 and provides the district courts with original jurisdiction for any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States.

275. Complaint, Salim v. Mitchell, *supra* note 271, at 2.

276. *Id*. at 75.

277. *Id*.

278. *Id*. at 75–76.

and refined their experiment based on their assessment of Plaintiffs' and other prisoners' physical and psychological reactions to torture and cruel, inhuman, and degrading treatment."[279] In addition, the complaint alleged Mitchell and Jessen were liable because they conspired with the United States and aided and abetted the United States in experimenting on the plaintiffs without their consent.[280]

In January 2016, Mitchell and Jessen filed a motion to dismiss, raising three challenges to the lawsuit.[281] First, they argued the lawsuit should be dismissed pursuant to the political question doctrine because the lawsuit involved decisions of the political branches and the issues in the case lacked any judicially manageable standards.[282] Second, they argued they were entitled to derivative sovereign immunity because they were performing work on behalf of the U.S. government.[283] Third, they argued the plaintiffs had failed to allege proper claims under the Alien Tort Statute.[284] They asserted the complaint failed to meet the standard for ATS cases set forth by the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co*. because the claims did not "touch and concern" the United States with sufficient force to overcome the presumption against extraterritoriality.[285] With respect to the claim of non-consensual human experimentation, Mitchell and Jessen asserted this norm was not specific, universal, or obligatory as required for ATS litigation.[286] They argued the norm was not specific because "the parameters of what constitutes non-consensual human [medical] experimentation are not defined."[287] They argued it was not sufficiently universal because violations of the norm "do not threaten serious consequences in international affairs."[288] And, they argued it was not obligatory "because the prohibition is not enshrined in international treaties or custom."[289] Finally, Mitchell and Jessen asserted their actions could not

279. *Id*. at 76.

280. *Id*. at 76–77.

281. Defendants' Motion to Dismiss Pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (Jan. 8, 2016), Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ) [hereinafter Defendants' Motion to Dismiss].

282. *Id*. at 3–10.

283. *Id*. at 10–21.

284. *Id*. at 21–29. The Defendants also alleged that Obaid Ullah, as the personal representative of Gul Rahman, lacked the capacity to sue them. *Id*. at 29–30.

285. *Id*. at 21–23; *see* Kiobel v. Royal Dutch Petroleum Co., 133 U.S. 1659 (2013).

286. Defendants' Motion to Dismiss, *supra* note 281, at 27; *see* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

287. Defendants' Motion to Dismiss, *supra* note 281, at 27.

288. *Id*. (citations omitted).

289. *Id*.

be "characterized as either 'experimentation' or 'medical' in nature."[290] They alleged that the enhanced interrogation program could not be classified as experimentation because it was based on the SERE program, which they had worked on for several years. They also noted that the plaintiffs had not even referred to the interrogation program as "medical" in nature.

In response, the plaintiffs argued their claims of detainee abuse were not unreviewable political decisions and judicially manageable standards were available to assess their claims.[291] Indeed, they noted both the Supreme Court and Ninth Circuit had recognized the limited reach of the political question doctrine and that claims of detainee abuse fell within the judicial mandate.[292] The plaintiffs also argued the defendants were not entitled to derivative sovereign immunity because the government could not delegate the authority to commit detainee abuse and because the defendants had ample discretion in their contractual obligations.[293] In addition, the plaintiffs pointed out there was no historical precedent for granting psychologists immunity in such cases.[294] Moreover, the defendants were on notice that torture, cruel, inhuman, or degrading treatment, and non-consensual human experimentation were prohibited by international law.[295]

With respect to the status of non-consensual human experimentation under international law, the plaintiffs asserted the norm is well-established.[296] Significantly, the norm against non-consensual human experimentation had already been considered and affirmed in *Abdullahi v. Pfizer, Inc*.[297] The plaintiffs also argued the defendants did, in fact, engage in experimentation through their use of the theory of learned helplessness on detainees and their ongoing refinement of the interrogation program.[298] And, finally, the plaintiffs argued the prohibition against non-consensual human experimentation is not limited to medical experiments. It can apply to scientific or biological experimentation.[299]

On April 28, 2016, the district court issued its decision in *Salim v. Mitchell* rejecting each of the defendants' arguments.[300] The court declined

290. *Id*. at 28–29.

291. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss at 3–10 (Feb. 11, 2016), Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

292. *Id*.

293. *Id*. at 10–16.

294. *Id*. at 16–17.

295. *Id*. at 17–19.

296. *Id*. at 27–28.

297. Plaintiffs' Memorandum, *supra* note 291, at 27.

298. *Id*. at 28.

299. *Id*. at 29.

300. Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016).

to dismiss the lawsuit pursuant to the political question doctrine, finding that executive branch actions are not immune from judicial review and that manageable standards did exist for considering the claims in the lawsuit.[301] In addition, the court declined to grant the defendants derivative sovereign immunity because courts narrowly construe such immunity for federal contractors, and it is inapplicable if the "contractor 'exceeded his authority'" or such "'governmental authority was not validly conferred.'"[302] The court highlighted the defendants' actions in designing and implementing the torture program, which included proposing the theory of learned helplessness and convincing the government that specific interrogation techniques, including waterboarding, would be successful.[303]

In its analysis of the ATS claims, the district court held that the plaintiffs' claims fulfilled the extraterritoriality standard enunciated by the Supreme Court in *Kiobel*. The court determined the plaintiffs' allegations, which highlighted the defendants' U.S. citizenship and the defendants' development and supervision of the interrogation program in the United States, were sufficient to meet the "touch and concern" standard.[304] With respect to the substantive claims, the court did not specifically address the prohibition against non-consensual human experimentation. Rather, it acknowledged the plaintiffs' claims of torture were sufficient to state a claim under the ATS.[305]

In Fall 2016, the defendants filed a second motion to dismiss asserting the Military Commissions Act (MCA) deprived the district court of jurisdiction.[306] While the MCA did impose jurisdictional limits in cases involving designated enemy combatants, the district court concluded that none of the plaintiffs had been designated as enemy combatants.[307] Since the MCA was inapplicable to the plaintiffs, the district court rejected the motion to dismiss on January 17, 2017.[308]

In Summer 2017, the defendants renewed their efforts to dismiss the lawsuit by filing a motion for summary judgment.[309] Repeating their earlier

301. *Id*. at 1127–30.

302. *Id*. at 1130 (quoting Campbell-Ewald v. Gomez, 136 U.S. 663, 672–73 (2016)).

303. *Id*.

304. *Id*. at 1132.

305. *Id*. at 1132–33. The district court also rejected the defendants' challenge to Obaid Ullah's capacity to sue. *Id*. at 1133.

306. Defendants' Motion to Dismiss at 1, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ). *See generally* 28 U.S.C. § 2241(e)(2).

307. Salim v. Mitchell, No. CV-15-0286-JLQ, 2017 WL 390270, at *7 (E.D. Wash. Jan. 27, 2017).

308. *Id*.

309. *See* Defendants' Motion for Summary Judgment, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

challenges, they argued the lawsuit should be dismissed pursuant to the political question doctrine and that they were entitled to derivative sovereign immunity.[310] They also challenged the district court's jurisdiction under the Alien Tort Statute. They again asserted the ATS did not apply extraterritorially.[311] They also argued they could not be liable for the underlying claims under any applicable theory of liability, including direct liability, aiding and abetting liability, conspiracy, or joint criminal enterprise.[312] The plaintiffs filed their own separate motion for partial summary judgment on their claim that they were subjected to torture and other cruel, inhuman, or degrading treatment and that the defendants aided and abetted in these acts.[313] Both parties submitted expert declarations examining the status of non-consensual human experimentation under international law. On behalf of the plaintiffs, Professor Kevin Heller examined various international sources and concluded that "the Defendants' actions clearly violated all three aspects of the customary international law prohibition concerning human experimentation: (1) under IHL [international humanitarian law]; (2) under the law of war crimes; and (3) under international human rights law."[314] On behalf of the defendants, Professor Julian Ku asserted there is no "clear and universal prohibition on human experimentation sufficient to sustain jurisdiction under the ATS arising out of the only body of customary international law applicable to the defendants' alleged conduct: the law governing non-international armed conflicts."[315]

On August 7, 2017, the district court rejected the defendants' motion for summary judgment as well as the plaintiffs' motion for partial summary judgment.[316] The court reiterated that the nature of the case did not compel dismissal under the political question doctrine.[317] The court also reiterated

310. *Id*. at 2. The defendants also sought to exclude the SSCI Report by alleging it was hearsay and, therefore, inadmissible.

311. *Id*. at 21–23.

312. *See id*. at 24–35.

313. Plaintiffs' Motion for Partial Summary Judgment at 1, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

314. Declaration of Kevin Jon Heller in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgement at 24, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ); Expert Opinion of Kevin John Heller, at 24, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ); Rebuttal Opinion of Kevin Jon Heller, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

315. Expert Opinion of Professor Julian Ku at 14-15, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ); Sur-Rebuttal Opinion of Professor Julian Ku, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

316. Salim v. Mitchell, 268 F. Supp. 3d 1132, 1161 (E.D. Wash. 2017). The court also rejected the Defendants' motion to exclude the SSCI Report. *Id.*

317. *Id*. at 1145–1147.

the defendants were not entitled to derivative sovereign immunity because they had not established that "they merely acted at the direction of the Government, within the scope of their authority, and that such authority was legally and validly conferred."[318] With respect to the merits of the underlying claims, the district court again declined to specifically address the prohibition against non-consensual human experimentation. Rather, the district court acknowledged that a number of factual and legal issues remained in dispute. For example, the court noted the *actus reus* and *mens rea* requirements for aiding and abetting liability had not been conclusively resolved by the Ninth Circuit.[319] Moreover, the court determined that aiding and abetting liability "will also turn on whether the EITs [enhanced interrogation techniques] constituted 'torture.'"[320] Accordingly, summary judgment was inappropriate.

