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Global Justice Clinic

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THE PSYCHOLOGICAL TORTURE OF FAMILIES:
THE FORGOTTEN VICTIMS OF EXTRAORDINARY RENDITION AND FAMILY SEPARATION

SUBMISSION TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Executive Summary

The Global Justice Clinic (GJC) at New York University School of Law[1] hereby submits this report in response to the U.N. Special Rapporteur on Torture's open consultation on psychological torture and ill-treatment. This submission focuses on families as direct victims of psychological torture under the extraordinary rendition program of the George W. Bush administration and the policies of family separation at the U.S.-Mexico border of the Donald J. Trump administration.

The first part of this report demonstrates that family members of individuals subjected to the U.S. extraordinary rendition program may be victims of psychological torture. This submission focuses on the experiences of two of GJC's clients, Zahra Ahmed Mohamed, the late spouse of Mohammed al-Asad, as well as the late spouse of Mohamed Bashmilah, who prefers to remain unnamed in this report. Both women were married to men kidnapped, tortured, and detained under the U.S. extraordinary rendition program. They both endured severe pain and suffering as a result of witnessing their husbands' abductions and from the mental anguish of not knowing their spouses' whereabouts, or even if they were alive during the duration of their secret detention. The states involved in their husbands' renditions and detention intentionally punished these women by actively withholding information, obfuscating in response to inquiries, and/or lying about what happened. Given these considerations, these two women, and other similarly situated relatives of those subjected to the U.S. extraordinary rendition program are victims of psychological torture.

The second part of the report focuses on the Trump administration's policies of family separation at the U.S.-Mexico border. Many of the thousands of separated families have endured severe pain or suffering as a result of the separation policies. The U.S. government has made plain that the purposes behind the separations are to deter additional migrants from arriving to the United States and to coerce asylum seekers already in the U.S. to give up their asylum claims. These impermissible purposes are colored by discriminatory animus against Latin American migrants, expressed at the highest levels of the U.S. government. This submission demonstrates that these intentional and deliberate actions by the U.S. government constitute psychological torture.

As victims of torture, the families discussed in this report are entitled to reparations under international law. This submission recommends that the Special Rapporteur on Torture make this clear by inviting relevant states to begin the process of acknowledgment, apology, and repair.

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This report was authored by Sara Robinson, Legal Fellow at the NYU Global Justice Clinic, under the supervision of Professor Margaret Satterthwaite. Invaluable research assistance and legal analysis was provided by Anja Bossow and Harriet Farquhar, Human Rights Scholars at the Center for Human Rights and Global Justice at New York University School of Law. On the subject of family separations under the zero-tolerance policy, this report relies on the research and writing of Anjali Mehta and Ashley Miller, former law student advocates at the NYU Global Justice Clinic, under the supervision of Nikki Reisch, former Legal Director at the NYU Center for Human Rights and Global Justice and Professor Margaret Satterthwaite.

[1] This report does not purport to represent the institutional views, if any, of New York University.

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Introduction

The universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment safeguards the dignity and integrity of people across the globe, without exception or exclusion. This submission seeks to center the experiences of a group not often considered to be direct victims of torture: family members harmed when governments exploit their familial relationships. This report demonstrates that many family members of the men subjected to the U.S. extraordinary rendition program under the George W. Bush administration as well as the families separated under U.S. policies of the Donald J. Trump administration have endured psychological torture, in contravention of international law.

Part 1. Many Family Members of Individuals Who Were Subjected to the U.S. Extraordinary Rendition Program May Be Direct Victims of Psychological Torture.

Hundreds of men were subjected to the U.S. extraordinary rendition program under the George W. Bush administration. Much has been written about this program and the attempts by the men subjected to it to achieve accountability for what they endured.[2] Much less has been written about their families, who also suffered tremendously as a result of this program. Many close family members of those who were disappeared as part of this program are victims of psychological torture.

This submission demonstrates that family members of those disappeared under the U.S. extraordinary rendition program are victims of psychological torture when they i) endured severe pain or suffering from witnessing the abductions of their loved ones by the state and/or from the uncertainty of not knowing their relative's fate or whereabouts during their secret detention; and ii) the state intentionally fails to provide the family members with information or actively obfuscates in response to their attempts to obtain such information. Parents, children, spouses, and other long-term companions who meet these criteria should be presumed to be victims of psychological torture, leaving the states involved with the burden to disprove this claim.

1.1 The Families of Hundreds of Men Were Victimized by the U.S. Extraordinary Rendition Program.

The U.S. extraordinary rendition program was a widespread, coordinated global enterprise of kidnapping, bounty payments, incommunicado detention, and torture. From 2001 to 2008, the U.S. operated a network of secret prisons, where detainees were subjected to torture and other ill-treatment, including sexual violence. As part of this program, the U.S. Central Intelligence Agency (CIA), working with partner states[3] and other elements of the U.S. government, abducted and detained at least 119 men and subjected them to such human rights abuses.[4]

[2] *See* notes 3–10, *infra*.
[3] Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* (2013), https://www.justiceinitiative.org/uploads/655bbd41-082b-4df3-940c-18a3bd9ed956/globalizing-torture-20120205.pdf [hereinafter Globalizing Torture].
[4] Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, 112th Cong. 458–61 (2014), https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf [hereinafter Senate Report].

The U.S. extraordinary rendition program has been extensively investigated, including in a joint study published in 2010 by the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the U.N. Working Group on Arbitrary Detention, and the U.N. Working Group on Enforced or Involuntary Disappearances.[5] Additional investigations were carried out by the U.S. Senate Select Committee on Intelligence,[6] the Council of Europe,[7] numerous NGOs,[8] and many others.[9] Given the comprehensive fact base established through such investigations, this report does not endeavor to provide additional details about the general contours of this program.

The Center for Human Rights and Global Justice, which houses the NYU Global Justice Clinic (GJC, formerly the International Human Rights Clinic), has been working to achieve justice and accountability for those victimized by U.S. extraordinary rendition program for over 15 years.[10]

[5] *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, U.N. Doc. A/HRC/13/42 (2010), https://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf [hereinafter U.N. Joint Study];
[6] Senate Report, *supra* note 4.
[7] Dick Marty, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States*, COUNCIL OF EUROPE (June 7, 2007), http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf.
[8] *See e.g.*, Sam Raphael, Crofton Black, Ruth Blakeley, *CIA Torture Unredacted* (2019), https://www.therenditionproject.org.uk/documents/RDI/190710-TRP-TBIJ-CIA-Torture-Unredacted-Full.pdf [hereinafter CIA Torture Unredacted]; Human Rights Watch, *No More Excuses: A Roadmap to Justice for CIA Torture* (2015), https://www.hrw.org/sites/default/files/report_pdf/us1215web.pdf; Globalizing Torture, *supra* note 3; The Constitution Project, *The Report of the Constitution Project's Task Force on Detainee Treatment* (2013), https://detaineetaskforce.org/pdf/Full-Report.pdf [hereinafter Constitution Project]; Amnesty International, *United States of America: A Case to Answer: From Abu Ghraib to Secret CIA Custody* (14 Mar. 2008), https://www.amnesty.org/download/Documents/52000/amr510132008eng.pdf.
[9] *See e.g.*, CLARA USISKIN, AMERICA'S COVERT WAR IN EAST AFRICA: SURVEILLANCE, RENDITION, ASSASSINATION 24 (2019); Bureau of Investigative Journalism, *CIA Torture*, https://www.thebureauinvestigates.com/projects/cia-torture (last visited Jan. 22, 2019); *Extraordinary Rendition*, PBS FRONTLINE (Nov. 4, 2007), https://www.pbs.org/frontlineworld/stories/rendition701/; Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER (Feb. 7, 2005), https://www.newyorker.com/magazine/2005/02/14/outsourcing-torture;
[10] Committee on International Human Rights of the Association of the Bar of the City of New York & the NYU Center for Human Rights & Global Justice, *Torture By Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* (New York: NYU School of Law, 2004), https://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf; NYU Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After* Rasul v. Bush (New York: NYU School of Law, 2005), https://chrgj.org/wp-content/uploads/2018/01/Beyond-GTMO.pdf; NYU Center for Human Rights and Global Justice, *Fate and Whereabouts Unknown: Detainees in the "War on Terror"* (New York: NYU School of Law, 2005), https://chrgj.org/wp-content/uploads/2016/11/Whereabouts-Unknown-Final.pdf; NYU Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States* (New York: NYU School of Law, 2006), https://chrgj.org/wp-content/uploads/2006/02/BriefingPaperEnablingTorture.pdf; Amnesty International, Cageprisoners, Center for Constitutional Rights, NYU Center for Human Rights and Global Justice, Human Rights Watch, and Reprieve, *Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror"* (New York: NYU School of Law, 2007), https://www.amnesty.org/download/Documents/60000/amr510932007en.pdf; NYU Center for Human Rights and Global Justice, *On the Record: U.S. Disclosures on Rendition, Secret Detention, and Coercive Interrogation* (New York: NYU School of Law, 2008), https://chrgj.org/wp-content/uploads/2016/09/ontherecord.pdf.

