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Nunca Más or Déjà Vu?

CHARLES H. BROWER II*†

Known as an ethnic melting pot,¹ the country possessed abundant natural resources,² an educated population,³ and a remarkable constitutional tradition.⁴ Responding to stunning attacks by a group of brutal terrorists,⁵ the government declared and prosecuted a war based on the doctrine of national security.⁶ In so doing, officials refused to apply the Geneva Conventions,⁷ which did not contemplate a new kind of conflict against terrorists who did not wear uniforms, did not fight on traditional battlefields, and did not use conventional methods.⁸ Given the novelty of the conflict and the threat to Western civilization,⁹ the government concluded that terrorism justified any defensive response, “no matter how cruel.”¹⁰

Seeing few distinctions between combatants and their supporters, the government adopted a definition of “terrorists” that encompassed both groups.¹¹ Using this broad definition, it captured thousands of people, most of whom had never committed hostile acts.¹² Fearing that suspected terrorists would invoke the protections of the system they sought to destroy,¹³ the government denied them opportunities to challenge their detention in civilian courts.¹⁴ As a result, some disappeared into secret detention centers¹⁵ where the government applied methods of interrogation that included near-drowning.¹⁶ Others became victims of sexual violence, including detention and interrogation in a state of forced nudity.¹⁷ Stories began to circulate about a sinister pattern of

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† Editor’s Note: This Essay has been formatted with endnotes rather than footnotes for stylistic purposes.

flights by government aircraft engaged in a practice so disturbing that people referred to it only by euphemism.¹⁸ Perhaps for the first time in the country's history, systematic abuse of human beings had become official policy.¹⁹ An iconic naval facility became synonymous with that policy and, thus, the focus of international outrage.²⁰

During this fearful period, the government viewed investigative journalists as a threat to the social consensus that supported recourse to extraordinary measures.²¹ To discourage their curiosity, the government threatened to prosecute reporters for disclosing facts that might prejudice the struggle against terrorism.²² It also chided non-governmental organizations for reporting questionable allegations made by suspected terrorists, even though the government's own penchant for secrecy had eliminated access to more reliable sources.²³

Under the circumstances just described, the country's population remained poorly informed about the mistreatment of those detained as threats to national security.²⁴ To the extent that they heard specific allegations of abuse, most citizens regarded them with suspicion.²⁵ To the extent that they believed the allegations, most citizens accepted the government's claim that it needed extraordinary measures to protect the country.²⁶

Though the worst examples of mistreatment ceased after three years,²⁷ accountability did not follow as a matter of course. The government remained in power; those most responsible for the extraordinary measures received promotions and medals.²⁸ Yet things began to change after the government launched a disastrous foreign war,²⁹ in which it alienated its closest allies³⁰ and seriously misjudged the prospects for quick victory.³¹ With its popular standing in decline for the first time in six years,³² the government soon witnessed its dream of powerful executive rule collapse in the face of a resurgent judiciary committed to accountability and the rule of law.³³

If this story sounds familiar, it should: it recounts Argentina's prosecution of a Dirty War against terrorists from 1976 to 1979, and its prosecution of the Falkland/Malvinas Islands War with the United Kingdom in 1982. That the account also tracks the general contours of the so-called "Global War on Terror" (GWOT) and the Iraq War should be obvious. More interesting, and also less clear, is whether the comparison should provoke expressions of indignation or feelings of shame.

Those inclined to expressions of indignation may observe that the comparison seems unfair: it succeeds only at the level of abstraction. When one begins to examine details, the sense of congruity vanishes.

The Argentine junta disappeared, tortured, and killed some ten thousand or more individuals.³⁴ By contrast, the number of people recently subjected to analogous treatment by U.S. personnel constitutes a fraction of the atrocities committed during Argentina's Dirty War.³⁵ According to this view, the comparison to Argentina's Dirty War should provoke the same righteous indignation expressed in 2005 when Amnesty International described Guantánamo Bay as the "gulag of our times"³⁶—an assessment that then Secretary of Defense Donald H. Rumsfeld described as "reprehensible."³⁷

Those inclined to feelings of shame may notice that claims of righteous indignation tend only to reinforce the comparison to Argentina's Dirty War. When observers drew parallels between the Argentine junta and Nazi Germany,³⁸ many responded that the atrocities committed by Argentina represented a mere fraction of those perpetrated by the Third Reich.³⁹ In so doing, they relied on the power of factual accuracy, but failed to recognize the limited utility of trying to draw distinctions between degrees of malevolence.⁴⁰ That the Argentine junta preyed on fewer victims did not alter the vile character of its own transgressions; that many rejected the comparison to National Socialism showed their chilling lack of insight into a shared disregard for human dignity. One might similarly indict those who rely on smaller body counts to reject comparisons between the GWOT and Argentina's Dirty War.

For those who insist on comparisons that succeed on the level of detail, one may identify two more paradigms against which to judge the GWOT. First, during a three-year period, the Honduran government detained some 100 to 150 individuals thought to endanger security, held them in unregistered facilities, and subjected them to coercive interrogation.⁴¹ When passing judgment in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights implied that the "systematic" pattern of disappearances under review might embody a crime against humanity.⁴² Second, in the *Akayesu* case, the International Criminal Tribunal for Rwanda held that forced nudity represents a form of "sexual violence," which may constitute either a crime against humanity or a war crime depending on the circumstances.⁴³

The *Velásquez Rodríguez* case supplies the benchmark⁴⁴ against which to judge the CIA's detention of some 100 individuals at secret prisons around the world,⁴⁵ the military's detention at one point of up to 100 unregistered "ghost detainees" in Iraq,⁴⁶ and the "extraordinary rendition" of some 100 to 150 individuals,⁴⁷ either literally abducted⁴⁸ or released from official detention centers⁴⁹ and then surreptitiously trans-

ported by U.S. aircraft for interrogation in countries known to practice torture.⁵⁰ Likewise, the *Akayesu* case provides a standard against which to judge Secretary Rumsfeld's written authorization of forced nudity as an interrogation technique at Guantánamo Bay from December 2, 2002, to January 15, 2003,⁵¹ and the subsequent determination by two U.S. generals that sexual gambits, including forced public nudity before the opposite sex and the smearing of fake menstrual blood on devout Muslims, fell within the scope of approved interrogation tactics known as "futility" or "ego down."⁵²

After discussing the *Velásquez Rodríguez* and *Akayesu* cases, I recently asked students to explain how the reported treatment of U.S. detainees in Iraq and in the GWOT differs from conduct identified by two international tribunals as possible crimes against humanity. One could feel a palpable sense of shame envelop the classroom. Later, I asked a respected international lawyer to explain how the unregistered detention and coercive interrogation of U.S. detainees differs from practices made famous in Argentina's Dirty War.⁵³ Brimming with confidence, he replied: "We are fighting to protect democracy." The disparity of responses evoked a sincere division of public opinion once held in Argentina. It also posed a haunting question about how to describe our country's future: will it be *Nunca Más* or *Déjà Vu*?

1. IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS 13 (1990).

2. Ronald Dworkin, *Introduction to ARG. NAT'L COMM'N ON THE DISAPPEARED, NUNCA MÁS*, at xi (Farrar Straus Giroux 1986) [hereinafter *NUNCA MÁS*]; see also *Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcomm. on Int'l Orgs. of the H. Comm. on Foreign Affairs*, 96th Cong. 204 (1980) [hereinafter *Hearings*] (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (mentioning Argentina's "rich material resources").

3. Dworkin, *supra* note 2, at xi; see also *Hearings*, *supra* note 2, at 204 (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (referring to "the enormous potential offered by [Argentina's] vibrant people").

4. *Hearings*, *supra* note 2, at 95 (joint statement of David Hinkley, Chairman of Amnesty International USA, and Patricia Weiss Fagen, Executive Committee of Amnesty International USA); see also *id.* at 204 (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (describing Argentina as "a nation with traditions of justice").

5. See *Hearings*, *supra* note 2, at 115 (statement of Tom Quigley, Adviser on Latin American and Caribbean Affairs, U.S. Catholic Conference) (recognizing that "before the 1976 coup Argentina was plagued by terrorist activities"); *id.* at 208 (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (recognizing that, in the mid-1970s, Argentina "had been suffering...from...widespread terrorist violence"); GUEST, *supra* note 1, at 17, 19-20 (referring to "a spate of spectacular bombings and killings in 1975 and 1976," describing "a long series of provocative actions that held the country in thrall and helped to win the Montoneros a reputation for ferocity throughout the Continent," and concluding that "[b]y the beginning of

1976, left-wing terrorism [in Argentina] was sullen, brutal, and terrifying”).

6. See NUNCA MÁS, *supra* note 2, at 402 (observing that the Argentine junta committed disappearances “under the pretext of guaranteeing national security”); MARK J. OSIEL, *MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR* 110 (2001) (recognizing the existence of works that portray the “national security doctrine” as “the guiding intellectual inspiration for policies like the Dirty War”); see also GUEST, *supra* note 1, at 21 (observing that the junta’s members “were personally committed to the doctrine of national security”).

7. See OSIEL, *supra* note 6, at 16 (describing the view of most Argentine officers that one could not fight terrorists within the framework of the Geneva Conventions).

8. See *id.* at 76 (“General rules of positive law, formulated in advance of application, could not grapple effectively with the ever-shifting operational necessities of fighting a counterrevolutionary war where the enemy wore no uniform and the field of operations was not confined to any identifiable battlefield.”); *id.* at 114 (quoting junta member General Roberto Viola for the proposition that “[t]his war, unlike classical war, does not have a determinate beginning nor a final battle at which the victor will be crowned”); see also *Hearings, supra* note 2, at 295 (statement of Hon. Patricia M. Derian, Assistant Secretary of State for Human Rights and Humanitarian Affairs) (“We are told that the disappearances...are the unavoidable byproduct of the ‘war’ against...terrorism.”).

