THE MYTH OF ATTENUATION: REINVIGORATING THE EXCLUSIONARY RULE FOR TORTURE-TAINTED STATEMENTS

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Impunity, Exhibit A: In the biggest criminal case in U.S. history – *United States v. Khalid Sheikh Mohammad et al.*, "the 9/11 case") – the U.S. government is fighting to use evidence derived from the infamous CIA torture program to convict and execute men in purpose-built military commissions at Guantanamo Bay.[1] Their argument relies in significant part on recent case law on "attenuation"; a set of parameters within which torture survivors could still be prosecuted using evidence that may have originated from their torture.

The prohibition on torture, always more lauded than followed by states, has suffered unprecedented attacks over the past two decades. The United States' state-sponsored interrogation program relied on the use of torture; yet the perpetrators were never brought to account, and the full details of the program remain selectively classified to obscure the ineffectiveness of the techniques.[2] There is a great deal of tension between "attenuation" caselaw, analyzing voluntariness and reliability of evidence; and the exclusionary rule, a customary international law tenet barring the fruits of torture from use in prosecution against a torture victim. This Article discusses the deterioration of the exclusionary rule through court decisions establishing parameters for attenuation and explores the effect of torture on the 9/11 case. The Article concludes that "attenuation parameters" entirely ignore the *unreliability* of statements made after torture, meaning that no matter how voluntariness is assessed, attenuation may never be possible once torture is inflicted. The international community should enforce the exclusionary rule's prohibition on using post-torture evidence without exception, as reflected in the newly-released Principles on Effective Interviewing for Investigation and Information-Gathering (the "Méndez Principles").

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1. *See* Transcript of Dec. 5, 2017 at 17385-386, *United States v. Mohammad*, et. al, https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS5Dec2017-MERGED).PDF.

2. Alka Pradhan, *Alka Pradhan: Torture Secrets Still Being Uncovered at Guantanamo*, PITTSBURGH POST-GAZETTE (Jan. 14, 2020), https://www.post-gazette.com/opinion/Op-Ed/2020/01/14/Alka-Pradhan-Torture-secrets-still-being-uncovered-at-Guantanamo-Bay/stories/202001140009.

I. BROADENING THE EXCLUSIONARY RULE FOR ATTENUATION

In 2006, a group of detainees who had spent years incommunicado in secret prisons scattered around the world were flown to Guantanamo Bay, Cuba. The men had spent between 2-4 years under CIA control, being rendered from one "black site" to another, sometimes in the direct custody of the CIA, and sometimes in the custody of third-party states.[3] One of them, Ammar al Baluchi, was disappeared in Pakistan, and entered CIA custody in May 2003. Much of Mr. al Baluchi's torture in CIA custody has been publicly documented. In 2012, the Hollywood film "Zero Dark Thirty" utilized information obtained from the CIA to portray Petitioner's torture, including his water dousing and stress positions.[4] Mr. al Baluchi's arrest, and disappearance by the CIA in 2003 were also detailed in the redacted Executive Summary of the Senate Select Committee on Intelligence's Report on the CIA's RDI Program ("SSCI Report Summary").[5] One of the RDI program's architects, Dr. James Mitchell, testified that Mr. al Baluchi had been used as a "training prop" for CIA personnel to receive their certifications to use "enhanced interrogation techniques."[6] Mr. al Baluchi's "walling" alone was severe enough to cause a traumatic brain injury; ice water was used during his water torture; and standing sleep deprivation for (on one occasion) eighty-two hours that resulted in chronic back and knee pain.[7] Following intense physical torture, Mr. al Baluchi was subjected to psychological torture, including prolonged incommunicado detention, sleep deprivation, and explicit and implicit threats of physical harm, for over three years. Mr. al Baluchi was not alone in his physical and psychological responses to the torture; CIA records describe detainees looking like dogs that "had been kenneled," and cowering when the doors to their cells were opened.[8]

Article 15 of the United Nations Convention Against Torture - the "exclusionary rule" provides that

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3. SENATE SELECT COMMITTEE ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, at 61 (Dec. 3, 2014), http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909 [hereinafter *SSCI Redacted Executive Summary*].