As part of this work, GJC represents two women, the widowed spouses of men who were abducted, tortured, and detained as part of the U.S. extraordinary rendition program. Both women are victims of psychological torture.

a. Zahra Ahmed Mohamed

Zahra Ahmed Mohamed is the widow of Mohammed Abdullah Saleh al-Asad, a Yemeni national who was living in Tanzania when he was subjected to the U.S. extraordinary rendition program. Mr. al-Asad was included in the report by the Senate Select Committee on Intelligence, which cataloged the individuals who were held in CIA custody as part of this program. Mr. al-Asad is listed as detainee number 92 in the Senate Report.[11]

On 26 December 2003, Mr. al-Asad was taken from his home without warning and summarily detained by Tanzanian officials. For the next year and a half, Ms. Mohamed did not have any information about her husband; she did not know where he was, who was holding him, if he was safe, or even if he was alive. Only after Mr. al-Asad arrived in Yemen in May 2005, did Ms. Mohamed discover what had happened to her husband. She learned that the day after Tanzanian authorities took her husband, he was flown to Djibouti, where he was held and interrogated for two weeks in a local facility. On 7 January 2004, Djiboutian officials handed him over to CIA custody on the tarmac at the airport in Djibouti. He was then flown to Afghanistan, where the CIA held and tortured him in three different facilities, including a purpose-built "black site," for a year and a half. After his release, Mr. al-Asad told his wife that throughout his detention, he was never once given the opportunity to contact his family, the Yemeni consulate, a court, a legal representative, or humanitarian agencies. Mr. al-Asad was never charged with terrorism, never taken to Guantánamo, and never designated as a terrorist by the U.S. government or the United Nations.[12]

Ms. Mohamed will never forget the day Mr. al-Asad was taken. She was at home with her husband and their oldest daughter Fatima, who was 11 at the time. Her three younger children, ages 9, 7, and 4, were upstairs with their grandparents at a relative's birthday party. She describes her experiences that evening as follows:

> *On 26 December 2003 at around 9:00 pm, I was in my bedroom, and Mohammed was preparing for dinner with our family. Our eldest daughter told me that the police wanted to speak to Mohammed. I told my daughter that her father was in the dining room. At the time, I was not worried because Mohammed was an*

[11] Senate Report, *supra* note 4, at 460 of 499.
[12] CIA Torture Unredacted, *supra* note 8, at 224–27; Justice Forum, Haki Africa, International Comm'n of Jurists, *Ignorance Is No Defense: Djibouti, Rendition & Torture* 12–13 (2015), http://justiceforum.ninjaresearch.org/wp-content/uploads/2015/04/Shadow-Report-to-ACHPR-on-Djibouti-Renditions-WITH-COVER-140415.pdf; Globalizing Torture, *supra* note 3, at 32; Constitution Project, *supra* note 8, at 194; U.N. Joint Study, *supra* note 5, at 80–81; Amnesty International, *USA: Below the Radar: Secret Flights to Torture and 'Disappearance'* 11 (Apr. 4, 2006), https://www.amnesty.org/download/Documents/72000/amr510512006en.pdf [hereinafter Amnesty, *Below the Radar*]; Amnesty International, *Secret Detention in CIA 'Black Sites'* 1, 9–10 (Nov. 8, 2005), https://www.therenditionproject.org.uk/documents/RDI/051108-Amnesty-CIA-Black-Sites.pdf [hereinafter Amnesty, '*Black Sites'*].

> *upstanding businessman. I thought it was something small and routine. I never could have imagined that it would lead to so much tragedy. A few minutes later, I heard loud yelling. Some men in civilian clothing were in the apartment. They put Mohammed in handcuffs and demanded his passport and mobile phone. I went onto the balcony to see what was happening. When the men took him out of the building, Mohammed's eyes were covered with black cloth. They quickly shoved him into a car and drove him away. When I saw the black cloth, I became very worried. I had never seen that before. My young children were upstairs at a birthday party, but they heard the commotion from the arrest. The children were very upset and started crying. Their father had never been arrested before, and it was shocking. It was a terribly frightening experience, but it was just the beginning.*[13]

Over the next year and a half, Ms. Mohamed and her children were forced to live with the anguish and uncertainty of not knowing the whereabouts of their husband and father.[14] Ms. Mohamed was two months pregnant at the time her husband was taken and she gave birth while Mr. al-Asad was still missing.[15] Throughout this period, Ms. Mohamed continuously searched for her husband in local prisons in Tanzania; she requested information from diplomats and other officials; she instructed her father-in-law to search for him in Yemen after local media wrongfully reported he had been deported there; and she filed a tracing request with the International Committee of the Red Cross (ICRC), among other efforts.[16] Despite these steps, she was unable to locate her husband or even to confirm that he was still alive.

On May 5, 2005, the CIA flew Mr. al-Asad from Afghanistan to Yemen. The U.S. government instructed the Yemeni authorities to detain Mr. al-Asad.[17] After 10 months in Yemeni prisons, Mr. al-Asad was finally released and reunited with his family.[18]

Upon his release, Ms. Mohamed learned some of the harrowing details of what Mr. al-Asad experienced while he was missing.[19] In Djibouti, Mr. al-Asad was interrogated by American officials and told that his children would soon become orphans. At the airport in Djibouti, the CIA subjected Mr. al-Asad to "capture shock" treatment, a brutal procedure amounting to torture that the CIA deployed to foster what it termed "learned helplessness"—a sense of total

[13] Declaration of Zahra Ahmed Mohamed, Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10, paras. 5–9 (2011), https://chrgj.org/wp-content/uploads/2016/11/Zahra-Mohamed-Signed-Declaration.pdf [hereinafter 2011 Declaration by Ms. Mohamed].
[14] *See* text accompanying note 75 for additional information about the effect of Mr. al-Asad's enforced disappearance on Ms. Mohamed.
[15] *Id.*
[16] *See* text accompanying notes 87–89 for additional information about the steps Ms. Mohamed took to try and locate her husband.
[17] *See supra* note 12.
[18] *Id.*
[19] Unless otherwise noted, the facts in this paragraph are drawn from Declaration of Mohammed Abdullah Saleh al-Asad, Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10 (2011), https://chrgj.org/wp-content/uploads/2016/11/Al-Asad-Signed-Declaration.pdf [hereinafter 2011 Declaration by Mr. al-Asad].

subjection to U.S. control.[20] Mr. al-Asad was stripped naked, sexually assaulted, diapered, chained, and strapped down to the floor of an airplane. Once he arrived in Afghanistan, he was held in a pitch dark cell, where he was unable to stand fully upright because of a shackle connecting him to the wall. His American captors blasted loud, thumping music 24 hours a day, overloading his senses and preventing him from sleeping. Several months later, Mr. al-Asad was transferred to a purpose-built "black site" in Afghanistan, where he was subjected to dietary manipulation, held in complete isolation, and blocked from sunlight. Each time Mr. al-Asad was transferred, he was subjected to a version of the "capture shock" treatment. Because of these experiences, Mr. al-Asad developed an intense aversion to traveling, fearing that each time he traveled, he would be forced to undergo the brutal capture shock procedure.

Ms. Mohamed noticed the long-term psychological effects of the torture Mr. al-Asad experienced. In her words:

> *Mohammed's personality changed after his detention. He became an angry person, someone with little patience. Something tiny would happen and he would blow up—he would be so angry—I had never ever seen him like this before. At these times, he would come close to crying, and he would withdraw to be alone. Then he would apologize later. This was hard on him—to see himself out of control—and it was also hard for me, as his wife, and for our children. This anger and impatience made him feel physically ill and made him to believe [sic] he had diabetes. He spoke of that often.*[21]

Not only was their family impacted by these psychological effects, but Mr. al-Asad's torture and disappearance also depleted the family's finances and adversely impacted their children's education.[22]

Three and a half years ago, on 8 May 2016, a decade after he was released from prison in Yemen, Mr. al-Asad suddenly passed away. He had been experiencing chest pains for some time but he was too scared to travel to see a physician. Ms. Mohamed explained that because of what Mr. al-Asad endured:

[20] Memorandum from Central Intelligence Agency, to Dan Levin, DOJ Command Center (Dec. 30, 2004), https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc97.pdf; International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* 6 (Feb. 2007), http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf [hereinafter ICRC Rendition Report]; Dep't of Justice, Office of Legal Counsel, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005) (explaining that the objective of the transfer procedure was that "[u]pon arrival at the site, the detainee 'finds himself in complete control of Americans' and is subjected to 'precise . . . almost clinical' procedures designed to underscore 'the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread [a detainee] may have of US custody.'").