9. See NUNCA MÁS, *supra* note 2, at 5 (noting that junta members “continue to repeat the old excuses that they were engaged in a *dirty war*, or that they were saving the country and its Western, Christian values”); OSIEL, *supra* note 6, at 56 (referring to the Argentine junta’s repeated invocation of the “imminent threat” that leftist guerrillas posed to “Western Civilization”); Dworkin, *supra* note 2, at xiii (discussing the military leadership’s belief that “the terrorists of the left were not just criminals to be pursued and punished by police action but a lethal and immanent threat to Argentine civilization, an army of evil they had a duty to destroy in what they called a ‘dirty war’”).

10. See GUEST, *supra* note 1, at 388 (noting that, at their trial, Junta members “maintained, chillingly, that terrorism justified any and every response, no matter how cruel”).

11. See *Hearings, supra* note 2, at 209–10 (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (quoting Argentine President General Jorge Videla for the proposition that “[a] terrorist is not just someone with a gun or a bomb but also someone who spreads ideas that are contrary to Western and Christian civilization”); AMNESTY INT’L USA, *DISAPPEARANCES: A WORKBOOK* 10 (1981) (same); NUNCA MÁS, *supra* note 2, at 333 (same); OSIEL, *supra* note 6, at 12 (same); see also GUEST, *supra* note 1, at 19 (“In retrospect it is impossible to draw the line between active combatants and sympathizers.”).

12. See OSIEL, *supra* note 6, at 77 (“As to the vast majority of detainees, the executive had no evidence connecting them directly to revolutionary violence.”); Dworkin, *supra* note 2, at xiv (“Very few of those who disappeared had any connection to the left-wing terrorist groups whose activities provided the original excuse for the military coup.”); Tina Rosenberg, *Foreword* to MUNÚ ACTIS ET AL., *THAT INFERNO: CONVERSATIONS OF FIVE WOMEN SURVIVORS OF AN ARGENTINE TORTURE CAMP*, at ix, xi (2006) (indicating that the “vast majority” of those who were detained at the Navy Mechanics School “had never taken up a gun”); see also *Hearings, supra* note 2, at 209 (statement of Hon. Marvin E. Frankel, Lawyers Committee for International Human Rights) (“Without trials, evidentiary hearings, or any showings of probable cause, ‘mistakes’ were undoubtedly rife.”).

13. See OSIEL, *supra* note 6, at 54 (quoting an Argentine officer for the proposition that “[w]e knew if we put [terrorists] into the courts, they would ask for all the guarantees of the system they were attacking”).

14. See Cable from the U.S. Embassy in Buenos Aires to the Secretary of State on “The Tac-

tic of Disappearance" (Sept. 1980), *reprinted in* GUEST, *supra* note 1, at 430, 433 ("The military are unwilling to use civilian courts to punish active terrorists. They argue that the courts would simply let the terrorists go."); *see also* GUEST, *supra* note 1, at 26 (describing the collapse of judicial guarantees during Argentina's Dirty War); NUNCA MÁS, *supra* note 2, at 386-87, 396-97 (same); OSIEL, *supra* note 6, at 78 (same).

15. NUNCA MÁS, *supra* note 2, at 20.

16. *Id.* at 35, 42-44; Dworkin, *supra* note 2, at xvi.

17. GUEST, *supra* note 1, at 40-41; NUNCA MÁS, *supra* note 2, at 27, 34, 36-39, 43-49, 138, 143-45, 174, 196, 241, 409; Dworkin, *supra* note 2, at xvi.

18. During Argentina's Dirty War, the armed forces developed a practice of "transferring" disappeared prisoners, which entailed administering sedatives to prisoners, loading them onto aircraft, and throwing them, alive, into the sea. ACTIS ET AL., *supra* note 12, at 17-19; GUEST, *supra* note 1, at 42; NUNCA MÁS, *supra* note 2, at 221-22; *see also* Press Release, Amnesty Int'l, Amnesty Int'l Publishes Testimony of Survivors from Secret Detention Camps in Arg. (Feb. 4, 1980), *reprinted in* Hearings, *supra* note 2, at 625, 627.

19. *See* GUEST, *supra* note 1, at 32 ("What made the dirty war different...was the scale and method. Never before had the...resources of [the] state been geared to systematic torture and murder. The Junta turned disappearances into a government policy...as deliberate, methodical, and calculated as collecting tax, [which was] very much out of character with the haphazard brutality of previous military regimes.").

20. *See* Rosenberg, *supra* note 12, at ix, xi (describing the Mechanics School of the Argentine Navy (ESMA) as a "torture chamber that became the most notorious in Latin America's history," and indicating that some 4,000 to 4,500 individuals perished there during Argentina's Dirty War); *see also* ACTIS ET AL., *supra* note 12, at 28 (Elisa Tokar) ("When I fell, during the torture, they asked me, 'From what you know or what you've heard, where would you least like to be?' I said, 'In the ESMA.' And they replied, 'You are in the ESMA.'"); GUEST, *supra* note 1, at 37 (describing the ESMA as "the navy's nerve center in the war against subversion," which "would claim the lives of almost 5,000 Argentinians").

21. NUNCA MÁS, *supra* note 2, at 363.

22. *Id.* ("On 24 March 1976, the Junta of the Commanders-in-Chief let it be know in their communiqué No. 19 that 'anyone who by any means emits, spreads or propagates news, communiqués or images with a view to upsetting, prejudicing, or demeaning the activity of the Armed, Security, or Police Forces, will be liable to a punishment of up to ten years in prison.'").

23. *See* GUEST, *supra* note 1, at 84 ("The Foreign Ministry would charge Amnesty with accepting questionable allegations, but this ignored the fact that the policy of disappearances was designed to ensure that hard information was not available.").

24. NUNCA MÁS, *supra* note 2, at 364.

25. *Id.*; *see also* ACTIS ET AL., *supra* note 12, at 28 (Elisa Tokar) ("I heard rumors about what was happening, but I said, 'That much perversion just can't be real.'"); *id.* at 29 (Liliana Gardella) ("We were in denial about what was going on.").

26. OSIEL, *supra* note 6, at 14, 82; Ass'n of the Bar of the City of N.Y., *Report of the Mission of Lawyers to Argentina April 1-7, 1979*, *reprinted in* Hearings, *supra* note 2, at 446, 462; Dworkin, *supra* note 2, at xiv-xv.

27. Dworkin, *supra* note 2, at xi, xv (indicating that Argentina's Dirty War began in 1976, but that "[a]fter 1979...the disappearances largely ceased"); *see also* GUEST, *supra* note 1, at 179 (opining that "the disappearances tailed off in the last quarter of 1979").

28. *See* ACTIS ET AL., *supra* note 12, at 145 (Miriam Lewin) (mentioning that Admiral Emilio Massera "decorated those who had fought" in Argentina's Dirty War); OSIEL, *supra* note 6, at 58 (describing the promotions later conferred on Alfredo Astiz, one of the Dirty War's most notorious figures); *id.* at 82-83 ("Even after the juntas had been tried and convicted, and the crimes of

their subordinates became common knowledge to all Argentines, several officers were able to win public office (or, at least, many thousands of civilian votes) in elections.”); *see also* GUEST, *supra* note 1, at 399–400 (describing how, after the Falkland/Malvinas Islands War, Astiz returned from British captivity “like a hero,” “was awarded a medal,” and “resumed working for the navy intelligence”).

29. GUEST, *supra* note 1, at 3, 335; OSIEL, *supra* note 6, at 15; Dworkin, *supra* note 2, at xv.

30. *See* GUEST, *supra* note 1, at 341 (observing that, in the Falkland/Malvinas Islands War, Argentina “had forced the United States to choose between its closest European ally and [Argentina]”).

31. GUEST, *supra* note 1, at 337; Dworkin, *supra* note 2, at xv.

32. *See* GUEST, *supra* note 1, at 345 (“Following the Falklands/Malvinas war, all the emotion that had been bottled up through six long years of military rule exploded....”).

33. *See id.* at 335 (“Within three months [of the Falkland/Malvinas Islands War], the Junta’s dream of indefinite military rule would be shattered.”); *see also id.* at 386–91 (describing the 1985 trial and conviction of five junta members, and quoting a cable in which U.S. Ambassador Frank Ortiz described the outcome as a “dramatic demonstration...of judicial independence in democratic Argentina”); OSIEL, *supra* note 6, at 16 (describing the trial and conviction of five junta members in December 1985).

34. *Hearings, supra* note 2, at 43–44 (statement of Jerome J. Shestack, President, International League for Human Rights); *id.* at 351 (statement of Orville H. Schell, Lawyers Committee for International Human Rights); GUEST, *supra* note 1, at 3, 30, 32, 384; NUNCA MÁS, *supra* note 2, at 5, 10, 284; OSIEL, *supra* note 6, at 1, 13; Dworkin, *supra* note 2, at xi.

35. *Cf. Hearings, supra* note 2, at 114 (statement of Tom Quigley, Adviser on Latin American and Caribbean Affairs, U.S. Catholic Conference) (“Obviously disappearance as a policy of political repression is of a different order in Argentina than anywhere else.”); *id.* at 43 (statement of Jerome J. Shestack, President, International League for Human Rights) (describing Argentina’s Dirty War as “the most shocking and disturbing” example of disappearances); *id.* at 386 (statement of Chauncey Alexander, Chairman, Council on Hemispheric Affairs and Executive Director, National Association of Social Workers) (describing Argentina as “probably ‘the’ worst violator [of human rights] in South America”).

