

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

**RECOMMENDATIONS RESPECTFULLY SUBMITTED
TO THE UNITED STATES CONGRESS REGARDING
COMPENSATION AND TREATMENT FOR VICTIMS OF TORTURE,
AND CRUEL, INHUMAN AND DEGRADING TREATMENT**

The New York City Bar Association (the “City Bar”) writes to express its recommendation that Congress provide remedies for those the United States has tortured or subjected to cruel, inhuman or degrading treatment in the years following 9/11. Since its establishment in 1870, the City Bar has worked to advance and defend the rule of law. Over the past sixteen years in particular, the City Bar has issued thoroughly researched and thoughtfully reasoned reports and letters to promote America’s long-term security in part through respect for lawful and humane policies. We believe that the national security, values and law of the United States demand compensation and treatment for victims of U.S. programs deploying so-called “enhanced interrogation techniques.”

A cornerstone of America’s republican ideals is a belief in the inherent dignity of the individual and the right of all people to be free from torture or other cruel, inhuman and degrading treatment. This tradition of human rights dates back to the American Revolution, when George Washington instructed the Continental Army to treat captured British soldiers “with humanity.”¹ This principle has since been enshrined in our Constitution, laws and military regulations. It has also long motivated our nation’s role in international affairs. The United States played a principal role in prosecuting war crimes during the Nuremberg Trials,² and in 1949 ratified the Geneva Conventions.³ Our nation was also an original party of two seminal international instruments establishing the fundamental right of all people to be free from torture and other mistreatment, the Universal Declaration of Human Rights and the United Nations Convention Against Torture (the “CAT”).⁴ Federal law makes the commission of torture by U.S. officials a crime and makes the commission of torture and other war crimes by or against U.S. nationals prosecutable in federal court.⁵

¹ DAVID HACKETT FISHER, *WASHINGTON’S CROSSING*, 377-79 (1994).

² Joseph Brunner, *American Involvement in Nuremberg War Crimes Trial Process*, 1 MICH. J. HIST. (2002), available at <https://umichjh.com/past-volumes/volume-i/>.

³ *Final Record of the Diplomatic Conference of Geneva of 1949*, 1 Federal Political Dept., Berne, 346. United Nations Treaty Series, vol. 213, 379-384 (1955).

⁴ *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46. Annex, 39 U.S. GAOR Supp. No. 51, U.N. Doc. A/39/51 (hereinafter “CAT”); Geneva Convention (IV), common art. III, Aug. 12, 1949; Universal Decl. of Human Rights, common arts. III-XI, Dec. 16, 1948.

⁵ 18 U.S.C. 2340A (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”), 18 U.S.C. 2441.

Following the terrorist attacks of September 11, 2001, and during the ensuing “War on Terror,” some Americans turned their backs on this tradition and the moral values it reflects. For several years, certain elements in the U.S. government engaged in systematic campaigns of abduction, extrajudicial detention, unlawful rendition, and torture and abuse of people suspected of terrorism or connections to terrorism.⁶ The U.S. government imprisoned individuals secretly for years and subjected them to appalling mistreatment. Images of that abuse—from detainees hooded and shackled at the naval base in Guantánamo Bay, to prisoners standing naked and humiliated at Abu Ghraib prison—have become infamous symbols of our nation’s failure to adhere to its vaunted ideals and binding legal obligations, as well as invaluable propaganda for our enemies.⁷ To date, however, the United States has not provided these victims with compensation or treatment for the injuries sustained while in U.S. custody.⁸

Domestic and international law not only forbid such acts of cruelty,⁹ but also require compensation for victims and punishment of offenders.¹⁰ The CAT explicitly requires all states parties to ensure that victims of state-sponsored torture are able to “obtain redress,” including an enforceable¹¹ right to “fair and adequate compensation, including the means for as full rehabilitation as possible.”¹² The CAT also prohibits “other acts of cruel, inhuman or degrading

⁶ See generally UNITED STATES SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM (Dec. 3, 2014), <https://web.archive.org/web/20141209165504/http://www.intelligence.senate.gov/study2014/sscistudy1.pdf> (describing CIA-administered abuses); INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY REPORT OF THE COMMITTEE ON ARMED SERVICES UNITED STATES SENATE, 43-49 (Nov. 20, 2008) (describing similar abuses committed by the armed forces); see also *No More Excuses: A Roadmap to Justice for CIA Torture*, HUMAN RIGHTS WATCH, (2015) (summarizing problems with US torture investigations and provision of remedies).