[21] Declaration of Zahra Ahmed Mohamed, Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10, para. 8a (2016) (on file with authors) [hereinafter 2016 Declaration by Ms. Mohamed].

[22] For additional details, see 2011 Declaration by Mr. al-Asad, *supra* note 19.

> *Mohammed became afraid of traveling. This was something remarkable, because he had been a frequent traveler before his secret detention and extraordinary rendition. He said that he was worried that they might abduct him again, and that no one would know where he had been taken.*[23]

With regard to his death, Ms. Mohamed said that "I believe that Mohammed died because he didn't get treatment, and he didn't get treatment because he was afraid of traveling, because of the paranoia he developed due to his detention."[24] The trauma Mr. al-Asad endured at the hands of the U.S. authorities prevented him from seeking what could have been life-saving help.

b. The Spouse of Mohamed Bashmilah

The widow of the late Mohamed Farag Ahmad Bashmilah, who prefers not to be named in this report, also experienced psychological torture. Mr. Bashmilah was subjected to the U.S. extraordinary rendition program and was included in the Senate Select Committee on Intelligence report, as detainee number 89.[25] This report also noted that he was one of twenty-six individuals that the Senate committee confirmed had been wrongfully detained by the CIA.[26]

On 21 October 2003, Mr. Bashmilah was taken into Jordanian custody after he voluntarily presented himself to the General Intelligence Department (GID) to recover his passport that had been taken from him at the airport.[27] He was tortured for five days by the Jordanian authorities. He was then handed over to U.S. custody and transferred to Afghanistan, where he was held in two different secret facilities for over a year and a half. On 5 May 2005, Mr. Bashmilah was transferred with Mr. al-Asad and another detainee to Yemen, where he was imprisoned for an additional 10 months. He was finally released on 27 March 2006, never having been charged with a terrorism-related crime.

Mr. Bashmilah met his spouse in Indonesia in the early 2000s. Mr. Bashmilah, a Yemeni national, had moved to Indonesia to work at his cousins' clothing factory. The couple were married in Indonesia. In late 2003, Mr. Bashmilah was arrested and detained by the Indonesian authorities for possessing a forged Indonesian identity card, which he had used to marry and to work as a merchant. To avoid criminal prosecution, Mr. Bashmilah agreed to pay a fine and voluntarily leave Indonesia.

Mr. Bashmilah and his wife decided to continue their lives together in Yemen. But because Mr. Bashmilah's mother, Mrs. Ni'ma al-Sabri, had a heart condition and needed surgery, they arranged to all meet in Jordan for the procedure, with Mr. Bashmilah and his wife arriving from Indonesia and Mrs. al-Sabri arriving from Yemen. At the airport in Jordan, Mr. Bashmilah was

[23] 2016 Declaration by Ms. Mohamed, *supra* note 21, at para. 8d.
[24] *Id.* at para. 9.
[25] Senate Report, *supra* note 4, at 460 of 499.
[26] *Id.* at 16 n.32.
[27] Unless otherwise noted, the facts in the remaining paragraphs of this section come from Center for Human Rights & Global Justice, *Surviving the Darkness: Testimony from the U.S. "Black Sites"* (New York: NYU School of Law, 2007), https://chrgj.org/wp-content/uploads/2020/01/CHRGJ-2007-Report-Surviving-the-Darkness.pdf [hereinafter Surviving the Darkness]. *See also* Amnesty, *Below the Radar*, *supra* note 12; Amnesty, '*Black Sites*,*' supra* note 12.

questioned about his passport, which lacked exit and entry stamps. Mr. Bashmilah explained that he had lost his passport in Indonesia and that the Yemeni embassy in Jakarta had issued him a new one, which therefore lacked an Indonesian entry stamp and a Yemeni exit stamp. The Jordanian officials confiscated his passport and told him to retrieve it from the office of the General Intelligence Department (GID).

The family was desperate to retrieve the passport as it was needed to schedule Mrs. al-Sabri's heart surgery. Intending to travel to the hospital straight from the GID office, Mr. Bashmilah, his wife, and his mother traveled together to the office on 21 October 2003. The family was immediately separated. His wife and mother remained in the women's area while Mr. Bashmilah was taken to a men's area upstairs. Soon after, the two women were put in a car. They could see that Mr. Bashmilah, who was handcuffed and chained, was in a car ahead of them. They were all driven to the apartment where the three had been staying. GID officials searched the apartment from top to bottom, dumping out the contents of their suitcases. Mr. Bashmilah offered to help the officials find whatever they were looking for but the GID officials slapped and pushed him in response. Though his hands were already handcuffed, they tied his hands tightly behind him in a painful position.

Following this violence, the two women began to scream and were locked in another room. Soon after, Mr. Bashmilah was taken out of the apartment by some of the officials. At this point, Mrs. al-Sabri began protesting her son's detention with the officials who had stayed behind. The officials responded by slapping her. Mr. Bashmilah's wife came to her defense and she was slapped as well.

After the officials left, the two women solicited the assistance of the Yemeni Embassy in Amman. The Embassy was able to arrange for them to see Mr. Bashmilah a few days later at the GID facility. They were only permitted to see him for less than ten minutes. Mr. Bashmilah seemed relieved that his wife and mother were not physically harmed or in Jordanian custody. He requested they continue working with the Yemeni Embassy to secure his release. That was the last time the two women saw Mr. Bashmilah for over a year and a half.

Throughout the time Mr. Bashmilah was missing, his wife and mother extensively searched for him. Soon after their brief visit at the GID facility, the Jordanians claimed that Mr. Bashmilah had "left the Kingdom" and that he was no longer in their custody.[28] With nothing left for them in Jordan, they returned to Yemen. His wife spent the next three months in Yemen, struggling to obtain any information about her husband. Without her husband and with limited Arabic, his wife and her husband's family decided it would be best for her to return to Indonesia. With her husband missing and without any economic support, she found herself alone in Indonesia where she was forced to sustain herself by selling aluminum foil that she found in the trash.

Upon Mr. Bashmilah's release from American and then Yemeni custody, he was able to share details about what he had experienced. Working with attorneys from the NYU Global Justice Clinic, Mr. Bashmilah prepared a 60-page declaration describing the experiences he endured as

[28] Surviving the Darkness, *supra* note 27, at 64.

part of the U.S. extraordinary rendition program.[29] Mr. Bashmilah explained that he was detained in Jordan for five days, where he was subjected to torture; he was beaten by canes, forced to imitate animals, suspended upside down, and continuously slapped and kicked during interrogations. He was then handed over to the CIA, who subjected him to the same "capture shock" treatment as Mr. al-Asad.

The CIA rendered Mr. Bashmilah to Afghanistan where he was held in two different facilities. For his first 15 days in Afghanistan, his hands were cuffed together. Despite the cuffs, he was also shackled to the wall. During that time, the CIA also left him in the diaper that they had used as part of the "capture shock" treatment. What he described as "excruciatingly loud western rap and Arabic music" was played in his cell 24 hours a day, 7 days a week.[30] He became so depressed during the first few months that he attempted suicide three different times. In the second facility, Mr. Bashmilah went on hunger strike for 10 days, but the American authorities ended his strike by subjecting him to forced feeding through a tube in his nose. Finally, on May 5, 2005, he was flown to Yemen. The Yemeni authorities imprisoned him for an additional 10 months, before he was finally released on March 27, 2006.