36. ALFRED W. MCCOY, A QUESTION OF TORTURE 179 (2006); Lizette Alvarez, *Rights Group Defends Chastising of U.S.*, N.Y. TIMES, June 4, 2005, at A5; Editorial, “American Gulag,” WASH. POST, May 26, 2005, at A26; Kenneth Anderson, *An American Gulag?*, WKLY. STANDARD, June 13, 2005, at 11; Dan Eggen & Josh White, *Inmates Alleged Koran Abuse*, WASH. POST, May 26, 2005, at A1; Cragg Hines, *Gulag? No. Unnecessary Geopolitical Pain? You Bet.*, HOUS. CHRON., June 8, 2005, at B9; Dana Milbank, *An Administration’s Amnesty Amnesia*, WASH. POST, June 5, 2005, at A4; Michael O’Hanlon, *Amnesty Astray*, WASH. TIMES, June 6, 2005, at A20; Robert Scheer, *Commentary*, L.A. TIMES, June 7, 2005, at 13; Demetri Sevastopulo, *Rumsfeld Joins Attack on Amnesty “Gulag” Claims*, FIN. TIMES, June 1, 2005, available at http://us.ft.com/ftgateway/superpage.ft?news_id=fto060120050080001204.

37. Sources cited *supra* note 36. President Bush characterized Amnesty’s choice of words as “absurd.” *Id.* Vice President Cheney claimed that the words “offended” him. Sources cited *supra* note 36. Describing it as an “infuriating,” “counterproductive,” “outrageous,” and “ludicrous” exaggeration, even prominent critics of the Bush Administration joined in condemning Amnesty’s comparison of Guantánamo to the Soviet gulag. *See, e.g.*, Anne Applebaum, Editorial, *Amnesty’s Amnesia*, WASH. POST, June 8, 2005, at A21, available at 2005 WLNR 9076716 (chastising Amnesty for its “infuriating” misuse of language); E.J. Dionne, Jr., *Hyperbole and Human Rights*, WASH. POST, June 3, 2005, at A23 (lamenting the “maddening” use of the “outrageous gulag metaphor”); O’Hanlon, *supra* note 36 (denouncing Amnesty for its “counterproductive” and “egregiously ludicrous exaggeration”); *see also* Alvarez, *supra* note 36 (“I think it was a

rather serious misjudgment to use the term *gulag*.... [I]t has given the administration the opportunity to divert from the substance of the concern.”) (quoting Sir Nigel Rodley, formerly Amnesty’s legal adviser and U.N. Special Rapporteur on Torture); “*American Gulag*,” *supra* note 36 (complaining that Amnesty had lost “its bearings” and gave “the administration another excuse to dismiss valid objections to its policies as ‘hysterical’”).

Shortly after Amnesty’s controversial use of the “*gulag*” metaphor, Senator Richard J. Durbin (D.-Ill.) compared the treatment of detainees at Guantánamo Bay to the repressive practices of the Nazi and Khmer Rouge regimes. *Apology Demanded for Remark on U.S.*, N.Y. TIMES, June 17, 2005, at A18. Leading Republicans demanded an apology. *Id.*

38. See ACTIS ET AL., *supra* note 12, at 284 (“The prisoners of the ESMA experienced firsthand the similarities between the procedures and conduct of the Nazis during World War II and the Argentine Navy during the military dictatorship.”); GUEST, *supra* note 1, at 282 (“Again and again the parallel was drawn between Argentina and Nazi Germany.”); *id.* at 32 (“Historically, the nearest equivalent to [Argentina’s] disappearances were the Night and Fog decrees used by the Nazis to remove several hundred members of the Resistance and sow terror in Nazi-occupied Europe.”).

39. See GUEST, *supra* note 1, at 288 (explaining that most people regarded the comparison of Argentina to Nazi Germany as an exaggeration).

40. See J.M. COETZEE, THE LIVES OF ANIMALS 44 (2001) (involving a scene in which the main character rejects a distinction between two potentially objectionable practices because they merely represent “[d]egrees of obscenity”).

41. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, at 121–23, 127, 140–42 (July 29, 1988), *reprinted* in 28 I.L.M. 291 (1989).

42. Although the Inter-American Court did not expressly hold that Honduran officials had perpetrated a crime against humanity, it recognized that “[i]nternational practice and doctrine have often categorized disappearances as a crime against humanity.” *Id.* at 146. Furthermore, the court emphasized that Honduran officials had performed disappearances on a “systematic” basis, a finding typically required to establish liability for crimes against humanity. *Id.* at 141; see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64, 80 (2003) (indicating that crimes against humanity “are not isolated or sporadic events,” but involve “a widespread or systematic” perpetration of atrocities, such as enforced disappearances); STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 57, 74 (1997) (emphasizing that crimes against humanity involve the perpetration of atrocities, such as disappearances, on a large scale or in a “systematic manner”). Thus, by emphasizing the systematic nature of disappearances in Honduras, the Inter-American Court implied that they represented a crime against humanity.

Subsequent treaties and declarations have affirmed that the systematic perpetration of disappearances constitutes a crime against humanity. See, e.g., Rome Statute of the International Criminal Court art. 7(1)(i), July 17, 1998, 2187 U.N.T.S. 90 (defining crimes against humanity to include “[e]nforced disappearance of persons” when “committed as part of a widespread or systematic attack directed against any civilian population”); Inter-American Convention on the Forced Disappearance of Persons *pmb.*, ¶ 6, June 9, 1994, 33 I.L.M. 1529 (1994) (“REAFFIRMING that the systematic practice of the forced disappearance of persons constitutes a crime against humanity”); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, *pmb.*, ¶ 4, U.N. Doc. A/RES/47/133 (Dec. 18, 1992) (“Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity”); NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 267 (2d ed. 1999) (“The 1990s have seen a rapid evolution of the notion of ‘disappearances’ [as] constituting a crime against humanity.”).

Although the disappearances in Honduras usually entailed torture and ended in murder, the Inter-American Court regarded the “mere subjection of an individual to prolonged isolation and deprivation of communication...itself [as] cruel and inhuman treatment.” Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 at 148–49, 159; Human Rights Watch, *The United States’ “Disappeared”: The CIA’s Long-Term “Ghost Detainees,”* at 10 (Oct. 2004), available at <http://hrw.org/backgrounders/usa/us1004/us1004.pdf>; see also Human Rights First, *Ending Secret Detentions*, at 20 (June 2004), available at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (noting that “incommunicado detention, especially by denying individuals contact with family and friends, violates the ICCPR’s obligation to treat prisoners with humanity”); Josh White, *Prisoner Accounts Suggest Detention at Secret Facilities*, WASH. POST, Nov. 7, 2005, at A11 (quoting Manfred Nowak, the U.N. Rapporteur on Torture, for the proposition that “[i]ncommunicado detention forms inhuman treatment in and of itself”). Consistent with the Inter-American Court’s holding, modern judicial decisions and legal instruments define disappearances merely as the abduction of individuals followed by the state’s refusal to acknowledge the abduction or disclose the person’s fate or whereabouts. See *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988); see also Rome Statute of the International Criminal Court, *supra*, art. 7(2)(i); Inter-American Convention on the Forced Disappearance of Persons, *supra*, art. II; Declaration on the Protection of All Persons from Enforced Disappearance, *supra*, pmbi., ¶ 3.

Also consistent with the Inter-American Court’s holding in *Velásquez Rodríguez*, experiments have shown that isolation and sensory deprivation by themselves cause profound psychological disturbances, including frightening hallucinations. MCCOY, *supra* note 36, at 33–40; PHYSICIANS FOR HUMAN RIGHTS, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES* 59–66 (2005), available at <http://www.physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf>; see also Amnesty Int’l, *United States of America/Yemen: Secret Detention in CIA “Black Sites,”* at 14 (Nov. 2005), AI Index AMR 51/177/2005, available at [http://web.amnesty.org/library/pdf/AMR511772005ENGLISH/\\$File/AMR5117705.pdf](http://web.amnesty.org/library/pdf/AMR511772005ENGLISH/$File/AMR5117705.pdf). One study even concluded that “the effect of isolation on the brain function of the prisoner is much like that which occurs if he is beaten, starved, or deprived of sleep.” MCCOY, *supra* note 36, at 33. This corresponds to the experience of one of Argentina’s disappeared, who stated that “[t]he psychological torture of the ‘hood’ was as bad or worse than the physical, although the two cannot be compared since whereas the latter attempts to reach the limits of pain, the hood causes despair, anxiety and madness.” NUNCA MÁS, *supra* note 2, at 57. The hood became so unbearable for that person that he begged to be “transferred,” a process synonymous with death. *Id.*; see also *supra* note 18 (discussing the practice of “transferring” in Argentina’s Dirty War).

Both the International Committee for the Red Cross and the F.B.I. have described the extreme psychological trauma exhibited by U.S. detainees subjected to sensory deprivation and extended periods of isolation. MCCOY, *supra* note 36, at 158; PHYSICIANS FOR HUMAN RIGHTS, *supra*, at 66–68.

43. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶¶ 429, 688 (Sept. 2, 1998) (defining sexual violence to include coercive acts of a sexual nature not involving a physical invasion, ruling that the undressing of a female student and forcing her to perform gymnastics in a public courtyard constituted a form of sexual violence, and holding that such conduct violated both Article 3 (crimes against humanity) and Article 4 (war crimes) of the tribunal’s statute). Similarly, the International Tribunal for the Former Yugoslavia has held that stripping female prisoners and forcing them to stand or dance on tables represents an “outrage upon personal dignity” constituting a war crime. *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 9, 766–74, 782 (Feb. 22, 2001); see also *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶¶ 170, 180, 190 (Nov. 2, 2001) (reciting precedent to support the proposition

that “sexual violence, including forced public nudity, cause[s] severe physical or mental pain and amount[s] to outrages upon personal dignity” and that “rape and forced nudity are recognized as crimes against humanity”); KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 331 (2003) (indicating that “forced nudity” falls within the scope of war crimes involving sexual violence).