4. Carol Rosenberg, *Guantánamo War Court Screens Grisly 'Zero Dark Thirty' Torture Scenes*, MIAMI HERALD (Feb. 18, 2016), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article61163027.html.

5. *SSCI Redacted Executive Summary*, *supra* note 3, at 243-46.

6. Sacha Pfeiffer, *CIA Used Prisoner as 'Training Prop' for Torture, Psychologist Testifies*, NATIONAL PUBLIC RADIO (Jan. 23, 2020), https://www.npr.org/2020/01/23/799130233/psychologist-who-helped-create-interrogation-methods-says-cia-may-have-gone-too.

7. Carol Rosenberg, *Defense Lawyers Seek CIA Health Records in Guantánamo's Sept. 11 Case*, MIAMI HERALD (Oct. 12, 2016), https://www.miamiherald.com/news/nation-world/national/article107872842.html.

8. *SSCI Redacted Executive Summary*, *supra* note 3, at 49-50 n. 240.

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[9]

As stated by the Committee Against Torture (the treaty body for the UNCAT), Article 15 "must be observed in all circumstances"[10]; which would result in automatic exclusion of statements made after the subject's torture.

This is because the goal of using torture in interrogations is to create a psychological space in which prisoners will disclose information to interrogators without resistance. In recent history, this process has been called establishing "learned helplessness,"[11] and CIA psychologist James Mitchell called it "Pavlovian classical conditioning."[12] Both phrases describe a psychological state in which the prisoners' "spontaneous expression of will"[13] is eliminated or entirely subjected to the interrogators'; the techniques create 'anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness'."[14] The concept of attenuation hinges on the hypothetical ability to reverse the "helpless" psychological state and reinstate a prisoner's voluntary actions such that later statements by the prisoner may be admissible, even in proceedings taken against him. Courts around the world are divided on whether such attenuation from acts of torture/CIDT might be possible, if the victims are separated from their torture by a variety of factors.[15] The Inter-American Court of Human Rights takes the position that no degree of separation is capable of curing the exclusionary effect of torture and CIDT, and that it applies to "all other pieces of evidence subsequently obtained through legal means, but which originated in an act of torture."[16] On the other hand, the European Court of Human Rights has stated that "There is no clear consensus among Contracting States . . . as to the exact scope of the exclusionary rule," to justify applying an attenuation analysis."[17]

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9. G.A. Res. 39/46 (Dec. 10, 1984).

10. U.N. Comm. Against Torture, General Comment No. 2 (Jan. 24, 2008), http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskvE%2BTuw1mw%2FKU18dCyrYrZhDDP8yaSRi%2Fv43pYTgmQ5n7dAGFdDalfzYTJnWNYOXxeLRAIVgbwcSm2ZXH%2BcD%2B%2F6IT0pc7BkgqlATQUZPVhi.

11. JAMES E. MITCHELL & BILL HARLOW, ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA 46 (2016).

12. *Id.*

13. *García v. Mexico*, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶¶ 169, 201(Nov. 26, 2010).

14. *See generally* Brown v. Mississippi, 297 U.S. 278 (1936); Metin Başoğlu, *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES OF GEN. PSYCHIATRY 277, 283 (2007).

15. This would include any investigative leads obtained as a result of torture and CIDT, and any evidence obtained as a result of those leads.

16. *García*, *supra* note 13, at ¶ 167 (including evidence obtained under duress); *Cruz e v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 273, ¶¶ 58-61 (Nov. 26, 2013); *Vargas v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 300, ¶ 118 (Sept. 2, 2015).

17. *Gäfgen v. Germany*, App. No. 22978/05, 52 Eur. Ct. H.R. 1, ¶ 174 (June 1, 2010).