Upon his release, Mr. Bashmilah's wife moved to Yemen to live with her husband. For the next several years, they lived together in Yemen, with what he called the "mental and physical scars of prolonged uncharged detention, torture, and cruel treatment."[31] In 2015, Mr. Bashmilah was killed by Houthi rebels in the ongoing civil war in Yemen. His wife, now a widow, continues to suffer from the psychological wounds of the trauma she experienced when her late husband was disappeared and tortured.

c. Attempts to Secure Accountability and Justice

Both Ms. Mohamed and Mr. Bashmilah's spouse have worked tirelessly to seek justice for what has happened to them and their families, yet their attempts thus far remain in vain. The lack of even an official acknowledgement of what happened,[32] to say nothing of an apology or other

[29] The declaration was prepared for and used in litigation brought on behalf of Mr. Bashmilah and several other plaintiffs by the American Civil Liberties Union (ACLU) and co-counsel against Jeppesen DataPlan, Inc., a Boeing subsidiary that provided flight planning and other logistical support to the aircraft and crews used by the CIA as part of this program. *See* Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, Mohamed et al. v. Jeppesen, No. 5:07-cv-02798 (JW) (N.D. Cal. Dec. 14, 2007), ECF No. 53. The declaration was adapted and submitted in ongoing litigation against the United States before the Inter-American Commission on Human Rights. *See* Petition Alleging Violations of the Human Rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi by the United States of American with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (Nov. 14, 2011), https://www.aclu.org/other/mohamed-et-al-petition-inter-american-commission-human-rights?redirect=human-rights-national-security/mohamed-et-al-petition-inter-american-commission-human-rights. Additionally, Mr. Bashmilah's testimony has been reproduced in a report authored by the NYU Center for Human Rights & Global Justice. *See* Surviving the Darkness, *supra* note 27.

[30] Surviving the Darkness, *supra* note 27, at 21.

[31] *Id.* at 62.

[32] The 2014 report published by the Senate Select Committee on Intelligence (SSCI), which lists both Mr. al-Asad and Mr. Bashmilah as victims of the U.S. extraordinary rendition program, does not constitute official acknowledgement by the U.S. government. *See* note 97, *infra*.

reparations, has made healing from the psychological torture they experienced all the more elusive.

The U.S. government has stymied every attempt at accountability. The government has refused to release documents concerning Mr. al-Asad and Mr. Bashmilah's detention and treatment, despite over 50 Freedom of Information Act requests filed on their behalf with various government agencies. Litigation to enforce these Freedom of Information Act requests has not led to any additional information.[33]

Additionally, the U.S. government blocked attempts by Mr. Bashmilah to hold accountable Jeppesen DataPlan Inc., a Boeing subsidiary that provided flight planning and logistical support to the CIA, including the flight that transferred Mr. Bashmilah from Jordan to Afghanistan. Evidence demonstrates that Jeppesen was acutely aware of what their services were being used for: a former employee reported that a managing director said, "We do all of the extraordinary rendition flights—you know, the torture flights. Let's face it, some of these flights end up that way."[34] The U.S. government intervened in the litigation against Jeppesen, claiming that the entire subject matter of the case was a "state secret." The district court subsequently dismissed the lawsuit. Although the Ninth Circuit Court of Appeals ("Ninth Circuit") initially reversed this lower court decision, the government requested that an en banc panel of the Ninth Circuit rehear the case. The en banc panel reversed, affirming the lower court's dismissal of the case. The U.S. Supreme Court denied a request to hear an appeal of this decision.[35]

Both Ms. Mohamed and Mr. Bashmilah's spouse have also been unsuccessful at attaining accountability on the international stage. Ms. Mohamed is the successor-in-interest in her late husband's legal claims against the Republic of Djibouti before the African Commission on Human and Peoples' Rights ("African Commission"). That communication was filed on 10 December 2009.[36] While the African Commission initially held the case inadmissible in 2014,[37] the African Commission overturned that decision in 2016.[38] Although more than 10 years have passed since the complaint was filed, a final decision on the merits has yet to be issued.[39] It

[33] For additional information about this litigation, see generally *FOIA: Ghost Detention and Extraordinary Rendition Case*, CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/foia-ghost-detention-and-extraordinary-rendition-case (last visited Jan. 24, 2020).
[34] Jane Mayer, *The C.I.A.'s Travel Agent*, NEW YORKER (Oct. 23, 2006), https://www.newyorker.com/magazine/2006/10/30/the-c-i-a-s-travel-agent.
[35] For a synopsis of the lawsuit and key legal documents, see *Mohamed et al. v. Jeppesen DataPlan, Inc.*, ACLU, https://www.aclu.org/cases/mohamed-et-al-v-jeppesen-dataplan-inc (last visited Jan. 23, 2020).
[36] Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10, para. 1 (2014), https://www.achpr.org/sessions/descions?id=250.
[37] *Id.*
[38] African Commission on Human and Peoples' Rights, *40th Activity Report of the African Commission on Human and Peoples' Rights* 7 (2016), https://www.achpr.org/activityreports/viewall?id=39.
[39] The African Commission posts its opinions on its website. No merits decision is currently listed for this case. *See* Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10, https://www.achpr.org/sessions/descions?id=250 (last visited Jan. 24, 2020).

remains unclear when the African Commission will issue a decision, especially considering their large backlog of cases.[40]

Mr. Bashmilah's widow is the successor-in-interest in her late husband's claims against the United States before the Inter-American Commission on Human Rights (IACHR). On 14 November 2011, Mr. Bashmilah and three other victims of the U.S. extraordinary rendition program filed a petition requesting that the IACHR investigate the matter and hold a hearing on the merits.[41] The IACHR only forwarded the petition to the United States in February 2016. In May of that year, the U.S. government responded, claiming that the IACHR lacks competence to issue a binding decision on the United States on matters arising under the American Declaration of the Rights and Duties of Man. This response was forwarded to the petitioners in late 2018. The petitioners are currently awaiting the government's reply to their response to this claim. Given the Trump administration's adversity to the IACHR, and human rights bodies more generally,[42] it remains to be seen whether the U.S. will even respond or participate in any future proceedings, should the case be found admissible.

Additionally, Ms. Mohamed has participated in proceedings before the International Criminal Court (ICC) regarding the Situation in the Islamic Republic of Afghanistan. In January 2018, Ms. Mohamed submitted a victim representation statement, in accordance with Article 15(3) of the Rome Statute.[43] Much to the surprise of commentators,[44] the ICC Pre-Trial Chamber rejected the Prosecutor's request to open an investigation into possible crimes in Afghanistan, thereby shutting the door on victims seeking accountability for, *inter alia*, abuses carried out in Afghanistan as part of the U.S. extraordinary rendition program.[45] The ICC Appeals Chamber is currently hearing an appeal of this decision and a judgment is expected later this year.[46] It thus

[40] For additional information about the current status of legal cases before the African Commission, see Amnesty International, *The State of African Regional Human Rights Bodies and Mechanisms 2018-2019*, AFR 01/1155/2019 (Oct. 21, 2019), https://www.amnesty.org/en/documents/afr01/1155/2019/en/.

[41] Petition Alleging Violations of the Human Rights of Binyam Mohamed, Abou Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher al-Rawi by the United States of American with a Request for an Investigation and Hearing on the Merits, Inter-Am. Comm'n H.R. (Nov. 14, 2011), https://www.aclu.org/other/mohamed-et-al-petition-inter-american-commission-human-rights?redirect=human-rights-national-security/mohamed-et-al-petition-inter-american-commission-human-rights.

[42] *See e.g.*, Jamil Dakwar, *In an Unprecedented No-Show, the U.S. Pulls out of Planned Human Rights Hearing*, ACLU (Mar. 21, 2017), https://www.aclu.org/blog/human-rights/unprecedented-no-show-us-pulls-out-planned-human-rights-hearing.

[43] *GJC Files Victim Statement Calling on International Criminal Court to Hold Perpetrators of CIA Torture Program Accountable*, CENTER FOR HUMAN RIGHTS & GLOBAL JUSTICE (Feb. 16, 2018), https://chrgj.org/2018/02/16/gjc-files-victim-statement-calling-on-international-criminal-court-to-hold-perpetrators-of-cia-torture-program-accountable/.

[44] *See e.g.*, Laura Dickinson & Alex Whiting, *Expert Q&A: The International Criminal Court's Afghanistan Probe and the U.S.*, JUST SECURITY (Mar. 26, 2018), https://www.justsecurity.org/54276/backgrounder-icc-afghanistan-probe-us-expert-qa/; Laura Dickinson, *Just Security's Symposium on the ICC Afghanistan Probe and the US*, JUST SECURITY (Apr. 5, 2018), https://www.justsecurity.org/54519/securitys-symposium-icc-afghanistan-probe/.

[45] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33 (Apr. 12, 2019), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-33.