⁷ See *Getting Away With Torture: The Bush Administration and Mistreatment of Detainees*, HUMAN RIGHTS WATCH (July 12, 2011), <https://www.hrw.org/report/2005/04/23/getting-away-torture/command-responsibility-us-abuse-detainees#3f1cb3>; see also U.S. ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS, App. M (Sep. 2006).

⁸ Ensuring Lawful Interrogations, Exec. Order No. 13491, 3 C.F.R. § 13491 (Jan. 22, 2009).

⁹ See, e.g., CAT, art. 1 (forbidding these practices under international law); 18 U.S.C. § 2340 (forbidding these practices under U.S. law); see also U.S. CONST., amend. VIII (forbidding “cruel and unusual” punishment).

¹⁰ See, e.g., CAT, arts. 7 & 14 (requiring compensation for victims of torture under international law); *Carlson v. Green*, 446 U.S. 14 (1980) (establishing a federal cause of action for damages for violations of the Eight Amendment’s prohibition on “cruel and unusual” punishment), International Covenant on Civil and Political Rights art. 2, G.A. Res. 2200A(XXI) (Dec. 19, 1966) (undertaking to ensure an effective remedy to anyone whose rights or freedoms are violated); and for US criminal law, see footnote 5 *supra*.

¹¹ The US declaration to CAT also acknowledges that article 14 requires a private right of action for damages for torture. Though the declaration limits the requirement to acts committed in territory under that state’s jurisdiction, the unclassified Executive Summary of the UNITED STATES SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM marshals arguments against that limitation: “The understanding submitted by the United States that article 14 was limited to territory under a State’s jurisdiction is at odds with its legislation (Alien Tort Claims Act) and jurisprudence. It has been rejected by subsequent action, such as the enactment of the Torture Victim Protection Act, and in any event indicates the otherwise comprehensive extraterritorial applicability of the article.” UN Doc. A/70/303, para. 56, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/70/303&referer=/english/&Lang=E.

¹² CAT, art. 14.

treatment [(“CID”)] or punishment which do not rise to the level of torture,”¹³ and requires that each state party provide victims of CID with the right to “complain to, and to have his case promptly and impartially examined by, its competent authorities.”¹⁴ The International Covenant on Civil and Political Rights, to which the U.S. is signatory, also requires compensation for victims of torture and other cruel, inhuman, or degrading treatment.¹⁵ In addition, the U.S. Supreme Court has held that victims of government mistreatment have a right to recover damages for violations of their constitutional rights through civil suits.¹⁶ The Alien Tort Statute (ATS) also authorizes a civil remedy for non-citizens for clearly established violations of international law, such as torture.¹⁷

Our nation remains in breach of these obligations. Neither the Executive nor the Legislative branch has made any attempt to provide compensation to the victims of torture and other abuses committed by the government since 9/11. Indeed, when victims have sought redress by pursuing lawsuits in the courts, the Executive Branch has sought to block these efforts by aggressively asserting unusually broad legal defenses, including state secrets and immunity doctrines. As a result, with the exception of two cases still pending, courts have dismissed suits to recover damages by victims of torture and other abuses on threshold grounds of justiciability without reaching the merits.¹⁸ This continuing refusal to provide compensation to victims of torture and other abuse—whether in judicial proceedings or otherwise—makes the United States

¹³ CAT, art. 16. The United States Senate, in ratifying CAT, stipulated a reservation limiting the reach of the provision prohibiting CID, clarifying that it would only interpret it to prohibit conduct that is unconstitutional under the Fifth, Eighth, and Fourteenth Amendments.

¹⁴ CAT, art. 13; CAT, art. 16.

¹⁵ See International Covenant on Civil and Political Rights, art. 9, G.A. Res. 2200A(XXI) (Dec. 19, 1966).

¹⁶ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (holding that certain individual protections within the Constitution create an implied cause of action for damages against federal officials who violate those rights).

¹⁷ ATS, 28 U.S.C. 1350 and *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).