According to one source who regularly works with victims of sexual violence, victims would prefer physical beatings to sexual abuse. PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 56. Thus, only those unfamiliar with the law and the psychological effects of sexual violence would compare forced nudity to something as “innocuous” as “locker-room nudity.” *Id.* at 57. *But see* David Remnick, *Hearts and Minds*, NEW YORKER, May 17, 2004, at 27 (“This is no different than what happens at the Skull and Bones initiation....”) (quoting Rush Limbaugh).

44. Echoing the Inter-American Court’s judgment in *Velásquez Rodríguez*, the United Nations Special Rapporteur on Torture stated that “if reports of the C.I.A.’s activities proved correct, then the agency was engaged in a ‘systematic practice of enforced disappearance.’” Stephen Grey & Renwick McLean, *Spain Looks into C.I.A.’s Handling of Detainees*, N.Y. TIMES, Nov. 14, 2005, at A8.

45. JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 35 (2006); *Coming Clean*, ECONOMIST, Sept. 9, 2006, at 33; Ian Fisher, *Rights Group Lists 26 It Says U.S. Is Holding in Secret Abroad*, N.Y. TIMES, Dec. 2, 2005, at A6; Dafna Linzer & Glenn Kessler, *Decision to Move Detainees Resolved Two-Year Debate Among Bush Advisers*, WASH. POST, Sept. 8, 2006, at A1; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1 [hereinafter Priest, *CIA Holds Terror Suspects in Secret Prisons*]; Editorial, *The Prison Puzzle*, N.Y. TIMES, Nov. 3, 2005, at A26; Editorial, *Rebellion Against Abuse*, WASH. POST., Nov. 3, 2005, at A20; Scott Shane, *The Question of Liability Stirs Concern at the CIA*, N.Y. TIMES, Sept. 16, 2006, at A12; R. Jeffrey Smith, *McCain Names Practices Detainee Bill Would Bar*, WASH. POST, Sept. 25, 2006, at A5; R. Jeffrey Smith & Michael Fletcher, *Bush Says Detainees Will Be Tried*, WASH. POST, Sept. 7, 2006, at A1; Sheryl Gay Stolberg, *President Moves 14 Held in Secret to Guantánamo: Seeks Tribunals*, N.Y. TIMES, Sept. 7, 2006, at A1. This figure represents the total number of people, not picked up in Iraq, who passed through secret CIA detention centers. Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra*.

Until recently, reports consistently stated that the CIA maintained long-term custody of approximately two to three dozen high-value detainees. MCCOY, *supra* note 36, at 116–17; Amnesty Int’l, *supra* note 42, at 4; Douglas Jehl, *C.I.A. Is Seen as Seeking New Role on Detainees*, N.Y. TIMES, Feb. 16, 2005, at A16; Douglas Jehl, *Qaeda-Iraq Link U.S. Cited Is Tied to Coercion Claim*, N.Y. TIMES, Dec. 9, 2005, at A1 [hereinafter Jehl, *Qaeda-Iraq Link*]; Douglas Jehl, *Senate Intelligence Chairman Opposes C.I.A. Abuse Inquiry*, N.Y. TIMES, Mar. 2, 2005, at A7; Douglas Jehl, *Senate Is Set To Require White House To Account for Secret Prisons*, N.Y. TIMES, Dec. 15, 2005, at A25; David Johnston & Neil A. Lewis, *Officials Describe Secret C.I.A. Center at Guantanamo*, N.Y. TIMES, Dec. 18, 2004, at A15; Neil A. Lewis & Mark Mazzetti, *Lawyers Weighing Suits Over CIA’s Secret Jails*, N.Y. TIMES, July 13, 2006, at A20; Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra*; Dana Priest, *Senate Urged to Probe CIA Practices*, WASH. POST, Apr. 22, 2005, at A2 [hereinafter Priest, *Senate Urged to Probe CIA Practices*]; Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison*, WASH. POST, Dec. 17, 2004, at A1; Dana Priest & Josh White, *Policies on Terrorism Suspects Come Under Fire*, WASH. POST, Nov. 3, 2005, at A2; Katherine Shrader, *Terror War Detainees Total Passes 83,000; Some Held for Years*, ASSOCIATED PRESS, Nov. 16, 2005; Steven R. Weisman, *U.S. Rebuffs Red Cross Request for Access to Detainees Held in Secret*, N.Y. TIMES, Dec. 10, 2005, at A10; Kate Zernike, *Administration Prods Congress To Curb the Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1. Thus, of the roughly 100 people who entered its secret detention centers, the CIA apparently re-

tained custody of the highest-value prisoners and eventually transferred the lower-value prisoners to the custody of third states. Priest, *CIA Holds Terror Suspects in Secret Prisons*, *supra*; *The Prison Puzzle*, *supra*.

On September 6, 2006, President Bush “reappeared” fourteen individuals held at secret CIA detention centers, transferred them into official custody at Guantánamo Bay, and called for their prosecution before military commissions. George W. Bush, U.S. President, President Bush Delivers Remarks on Terrorism (Sept. 6, 2006) (transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601425.html>) [hereinafter Bush Delivers Remarks on Terrorism]; see *Coming Clean*, *supra*; David E. Sanger, *President Moves 14 Held in Secret to Guantánamo: For Congress, 2 Votes Loom*, N.Y. TIMES, Sept. 7, 2006, at A1; Smith & Fletcher, *supra*; Stolberg, *supra*.

While indicating that no prisoners remained in secret CIA detention centers after September 6, 2006, the Bush administration stated that the sites should continue to play an important role in the GWOT. Bush Delivers Remarks on Terrorism, *supra*; see Dana Priest, *Officials Relieved Secret Is Shared*, WASH. POST, Sept. 7, 2006, at A17; Eugene Robinson, Editorial, “Values” We Have to Hide Abroad, WASH. POST, Sept. 8, 2006, at A17; Jim Rutenberg & Sheryl Gay Stolberg, *Bush Says G.O.P. Rebels Are Putting Nation at Risk*, N.Y. TIMES, Sept. 16, 2006, at A12; Jonathan Weisman, *GOP Leaders Back Bush on Wiretapping, Tribunals*, WASH. POST, Sept. 14, 2006, at A13; see Editorial, *Ending the Lawlessness*, WASH. POST, Sept. 7, 2006, at A26 (noting President Bush’s insistence “that the CIA’s program of secret detentions and coercive interrogations needs to continue”); Shane, *supra* (“Mr. Bush has defended the interrogation program and has said it should not be disbanded....”).

A week after transferring the fourteen inmates to Guantánamo, President Bush made an impassioned plea for Congress to enact the legislation needed to ensure that the CIA “program” could “go forward.” Bush Delivers Remarks on Terrorism, *supra*; see Charles Babington & Jonathan Weisman, *Senators Defy Bush on Terror Measure*, WASH. POST, Sept. 15, 2006, at A1; Peter Baker, *GOP Infighting on Detainees Intensifies*, WASH. POST, Sept. 16, 2006, at A1; Editorial, *A License to Abuse*, WASH. POST, Sept. 17, 2006, at B6; Rutenberg & Stolberg, *supra*; see also Editorial, *A Defining Moment for America*, WASH. POST, Sept. 15, 2006, at A18; Editorial, *Stamped-ing Congress*, N.Y. TIMES, Sept. 15, 2006, at A24; Kate Zernike, *Rebuff for Bush on How to Treat Terror Suspects*, N.Y. TIMES, Sept. 15, 2006, at A1.

Two weeks after President Bush made his impassioned plea, Congress adopted legislation to satisfy his demands. See Charles Babington, *House Approves Bill on Detainees*, WASH. POST, Sept. 28, 2006, at A1; Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, WASH. POST, Sept. 29, 2006, at A1; Carl Hulse & Kate Zernike, *House Passes Detainee Bill as It Clears Senate Hurdle*, N.Y. TIMES, Sept. 28, 2006, at A20. In so doing, Congress seems to have forgotten the words of House Concurrent Resolution 285, adopted on March 10, 1980, by a vote of 343 to 3. In that document, the House of Representatives warned that “any government which causes the disappearance of any person by the abduction and clandestine detention of that person is committing an act of terrorism which cannot be justified under any circumstances.” H.R. Con. Res. 285, 96th Cong. (1980), reprinted in *Hearings*, *supra* note 2, at viii, 632 (emphasis added).

46. According to congressional testimony by Army General Paul J. Kern, U.S. armed forces held “perhaps up to 100” unregistered detainees in Iraq at the CIA’s behest. Tom Bowman, *More Iraqis Hidden from Red Cross, Army Finds CIA Kept up to 100 Detainees at Abu Ghraib off Prison Rolls, Spy Agency Shuts out Investigators*, BALT. SUN, Sept. 10, 2004, at 1A; *Dossier: An Ounce of Detention*, AM. PROSPECT, Nov. 1, 2005, at 7; Bradley Graham & Josh White, *General Cites Hidden Detainees*, WASH. POST, Sept. 10, 2004, at A24; Ken Guggenheim, *Generals Say Abu Ghraib May Have Had Two Dozen “Ghost Detainees,”* CHI. SUN TIMES, Sept. 10, 2004; John Hendren, *CIA May Have Held 100 “Ghost” Prisoners*, L.A. TIMES, Sept. 10, 2004, at 1;

Iraq Digest, SEATTLE TIMES, Sept. 10, 2004, at A18; Jonathan S. Landay & Sumana Chatterjee, *Probe Finds CIA Had Dozens of "Ghost" Inmates*, PHILA. INQUIRER, Sept. 10, 2004, at A10; Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106, 108; Dana Priest, *Detainee Shift Enabled by Justice Memo*, PITTSBURGH POST-GAZETTE, Oct. 24, 2004, at A1; Eric Schmitt & Douglas Jehl, *Army Says C.I.A. Hid More Iraqis Than It Claimed*, N.Y. TIMES, Sept. 10, 2004, at A1; Tom Squitieri, *CIA Hid Many Iraqi Prisoners, Generals Say as Many as 100 "Ghost Detainees"*, USA TODAY, Sept. 10, 2004, at 10A; Guy Taylor, *"Ghost Detainees" Number up to 100*, WASH. TIMES, Sept. 10, 2004, at A5; see also Josh White, *Army, CIA Agreed on "Ghost" Prisoners*, WASH. POST, Mar. 11, 2005, at A16 [hereinafter White, *Army, CIA Agreed on "Ghost" Prisoners*].