[46] For additional information about this appeal and what is expected next, see Katherine Gallagher & Nikki Reisch, *ICC Holds Historic Hearing on U.S. Torture and Other Grave Crimes in Afghanistan*, JUST SECURITY (Dec. 23,

remains unclear whether the ICC will continue to investigate war crimes and crimes against humanity that occurred in relation to the armed conflict in Afghanistan and whether the crimes committed by U.S. actors, including the CIA, military, and contractors, will be included within the scope of any eventually approved investigation.

Ms. Mohamed and Mr. Bashmilah's widow are not alone in their inability to secure accountability and justice for what happened to their husbands and them under the U.S. extraordinary rendition program. To this day, the United States has never criminally prosecuted anyone responsible for the torture program and it continues to prevent civil accountability by asserting broad immunities and the "state secrets" privilege.[47] The Trump administration has gone so far as to appoint Gina Haspel, who ran a CIA torture "black site" in Thailand, as Director of the CIA. Reports suggest that Haspel was appointed as Director not *despite* her record of torture but *because* of it.[48] Indeed, President Trump campaigned on bringing back torture "worse than waterboarding"[49] and has pardoned accused and convicted war criminals.[50] In this climate, it remains unlikely that Ms. Mohamed and Mr. Bashmilah's spouse will achieve acknowledgement, recognition, or accountability for what they suffered, furthering the trauma that they experienced as a result of the U.S. extraordinary rendition program.

1.2 The Psychological Harm Endured by Ms. Mohamed, Mr. Bashmilah's Spouse, and Other Similarly Situated Persons Meets the Definition of Torture under International Law.

Article 1(1) of the U.N. Convention Against Torture (CAT) defines torture as follows:

> [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

2019), https://www.justsecurity.org/67843/icc-holds-historic-hearing-on-u-s-torture-and-other-grave-crimes-in-afghanistan/.

[47] *See e.g.*, James Risen, Sheri Fink, & Charlie Savage, *State Secrets Privilege Invoked to Block Testimony in C.I.A. Torture Case*, N.Y. TIMES (Mar. 8, 2017), https://www.nytimes.com/2017/03/08/us/justice-department-cia-psychologists-interrogation-program.html; Spencer S. Hsu, *U.S. Invokes State Secrets Privilege to Block American Journalist's Challenge to Alleged Spot on Drone 'Kill List,'* N.Y. TIMES (Sept. 24, 2019), https://www.washingtonpost.com/local/legal-issues/us-invokes-state-secrets-privilege-to-block-american-journalists-challenge-to-alleged-spot-on-drone-kill-list/2019/09/24/15580b88-dee9-11e9-b199-f638bf2c340f_story.html.

[48] Jonathan Swan, *Trump said CIA Director Gina Haspel Agreed with him "100%" on Torture*, AXIOS (Nov. 17, 2019), https://www.axios.com/trump-gina-haspel-cia-torture-waterboarding-f8c4b63b-7825-4cc9-9ff3-128c759f5eee.html.

[49] Tim McCarthy, *Donald Trump: I'd bring back 'a hell of a lot worse than waterboarding,'* GUARDIAN (Feb. 7, 2016), https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture.

[50] Dave Phillips, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/11/15/us/trump-pardons.html.

> instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[51]

In line with this definition, family members of those disappeared under the U.S. extraordinary rendition program are victims of psychological torture when they i) endure severe pain or suffering from witnessing the abductions of their loved ones by the state and/or from the uncertainty of not knowing their relative's fate or whereabouts; and ii) the state intentionally fails to provide the family members with information or actively obfuscates its responses about what happened. Parents, children, spouses and other long-term companions who meet these criteria should be presumed to be victims of psychological torture, leaving the state with the burden to disprove this claim. Both Ms. Mohamed and Mr. Bashmilah's spouse endured psychological torture pursuant to these criteria.

a. Severe Pain or Suffering: Witnessing Loved Ones' Abductions or Enduring the Anguish of Uncertainty

To constitute torture, an act must inflict "severe pain or suffering, whether physical or mental" on a person.[52] In the case of relatives of victims of the U.S. extraordinary rendition program, the threshold of severe pain or suffering is met when family members witness their relative's abduction and/or endure the anguish of not knowing their loved one's fate and whereabouts.

The regional human rights mechanisms have found that witnessing the suffering of loved ones is sufficient to meet the severe pain or suffering required to constitute torture or cruel, inhuman, or degrading treatment (CIDT). In *Çakici vs. Turkey*, the European Court of Human Rights ("European Court") outlined a series of "special factors" used to establish whether "a family member of a 'disappeared person' is thereby a victim of treatment contrary to [the prohibition of torture and CIDT under] Article 3 [of the European Convention on Human Rights]."[53] These factors include "the extent to which the family member witnessed the events in question."[54] In *Çakici* itself, the brother of the disappeared person was found not to have suffered a violation of Article 3 of the European Convention in part because he was not present when the security forces took his brother.[55]

The Inter-American Court of Human Rights ("Inter-American Court") and the African Commission on Human and Peoples' Rights ("African Commission") have both found that witnessing the torture of loved ones can itself constitute torture. In *Cantoral-Benavides v. Peru*, the Inter-American Court found that the complainant had suffered psychological torture after being forced to endure the cries of his brother as he was beaten by police agents, among other abuses.[56] In *Elgak et al. v. Sudan*, the African Commission found that Osman Hummeida had suffered a violation of Article 5 of the African Charter, which prohibits torture and CIDT, after

[51] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT];
[52] CAT, *supra* note 51, at art. 1.
[53] Çakici vs. Turkey, Eur. Ct. H.R., No. 23657/94, para. 98 (July 8, 1999).
[54] *Id.*
[55] *Id.* at para. 99.
[56] Cantoral-Benavides v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 69, paras. 63f, 104 (Aug. 18, 2000).

being subjected to death threats and "made to witness the torture of his colleague and friend."[57] This case law demonstrates that witnessing the events in question, like an abduction or abuse of a loved one, meets the threshold of severe pain or suffering in the definition of torture.

Both Ms. Mohamed and Mr. Bashmilah's wife witnessed the abduction and abuse of their husbands. Ms. Mohamed was present when plain-clothed Tanzanian authorities entered her home and summarily took her husband without any prior warning. She was personally told to stay back and she had no control over what was happening to her husband.[58]

Mr. Bashmilah's wife also witnessed the abduction of her husband.[59] She was separated from Mr. Bashmilah at the GID facility and then transported back to the apartment where they had been staying. At the apartment, she witnessed the rough treatment of Mr. Bashmilah by the Jordanian authorities. Once Mr. Bashmilah was driven away, the Jordanians slapped both his wife and his sickly mother for protesting his treatment. A few days later, after seeking the assistance of the Yemeni Embassy, they were allowed to see Mr. Bashmilah for less than 10 minutes. It was clear that he had been tortured by the Jordanians over the few days they had been separated. This was the last time they saw Mr. Bashmilah, or even knew where he was or if he was alive, for the next year and a half.

In addition to witnessing abuses, the anguish caused by the uncertainty of not knowing their loved one's fate or whereabouts also meets the threshold of severe pain or suffering under the CAT definition of torture. The U.N. Working Group on Enforced or Involuntary Disappearances (WGEID), several U.N. Special Rapporteurs, and the U.N. Office for the High Commission for Human Rights (OHCHR) have recognized that the anguish experienced by family members of the disappeared can reach the threshold of severe pain or suffering required to constitute torture.