In preparing for trial, the plaintiffs compiled a proposed set of jury instructions addressing many of the legal issues that would be considered at trial. With respect to non-consensual human experimentation, the proposed jury instructions indicated that this norm "derives from the international response to experiments conducted by Nazi doctors, which were universally condemned as a violation of basic human rights and civilized morality."[321] The proposed instructions then identified five elements to the claim of non-consensual human experimentation: (1) the plaintiff was a human subject of research involving an intervention or interaction with him; (2) the research was not carried out for his physical or mental health; (3) the research seriously endangered his physical or mental health; (4) the research was performed on him without his informed consent; and (5) the perpetrator acted under color of law or in concert with the state.[322] Research was defined as "an attempt to answer a question by collecting data or information, analyzing the data or information, and drawing conclusions from the results in an attempt to contribute to generalizable knowledge."[323] In support, the plaintiffs cited numerous sources, including the Nuremberg trials, the 1949 Geneva Conventions, Additional Protocols I and II, the Rome Statute, the work of the U.N. Human Rights Committee, and several federal cases and statutes.[324]

318. *Id*. at 1150.

319. *See id*. at 1155.

320. *Id*. at 1157.

321. Plaintiffs' Proposed Jury Instructions in Accordance with LR 51.1 at 50, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

322. *Id*. at 51–53.

323. *Id*. at 55.

324. *Id*. at 51–53.

The defendants proposed a different set of jury instructions. While the defendants continued to argue that the prohibition against non-consensual human experimentation was not sufficiently well-defined for purposes of the ATS, they offered a three-part definition for the jury to consider when it was assessing this claim. To find the defendants liable, the jury would have to establish: (1) the CIA subjected the plaintiffs (or Gul Rahman) to medical or scientific experiments; (2) the experiments endangered the plaintiffs' (or Gul Rahman's) physical or mental health; and (3) the CIA experimented upon the plaintiffs (or Gul Rahman) while acting under color of law.[325] They defined experiment as "an action taken with the primary purpose of learning about the medical or scientific effects of that action on humans."[326] In support, the defendants cited the *Brandt* and *Pfizer* cases as well as Additional Protocol II and the Torture Victim Protection Act.[327]

On August 17, 2017, only three weeks before trial, the parties settled the lawsuit although the terms of the financial settlement were not disclosed.[328] While the specific provisions of the settlement are confidential, both sides expressed satisfaction with the outcome.[329] In a carefully worded joint statement, Mitchell and Jessen admitted they worked to develop a program for the CIA "that contemplated the use of specific coercive methods to interrogate certain detainees."[330] They acknowledged that Gul Rahman suffered abuse in the CIA program and died as a result of this abuse. They acknowledged that Suleiman Abdullah Salim and Mohamed Ahmed Ben Soud "were also subjected to coercive methods in the CIA program, which resulted in pain and suffering for them and their families."[331] While Mitchell and Jessen indicated it was regrettable that the plaintiffs had suffered these abuses, they did not accept responsibility. With respect to the abuse suffered by Salim and Ben Soud, Mitchell and Jessen alleged it "occurred without

325. Defendants' Proposed Jury Instructions at 74, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

326. *Id*. at 74.

327. *Id*. at 75.

328. *See generally* Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES, Aug. 18, 2017, at A12; *Legal Settlement in Psychologists' CIA Torture Case*, L.A. TIMES, Aug. 20, 2017, at A22.

329. Pursuant to the terms of Mitchell and Jessen's contracts with the CIA, the U.S. government will indemnify them for their legal fees and settlements. A 2008 Indemnification Agreement signed by Mitchell and Jessen placed a $5 million cap on the amount available for indemnification. Indemnification Agreement Between James Mitchell, John Bruce Jessen, and Mitchell, Jessen and Associates and the U.S. Government (Dec. 15, 2011). By November 2011, this amount had been reduced to $3.8 million. Of course, Mitchell and Jessen may also have private insurance coverage to supplement this amount. *See* Fink, *supra* note 328, at A12.

330. *On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on Behalf of Three Torture Victims*, AM. C.L. UNION (Aug. 17, 2017), https://www.aclu.org/news/cia-torture-psychologists-settle-lawsuit [hereinafter ACLU News Release].