In the executive summary of his report on interrogation operations, Vice Admiral Albert T. Church III indicated that the U.S. military had held approximately thirty "ghost detainees" in Iraq. Albert T. Church III, *DoD Presents Findings of Church Report*, at 18 (Mar. 10, 2005), <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>; see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 33; White, *Army, CIA Agreed on "Ghost" Prisoners*, *supra*; Josh White, *Army Documents Shed Light on CIA "Ghosting"*, WASH. POST, Mar. 24, 2005, at A15. Army Major General George Fay provided a similar estimate: somewhere "in the area of two dozen or so—maybe more." Bowman, *supra*; Graham & White, *supra*; Guggenheim, *supra*; Landay & Chatterjee, *supra*; see also Schmitt & Jehl, *supra*.

While not hazarding a numerical estimate, another Army investigator, Major General Antonio Taguba, observed that the detention facilities operated by the 800th Military Police Brigade "routinely" held ghost detainees for the CIA. Maj. Gen. Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, at 26–27 (2004), http://www.npr.org/iraq/2004/prison_abuse_report.pdf. Likewise, the "second in command of the intelligence gathering effort at Abu Ghraib...told military investigators" that the CIA and special forces "routinely" brought ghost detainees to his facilities. White, *Army, CIA Agreed on "Ghost" Prisoners*, *supra*.

Former Secretary of Defense Donald H. Rumsfeld personally ordered the unregistered detention of at least one Iraqi at the request of then CIA Director George Tenet. See James R. Schlesinger et al., *Final Report of the Independent Panel to Review Department of Defense Detention Operations*, reprinted in THE ABU GHRAIB INVESTIGATIONS 1, 95 (Steven Strasser ed., 2004) [hereinafter *Schlesinger Report*]; Human Rights Watch, *supra* note 42, at 5; see also Bowman, *supra*; Editorial, *A Failure of Accountability*, WASH. POST, Aug. 29, 2004, at B6; *Fanning the Flames*, ECONOMIST, June 26, 2004, at 33; Graham & White, *supra*; Hendren, *supra*; *Iraq Digest*, *supra*; Douglas Jehl, *U.S. Rules on Prisoners Seen as a Back and Forth of Mixed Messages to G.I.'s*, N.Y. TIMES, June 22, 2004, at A7; Mayer, *supra*, at 108; Blake Morrison & John Diamond, *Pressure at Iraqi Prison Detailed*, USA TODAY, June 18, 2004, at 1A; Dana Priest & Bradley Graham, *U.S. Struggled Over How Far to Push Tactics*, WASH. POST, June 24, 2004, at A1; Dana Priest & Josh White, *Detainee Reportedly Was Lost in System*, WASH. POST, June 17, 2004, at A19; Schmitt & Jehl, *supra*; Eric Schmitt & Thom Shanker, *Rumsfeld Issued an Order To Hide Detainee in Iraq*, N.Y. TIMES, June 17, 2004, at A1; Thom Shanker & Andrea Elliott, *Rumsfeld Admits He Told Jailers To Keep Detainee in Iraq out of Red Cross View*, N.Y. TIMES, June 18, 2004, at A10; Editorial, *Torture Policy (cont'd)*, WASH. POST, June 21, 2004, at A18.

47. MCCOY, *supra* note 36, at 117, 124; Daniel Byman, Op-Ed, *Reject the Abuses, Retain the Tactic*, WASH. POST, Apr. 17, 2005, at B1; *Dossier: An Ounce of Detention*, *supra* note 46; Ian Fisher, *Reports of Secret U.S. Prisons in Europe Draw Ire and Otherwise Red Faces*, N.Y. TIMES, Dec. 1, 2005, at A14; Grey & McLean, *supra* note 44; Stephen Grey & Don Van Natta, Jr., *Italy Judge Orders the Arrest of 13 CIA Agents*, INT'L HERALD TRIB., June 25, 2005, at 1; Jehl, *Qaeda-Iraq Link*, *supra* note 45; Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, at 1; Mayer, *supra* note 46, at 107; Dana Priest, *Senate Urged to Probe CIA Practices*, *supra* note 45; *Report Rendered*, ECONOMIST,

June 10, 2006, at 49; Jan Sliva, *EU Lawmakers Say CIA Conducted 1,000 Secret Flights Over Europe*, BOSTON GLOBE, Apr. 27, 2006, at A16 [hereinafter Sliva, *EU Lawmakers Say CIA Conducted 1,000 Secret Flights*]; Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Odyssey in U.S. Hands*, N.Y. TIMES, July 7, 2006, at 1; Editorial, *Torture by Proxy*, N.Y. TIMES, Mar. 8, 2005, at 22; Don Van Natta, Jr., *U.S. Recruits a Rough Ally to Be a Jailer*, N.Y. TIMES, May 1, 2005, at 1; see also Jan Sliva, *Swiss Investigator Says U.S. "Outsourced" Torture—and European Countries Likely Knew*, ASSOCIATED PRESS, Jan. 24, 2006 [hereinafter Sliva, *Swiss Investigator Says U.S. "Outsourced" Torture*].

According to one source, the "CIA inspector general is investigating a growing number of what it calls 'erroneous renditions,'" said by one official to include about "three dozen names." Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1; see also Byman, *supra* ("[T]he United States will at times inevitably render the wrong people."); Bob Herbert, Editorial, *Torture, American Style*, N.Y. TIMES, Feb. 11, 2005, at A25 ("There is a widespread but mistaken notion in the U.S. that everybody seized by the government in its so-called war on terror is in fact somehow connected to terrorist activity. That is just wildly wrong."); Editorial, *Self-Inflicted Wounds*, N.Y. TIMES, Feb. 15, 2005, at A18 ("Report after report shows that a vast majority of those swept up in American anti-terrorism campaigns were innocent."); Jan Sliva, *CIA Carried Out More Than 1,000 Secret Flights Over Europe*, *EU Lawmakers Say*, ASSOCIATED PRESS, Apr. 26, 2006 ("[M]istakes had been made and were being investigated by the CIA's inspector general.").

Despite the unsettling error rate, top U.S. officials have defended the use of "extraordinary renditions." See Grey & Van Natta, *supra* (noting that "senior officials have defended the practice...as a legal way to thwart terrorist activities"); Jehl, *Qaeda-Iraq Link*, *supra* note 45 (observing that "American officials including Ms. Rice have defended [extraordinary rendition], saying it...provides an important tool for interrogation"); Glenn Kessler, *Rice Defends Tactics Used Against Suspects*, WASH. POST, Dec. 6, 2005, at A1 (reporting Secretary of State Condoleezza Rice's description of renditions as a "vital tool" that "save[s] lives" by taking terrorists "out of action"); Dana Priest & Walter Pincus, *CIA, White House Defend Transfers of Terror Suspects*, WASH. POST, Mar. 18, 2005, at A7 (reporting that "[t]he CIA and the White House yesterday defended the practice of secretly transferring suspected terrorists to other countries"); *Self-Inflicted Wounds*, *supra* (indicating that the "new attorney general, Alberto Gonzales, defended [extraordinary rendition] in his recent confirmation hearings in the Senate"); R. Jeffery Smith, *Gonzales Defends Transfer of Detainees*, WASH. POST, Mar. 8, 2005, at A3 ("Attorney General Alberto R. Gonzales [has] defended the practice of 'extraordinary rendition.'"); see also Michael Scheuer, Editorial, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, A23 (expressing the view of a former CIA employee that the rendition program operated with approval of the Justice Department, the National Security Council, and President George W. Bush); Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1 ("The CIA has...defended the controversial practice as an effective and legal way to prevent terrorism.").

48. For example, in February 2003, a CIA team in Milan, Italy, sprayed chemicals into the face of radical Muslim cleric Abu Omar (also known as Hassan Mustafa Osama Nasr), packed him into a van, brought him to Aviano airbase, loaded him onto a plane, and flew him via Germany to Egypt, where he experienced fourteen months of torture. Amnesty Int'l, *USA/Jordan/Yemen: Torture and Secret Detention* 15, AI Index AMR 51/108/2005, Aug. 4, 2005, available at [http://web.amnesty.org/library/pdf/AMR511082005ENGLISH/\\$File/AMR5110805.pdf](http://web.amnesty.org/library/pdf/AMR511082005ENGLISH/$File/AMR5110805.pdf) [hereinafter *USA/Jordan/Yemen: Torture and Secret Detention*]; see MCCOY, *supra* note 36, at 174-75; Fisher, *supra* note 47; Sliva, *Swiss Investigator Says U.S. "Outsourced" Torture*, *supra* note 47; Phil Stewart, *Italian Govt Rebuffs Pressure in CIA Kidnap Case*, REUTERS NEWS, Mar. 2, 2006; Whitlock, *supra* note 47; see also John Crewdson et al., *Italy Charges CIA Agents*, Chi. Trib., June 25, 2005, § 1, at 1; Tom Hundley & John Crewdson, *Italy Wants Alleged*

CIA Plotters Extradited, Chi. Trib., June 29, 2005, § 1, at 4; Craig Whitlock, *CIA Ruse Is Said to Have Damaged Probe in Milan*, WASH. POST, Dec. 6, 2005, at A1 [hereinafter Whitlock, *CIA Ruse*]; Craig Whitlock & Dafna Linzer, *Italy Seeks Arrest of 13 in Alleged CIA Action*, WASH. POST, June 25, 2005, at A1; Tracy Wilkinson, *CIA Said To Leave Trail in Abduction*, L.A. TIMES, June 26, 2005, at A3 [hereinafter Wilkinson, *CIA Said To Leave Trail in Abduction*].