In a 2011 General Comment on the Right to Truth, the WGEID found that the "anguish and sorrow" experienced by relatives and recognized in the Declaration on the Protection of All Persons from Enforced Disappearance is a "suffering that reaches the threshold of torture."[60] Further, the WGEID noted that "the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the *continuous torture* inflicted upon the relatives."[61]

In 2001, Sir Nigel Rodley, then the Special Rapporteur on Torture, recognized that the family members of the disappeared person may experience torture or CIDT. He stated, "the Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the

[57] Monim Elgak et al. v. Sudan, African Commission on Human and Peoples' Rights, Comm. No. 379/09, paras. 76, 101 (2014).
[58] 2011 Declaration by Ms. Mohamed, *supra* note 13.
[59] The facts included in this paragraph come from Surviving the Darkness, *supra* note 27, at 6–9, 10–11.
[60] Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to Truth*, U.N. Doc. A/HRC/16/48, para.4 (2011), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/104/45/PDF/G1110445.pdf.
[61] *Id.* (emphasis added).

disappeared person or him/herself."[62] Additionally, in the 2010 joint U.N. study on the rendition program referenced above, which was authored by two Special Rapporteurs, the WGEID, and the Working Group on Arbitrary Detention, the U.N. experts noted that "the suffering caused to family members of a disappeared person may also amount to torture or other forms of ill-treatment."[63]

The OHCHR also recognizes that the families of the disappeared may experience suffering that constitutes torture. In a 2004 fact sheet about enforced or involuntary disappearances, the OHCHR discussed how the "family and friends of disappeared persons experience *slow mental torture*, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health."[64] Further, in a 2006 report by the OHCHR to the U.N. Commission on Human Rights, the precursor to the U.N. Human Rights Council, found that families of the disappeared may undergo torture. Specifically, this body recognized the connection between the right to truth for families of the disappeared and "the right not to be subjected to torture or ill-treatment given the *psychological torture* which relatives of missing persons undergo."[65]

The case law of the U.N. Human Rights Committee supports the finding that the mental anguish families endure from not knowing the location and fate of their loved ones is sufficient to constitute a violation of Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which prohibits torture and CIDT. In the case of *Quinteros v. Uruguay*, the Human Rights Committee determined that the mother of a disappeared woman suffered a violation of Article 7.[66] The Committee found:

> The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.[67]

The Human Rights Committee did not specify whether the treatment that the mother suffered constituted torture or CIDT; instead, it simply concluded that a violation of Article 7 had occurred. The Human Rights Committee has cemented this approach in further decisions, finding

[62] *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/56/156, para. 14 (July 3, 2001), https://undocs.org/A/56/156 [hereinafter 2001 Special Rapporteur on Torture Report].
[63] U.N. Joint Study, *supra* note 5, para. 35.
[64] U.N. Office of the High Commissioner for Human Rights, *Fact Sheet No. 6: Enforced or Involuntary Disappearances* 2 (May 2004), https://www.ohchr.org/Documents/Publications/FactSheet6Rev.2en.pdf (emphasis added).
[65] U.N. Office of the High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91, para. 26 (Feb. 8, 2006), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/106/56/PDF/G0610656.pdf (emphasis added).
[66] Quinteros v. Uruguay, U.N. Human Rights Committee, No. 107/1981 (July 21, 1983).
[67] *Id.* at para. 14.

that the suffering of family members is sufficient to constitute violations of Article 7 of the ICCPR.[68]

Case law from the regional human rights mechanisms supports a finding that the anguish caused by the continued uncertainty of not knowing a loved one's whereabouts or fate constitutes inhuman treatment and may be sufficient to constitute torture. The European Court has repeatedly found that relatives of a disappeared person suffer "severe mental distress and anguish" sufficient to constitute inhuman treatment contrary to the Article 3 of the European Convention on Human Rights.[69] While the European Court has found that such relatives suffered inhuman treatment, the Court has also recognized that "certain acts which were classified in the

[68] *See* Sarma v. Sri Lanka, U.N. Human Rights Committee, No. 950/2000, para. 9.5 (July 31, 2003) ("[N]oting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts, the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant.") (internal citations omitted); Bousroual v. Algeria, U.N. Human Rights Committee, No. 1085/2002, para. 9.8 (Mar. 15, 2006) ("The Committee also notes the anguish and stress caused to the author by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author herself.") (internal citations omitted); El Awani v. Libyan Arab Jamahiriya, U.N. Human Rights Committee, No. 1295/2004, para. 6.6 (July 11, 2007) ("The Committee also notes the anguish and distress caused to the author by his brother's disappearance and subsequent death. Consequently, it finds that the facts before it reveal a violation of article 7 of the Covenant with regard to the author himself.") (internal citations omitted); El Hassy v. Libyan Arab Jamahiriya, U.N. Human Rights Committee, No. 1422/2005, para. 6.11 (Oct. 24, 2007) ("With regard to the author himself, the Committee notes the anguish and stress that the disappearance of the author's brother since June 1996 caused to the author. It therefore is of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author himself.") (internal citations omitted); El Abani v. Libyan Arab Jamahiriya, U.N. Human Rights Committee, No. 1640/2007, para. 7.5 ("After he had served his full sentence, Mr. El Abani's fate remained unknown to his family, who were not able to obtain confirmation that he was being held in Abu Salim prison until his release in April 2008. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant…"); Giri v. Nepal, U.N. Human Rights Committee, No. 1761/2008, para. 7.1 (Mar. 24, 2011) ("The family never obtained an official confirmation of his detention. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant…").

[69] Orhan v. Turkey, Eur. Ct. H.R., No. 25656/94, paras. 360 (Nov. 6, 2002) (finding that the treatment the applicant suffered "has clearly caused him severe mental distress and anguish constituting inhuman treatment contrary to Article 3"); *see also* Ipek v. Turkey, Eur. Ct. H.R., No. 25760/94, para. 183 (Feb. 17, 2004) ("[T]he Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of his two sons and of his inability to find out what had happened to them. The manner in which his complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3."); Tanış and Others v. Turkey, Eur. Ct. H.R., No. 65899/01, para. 221 (Aug. 2, 2005) ("[T]he Court notes that the applicants' anguish concerning their relatives' fate continues to the present day and finds that they have personally suffered inhuman and degrading treatment contrary to Article 3 of the Convention as a result of their disappearance."); Imakayeva v. Russia, Eur. Ct. H.R., No. 7615/02, para. 166 (Nov. 9, 2006) ("[T]he Court finds that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and husband and of her inability to find out what had happened to them. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3."); Umarov v. Russia, Eur. Ct. H.R., No. 12712/02, para. 127 (July 3, 2008); Varnava and Others v. Turkey, Eur. Ct. H.R., Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, para. 202 (Sept. 18, 2009) ("The length of time over which the ordeal of the relatives has been dragged out and the attitude of official indifference in face of their acute anxiety to know the fate of their close family members discloses a situation attaining the requisite level of severity. There has, accordingly, been a breach of Article 3 in respect of the applicants."); Beksultanova v Russia, Eur. Ct. H.R., No. 31564/07, paras. 106–07 (Sept. 27, 2011); Pitsayeva and Others v. Russia, Eur. Ct. H.R., No. 61243/08, para. 479 (Jan. 9, 2014).

past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future."[70] In this context, the European Court explained that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[71] This suggests that some acts which the European Court previously characterized as inhuman treatment in fact constitute torture.

The Inter-American Court takes a similar approach. In *Bámaca Velásquez v. Guatemala*, the wife of a man captured by the Guatemalan army was found to have suffered "profound anguish" sufficient to constitute a violation of the Article 5 prohibition on torture and CIDT found in the American Convention on Human Rights.[72] Since this decision, the Inter-American Court has repeatedly found that family members of the disappeared can be direct victims of violations of their right to be free from CIDT under Article 5.[73] Moreover, the Inter-American Court has adopted the approach of the European Court, finding that certain acts found in the past to constitute CIDT may be re-classified as torture.[74]

Taken together, existing human rights case law and soft law make it clear that the mental anguish and trauma suffered by family members of the disappeared can meet the severity threshold of the torture definition. Both Ms. Mohamed and Mr. Bashmilah's wife suffered severe mental pain or suffering analogous to that of the complainants in the case law described above.

Ms. Mohamed describes the mental suffering and pain she experienced as follows:

> *My family and I kept looking for my husband. I had to keep looking because I had to know what had happened to him. I had to know whether he was dead or alive. It was terrible to live with the uncertainty. I needed to know how to move forward down the path of my life and lives of my children. If Mohammed was dead, I needed to know where his body was. I needed to know if I was a widow, if my children had lost their father.… The whole time Mohammed was in detention in Djibouti and in the other secret prisons, we never received any news of his whereabouts or any information about his health, except for terrifying rumors. Having no communication with my*

[70] Selmouni v. France, Eur. Ct. H.R., No. 25803/94, para. 101 (July 28, 1999).
[71] *Id.*
[72] Bámaca Velásquez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 70, paras. 121, 165 (Nov. 25, 2000).
[73] *See* Humberto Sánchez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 99, para 101 (June 7, 2003); Gómez-Paquiyauri Brothers v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 110, para. 118 (July 8, 2004); Goiburú et al. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 153, paras. 97, 101(e) (Sept. 22, 2006); Heliodoro Portugal v. Panama, Inter-Am. Ct. H.R. (ser. C) No. 186, paras. 163, 175 (Aug. 12, 2008); Anzualdo Castro v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 202, para. 113–14 (Sept. 22, 2009); Radilla-Pacheco v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 209, para. 172 (Nov. 23, 2009); González Medina v. Dominican Republic, Inter-Am. Ct. H.R. (ser. C) No. 240, para. 270 (Feb. 27, 2012); Gudiel Álvarez v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 253, para. 301 (Nov. 20, 2012); Rodriguez Vera v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 287, paras. 534, 539 (Nov. 14, 2014).
[74] Cantoral-Benavides v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 69, para. 99 (Aug. 18, 2000). *Cf.* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 114 (Oct. 1, 1999); Villgran-Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, para. 193 (Nov. 19, 1999); Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, para. 125 (June 17, 2005); Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 143, para. 106 (Sept. 15, 2005).