331. *Id.*

their knowledge or consent and that they were not responsible for those actions."[332] With respect to the abuse suffered by Rahman, they alleged "that they were unaware of the specific abuses that ultimately caused Mr. Rahman's death and are also not responsible for those actions."[333]

In separate statements, both parties highlighted the significance of the settlement. In their statement, the defendants emphasized that their actions were legal and had been taken to save lives.[334] According to Jessen, "[t]his resolution brings closure to this unfortunate matter. Neither Dr. Mitchell nor I knew about, condoned, participated in, or sanctioned the unauthorized actions that formed the basis for this lawsuit."[335] The plaintiffs offered a much different perspective. According to the plaintiffs, "[w]e brought this case seeking accountability and to help ensure that no one else has to endure torture and abuse, and we feel that we have achieved our goals."[336] They pointed out that the lawsuit forced Mitchell and Jessen to respond and forced the CIA to release classified information about the program. One of the plaintiffs' attorneys echoed these thoughts: "This is a historic victory for our clients and the rule of law . . . This outcome shows that there are consequences for torture and that survivors can and will hold those responsible for torture accountable. It is a clear warning for anyone who thinks they can torture with impunity."[337] He acknowledged, however, that the search for justice can take many years. "But Mohamed, Suleiman, and Obaidullah remind me of why we keep fighting for accountability against what can feel like insurmountable odds. Now they want to turn to healing, and we can get closer to finally turning the page on torture."[338]

B. Assessing the *Salim* Litigation

The *Salim* litigation is significant for several reasons. It represents the first lawsuit involving the RDI Program that moved beyond the initial stages of litigation.[339] Prior to this decision, every lawsuit filed in the United States

332. *Id.*

333. *Id.*

334. *Attorneys for Defendants in Salim v. Mitchell Announce Settlement*, BUS. WIRE (Aug. 17, 2017), http://www.businesswire.com/news/home/20170817005689/en/Attorneys-Defendants-Salim-v.-Mitchell-Announce-Settlement.

335. *Id.*

336. AM. C.L. UNION, *supra* note 330.

337. *Id.*

338. *Id.*

339. *See* Jeffrey Davis, *Uncloaking Secrecy: International Human Rights Law in Terrorism Cases*, 38 HUM. RTS. Q. 58, 63–69 (2016) (discussing cases involving the RDI Program that were dismissed early); Jameel Jaffer, *Known Unknowns,* 48 HARV. C.R.-C.L. L. REV. 457, 470 (2013) (discussing dismissal of suits); Daniel Joseph Natalie, *No Longer Secret: Overcoming the State Secrets Doctrine to Explore Meaningful Remedies for Victims of Extraordinary Rendition*, 62 CASE W. RES. L. REV. 1237,

seeking redress for actions arising out of the RDI Program was dismissed on jurisdictional or prudential grounds. In contrast, the *Salim* plaintiffs overcame two motions to dismiss and a motion for summary judgment. Despite the defendants' repeated efforts, the district court declined to dismiss the case under the political question doctrine. It declined to offer the defendants immunity for their actions. And the court held the plaintiffs had raised actionable claims under the ATS. With respect to non-consensual human experimentation, the court declined to accept Mitchell and Jessen's claims that the norm did not exist or that it failed to meet the standards for ATS liability.

The *Salim* litigation is significant because it forced the architects of the RDI Program to answer the plaintiffs' claims through responsive pleadings and in depositions. In addition, several CIA officials were also forced to explain their roles in the RDI Program through depositions.

The discovery process revealed extensive information about the development of the RDI Program and Mitchell and Jessen's role in testing the theory of learned helplessness on detainees.[340] Hundreds of previously classified documents were released through the discovery process, thereby removing the secrecy that had previously cloaked the RDI Program.

- **Jessen and Mitchell entered a series of contracts with the CIA, which needed "psychologists who are trained in and experienced in conducting psychological assessments and applied research in high-risk operational settings to provide consultation and training in the area of operational assessment."**[341] The project objectives included:

  > Provide the [redacted] with research and consultation in support of [redacted] applied research efforts in the area of operational psychology.
  >
  > Provide the [redacted] with recommendations and suggested courses of action for applying research methodology to meet mission goals and objectives in conducting psychological

1238–39 (2012) (discussing RDI cases dismissed on state secrets grounds); Ashley Scott, *The State Secrets Privilege: Alternative Remedies in Cases of Torture Abroad*, 45 SW. L. REV. 219, 219–24 (2015) (same); Christina E. Wells, *State Secrets and Executive Accountability*, 26 CONST. COMMENT. 625, 626 (2010) (same); *Developments in the Law – Access to Courts*, 122 HARV. L. REV. 1151, 1160 (2009) (same).