¹⁸ See e.g. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092 (9th Cir. 2010) (“[W]e do not reach our decision lightly or without close and skeptical scrutiny of the record and the government’s case for secrecy and dismissal... We ... acknowledge that this case presents a painful conflict between human rights and national security.”); *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), cert. denied 552 U.S. 947 (2007) (upholding lower court’s dismissal of suit on grounds that el-Masri, who alleged that he was kidnapped, illegally detained and abused by the CIA, would not be able to make his case except by using evidence barred by the state secrets privilege); *Arar v. Ashcroft*, 585 F.3d 559, 565, 575, 578, 580-81 (2d Cir. 2009), cert. denied 560 U.S.978 (2010) (upholding lower court’s dismissal of suit, on the basis that it would interfere with national security and foreign policy, by Canadian national who claimed he was sent by the United States to Syria, where he was tortured for one year until his release). Suits have also been brought by several former detainees in Guantanamo Bay, Iraq and Afghanistan, which have been dismissed on the same theory. See *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009); *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85, 103-07 (D.D.C. 2007), aff’d by *Ali v. Rumsfeld*, 649 F.3d 762, 765 (D.C. Cir. 2011).

Two cases are ongoing, one against military contractors and one against CIA contractors. In both those cases the government has not intervened to assert defenses thus far. See *Al Shimari v. CACI Premier Technology, Inc.*, 840 F.3d 147 (4th Cir. 2016) (reversing dismissal on political question grounds against private contractors for torture at Abu Ghraib); *Salim v. Mitchell*, 183 F. Supp. 1121 (E.D. Wa. Apr. 28, 2016) (denying motion to dismiss in suit by torture victims against two private CIA contractors). For the on-going suits see also *Salim v. Mitchell—Lawsuit Against Psychologists Behind CIA Torture Program*, ACLU (Jan. 27, 2017) (describing *Salim v. Mitchell*), available at <https://www.aclu.org/cases/salim-v-mitchell-lawsuit-against-psychologists-behind-cia-torture-program> and *Al Shimari v CACI et al.*, Center for Constitutional Rights (March 31, 2017) available at <https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al>.

an outlier among its allies. The United Kingdom¹⁹, Australia²⁰, Canada²¹, Sweden²², Poland²³, and Macedonia²⁴ have all provided financial awards to people in whose torture they were complicit, regardless of which country's officials inflicted such abuse, whether voluntarily or as a result of a court order.

Fidelity to the rule of law and basic requirements of justice demand that the United States follow suit and afford redress for victims of unlawful abuses. Compensating those who have been mistreated would provide a measure of justice and also reaffirm that torture and cruel, inhuman or degrading treatment are contrary to American core values. In the years since these programs were first revealed, the City Bar has consistently sought to end the abuses and promote remedies, in the face of government denials, public indifference and legal impediments found by the courts of the United States.²⁵ With the publication in December 2014, of the 500-plus page executive summary of the Senate Select Committee on Intelligence's report on CIA detention and interrogation, the public record today includes clear and overwhelming evidence of wide-ranging abuses.²⁶ **The City Bar now therefore urges Congress to clear any obstacles to compensating victims of such treatment.** To date, the primary obstacle to bringing suits seeking civil remedies for torture has been the lack of a specific, Congressionally-created cause of action against the United States. Courts have balked at allowing suits to proceed when not expressly authorized to do so by the political branches. A statute could resolve that difficulty by providing such authorization. In the past, similar compensation statutes have afforded

¹⁹ Patrick Wintour, "Guantanamo Bay Detainees to be Paid Compensation by UK Government," THE GUARDIAN (Nov. 15, 2010), <https://www.theguardian.com/world/2010/nov/16/guantanamo-bay-compensation-claim>.

²⁰ *Id.*

²¹ "Ottawa Reaches \$10M Settlement with Arar," CBC NEWS (Jan. 25, 2007), <http://www.cbc.ca/news/canada/ottawa-reaches-10m-settlement-with-arar-1.682875>.

²² *No More Excuses*, supra note 5, at 107.

²³ *Al Nashiri v. Poland*, OPEN SOCIETY FOUNDATIONS (last updated Feb. 17, 2015), <https://www.opensocietyfoundations.org/litigation/al-nashiri-v-poland>.