In the United States, an attenuation analysis for whether a statement is voluntary entails "whether the statement was a 'product of an essentially free and unconstrained choice by its maker,'"[18] and requires "careful evaluation of all the circumstances of the interrogation."[19] These circumstances typically include, by are "not limited to the defendant's age and education, the length of the detention, whether the defendant was advised of his rights, and the nature of the questioning,"[20] as well as "use of physical punishment such as the deprivation of food or sleep.'"[21] This is often called the inquiry into the "totality of the circumstances," and is focused on whether "there has been a 'break in the stream of events . . . sufficient to insulate the statement from the effect of all that went before.'"[22]

"All that went before" includes the "continuing effect of the prior coercive techniques on the voluntariness of any subsequent confession,"[23] and conditions of confinement such as isolation or inhuman living conditions.[24] In one of the seminal U.S. cases on attenuation of torture evidence, *United States v. Karake*, the Supreme Court found that

> The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the removal of the coercive circumstances and the present confession. (…) Where, as here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement, it is impossible for the Court to conclude that there was any meaningful relief from those conditions prior to the interrogations by American investigators.[25]

Some of the most relevant recent litigation over the parameters of attenuation concerns Guantanamo Bay detainees who were tortured by the United States. In *Ali Ahmed v. Obama*, the court stated that the witness's testimony had "been cast into significant question, due to the fact that it was elicited at Bagram *amidst actual torture or fear of it*."[26] Later in the *Ali Ahmed* opinion, the court considered the statements of a different detainee that the government offered as evidence that Ali Ahmed received military training, and found that because the witness in question "made the inculpatory statement at Bagram Prison in Afghanistan, about which there have been widespread, credible reports of torture and detainee abuse," the statement would not be admitted.[27] The court actually rejected the U.S.

18. United States v. Murdock, 667 F.3d 1302, 1305 (D.C. Cir. 2012) (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

19. Mincey v. Arizona, 437 U.S. 385, 401 (1978).

20. *Murdock*, 667 F.3d at 1305-06 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

21. Mohammed v. Obama, 704 F. Supp. 2d 1, 25 (D.C.C. 2009).

22. *Id.*

23. United States v. Karake, 443 F. Supp. 2d 8, 87 (D.D.C. 2006).

24. Brooks v. Florida, 389 U.S. 413, 414 (1967).

25. *Karake*, 443 F. Supp. 2d at 89.

26. Ahmed v. Obama, 613 F. Supp. 2d 51, 56 (D.D.C. 2009).

27. *Id.* at 61.

government's attempt to rehabilitate one of the allegedly coerced statements by showing that it was made during "the same interrogation session where the detainee made inculpatory statements about himself."[28] The court concluded that "[a]ny effort to peer into the mind of a detainee at Bagram, who admitted to fearing torture at a facility *known to engage in such abusive treatment*, simply does not serve to rehabilitate a witness whose initial credibility must be regarded as doubtful."[29]

One of the most important Guantanamo Bay attenuation cases was *Mohammed v. Obama*,[30] in which the government conceded that Mr. Mohamed had been badly abused over a long period of time before his transfer to Guantánamo, but that the rapport that an FBI agent later built with him vitiated the taint of his prior abuse and that his statements implicating the petitioner should therefore be credited. The court accepted the concept of attenuation in theory, noting that "courts have never insisted that a specific amount of time must pass before the taint of earlier mistreatment has dissipated," and that "the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession."[31] To apply the standard, the court spent 23 pages cataloguing the mistreatment of Mr. Mohamed and examined scientific articles describing the effects of physical and psychological torture on prisoners. The court finally concluded that "even though the identity of the individual interrogators changed, there is no question that . . . [f]rom Binyam Mohamed's perspective, there was no legitimate reason to think that transfer to Guantánamo Bay foretold more humane treatment . . ."[32] Ultimately, the court could not admit Mr. Mohamed's statements, because "his will was overborne by his lengthy prior torture."[33]

In Guantanamo cases where some judges seem favorably disposed to find attenuation, most have insisted on a "clean break" between the alleged torture and the statements to be admitted. In *Salahi v. Obama*[34], the court reasoned that "at some point, after the passage of time and intervening events, and considering the circumstances – the taint of abuse and coercion may be attenuated enough for [statements] to be considered reliable—there must certainly be a 'clean break' between the mistreatment and any such statement."[35] The court noted that the statement at issue was made both "a year after [Salahi's] coercive interrogation,

28. *Id.*

29. *Id.* at 62.

30. Mohammed v. Obama, 689 F. Supp. 2d 38, 61 (D.D.C. 2009). The Petitioner's name was properly spelled as "Mohamed" rather than "Mohammed."

31. *Mohammed*, 689 F. Supp. 2d at 62-63.