340. *See generally* Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Partial Summary Judgment, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ) (laying out the RDI program intended to develop learned helplessness in detainees). *But see* Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ) (disputing or objecting to facts regarding the RDI program).

341. Exhibit 1 to Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 49, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

assessment in high-risk operational settings.

Conduct specified, time-limited research projects identified by the [redacted] in support of operational psychology.[342]

• **Before commencing the use of enhanced interrogation techniques on Abu Zubaydah, the interrogation team "suggested several environmental modifications to create an atmosphere that enhances the strategic interrogation process of [Abu Zubaydah].** The deliberate manipulation of the environment is intended to cause psychological disorientation, and reduced psychological wherewithal for the interrogation. The deliberate establishment of psychological dependence upon the interrogator as well as an increased sense of learned helplessness."[343]

• **The theory of learned helplessness was the primary driver of the interrogation program.** "The physical environment, [redacted] psychological state and the actual interrogation process are intentionally designed to develop three basic psychological conditions to enhance cooperation and willingness to discuss vital intelligence. The development of psychological dependence, learned helplessness and short term thinking are key factors in reducing [redacted] sense of hope that his well-honed counter-measure interrogation skills will help him from disclosing important intelligence."[344]

• **The interrogation team sought to induce complete helplessness, compliance and cooperation from Zubaydah**. "Our goal was to reach the stage where we have broken any will or ability of subject to resist or deny providing us information (intelligence) to which he had access. We additionally sought to bring subject to the point that we confidently assess that he does not/not possess undisclosed threat information, or intelligence that could prevent a terrorist event."[345]

• **Once the use of enhanced interrogation techniques on Abu Zubaydah had ended, the interrogation team recommended that these techniques should be used on other detainees.** "The aggressive phase at [redacted] should be used as a template for future interrogation of high value captives. Psychologists familiar with interrogation, exploitation and resistance to interrogation

342. *Id.*

343. Cable from [redacted] to [redacted], Subject: Eyes Only – Behavioral Interrogation Team Site Report (Apr. 7, 2002) (on file with the American Civil Liberties Union), https://www.thetorturedatabase.org/files/foia_subsite/94o.pdf.

344. Cable from [redacted] to [redacted], Subject: Eyes Only – Interrogation Plan 2 (Apr. 12, 2002) (on file at The Torture Database), https://www.thetorturedatabase.org/files/foia_subsite/50_0.pdf.

345. Cable from [redacted] to Immediate ALEC Info Director [redacted], Subject: Eyes Only – Status of Interrogation Phase (Aug. 20, 2002) (on file with the American Civil Liberties Union), https://www.thetorturedatabase.org/files/foia_subsite/98o.pdf.

> should shape compliance of high value captives prior to debriefing by substantive experts."[346]
>
> • **The use of psychologists was essential to the interrogation program.** "Personnel experienced in high value captive interrogation (HVCI) are essential to the successful design and conduct of these activities. Specially trained HVCI psychologists with exploitation and resistance training experience, and who possess the skills necessary to apply those techniques, are essential to the success of the interrogation process and must be physically present in each session with a detainee. In addition, the HVCI-qualified psychologists must provide appropriate interrogation and questioning training to the [redacted] subject matter and language experts on the teams; this training may be provided on site where necessary, and will be augmented throughout the process by the deployed HVCI-qualified psychologists."[347]

Through the discovery process, the *Salim* litigation created an historical record. Most of these documents would not have been released without the lawsuit. In their absence, the details of the RDI Program would have remained in dispute or been lost to history.[348]

The *Salim* litigation also revealed the profound suffering experienced by the plaintiffs. In his declaration, Suleiman Abdullah Salim described how the brutal treatment he endured left lasting marks on his body and spirit.

> I still suffer the excruciating physical and mental effects of my time in the Darkness and the interrogators' abusive treatment of me. My whole body still aches, my upper and lower back especially. I regularly suffer crippling flashbacks and nightmares. They're a constant reminder of that place and the terrible things that were done to me there.[349]

Mohamed Ben Soud offered a similar account of the agony he experienced as a CIA detainee. And he described his continuing confusion as to why he was forced to suffer.

> I do not know why the CIA detained and interrogated me. I have never been involved in terrorism. I have never been a member of Al Qaeda, nor associated with that organization. I opposed and fought against the

346. *Id.*

347. Cable from [redacted] to [redacted], Subject: Eyes Only – Lessons for the Future, at 3 (Jan. 8, 2003) (on file with the American Civil Liberties Union), https://www.thetorturedatabase.org/files/foia_subsite/9_0.pdf.