Abu Omar's fate became public knowledge in mid-2004, when—during a brief period of release—he placed a call from Egypt to his wife's telephone in Italy, where a wiretap by Italian authorities recorded the conversation. *USA/Jordan/Yemen: Torture and Secret Detention*, *supra*, at 15; Crewdson et al., *supra*; Whitlock, *CIA Ruse*, *supra*; Whitlock, *supra* note 47; Craig Whitlock, *Italy Seeks Extradition of 22 CIA Operatives*, WASH. POST, Nov. 12, 2005, at A19 [hereinafter Whitlock, *Italy Seeks Extradition*]; Whitlock & Linzer, *supra*; Tracy Wilkinson, *Italy Seeks Former U.S. Diplomat in Kidnapping*, L.A. TIMES, Sept. 30, 2005, at A1 [hereinafter Wilkinson, *Italy Seeks Former U.S. Diplomat in Kidnapping*]; see also Wilkinson, *CIA Said To Leave Trail in Abduction*, *supra* (noting that “during a brief period of freedom in 2004,” Abu Omar “told associates that he was tortured with electrical shocks to his genitals and beatings”). Shortly thereafter, Egyptian authorities reportedly rearrested Abu Omar. *USA/Jordan/Yemen: Torture and Secret Detention*, *supra*, at 15; Whitlock, *CIA Ruse*, *supra*; Whitlock, *supra* note 47. He remains in custody without charges. *USA/Jordan/Yemen: Torture and Secret Detention*, *supra*, at 15; Wilkinson, *Italy Seeks Former U.S. Diplomat in Kidnapping*, *supra*; see also *Account Rendered*, ECONOMIST, July 22, 2006, at 50 (reporting that Abu Omar's “lawyer says that he is in Cairo's al-Tora prison, where he has been repeatedly tortured, and has three times attempted suicide”).

In June 2005, an Italian judge ordered the arrest of thirteen U.S. citizens believed to work for the CIA and to have participated in the kidnapping of Abu Omar. *USA/Jordan/Yemen: Torture and Secret Detention*, *supra*, at 15; Sophie Arie, *Europe, US Clash over Terror War*, CHRISTIAN SCI. MONITOR, June 29, 2005, at 6; Crewdson et al., *supra*; Grey & Van Natta, *supra* note 47; Hundley & Crewdson, *supra*; Whitlock & Linzer, *supra*; Wilkinson, *CIA Said To Leave Trail in Abduction*, *supra*. By late 2005, Italian officials had issued nine more warrants for the arrest of U.S. citizens, bringing the total to twenty-two. Grey & McLean, *supra* note 44; Fisher, *supra* note 47; Whitlock, *CIA Ruse*, *supra*; Craig Whitlock, *Europeans Probe Secret CIA Flights*, WASH. POST, Nov. 17, 2005, at A22 [hereinafter Whitlock, *Europeans Probe Secret CIA Flights*]; Whitlock, *Italy Seeks Extradition*, *supra*; Tracy Wilkinson, *Europe in Uproar Over CIA Operations*, L.A. TIMES, Nov. 26, 2005, at A1; Wilkinson, *Italy Seeks Former U.S. Diplomat in Kidnapping*, *supra*. In addition, Italian police arrested two Italian intelligence officers alleged to have played a role in the kidnapping. Jim Hoagland, Op-Ed, *Bush's Unintended Internationalism*, WASH. POST, July 9, 2006, at B7; Smith & Mekhennet, *supra* note 47; Craig Whitlock, *Prosecutors: Italian Agency Helped CIA Seize Cleric*, WASH. POST, July 6, 2006, at A15. German prosecutors have also opened an investigation into the use of Ramstein airbase in connection with the kidnapping of Abu Omar. Whitlock, *Europeans Probe Secret CIA Flights*, *supra*.

Another example of abduction involves Mamdouh Habib, an Australian citizen pulled from a bus in Pakistan by local authorities shortly after the September 11, 2001, terrorist attacks. Ass'n of the Bar of the City of N.Y. & Ctr. for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* at 12 (2004), available at [http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf); see also MCCOY, *supra* note 36, at 173; Raymond Bonner, *Detainee Says He Was Tortured While in U.S. Custody*, N.Y. TIMES, Feb. 13, 2005, at A1; Neil A. Lewis, *U.S. Adds to Detained Australians' Rights*, N.Y. TIMES, Nov. 26, 2003, at A22; Megan K. Stack & Bob Drogin, *A Detainee's Long Odyssey Toward Freedom*, L.A. TIMES, Jan. 13, 2005, at A1. After his abduction, U.S. personnel delivered Habib to Egypt, where he endured six months of torture. Ass'n of the Bar of the City of N.Y. & Ctr. for Human Rights and Global Justice, *supra*, at 12; see also MCCOY, *supra* note 36, at 173; Bonner, *supra*; Mayer, *supra* note 46, at 118; Rod McGuirk, *Freed Terror Sus-*

pect Alleges Torture Under U.S. Custody, PHILA. INQUIRER, Feb. 14, 2005, at A5; Priest, *supra* note 47; Dana Priest & Dan Eggen, *Terror Suspect Alleges Torture*, WASH. POST, Jan. 6, 2005, at A1; Stack & Drogin, *supra*. Following his release from Egyptian custody, Habib spent a week in U.S. custody at Bagram airbase in Afghanistan and over two years in U.S. custody at Guantánamo Bay. MCCOY, *supra* note 36, at 173; Bonner, *supra*. During his detention at Guantánamo Bay, interrogators allegedly subjected him to sexual violence, including an incident in which a female interrogator smeared him with what appeared to be menstrual blood. Bonner, *supra*. After forty months of detention, the United States released Habib and returned him to Australia without charge or explanation. Bonner, *supra*; Jehl & Johnston, *supra* note 47; Mayer, *supra* note 46, at 118.

49. For example, in December 2001, Swedish authorities arrested two unsuccessful Egyptian asylum-seekers, Muhammad Zery and Ahmed Agiza. Craig Whitlock, *New Swedish Documents Illuminate CIA Action*, WASH. POST, May 21, 2005, at A1 [hereinafter Whitlock, *New Swedish Documents*]; Craig Whitlock, *A Secret Deportation of Terror Suspects*, WASH. POST, July 25, 2004, at A1 [hereinafter Whitlock, *A Secret Deportation of Terror Suspects*]. Within hours, Swedish officials transferred them into CIA custody for delivery to Egypt, where authorities allegedly subjected them to torture including electric shocks. Mayer, *supra* note 46, at 118; Whitlock, *New Swedish Documents*, *supra*; Whitlock, *A Secret Deportation of Terror Suspects*, *supra*. Egypt released one of the men after nearly two years and sentenced the other to a lengthy prison term. Whitlock, *A Secret Deportation of Terror Suspects*, *supra*. Swedish government officials now regard the deportation as an embarrassing mistake. *Id.*

Another example of transfer from official custody involves Canadian citizen Maher Arar, who in September 2002 was transiting through Kennedy International Airport on his way home from a family vacation in Tunisia. *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 252–53 (E.D.N.Y. 2006); Ian Austen, *Canadians Fault U.S. for Its Role in Torture Case*, N.Y. TIMES, Sept. 19, 2006, at A1; Herbert, *supra* note 47; Mayer, *supra* note 46, at 106. Based on erroneous information provided by Canada's Royal Mounted Police, U.S. immigration officials detained Arar in the United States for thirteen days. Austen, *supra*; Mayer, *supra* note 46, at 106; *Red Coats with Red Faces*, ECONOMIST, Sept. 23, 2006, at 42. Thereafter, the Deputy Attorney General authorized Arar's transfer to Syria without informing Canadian officials and despite Arar's pleas that Syria would subject him to torture. *Arar*, 414 F. Supp. 2d at 253–54. See Editorial, *Abu Ghraib's Abuses Require a Wider Focus*, GLOBE & MAIL (Toronto), May 8, 2004, at A24 (noting that "the deputy attorney-general of the United States signed off on [Arar's] deportation").

After holding him for ten months in a grave-like cell and subjecting him to severe beatings with electrical cables, Syria released Arar because it could find no evidence of any links to terrorist activities. *Arar*, 414 F. Supp. 2d at 254–55; Austen, *supra*, at A1; Bob Herbert, Op-Ed, *The Torturers Win*, N.Y. TIMES, Feb. 20, 2006, at A15; Mayer, *supra* note 46, at 106; Scott Shane, *Torture Victim Had No Terror Link, Canada Told U.S.*, N.Y. TIMES, Sept. 25, 2006, at A10. Following the lengthy investigation of a commission headed by a Canadian judge, Canada's government has acknowledged Arar's innocence and its own grave mistake of setting in motion the train of events that led to his needless detention and torture. Austen, *supra*; Ian Austen, *Canadian Man Tortured in Syria Wants Explanation from U.S.*, N.Y. TIMES, Sept. 20, 2006, at A12; *Red Coats with Red Faces*, *supra*; Shane, *supra*; Doug Struck, *Canadian Police Official Apologizes for Mistakes*, WASH. POST, Sept. 29, 2006, at A16.