32. *Id.* at 65; *see also* Anam v. Obama, 696 F. Supp. 2d 1, 7 (D.D.C. 2010), *aff'd sub nom.* Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011) (finding that "Because the U.S. was involved both with the earlier conditions of confinement and his later detention at Guantánamo, Al Madhwani was "gripped by the same fear that infected his Afghanistan confessions.").

33. *Mohammed*, 689 F. Supp. 2d at 66.

34. Salahi v. Obama, 710 F. Supp. 2d 1, 7 (D.D.C. 2010), *vacated*, 625 F.3d 745 (D.C. Cir. 2010).

35. *Id.*

and after he had disavowed earlier incriminating statements."[36] Even with this more permissive view towards attenuated evidence, the *Salahi* court discounted one of the statements at issue, and admitted only one that had been made over a year after the coercive techniques ended.[37]

The European Court of Human Rights, which recognizes a debate among states parties regarding attenuation, nevertheless also insists on a "break in the causal chain" between the use of torture/CIDT and statements either made entirely voluntarily at a later time, or "corroborated by further *untainted* real evidence."[38] The requirement that corroborating evidence also be free of taint was highlighted by the court in *Anam v. Obama*[39]:

> The Court is particularly concerned that the interrogators at Guantanamo relied on, or had access to, Petitioner's coerced confessions from Afghanistan. The logical inference from the record is that the initial interrogators reviewed Petitioner's coerced confessions from Afghanistan with him and asked him to make identical confessions. Far from being insulated from his coerced confessions, his Guantanamo confessions were thus derived from them.[40]

This "derivative evidence" problem – the "fruit of the poisonous tree" – is often discussed as the fatal flaw in the 9/11 case. When the men were brought to Guantanamo from the black sites in September 2006, they remained under the operational control of the CIA,[41] at a camp specifically for former black site detainees. On the day they were transferred, President Bush – commander-in-chief of the military judges overseeing the Guantanamo military commissions - announced the intention to prosecute the men for their participation in the 9/11 attacks, thereby casting the first blow to the presumption of innocence.[42] The problem, however, was that any statements made by the detainees at the black sites, under "enhanced interrogation techniques," might not be accepted by a judge, even in a purpose-built military commission at Guantanamo.[43] So the Department of Justice made the decision to have FBI agents re-interrogate the men.[44] The new interrogators were marketed by the government as "clean teams" because they used traditional rapport-building techniques as opposed to the torture techniques used at the black sites. Surely, given the space of several months, change in location to sunny Guantanamo Bay, and the new interrogation teams providing bathroom and

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36. *Id.* at 10.

37. *Id.*

38. Gäfgen v Germany, App. No. 22978/05, 52 Eur. Ct. H.R. 1, ¶ 180 (June 1, 2010).

39. Anam v. Obama, 696 F. Supp. 2d 1 (D.D.C. 2010), *aff'd sub nom.* Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011).

40. *Id.* at 8.

41. *SSCI Redacted Executive Summary*, *supra* note 3, at 160.

42. *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, THE WHITE HOUSE (Sept. 6, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.

43. Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943 (2010).

44. *Id.* at 952.

prayer breaks as well as McDonald's snacks, these interrogations would meet the "clean break" guidance elucidated in *Salahi* and *Gäfgen* such that the resulting statements would be admissible?

In fact, the government has a serious *Anam* problem – the FBI interrogators were the same special agents who had spent the previous years since 9/11 sending questions to the black sites to be posed to the incommunicado detainees, the answers woven back into the overall 9/11 investigation.[45] Worse, the agents "had access to," and reviewed the CIA torture-acquired statements immediately before they re-interrogated Mr. al Baluchi and the other former black site prisoners, meaning that, per the *Anam* court's analysis, the Guantanamo statements were "derived" from the torture-acquired statements.[46]