348. The human rights movement has long recognized the significance of truth and transparency in promoting healing, reconciliation, and justice. *See generally* William J. Aceves, *The Civil Redress and Historical Memory Act of 2029: A Legislative Proposal*, 51 U. MICH. J. L. REFORM 163, 208–09 (2017) (discussing the right to truth in international law).

349. Declaration of Suleiman Abdullah Salim at 9, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

> Gaddafi dictatorship, but I have never taken up arms against the United States.[350]

Finally, the settlement in *Salim v. Mitchell* revealed the importance of pursuing accountability for human rights abuses. Civil litigation allows victims to lead the search for justice and achieve redress, which can offer them closure and an opportunity for a new life.[351] In *Salim*, the plaintiffs acknowledged the personal significance of the litigation and their satisfaction with the outcome. "We were able to tell the world about horrific torture, the CIA had to release secret records, and the psychologists and high-level CIA officials were forced to answer our lawyers' questions. It has been a long, difficult road, but we are very pleased with the results."[352] In *Salim*, the plaintiffs also received an undisclosed financial settlement from the defendants. While compensation is seldom the reason for human rights litigation, it can offer victims financial relief and allow them to start a new life. As noted by their attorneys when the settlement was announced, the plaintiffs could now move forward and begin to heal: "[a]ccountability is a process. Recovery is a process. Survival is a process. And today was a good day."[353]

V. INTERROGATION OR EXPERIMENTATION?

Under the standards of international law, the CIA engaged in non-consensual human experimentation when it tested the theory of learned helplessness on high-value detainees in the RDI Program.[354]

First, the RDI Program consisted of systematic psychological research and experimentation that was meant to acquire generalizable information about human behavior. Mitchell and Jessen's contracts indicated they would conduct research on behalf of the CIA, which included identifying scientific theories for influencing human behavior and modifying these theories for application in operational settings.[355] They believed the theory of learned

350. Declaration of Mohamed Ben Soud at 10, Salim v. Mitchell, 183 F. Supp. 3d 1121 (E.D. Wash. 2016) (No. CV-15-0286-JLQ).

351. *See, e.g.*, Rupert Skilbeck, *Strategic Litigation of Torture, A Victim-Centred Approach*, REDRESS (May 9, 2018), https://redress.org/news/strategic-litigation-of-torture-a-victim-centred-approach/.

352. ACLU News Release, *supra* note 330, at 1–2.

353. Ladin, *supra* note 337, at 2.

354. In *Salim*, the plaintiffs' proposed jury instructions identified five elements to non-consensual human experimentation, including danger to the subject's health and state action. Plaintiffs' Proposed Jury Instructions, *supra* note 321, at 50–53. As previously discussed, international law does not require that the research endanger the subject's health or that the perpetrator act under color of law. Regardless, these two elements are clearly established in the *Salim* case because Mitchell and Jessen worked with the CIA and there was no question the plaintiffs suffered extraordinary harm.

355. Statement of Work *in* Exhibit 1 *supra* note 341, at 8–10.

helplessness could be used to acquire actionable intelligence from detainees. Their working hypothesis was that enhanced interrogation techniques would condition the detainees to become compliant. The detainees' degree of cooperation represented the primary outcome variable, and each interrogation technique served as a distinct independent variable.

Following extensive research and preparation, the theory was first tested on Abu Zubaydah.[356] It was refined in a deliberate manner with each interrogation and on each subsequent high-value detainee. Each interrogation was prepared in advance based upon the medical and psychological condition of the detainee. Each enhanced interrogation technique was meticulously applied to assess its impact on the primary outcome variable. Controls were implemented and maintained throughout interrogations to isolate the effects of the independent variables. Each interrogation was observed by medical professionals to ensure detainees were kept alive. Each interrogation was reviewed by psychologists to examine the validity of the theory and to ensure that results could be replicated. To Mitchell and Jessen, the theory was validated when detainees became cooperative and purportedly revealed information they had previously withheld from interrogators.

The validity of the theory of learned helplessness remains disputed although this is irrelevant for purposes of determining whether human experimentation occurred. The theory itself is subject to extensive criticism in the medical and psychological literature.[357] Its success is also unclear. Proponents assert that enhanced interrogation techniques conditioned detainees to be passive and cooperative.[358] As a result, they allege the CIA was able to acquire actionable intelligence that prevented several terrorist attacks and resulted in the capture of Al-Qaeda suspects.[359] Critics argue the theory was ill-conceived, and that little to no actionable intelligence was ever acquired.[360] In fact, some critics argue the use of enhanced interrogation

356. *See supra* Part III.B.

357. *See, e.g.*, Richard T. Liu et al., *The Hopelessness Theory of Depression: A Quarter Century in Review*, 22 CLINICAL PSYCH. 345 (2015); Charles G. Costello, *A Critical Review of Seligman's Laboratory Experiments on Learned Helplessness and Depression in Humans*, 87 J. ABNORMAL PSYCH. 21 (1978).