> *husband and the father of my children for so long was almost unbearable. What had happened was very unfair to my family and me. Mohammed's disappearance had enormous psychological impacts and harmed my soul.… Mohammed's disappearance was very hard on the other children as well. Every day my children would ask me where their father was, and I had nothing to tell them. The other kids at school knew that Mohammed was missing and would say hurtful things to my children. My eldest daughter, Fatima, was old enough to understand more about what had happened than the younger children. It was very painful for her especially.*[75]

In this passage, Ms. Mohamed describes the profound anguish and mental distress that she and her children experienced, which is what the U.N. Human Rights Committee and the regional human rights mechanisms required when finding that family members suffered severe pain or suffering sufficient to constitute violations of the prohibition on torture and CIDT.[76]

Like Ms. Mohamed, Mr. Bashmilah's wife's pain and suffering was sufficiently severe to meet the threshold required in the definition of torture. Mr. Bashmilah, describing the pain and suffering his wife and mother experienced, stated:

> *The whole time I was held by the Americans—from October 2003 to May 2005—my family had no idea where I was. All they knew was that the last time they had seen me was in GID custody and that now the Jordanians were saying that I was no longer there without explaining the truth about where I went. This caused them a great deal of hardship and despair. My family was never contacted by the U.S. government or the International Committee of the Red Cross. As a result of this lack of information, combined with the misinformation my mother received about my departure from Jordan, my mother was in anguish. She cried every night and worried about where I might be and how I was being treated. She became ill and was hospitalized for some time. Eventually, she gave up hope, convinced I had been killed. My wife was also hospitalized due to stress and anxiety.*[77]

The despair, stress, and anxiety endured by Mr. Bashmilah's wife is also analogous to the profound anguish and distress found sufficient to constitute severe pain or suffering by the U.N. Human Rights Committee and the regional human rights mechanisms.[78]

The pain and suffering directly endured by Ms. Mohamed and Mr. Bashmilah's wife shows that they too are victims of the U.S. extraordinary rendition program. The profound anguish and mental distress that they experienced from the uncertainty of not knowing the fate or whereabouts of their husbands meets the threshold of severe pain or suffering required under the definition of torture.

[75] 2011 Declaration by Ms. Mohamed, *supra* note 13, at paras. 20, 25, 27.
[76] *See* notes 66–74, *supra*.
[77] Surviving the Darkness, *supra* note 27, at 62.
[78] *See* notes 66–74, *supra*.

b. Impermissible Purpose: The State's Failure to Provide Families with Information about the Fate and Whereabouts of their Loved Ones

The definition of torture under the CAT requires that the state intentionally inflict the acts in question for an impermissible purpose. One such purpose includes "punishing him for an act he or a third person has committed or is suspected of having committed."[79] In the case of the families of the disappeared, the state intentionally punishes family members for the acts that the state suspects a third person—their disappeared relative—has committed. The state punishes family members by failing to provide them with information, obfuscating its actions in response to requests for such information, or lying about the whereabouts of their loved ones.

In 2001, then-Special Rapporteur on Torture, Sir Nigel Rodley commented that in the case of enforced disappearances, the state's "refusal to disclose the fate or whereabouts of the persons concerned" is an "intentional act directly affecting close family members."[80] He continued:

> Being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, *with a view to punishing or intimidating them and others*.[81]

Rodley is noting the larger purpose carried out by the state, namely the punishment or intimidation of the family members of the disappeared.

When analyzing whether a family member is a victim of treatment contrary to Article 3 of the European Convention, the European Court "emphasise[s] that the essence of such a violation … concerns the authorities' reactions and attitudes to the situation when it is brought to their attention."[82] In this regard, the European Court evaluates "the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries."[83] The European Court has relied on this approach in many of its cases.[84] The states' responses, whether they be silence, obfuscation, or lying, thus are evidence of the impermissible purpose of punishment.

The U.N. Committee Against Torture has taken a similar approach. In *Guerrero Larez v. Venezuela*, the Committee noted that "the authorities were indifferent to their efforts to ascertain his whereabouts and fate. The authors have never received an adequate account of the circumstances of his alleged death or escape [by the state]."[85] In this case, the state of Venezuela

[79] CAT, *supra* note 51, at art. 1(1).
[80] 2001 Special Rapporteur on Torture Report, *supra* note 62, para. 12 (internal citations omitted).
[81] *Id.* (emphasis added).
[82] Çakici vs. Turkey, Eur. Ct. H.R., No. 23657/94, para. 98 (July 8, 1999).
[83] *Id.*
[84] *See* Taş v. Turkey, Eur. Ct. H.R., No. 24396/94, para. 79 (Nov. 14, 2000); Orhan v. Turkey, Eur. Ct. H.R., No. 25656/94, para. 358 (June 18, 2002); Ipek v. Turkey, Eur. Ct. H.R., No. 25760/94, para. 181 (Feb. 17, 2004); Tanış and Others v. Turkey, Eur. Ct. H.R., No. 65899/01, para. 219 (Aug. 2, 2005); Imakayeva v. Russia, Eur. Ct. H.R., No. 7615/02, para. 164 (Nov. 9, 2006); Umarov v. Russia, Eur. Ct. H.R., No. 12712/02, para. 125 (July 3, 2008).
[85] Larez v. Venezuela, U.N. Committee Against Torture, No. 456/2011, para. 6.10 (May 15, 2015).

refused to provide the spouse and father of the deceased complainant with accurate information about their loved one's whereabouts. In fact, they actively lied to the family, telling them that their loved one had escaped prison when he had in fact been tortured, murdered, dismembered and buried in the prison yard.[86] From their active lies and passive failure to provide clarification of the true circumstances, the authorities were decidedly punishing the family, an impermissible purpose under the CAT definition of torture.

This case law demonstrates that states further an impermissible purpose of punishment when they lie, obfuscate, or remain silent regarding the fate and whereabouts of the loved ones of family members. The state of Jordan lied and obfuscated in response to Mr. Bashmilah's wife's attempts to obtain information about her husband. In both women's cases, the United States remained silent, as did Djibouti in Ms. Mohamed's case, despite that fact that each country had taken a role in the abductions and thereby possessed information about their husbands' fate and whereabouts. Djibouti, Jordan, and the United States thus exhibited the impermissible purpose of punishment, as required by the CAT definition of torture.

Soon after Mr. al-Asad was taken, Ms. Mohamed and her family began searching all over Tanzania for him. They visited police stations, immigration offices, and prisons in Dar es Salaam and in various other cities around the country. Each time, officials told Ms. Mohamed that they did not have her husband in their records.[87] Additionally, a Tanzanian immigration official inaccurately reported to the media that Mr. al-Asad had been deported to Yemen. Ms. Mohamed immediately contacted her father-in-law, who lived in Yemen. He met with Yemeni officials, who confirmed that Mr. al-Asad had not entered their country.[88] Ms. Mohamed's father-in-law then traveled to Tanzania to assist in the search for his son. He filed a habeas corpus petition in the High Court of Tanzania. Six months after Mr. al-Asad had been abducted and rendered to Djibouti and then Afghanistan, the Tanzanian High Court dismissed the case, telling Ms. Mohamed and her father-in-law—much too late for them to locate him there—that Mr. al-Asad had been deported to Djibouti and was no longer in Tanzanian custody. In fact, he had already been handed by the Djiboutians to the CIA, which had taken him to Afghanistan.[89]

The state of Jordan similarly lied and withheld information about Mr. Bashmilah's whereabouts. Mr. Bashmilah's wife and mother continuously searched for Mr. Bashmilah but were never given accurate information about what had happened to him. After the Jordanian authorities left their apartment with Mr. Bashmilah, his mother returned to the GID facility asking to see her son. They lied in response, claiming to not have him in their custody, stating: "He's not here with us. We can't say if he's gone to the Emirates or Yemen."[90] This prompted Mr. Bashmilah's wife and mother to solicit the help of the Yemeni Embassy in Jordan, which was able to arrange their short visit with Mr. Bashmilah at the GID facility. Mr. Bashmilah's wife and mother attempted to arrange a second visit with Mr. Bashmilah, but they were told by Jordanian intelligence

[86] *Id.* at paras. 2.1–2.4.
[87] 2011 Declaration by Ms. Mohamed, *supra* note 13, at paras. 10, 14.
[88] *Id.* at paras. 11–13.
[89] 2011 Declaration by Mr. al-Asad, *supra* note 19, at para 53; Abdullah Salehe Mohsen El Asaad v. Director of Immigration Services, High Court of Tanzania (Sept. 7, 2004).
[90] *Id.* at 59–60.

officials that Mr. Bashmilah had "left the Kingdom."[91] The Jordanian authorities refused to provide additional information.