The ban on reliance on previous statements raises the bar for attenuation. However, the cases ruling out reliance on the detainee's demeanour to establish voluntariness makes the bar almost unreachable. In *Abdah v. Obama*,[47] for example, the government presented an investigator's testimony that she herself did not mistreat anyone, nor did she observe any signs of abuse in the demeanor of the detainee. In fact, the government argued, one of the detainees felt "relaxed during the interviews . . .[enough] to complain about matters regarding his treatment and conditions of confinement."[48] The court, however, excluded the statements for two reasons. First, similar to the Prosecution here, the investigator met with the detainees for only a few hours at a time, an "insufficient" period of time in which to gauge the psychological state of a detainee in credible conditions of torture.[49] Second, the investigator "had no knowledge of the circumstances of detainee confinement before their arrival at Bagram, and quite limited knowledge of [their] treatment there."[50] The FBI agents also recalled that Mr. al Baluchi and other defendants seemed "comfortable" during the 2007 interrogations, although not quite enough to make complaints to them about his treatment or conditions of confinement.[51] Similar to *Abdah*, the FBI agents met with the detainees for "only a few hours at a time" for a few days. This is particularly important because, unlike *Abdah*, the FBI agents *did* know that the CIA detainees had been subjected to "enhanced interrogation techniques" and incommunicado detention at the black sites,[52] yet they would not have been able to credibly gauge the full scope of torture

45. Carol Rosenberg, *F.B.I. Agent Testifies That He Sent Questions for C.I.A. Detainees*, N.Y. TIMES (Sept. 19, 2019), https://www.nytimes.com/2019/09/19/us/politics/fbi-cia-torture.html.

46. Anam v. Obama, 696 F. Supp. 2d 1, 8 (D.D.C. 2010), *aff'd sub nom.* Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011).

47. Abdah v. Obama, 708 F. Supp. 2d 9, 18-19 (D.D.C. 2010), *rev'd sub nom.* Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011).

48. Brief of Respondent-Appellant at 50, Uthman v. Obama, No. 10-5235 (D.C. Cir. Mar. 29, 2011).

49. *Abdah*, 708 F. Supp. 2d at 20.

50. *Id.* at 19-20.

51. Transcript of Sept. 16, 2019 at 25475-476, United States v. Mohammad, No. 93CR00180, 2011 WL 1227685 (S.D.N.Y. 2011), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS16Sep2019-MERGED).pdf.

52. Rosenberg, *supra* note 46; Transcript of Sept. 17, 2019 at 25974, United States v. Mohammad, No. 93CR00180, 2011 WL 1227685 (S.D.N.Y. 2011), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS17Sept2019-MERGED).pdf.

effects in their short time with the men, only four months removed from the black sites, and still without legal representation or access to the outside world.

The former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms agreed with the *Abdah* court, explaining that[53]:

> If there are doubts about the voluntariness of statements by the accused or witnesses, for example when no information about the circumstances is provided or if the person is arbitrarily or secretly detained, a statement should be excluded irrespective of direct evidence or knowledge of physical abuse.

The circumstances in the 9/11 case clearly fail the "totality of the circumstances" test to determine voluntariness. However, the inherent subjectivity of the attenuation analysis, and variability of how to weigh different factors, means that the exclusionary rule is in real danger of being swallowed by its exceptions if courts continue to be guided by the question "voluntariness" alone.

II. UNRELIABILITY OF TORTURE-ACQUIRED STATEMENTS

Even if circumstances were to meet with the "clean break" standard of an attenuation analysis, and later evidence found to be voluntary, scientific studies show that later evidence following prolonged torture or CIDT is inherently unreliable and *should be excluded from every case*. This is because prolonged and extreme stress, like that associated with torture techniques, damages brain functions in two ways: 1.) Through the alteration of memory, and 2.) Through imposition of "learned helplessness."[54]

Shane O'Mara, Professor of Experimental Brain Research and noted torture expert, has written that

> Prolonged chronic stress impacts negatively across a wide range of brain and bodily organ systems, causing deleterious long-term changes that that are associated with neuropsychiatric, neuropsychological, and neurological conditions, as well as organ dysfunction. Sources of prolonged chronic stress can include environmental factors, such as heat or cold, deprivation such as hunger or thirst, or a wide variety of other stressors. This principle, which is supported by hundreds of scientific studies, is sometimes known as the neurotoxicity hypothesis. Without appropriate treatment, these negative conditions can persist for decades.[55]

Due to the fact that the goal of torture is psychological control, it is difficult to overstate – and states have recognized - the impact of conditions of confinement

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53. Martin Scheinin (Special Rapporteur), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 45(d), U.N. Doc. A/63/223 (Aug. 6, 2008), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/451/82/PDF/N0845182.pdf?OpenElement.