358. *See* REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM (Bill Harlow et al. eds., 2015); RODRIGUEZ, *supra* note 8, at 71.

359. *See, e.g.*, J. Philip Mudd, *The Craft of Intelligence and the Value of Detainee Information*, *in* Harlow, *supra* note 358, at 25.

360. SSCI II REPORT, *supra* note 268, at 2–3; *see also* Douglas A. Johnson et al., *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, FOREIGN AFFAIRS, Sept./Oct. 2016, at 121; Ali Soufan, *My Tortured Decision*, N.Y. TIMES, Apr. 22, 2009, at A27.

techniques could never lead to actionable intelligence because such actions inevitably harm memory and affect human cognition.[361]

In addition, the CIA's failure to follow established procedures regarding medical and psychological experimentation is also irrelevant for purposes of establishing that experimentation occurred.[362] These experiments lacked any semblance of scientific rigor. There were no control groups. There was no oversight by internal review boards. There were ample conflicts of interest, and the basic principles of scientific inquiry were lacking. The absence of such indicia of legitimate research, however, does not mean that experimentation did not occur. The historical record dating back to the Nuremberg trials makes clear that international law contains no such requirement. Moreover, imposing such a requirement would undermine the norm by providing a simple method for bypassing its obligations.

Second, detainees did not offer their informed consent to participate in the study of learned helplessness. Certainly, their status as detainees requires greater scrutiny to confirm that any proffered consent was legitimate and not the result of fear or undue influence. But, in fact, consent was never requested or provided. Given the purpose of the RDI Program was to gain compliance from detainees who were refusing to cooperate in the interrogation process, this lack of consent is not surprising. Not only was consent lacking, but detainees made affirmative and repeated requests to terminate the program. Of course, their requests were rejected.

Third, the theory of learned helplessness was not implemented for the betterment of the detainees. The use of enhanced interrogation techniques was clearly not justified by the medical or psychological conditions of the detainees. And, they were not carried out in the detainees' interests. Quite the contrary, the enhanced interrogation techniques posed serious health risks to detainees and resulted in many long-term injuries and even death.[363] The interrogation logs maintained by the CIA describe the profound pain and suffering caused by the various interrogation techniques. The interview records prepared by ICRC officials after they met with several high-value detainees at Guantanamo reveal that detainees still experienced pain and suffering years after the experiments were concluded.[364]

The participation of medical and psychological personnel in developing and implementing the theory of learned helplessness reinforces the

361. *See* SHANE O'MARA, WHY TORTURE DOESN'T WORK: THE NEUROSCIENCE OF INTERROGATION (2015).

362. *But see* M. Gregg Bloche, *When Torture Becomes Science*, N.Y. TIMES, Aug. 13, 2017, at SR6.

363. *See, e.g.*, Matt Apuzzo et al., *U.S. Torture Leaves a Legacy of Detainees with Damaged Minds*, N.Y. TIMES, Oct. 9, 2016, at A1.

364. ICRC REPORT *supra* note 247, at 8, 10, 30, 35.

conclusion that the CIA conducted non-consensual human experimentation on detainees. Mitchell and Jessen were licensed psychologists—professionals trained to study human behavior and conduct applied research in operational psychology.[365] They used their knowledge and training to conduct research on human beings, and yet they failed to comply with the most basic scientific and ethical standards of their profession. In fact, because of his involvement in the RDI Program, Mitchell recognized he would never again be able to work as a psychologist.[366] But Mitchell and Jessen were not the only medical personnel involved in the RDI Program. The CIA's Office of Medical Services was actively involved in monitoring and assessing the detainees throughout the detention process.[367] And because detainees are considered vulnerable individuals, they should have been provided additional protections to ensure they were not subjected to any form of non-consensual experimentation. These standards are recognized in both human rights law and humanitarian law and apply regardless of whether the detainees were captured in times of peace or during armed conflict.

And, while not dispositive, it is certainly relevant that the American Psychological Association and the American Medical Association repeatedly acknowledge the primacy of patient safety and well-being, require informed consent in research, and unequivocally condemn the role of medical professionals in any situations where torture or other cruel, inhuman, or degrading treatment may occur. In 2013, for example, the APA issued its *Policy Related to Psychologists' Work in National Security Settings and Reaffirmation of the APA Position against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[368] The policy was adopted in response to the RDI Program. It precludes psychologists from engaging in any activity, including advising, planning, designing, or providing training, that implicates torture or other cruel, inhuman, or degrading treatment.[369] The policy cites numerous international instruments

365. In seeking to establish his qualifications to provide the CIA with "special mission interrogation consultation," Mitchell offered a detailed summary of his prior experiences that were "relevant for providing psychological consultation to interrogation programs." Memorandum from James E. Mitchell, Subject: Qualifications to Provide Special Mission Interrogation Consultation (Feb. 1. 2003). This included providing "psychological consultation to interrogation teams," observing "the effectiveness of various interrogation approaches," and making "recommendations about how to improved [sic] the effectiveness of interrogation efforts." *Id*. at 1.