²⁴ *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, ECHR 453 (Dec. 13, 2012).

²⁵ See Ass'n of the Bar of the City of New York, Comm. on Int'l Human Rights, & Comm. on Military Affairs and Justice, *Human Rights Standards Applicable to the United States' Interrogation of Detainees* (extensively discussing, *inter alia*, reports of U.S. abuse and civil remedies for victims of torture), 59 *The Record of the Ass'n of the Bar of the City of New York* 183 (2004); Comm. on Int'l Human Rights of the Ass'n of the Bar of the City of New York & the Ctr. for Human Rights and Global Justice, New York Univ. School of Law, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'*, 60 *The Record of the Ass'n of the Bar of the City of New York* 13 (2005) (recommending "End the use of Extraordinary Rendition and take actions to remedy and compensate those harmed"); Ass'n of the Bar of the City of New York Amicus Brief in *American Civil Liberties Union et al., v Department of Defense et al.*, Feb. 28, 2006 ("This amicus brief addresses the serious harm that the government's interpretation of Exemption 7(F) would have on FOIA's ability to fulfill its core purpose: to require disclosure of information needed to inform the electorate and Congress about the performance of the government, to hold government accountable for misconduct, and to permit appropriate reforms that such misconduct may require. In this case, which involves allegations of the government's mistreatment of detainees in the "war on terror" in violation of United States and international law, the need for a robust and effective FOIA is profound."); and a complete record of the City Bar responses, see J. Silkenat & Mark R. Shulman, *IMPERIAL PRESIDENCY AND THE CONSEQUENCES OF 9/11: LAWYERS RESPOND TO THE GLOBAL WAR ON TERRORISM* (2007).

²⁶ See note 6, *supra*.

governments an opportunity to correct injustices.²⁷ Congress should now do the same to start to remedy these grave harms.

The City Bar recognizes that in some instances, paying funds to individuals who have been convicted of, or are being actively prosecuted for, terrorist acts may raise national security concerns, and that such damages might be needed to satisfy outstanding judgments in favor of the victims of terrorism. In those cases, existing law provides several means to avoid unjust enrichment or material assistance to individuals who constitute an on-going threat to the nation's security. Laws that may be used to prevent payments to the guilty include 18 U.S.C. §981, which provides for civil forfeiture for acts of terrorism, and 18 U.S.C. §3663A (the Mandatory Victims Restitution Act) as well as the federal racketeering statutes.²⁸ Any remaining gaps in the necessary forfeiture mechanisms can be filled in through necessary and appropriate legislation consistent with domestic and international norms of government accountability.

The United States has legal and moral obligations to compensate those whom it has tortured or subjected to cruel, inhuman and degrading treatment. Adopting the City Bar's recommendations would help satisfy the demands of justice and strengthen the nation's commitment to prohibiting the type of barbaric conduct that has so diminished its reputation. The City Bar therefore urges Congress to take steps promptly to implement these recommendations. In the course of working through these issues, we have assembled a variety of compensation schemes and ideas for implementing them that we would gladly share.

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²⁷ See, for example, Civil Liberties Act, Pub. L. 100-383 (codified at 50a U.S.C. § 1989b *et seq.*) (1988) (acknowledging the injustice of – and apologizing for - interning Japanese Americans during World War II and establishing a restitution scheme).

²⁸ The following statutes may be applicable:

- (1) 18 U.S.C. §981 authorizes civil forfeiture for a variety of conduct, and includes a subsection, §981(a)(1)(G) directed specifically at crimes of terrorism.
- (2) 18 U.S.C. §3663A, the Mandatory Victims Restitution Act, requires that an order of restitution be imposed upon any defendant convicted of an offense “in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.” See §3663A(c)(1)(B).
- (3) 18 U.S.C. §1963(a) authorizes forfeiture of any interest or proceeds stemming from a violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), which punishes the commission (or conspiracy to commit) two predicate (criminal) acts in the context of an illegal enterprise.
- (4) 18 U.S.C. §1964(c), the civil version of RICO, provides for treble damages for victims of the racketeering activity.

Also, because forfeiture and restitution judgments are treated as money judgments, case law has established that substitute assets may be used to satisfy such judgments (because money judgments may be satisfied by any assets of the defendant over which the plaintiff can assert jurisdiction).