54. *See e.g.*, Mohammed v. Obama, 704 F. Supp. 2d 1, 27 (D.D.C. 2009).

55. *Declaration of Shane O'Mara*, (March 24, 2016), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425OO(AAA)).pdf.

in reinforcing or crystallizing the impact of "learned helplessness"[56] on subsequent statements. It is also difficult to overstate – and the United States, for example, has refused to recognize[57] – the importance of "appropriate treatment" to attempt to alleviate the physical damage of prolonged torture/CIDT.

Acts of torture inflict permanent psychological wounds that cannot be reversed, and without adequate torture rehabilitation, victims continue to suffer the effects in perpetuity.[58] Such is Mr. al Baluchi's experience at Guantanamo Bay, where the withholding of medical and psychological treatment for his torture[59] – torture rehabilitation, which is mandated by Article 14 of the UNCAT - combine with his arbitrary detention[60] and poor conditions of confinement[61] to reinforce the effects of his torture. As observed by Prof. Derrick Pounder, a forensic pathologist who has accompanied the UN Special Rapporteurs on Torture on fact-finding missions: "The extreme nature of the torture event is powerful enough on its own to produce mental and emotional consequences regardless of a person's pre-torture psychological status."[62] The National Consortium of Torture Treatment Programs wrote in their 2014 CAT Shadow Report,

> Torture survivors have been transformed by their traumatic experiences that have been consciously caused by other human beings . . . Survivors of torture commonly demonstrate symptoms such as chronic pain in muscles and joints, headaches, incessant nightmares and other sleep disorders, stomach pain and nausea, severe

56. *See* Transcript of Oct. 20, 2018 at 17118, United States v. Mohammad, No. 93CR00180, 2011 WL 1227685 (S.D.N.Y. 2011), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(806%20Transcript%2020%20Oct%202017)_Part1.pdf ("M[ilitary]J[udge] . . . Pohl[]: [T]he conditions of how the [earlier, inadmissible] statements were taken, does the government believe that's material to the preparation of the defense in challenging the [later, impugned] statements? C[hief]P[rosecutor] . . . BG[en] Martins[]: Yes.").

57. *Deprivation and Despair: The Crisis of Medical Care at Guantánamo*, PHYSICIANS FOR HUM. RTS. (June 26, 2019), https://phr.org/wp-content/uploads/2019/06/2019-PHR-CVT-Guantanamo.pdf.

58. Walter Kälin, *The Struggle Against Torture*, INT'L COMM. OF THE RED CROSS (Sept. 30, 1998), https://www.icrc.org/en/doc/resources/documents/article/other/57jpg5.htm ("Acts of torture cannot be undone and psychological damage continues long after the physical wounds inflicted on the victim are healed. Yet human rights law recognizes that reparation and compensation for such victims may enhance the healing process by supporting the victim's sense of justice."); *see also* Miranda v. Arizona, 384 U.S. 436, 448 (1966) (citing Chambers v. Florida, 309 U.S. 227 (1940) ("coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.")).

59. Connell, J., Pradhan, A., & Lander, M., *Obstacles to Torture Rehabilitation at Guantánamo Bay*, TORTURE J.: J. ON REHAB. OF TORTURE VICTIMS AND PREVENTION OF TORTURE (Dec. 5, 2017), https://tidsskrift.dk/torture-journal/article/view/97219/146018.

60. *Opinion No. 89/2017 Concerning Ammar al Baluchi*, U.N WORKING GRP. ON ARBITRARY DET. (Jan. 24, 2018), https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session80/A_HRC_WGAD_2017_89.pdf.

61. Corey Dickstein, *Deteriorating Facilities Draw Scrutiny as Gitmo Eyed for Possible Prisoner Influx*, STARS AND STRIPES (Feb. 9, 2019), https://www.stripes.com/Migration/2019-02-09/Deteriorating-facilities-draw-scrutiny-as-Gitmo-eyed-for-possible-prisoner-influx-1481909.html.

62. Derrick J. Pounder, *The Medical Contribution to Assessing Allegations of Torture in International Fact-Finding Missions*, 208 FORENSIC SCI. INT'L 143, 145 (2011).