366. *See* MITCHELL & HARLOW, *supra* note 14.

367. *See* OMS Guidelines, *supra* note 209, at 1.

368. AMERICAN PSYCHOLOGICAL ASSOCIATION, POLICY RELATED TO PSYCHOLOGISTS' WORK IN NATIONAL SECURITY SETTINGS AND REAFFIRMATION OF THE APA POSITION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (2013).

369. *Id*. at 2–4.

with approval and relies upon them for guidance on appropriate standards.[370] Significantly, the policy identifies several examples of prohibited techniques, including waterboarding, slapping or shaking, stress positions, and sleep deprivation.[371]

Arguments that purport to justify the testing of learned helplessness and the use of enhanced interrogation techniques on national security grounds find no support in international law. This argument was forcefully rejected at Nuremberg.[372] And, it finds no support in any international instrument. Indeed, the ICCPR explicitly precludes derogation from the prohibition against non-consensual human experimentation.[373] Likewise, the argument that the President and other high-ranking government officials authorized the RDI Program, thereby offering legitimacy to human experimentation, is also contrary to international law. This argument was also rejected at Nuremberg. Neither the legal advice proffered by the Office of Legal Counsel nor the medical support offered by the Office of Medical Services can override international law. In sum, no exceptions justified the enhanced interrogation techniques and their use in the study of human behavior.[374]

Finally, the responsibility of those individuals who developed and implemented the RDI Program is clear.[375] Under the principles first set forth at Nuremburg and affirmed in Geneva and Rome, these individuals are subject to criminal responsibility. While non-consensual human experimentation is a discrete crime under international law, it can also constitute torture and other cruel, inhuman, or degrading treatment. In certain situations, it can constitute a crime against humanity.[376] In times of armed conflict, non-consensual human experimentation can be classified as a war crime.[377] These norms are not mutually exclusive, and a perpetrator is subject

370. *Id*. The policy cites the Convention against Torture, the 1949 Geneva Conventions, the Declaration of Helsinki, and several other international instruments.

371. *Id*.

372. *See* INTERNATIONAL MILITARY TRIBUNAL, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 222–24 (1947).

373. ICCPR, *supra* note 107, art. 4.

374. In fact, there are troubling parallels between the hypothermia experiments conducted by Nazi Germany and the environmental manipulation ("uncomfortably cool environments") and water dousing used on detainees. OMS Guidelines, *supra* note 209, at 10–13. According to OMS, detainee tolerance of cold temperatures and susceptibility for hypothermia must "be assessed on a case by case basis, and continuously reevaluated over time." *Id*. at 10–11. In addition, the OMS Guidelines for exposure to water "were derived from submersion studies." *Id*. at 13.

375. *See, e.g.*, Aceves, *supra* note 186, at 126–28.

376. *See, e.g.*, Military Tribunal No. 1, *supra* note 27, at 181; Rome Statute, *supra* note 83, art. 7 (designating inhumane acts that cause great suffering or serious injury to body or to mental or physical health as a crime against humanity).

377. Rome Statute, *supra* note 83, art. 8.

to criminal responsibility regardless of how the underlying crime is captioned. In addition, victims of non-consensual human experimentation are entitled to redress for their injuries, including reparations.[378]

VI. CONCLUSION

This Article has considered whether the CIA's RDI Program was an interrogation program or an example of human experimentation. In fact, it was both. The CIA believed the theory of learned helplessness could be used to acquire actionable intelligence from high-value detainees. To test the theory, the CIA developed several enhanced interrogation techniques that would be used on detainees to condition them and make them compliant. And with each application of the designated interrogation techniques, the CIA refined the program. Every hour of wall standing, every day of sleep deprivation, every facial slap and stress position, every application of the waterboard—each technique was documented, studied, and refined so it could be used again with greater efficacy in future interrogations.

Medical and legal professionals—individuals who had taken an oath to do no harm and uphold the rule of law—participated in the program at every stage. Doctors used their training in human psychology to destroy the will of detainees, and their knowledge of human physiology to keep them alive. Lawyers used their understanding of the law to justify derogations from established normative principles and ethical standards.

In the name of national security, the United States breached a norm that was long considered sacrosanct and conducted non-consensual human experimentation on detainees. In so doing, the United States reached its nadir in this conflict as the War on Terror became the war on everything.

378. ICCPR, *supra* note 107, art. 2(3).