50. ERIK SAAR & VIVECA NOVAK, *INSIDE THE WIRE* 247 (2005); Jehl & Johnston, *supra* note 47; Mayer, *supra* note 46, at 106–07; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1; Sliva, *EU Lawmakers Say CIA Conducted 1,000 Secret Flights*, *supra* note 47; *Torture by Proxy*, *supra* note 47; Van Natta, *supra* note 47.

51. On October 11, 2002, members of Joint Task Force 170 at Guantánamo Bay requested

approval for a series of interrogation methods, including “removal of clothing.” See Memoranda from LTC Diane E. Beaver, Staff Judge Advocate to Commander, Joint Task Force 170 (Oct. 11, 2002), *reprinted in* THE TORTURE PAPERS 226, 229–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS]; Memorandum from LTC Jerald Phifer, Dir., J2, to Commander, Joint Task Force 170 (Oct. 11, 2002) [hereinafter Memorandum from LTC Jerald Phifer], *reprinted in* TORTURE PAPERS, *supra*, at 227–28. On October 11, 2002, the commander of Joint Task Force 170 forwarded the request to the commander of the United States Southern Command. See Memorandum from Maj. Gen. Michael E. Dunlavey to Commander, U.S. S. Command (Oct. 11, 2002), *reprinted in* TORTURE PAPERS, *supra*, at 225. Two weeks later, the commander of the United States Southern Command forwarded the request to the Chairman of the Joint Chiefs of Staff. See Memorandum from Gen. James T. Hill to Chairman, Joint Chiefs of Staff (Oct. 25, 2002), *reprinted in* TORTURE PAPERS, *supra*, at 223. On November 27, 2002, the Defense Department’s general counsel forwarded the request to Secretary of Defense Donald H. Rumsfeld, who granted approval on December 2, 2002. See Memorandum from William J. Haynes II, Gen. Counsel, to Sec’y of Def. (Nov. 27, 2002) (countersigned with approval by Secretary Rumsfeld on Dec. 2, 2002), *reprinted in* TORTURE PAPERS, *supra*, at 236–37.

Faced with a quiet revolt by Alberto Mora, the Navy’s general counsel, Secretary Rumsfeld rescinded blanket approval for two categories of interrogation techniques, including the removal of clothing. Memorandum from Donald H. Rumsfeld, Sec’y of Def., to Commander, U.S. S. Command (Jan. 15, 2003) [hereinafter Rumsfeld Memo to S. Command], *reprinted in* TORTURE PAPERS, *supra*, at 239; Memorandum from LTC Jerald Phifer, *supra* (listing “removal of clothing” as a Category II technique). See Tim Golden, *Senior Lawyer at Pentagon Broke Ranks on Detainees*, N.Y. TIMES, Feb. 20, 2006, at A8 (discussing Mora’s objections and indicating that he warned superiors that authorization of the techniques could expose administration officials to prosecution); Jane Mayer, *The Experiment*, NEW YORKER, July 11 & 18, 2005, at 60, 70 [hereinafter Mayer, *The Experiment*] (same); Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32 [hereinafter Mayer, *The Memo*] (same). While removing blanket authority for such tactics, Rumsfeld held open the possibility that he might approve them for individual cases. Rumsfeld Memo to S. Command, *supra*.

Contemporaneously, Secretary Rumsfeld established a working group to examine and recommend a list of interrogation techniques. Memorandum from Donald H. Rumsfeld, Sec’y of Def., to Gen. Counsel of the Dep’t of Def. (Jan. 15, 2003), *reprinted in* TORTURE PAPERS, *supra*, at 238; Mayer, *The Experiment*, *supra*, at 70. Less than three months later, that working group proposed “removal of clothing” as an “effective” but “aggressive” means of interrogation. See *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003), *reprinted in* TORTURE PAPERS, *supra*, at 286, 342–43; see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 14, 87–89.

Even after Rumsfeld’s January 15, 2003, memorandum, one member of a Guantánamo “Tiger Team” stated to high-level investigators that interrogators retained authority to employ “removal of clothing as an ‘ego down’ technique.” George R. Fay, *Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade*, *reprinted in* THE ABU GHRAIB INVESTIGATIONS, *supra* note 46, at 109, 156 [hereinafter *Fay Report*]. This seems consistent with the conclusions later articulated in a report by Lieutenant General Randall M. Schmidt and Brigadier General John T. Furlow. See *infra* note 52 and accompanying text. Likewise, two high-level Army reports found that U.S. headquarters in Afghanistan continued to list and use “removal of clothing” as an approved interrogation technique after Rumsfeld’s January 15, 2003, memorandum. *Fay Report*, *supra*, at 155; *Schlesinger Report*, *supra* note 46, at 72; see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 5, 45, 91–92 (indicating that during 2003, 2004, and 2005, coalition forces in Afghanistan were still subjecting detainees to forced nudity and other forms of

sexual humiliation).

Thus, “removal of clothing for both M[ilitary] I[n]telligence] and M[ilitary] P[olice] objectives was authorized, approved, and employed in Afghanistan and Guantanamo.” *Fay Report, supra*, at 155. Later, the practice migrated to Iraq through temporary and long-term redeployment of personnel assigned to gather intelligence about the unexpectedly popular and brutal insurgency in that country. *Fay Report, supra*, at 154–55; *Schlesinger Report, supra* note 46, at 7–8, 10, 14–15, 68, 72; MCCOY, *supra* note 36, at 133, 137, 153–54, 156; *see also* Jane Mayer, *A Deadly Interrogation*, NEW YORKER, Nov. 14, 2005, at 44, 47 (“By the summer of 2003, the insurgency against the U.S. occupation of Iraq had grown into a confounding and lethal insurrection.... On orders from Secretary of Defense Donald Rumsfeld, General Geoffrey Miller, who had overseen coercive interrogations of terrorist suspects at Guantanamo, imposed similar methods at Abu Ghraib.”).

Following the migration of forced nudity to Iraq, Army investigators concluded that it became a “seemingly common” tool, that soldiers and officers believed they had authority to use it as an “ego-down” interrogation technique, and that recourse to nudity was “probabl[y]...sanctioned at some level within the chain-of-command.” *Fay Report, supra*, at 113, 156, 159, 161, 164; *see also Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation*, ¶¶ 25–26 (Feb. 2004), <http://www.stopwar.org.uk/Resources/icrc.pdf> (listing the “systematic” use of forced nudity as one of the forms of mistreatment most frequently alleged to occur at the coalition’s detention centers in Iraq); PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 36 (“Forced nudity was used not as a punishment, nor as an exception, but as an accepted method of interrogation at Abu Ghraib.”).

52. Randall M. Schmidt & John T. Furlow, *Army Regulation 15-6: Final Report (Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility)*, at 7–8, 15, 19–20 (June 9, 2005), available at http://www.humanrightsfirst.org/us_law/detainees/schmidt-army-reg-150605.pdf (indicating that all such gambits fell within the scope of approved interrogation tactics, but criticizing their use without advance approval or when combined with 160 days of isolation and nearly forty-eight consecutive days of eighteen to twenty-hour interrogations, yet still concluding that such combinations “did not rise to the level of prohibited inhumane treatment”); *see* Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13; *see also Fay Report, supra* note 51 (recounting a Guantánamo “Tiger Team” member’s belief that interrogators retained authority to employ “removal of clothing as an ‘ego down’ technique”); David Luban, Op-Ed, *Torture, American-Style*, WASH. POST, Nov. 27, 2005, at B1 (expressing amazement at Lieutenant General Schmidt’s and Brigadier General Furlow’s conclusion that such tactics constituted “humane” treatment falling within the scope of tactics “already authorized by U.S. Army doctrine”); Mayer, *The Experiment, supra* note 51, at 61 (recording the opinion of Brigadier General Jay W. Hood, commander of the detention camp at Guantánamo, that such conduct probably did not “rise to the level of abuse”); Mayer, *The Memo, supra* note 51 (quoting a senior Defense Department official for the proposition that such tactics were “within the bounds”); White, *supra* (recording the opinion of General Bantz J. Craddock, commander of the U.S. Southern Command, that such conduct might be “creative and aggressive,” but that it “did not violate any U.S. law or policy”).

Numerous sources have reported incidents involving female interrogators who smeared fake menstrual blood on a devout Muslim detainee. *See* PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 25, 27; SAAR & NOVAK, *supra* note 50, at 226–28; Anne Applebaum, *Blaming the Messenger*, WASH. POST, May 18, 2005, at A17; Bonner, *supra* note 48; Maureen Dowd, Op-Ed, *Torture Chicks Gone Wild*, N.Y. TIMES, Jan. 30, 2005, § 4 at 14; Eggen & White, *supra* note 36; Carol D. Leonnig, *Desecration of Koran Had Been Reported Before*, WASH. POST, May 18, 2005, at A12;

Neil A. Lewis & Eric Schmitt, *Inquiry Finds Abuses at Guantánamo Bay*, N.Y. TIMES, May 1, 2005, at 35; Mayer, *The Experiment*, *supra* note 51, at 60, 65; Conor O'Clery, *New Prisoner Abuse Claims*, IRISH TIMES, Feb. 19, 2005, at 11; *Self-Inflicted Wounds*, *supra* note 47; Editorial, *Torturers' Tricks Debasing Country's Mission at Guantánamo Bay*, DAYTONA BEACH NEWS-J., Feb. 7, 2005, at 4A. The United States has confirmed only one such incident. See Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators*, WASH. POST, Feb. 10, 2005, at A1 (indicating that in January 2005, "a Pentagon spokesman confirmed it had verbally reprimanded one female interrogator" for one such incident in early 2003). A careful reading of news accounts suggests that interrogators may have smeared multiple detainees with fake menstrual blood. Leonnig & Priest, *supra*. Compare Bonner, *supra* note 48 (describing the use of this technique against an Australian detainee), and O'Clery, *supra* (same), with SAAR & NOVAK, *supra* note 50, at 226–28 (describing the use of this technique against a Saudi detainee), and Dowd, *supra* (same).