> depression and anxiety, guilt, self-hatred, the inability to concentrate, thoughts of suicide and posttraumatic stress disorder.[63]

Worse, because of brain impairment provoked by chronic extreme stress, torture victims are prone to confabulation, or the production of false memories.[64] As stated by O'Mara,

> Even under optimal circumstances, the brain does not and cannot encode all events, or details of important events, let alone permit their retrieval. It is especially difficult to, retrieve the sequence of events, the emotional states associated with events, and prior states of knowledge . . . Memory is a transactive process with both constructive and reconstructive elements. Especially under stress, people consolidate information to which they are exposed into their memories, even if that information is not accurate . . . From the point of view of neuroscience, there is no fundamental difference between physical and psychological abuse. All pain is processed in the brain, regardless of its cause."[65]

Forensic psychiatry expert Dr. Charles A. Morgan, who has conducted numerous human studies on performance under high stress, agrees that

> Traumatic events and highly stressful event may make an individual more susceptible to errors in memory or recalling false memories. Traumatic and stressful events, additionally, create susceptibility to suggestion and compliance; in the context of interrogations, false memories may be created, and over time, these false memories are experienced and recounted as reality . . . For individuals who have experienced torture or trauma, memories, whether genuine or false in nature, are experienced as real. Indeed, false memories are just as real as genuine memories because the affected individual is unable to differentiate real memories from false memories. False memories become the same as real memories in individual's minds in that they have details. are associated with emotional responses and somatosensory experiences.[66]

The SSCI Redacted Report Summary is replete with examples of detainees providing false information during and following their CIA torture.[67] From a distance of nearly twenty years, and without declassification of contemporary medical records, it is impossible to definitively resolve which false statements were intended to stop the torture, and which may have been the products of false memories created over prolonged torture and incommunicado detention. Either option – and the reality that both can co-exist - should frighten prosecutors – particularly those seeking accountability for the most serious international crimes.

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63. *Shadow Report Article 14: The Right to Rehabilitation*, NAT'L CONSORTIUM OF TORTURE TREATMENT PROGRAMS (Nov. 2014), https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_CSS_USA_18541_E.pdf.

64. Mohammed v. Obama, 704 F. Supp. 2d 1, 27 (D.C.C. 2009).

65. Declaration of Shane O'Mara, *supra* note 55.

66. *Declaration of Charles A. Morgan*, (Apr. 4, 2016), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425NN(AAA)).pdf.

67. *See, e.g.*, *SSCI Redacted Report Summary*, *supra* note 3, at 81, 109, 138-39, 300, 394.

Dr. Katherine Porterfield, a psychologist who works with torture survivors, further described the provision of false statements after the initial torture as part of the following dynamic:[68]

> [f]or a torture victim who continues to be interrogated while being held in the environment in which he was tortured, a cognitive condition called learned helplessness can develop. With learned helplessness, the torture victim learns that, no matter what he does, he will not be able to escape his coercive conditions. Learned helplessness results in a state of passive acquiescence in which the torture victim stops trying to fight against his captors and may actually agree to false statements and to conditions that he does not want because he fears—and actually *expects*—further harm.

In fact, attempts to provide "cleansed" environments for the interrogations of torture survivors may instead place them squarely within the four corners of the scenario described in the OSCE Manual on Human Rights in Counter-Terrorism Investigations, where:[69]

> There is the potential that extended periods of confinement will give rise to "Stockholm Syndrome". The detainee may come to depend on the investigators as the only regular contact they have with people other than their lawyer. Often investigators authorize and/or dictate the level and frequency of contact with the lawyer. This will especially be the case when a detainee is frightened, anxious or feels powerless and believes that the investigator is solely responsible for his or her basic needs and well-being. He or she may feel indebted to the investigators whenever some small favour is done, such as the granting of an extended exercise period or the supply of reading material, and feel the need to comply with their wishes. *Where this happens, the reliability of any confession or information obtained must be in doubt* (emphasis added).