Numerous sources have also reported the gratuitous administration of enemas to detainees. See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, N.Y. TIMES, Jan. 1, 2005, at A11 (describing interviews with former intelligence officers and interrogators, who indicated that at least one detainee was "forcibly given an enema" because "it was uncomfortable and degrading," and indicating that several detainees may have received similar treatment); Joseph Margulies, *Wiggle Room on Cruelty*, WASH. POST, July 17, 2006, at A15 (asserting that interrogators "forcibly administered an enema" to a prisoner in solitary confinement at Guantánamo); Michelle Mittelstadt, *Gonzales Confirmed by Senate*, LONG BEACH PRESS-TELEGRAM, Feb. 4, 2005, at A1 (quoting Senator Edward Kennedy's statement to the effect that U.S. interrogators have "administered forced enemas"); Clint Talbott, *"Bad People" Deserve Trials*, BOULDER DAILY CAMERA, June 15, 2005 (indicating that "[i]nterrogators have used enemas as a form of punishment"); Editorial, *Public Silent as Rules of Civil Society Are Rewritten*, DAYTONA NEWS-J., Jan. 4, 2005, at 4A (stating that "the torture of prisoners at Guantánamo has included forced enemas"); Editorial, *The Torture Question*, BALT. SUN, Feb. 20, 2005, at 5F (describing "involuntary enemas" as one of the few details about "U.S. torture policy" that have "only trickled out"); *Torturers' Tricks Debasing Country's Mission at Guantánamo Bay*, *supra* (indicating that the means of abuse at Guantánamo Bay "vary from beatings to sleep deprivation to denials of personal hygiene to forced enemas").

Other sources have reported the gratuitous administration of body cavity searches. See *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 27–28 (D.D.C. 2006) (summarizing allegations, including forced nudity and body cavity searches); PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 23 (describing the claims of three British detainees of being subjected to "forced cavity searches, which... 'were used to degrade and humiliate them'"); Paul C. Campos, Editorial, *Bush Administration Wrongly Defends Torture*, AUGUSTA CHRON., Nov. 23, 2005, at A5 (describing a Guantánamo Bay prisoner's subjection "to body cavity searches despite having spent 160 days in solitary confinement"); Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 (discussing three detainees, who all claimed to have been beaten at Bagram air base in Afghanistan, but who "complained most bitterly of being stripped naked in front of female soldiers for showers and medical examinations, which they said included the first of several painful and humiliating rectal exams"); Nicholas D. Kristof, *Sami's Shame, and Ours*, N.Y. TIMES, Oct. 17, 2006, at A21 (discussing an Al Jazeera cameraman detained at Bagram airbase and Guantánamo Bay since December 2001, who was "subjected to anal cavity searches in public 'just to humiliate [him]'""); Mayer, *The Experiment*, *supra* note 51, at 60 (mentioning that Brigadier General Jay W. Hood "banished regular 'cavity searches' for detainees" at Guantánamo only after March 2004); Gary Sheftick, *Army Detainee Ops Plan Includes 35 New Units*, Pentagon Brief, Mar. 1, 2005, at 3 (describing the elimination of "cavity searches" as a "recently implemented" change at U.S. detention centers); see also Whitlock, *New Swedish Docu-*

ments, *supra* note 49 (describing the surprise of Swedish police officers when confronted with a U.S. extraordinary rendition team that insisted on strip-searching two prisoners even though Swedish police had already searched them and placed them in handcuffs).

Sources have also reported examples of female interrogators grabbing or striking the genitals of detainees. Letter from T.J. Harrington, Deputy Assistant Dir., FBI Counterterrorism Div., to Maj. Gen. Donald J. Ryder (July 14, 2004), available at http://www.aclu.org/torturefoia/released/FBI_4622_4624.pdf (describing an FBI special agent's observation of an interrogation during which a female interrogator whispered into a detainee's ear, caressed him, rubbed lotion onto his arms, and grabbed his genitals); see PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 25 (reporting an incident in which an FBI agent witnessed a female interrogator grab the genitals of a Guantánamo detainee); SAAR & NOVAK, *supra* note 50, at 244 (describing an incident in which "a marine told an FBI observer that [a female interrogator] had squeezed the detainee's genitals"); Edward Alden, *FBI Saw Abu Ghraib-Style Tactics in Guantánamo Bay Jail Two Years Ago*, FIN. TIMES, Dec. 7, 2004, at 2 (reporting that, in late 2002, FBI agents witnessed a "female interrogator grabbing the genitals of a male prisoner" at Guantánamo Bay); Neil A. Lewis, *Iraqi Prisoner Abuse Reported After Abu Ghraib Scandal*, N.Y. TIMES, Dec. 8, 2004, at A12 (describing the account of an FBI official who had witnessed "a female interrogator squeezing the genitals" of a Guantánamo detainee); Lewis & Schmitt, *supra* (reporting that "FBI agents wrote in memorandums that...they had seen female interrogators forcibly squeeze male prisoners' genitals"); Priest & Eggen, *supra* note 48 (describing the existence of documents showing that "FBI personnel serving in Afghanistan, Iraq, and Guantanamo Bay" had witnessed "incidents in which military interrogators grabbed prisoners' genitals"); see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 21 (describing Mamdouh Habib's claim that female soldiers at Bagram airbase "touched [him] in the private areas" while questioning him" in April 2002); Golden, *supra* (discussing the sworn statements of soldiers in Afghanistan, who described "one female interrogator with a taste for humiliation stepping on the neck of one prostrate detainee and kicking another in the genitals").

Other sources have reported examples of female interrogators rubbing their breasts against detainees. SAAR & NOVAK, *supra* note 50, at 224; Dowd, *supra*; Leonnig & Priest, *supra*; see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 6, 27 (reporting that in 2003 female interrogators at Guantánamo Bay "sat on detainees' laps and fondled themselves or detainees, opened their blouses and pushed their breasts in the faces of detainees, opened their skirts...and forced detainees to look at pornographic pictures or videos").

Sources have also reported examples of female interrogators touching detainees in other sexually provocative ways. Memorandum for Record, from [Name Redacted], ACS Def. Analyst, to [Name Redacted], ACS PM (Apr. 26, 2003), available at http://action.aclu.org/torturefoia.released/072605/1243_1381.pdf (FOIA release pages 1333–34) (describing a female interrogator's performance of "the proverbial 'strip club lap dance'" on a male detainee); see Leonnig & Priest, *supra* (recounting allegations, generally confirmed by a Pentagon investigation, that female interrogators "rubbed their bodies against" male detainees, "wore skimpy clothes in front of them, made sexually explicit remarks and touched them provocatively"); Mayer, *The Experiment*, *supra* note 51, at 62 (describing how a detainee tried to head-butt a female interrogator who embraced him from behind); Priest & Eggen, *supra* note 48 (describing government e-mails referring to an incident in which a female interrogator rubbed lotion on male prisoner during Ramadan); see also SAAR & NOVAK, *supra* note 50, at 191–92 (describing a female contract interrogator's attempts to provoke a Guantánamo detainee by taking off her dress and questioning him while in her bra and thong underwear).

According to one former intelligence analyst at Guantánamo, the Army's Behavioral Science Consultant Teams conceived and promoted the use of sexual gambits to disturb prisoners. See Mayer, *The Experiment*, *supra* note 51, at 65. Another source reports that "sexually oriented tac-

tics may have been part of the fabric of Guantánamo interrogations, especially in 2003.” Leonnig & Priest, *supra*; see also PHYSICIANS FOR HUMAN RIGHTS, *supra* note 42, at 6 (indicating that the use of female interrogators at Guantánamo Bay “appeared to decline in 2004”); Editorial, *Abu Ghraib, Caribbean Style*, N.Y. TIMES, Dec. 1, 2004, at A30 (describing Red Cross reports to the effect that “Guantánamo prisoners complained less frequently in 2004 than in 2003 about female interrogators who exposed their breasts, kissed prisoners, touched them sexually and showed them pornography”); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (citing a Red Cross report for the proposition that “there were frequent complaints by prisoners in 2003 that some of the female interrogators baited their subjects with sexual overtures”); Lewis & Schmitt, *supra* (citing a June 2003 International Committee of the Red Cross Report to the effect that “the use of sexual taunts by female interrogators was prevalent in 2002 and early 2003, but stopped abruptly in the middle of that year”).

53. See Editorial, *Misplaced Outrage*, USA TODAY, Nov. 14, 2005, at 20A (complaining that the “CIA has been hiding al-Qaeda suspects and interrogating them at secret prisons in Eastern Europe and elsewhere—essentially making them disappear, as South American and Soviet dictators once did”); *Rebellion Against Abuse*, *supra* note 45 (opining that “the CIA maintains its own network of secret prisons, into which 100 or more terrorist suspects have ‘disappeared’ as if they were victims of a Third World dictatorship”); Eugene Robinson, Editorial, *Torture Whitewash*, WASH. POST, May 3, 2005, at A21 (observing that some prisoners “have simply ‘disappeared,’ as if the U.S. government were some Latin American junta whose generals wear gold-braided epaulets as big as vultures”).