One rationale for promoting attenuation analyses is the very serious charges levied in domestic and international courts against certain terror suspects and alleged war criminals who have previously been tortured. This reasoning is exactly backwards; it is precisely because of the seriousness of such crimes that international law prohibits "balancing" the nature of the charges against a suspect with the admission of tainted evidence.[70] Even internal consistency in statements is unpersuasive

68. Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Ahmed Ag Mahmoud, ICC-01/12-01/18, Public Redacted Version of 'Corrigendum to "Defence Request to Terminate the Proceedings,"' ¶ 34 (June 16, 2020), https://www.icc-cpi.int/CourtRecords/CR2020_04689.PDF.

69. *Human Rights In Counter-Terrorism Investigations: A Practical Manual for Law Enforcement Officers*, ORG. FOR SEC. AND CO-OPERATION IN EUR., 115 (2013), https://www.osce.org/files/f/documents/5/f/108930.pdf.

70. J. HERMAN BURGERS & HANS DANELIUS, THE U.N. CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT 148 (1988); U.N. Comm. Against Torture, *supra* note 11, at ¶ 6 (The UN Committee Against Torture (CAT) has noted that "the obligations in [A]rticles 2 (whereby 'no exceptional circumstances whatsoever . . . may be invoked as a justification of torture'), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer),

where such extreme stress has affected cognitive patterns.[71] In such situations, it can be impossible to determine whether the subject himself knows whether his memories are real or false – resulting in a nightmare scenario for prosecutors. As attested by former Naval Criminal Intelligence Service Special Agent Mark Fallon, "[Torture] produces tainted evidence and corrupted intelligence, and policymakers then make flawed decisions based on fabricated information. So it's really a road that we need never go down again."[72]

III. CONCLUSION

Accountability, Exhibit A: the Principles on Effective Interviewing for Investigations and Information Gathering ("Méndez Principles")[73], in which lawyers, law enforcement officers, scientists, and other experts have assembled the body of international law and practice on preventing torture and CIDT in custodial interviews.[74] As former Special Rapporteur Juan Méndez states, the aim of the protocol is not only to "demonstrate that torture doesn't work," but "to offer an alternative" in the form of interviewing techniques [and safeguards against abuse] that preserve the integrity of the evidence obtained.[75]

The international community's experiment with "attenuation" has yielded a pile of exceptions that eviscerate the exclusionary rule, and depleted credibility for important regional and international decisions. This is why the Méndez Principles are so important at this time; it marks an effort to return to rights-based justice, which is, in turn, a critical factor in a democracy. Mr. al Baluchi and the other 9/11 defendants are currently in the midst of years-long litigation to suppress the statements from the 2007 FBI interrogations as involuntary and the products of CIA torture. The 9/11 case, now entering its ninth year of pre-trial hearings, is a stark example of how the use of torture results in the forfeiture of justice for everyone involved. States based on values of justice and human rights must reject

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and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) [. . .] 'must be observed in all circumstances.'")*; see also* U.N. H.R. Comm., General Comment No. 32, ¶ 6 (Aug. 23, 2007), https://www.refworld.org/docid/478b2b2f2.html ("The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. [. . . N]o statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by [A]rticle 14, including during a state of emergency,[] except if a statement or confession obtained in violation of [A]rticle 7 is used as evidence that torture or other treatment prohibited by this provision occurred.").

71. *See, e.g.*, Anam v. Obama, 696 F. Supp. 2d 1, 9 (D.D.C. 2010), *aff'd sub nom.* Al-Madhwani v. Obama, 642 F.3d 1071 (D.C. Cir. 2011) (The court was by the government's argument that the statements' internal consistency indicated they were reliable.).

72. *No Evidence Torture Produces Reliable Info: Former Investigator*, U.N. NEWS (Sept. 25, 2017), https://news.un.org/en/audio/2017/09/633532.

73. Principles on Effective Interviewing for Investigations and Information Gathering, May 2021. Retrieved from:

74. *Developing Guidelines on Non-Coercive Interviewing and Safeguards*, ASS'N FOR THE PREVENTION OF TORTURE, https://www.apt.ch/en/what-we-do/highlighted-projects/developing-guidelines-non-coercive-interviewing-and-safeguards. The author is a member of the Drafting Group for the Méndez Principles.

75. O.M.C.T. (@omctorg), TWITTER (Mar. 24, 2021, 1:15 PM), https://twitter.com/omctorg/status/1374771988414226433?s=20.

the myth of attenuation, and enforce the exclusionary rule without exceptions as the best path to accountability.