For the next few months, Mr. Bashmilah's wife and mother repeatedly communicated with the Yemeni Embassy in Amman, which in turn sent numerous letters to the Jordanian Foreign Ministry inquiring into the fate and whereabouts of Mr. Bashmilah. The Jordanians lied in their responses, claiming that he had not been detained but was rather "ordered to leave the Kingdom, which he did on October 26, 2003."[92] In reality, Mr. Bashmilah was not ordered to leave Jordan on that day; instead, this was the date that the Jordanians handed Mr. Bashmilah over to U.S. agents, who then rendered him to Afghanistan. The Jordanian authorities refused to disclose to which country Mr. Bashmilah was supposedly deported.[93] The repeated lies and obfuscations by the Jordanian authorities serve as further supporting evidence of their impermissible purpose.

The United States remained silent about the whereabouts and its treatment of both Mr. al-Asad and Mr. Bashmilah, as did the state of Djibouti with regard to Mr. al-Asad. The governments detained these men incommunicado, meaning that Mr. al-Asad and Mr. Bashmilah were barred from contacting their families, legal representatives, local courts, or humanitarian organizations. The withholding of information by these states is evidence that they acted with an impermissible purpose, as required under the CAT torture definition.

Moreover, both Djibouti and the United States continue to deny their role in the renditions and detention of Mr. al-Asad and Mr. Bashmilah. Djibouti has never admitted to holding Mr. al-Asad and continues to actively lie to the African Commission, claiming that Mr. al-Asad was never in their territory.[94] Additionally, the United States refuses to officially acknowledge that it held either of the men and it has refused to apologize to the victims and their families. The NYU GJC filed over 50 Freedom of Information Act requests with various U.S. government agencies to obtain documents concerning Mr. al-Asad and Mr. Bashmilah's rendition, detention, and treatment. The government systematically refused to release any information.[95] The 2014 U.S. Senate Select Committee on Intelligence (SSCI) report on the extraordinary rendition program does list both Mr. al-Asad and Mr. Bashmilah as victims of the U.S. extraordinary rendition program.[96] But this report does not constitute official acknowledgement by the U.S.

[91] *Id.* at 60.
[92] *Id.*
[93] *Id.* at 61.
[94] *See* Al-Asad v. Djibouti, African Commission on Human and Peoples' Rights, Comm. No. 383/10 (2014), https://www.achpr.org/sessions/descions?id=250 (summarizing Djibouti's arguments denying that it had ever held Mr. al-Asad). In 2016, the African Commission found the case admissible, establishing that the Court had territorial jurisdiction over the claim. African Commission on Human and Peoples' Rights, *40th Activity Report of the African Commission on Human and Peoples' Rights* 7 (2016), https://www.achpr.org/activityreports/viewall?id=39. A decision on the merits has yet to be issued in this case. *See* note 39 *supra*.
[95] Copies of the Freedom of Information Act requests, administrative responses, and administrative appeals are on file with the authors. *See generally FOIA: Ghost Detention and Extraordinary Rendition Case*, CENTER FOR CONSTITUTIONAL RIGHTS, https://ccrjustice.org/home/what-we-do/our-cases/foia-ghost-detention-and-extraordinary-rendition-case (last visited Jan. 24, 2020).
[96] Senate Report, *supra* note 4, at 460 of 499.

government.[97] The withholding of information and the continued silence by the United States shows that the U.S. government acted with an impermissible purpose under the CAT torture definition.

The states of Djibouti, Jordan, and the United States all actively lied, obfuscated, or withheld information from the families of Mr. al-Asad and Mr. Bashmilah. In line with the case law of the U.N. treaty bodies and the regional human rights mechanisms, these actions show that the states involved exhibited the impermissible purpose of punishment, meeting the definition of torture under the CAT.

c. Which Family Members: Setting a Presumption for Parents, Children, and Long-Term Companions

Not all family members who were affected by the disappearance of a relative are victims of torture. A review of the case law shows that parents, children, spouses and other long-term companions whose experiences meet the elements of the torture definition should be presumed to be victims of psychological torture, leaving the state with the burden to disprove this claim.

The case law of the regional human rights mechanisms provides clarity on how to determine which family members should be recognized as victims. The European Court evaluates a number of factors when determining whether a family member is a victim, including "the proximity of the family tie and the particular circumstances of the relationship."[98] The Inter-American Court has provided additional clarity and applies a presumption with regard to parents, children, spouses and other long-term companions. In such cases, the state has the burden to disprove the claim. In the case of other relatives, the Inter-American Court conducts a case-by-case analysis, examining the relationship between the individual and the disappeared person and whether they have endured special suffering as a result.[99]

Both Ms. Mohamed and Mr. Bashmilah's wife are the spouse of a disappeared individual. The European Court has recognized that marriage is a relationship of close proximity and has found many spouses of disappeared persons to be direct victims of violations of Article 3 of the

[97] The report was adopted by a majority vote of the SSCI and it does not represent the views of the executive branch. In fact, the report's findings were contested by the CIA as well as by the minority members of the SSCI. Additionally, eight former senior CIA officials wrote essays "rebutting" the report and its conclusions. *See* REBUTTAL: THE CIA RESPONSES TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM (Bill Harlow ed., 2015) (including the official responses of the minority members of the SSCI, the CIA's official response, as well as essays by former senior CIA officials including George Tenet, Porter Goss, Michael Hayden, John McLaughlin, Michael Morell, J. Philip Mudd, John Rizzo, and Jose Rodriguez). For additional information about the SSCI report and the efforts of the U.S. government to ensure it would never be published, see this three-part series published in the *Guardian*: Spencer Ackerman, *Inside the Fight to Reveal the CIA's Torture Secrets*, GUARDIAN (Sept. 6, 2016), https://www.theguardian.com/us-news/2016/sep/09/cia-insider-daniel-jones-senate-torture-investigation.

[98] Çakici vs. Turkey, Eur. Ct. H.R., No. 23657/94, para. 98 (July 8, 1999).

[99] Valle Jaramillo v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 192, para. 119 (Nov. 27, 2008); *see also* Radilla-Pacheco v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 209, para. 162 (Nov. 23, 2009) (reiterating which relatives have the benefit of the presumption); Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, para. 218 (July 5, 2004) (finding that the nephew and niece of the victim were not themselves direct victims of violations of Article 5).

European Convention.[100] Under the Inter-American Court approach, Ms. Mohamed and Mr. Bashmilah's wife would be presumed to be victims of torture as they are both the spouses of the disappeared men. The burden would thus shift to the involved state to disprove their claims, which—given the circumstances of their suffering—would prove difficult.

Under this approach, not all family members of individuals disappeared under the U.S. extraordinary rendition program would be recognized as victims of torture. By using a presumption and a burden shifting framework, tribunals could more easily evaluate which family members have undergone psychological torture in line with the CAT definition. Under this framework, Ms. Mohamed, Mr. Bashmilah's wife, and other similarly situated relatives, would be presumed to be victims of torture.

1.3 Conclusion

The Special Rapporteur should establish that many family members of the disappeared, including Ms. Mohamed and Mr. Bashmilah's wife, are victims of psychological torture. Both women endured severe pain and suffering from witnessing the abductions of their husbands and from the uncertainty of not knowing their fate or whereabouts. The involved states intentionally punished these women by withholding information, obfuscating in response to their attempts to find out what happened, or actively lying about their husbands' whereabouts. While not all family members of the disappeared are victims of psychological torture, both Ms. Mohamed and Mr. Bashmilah's wife ought to be presumed to be victims, given that they are the spouses of the disappeared men and they meet the other elements of the torture definition. The Special Rapporteur should take this opportunity to recognize that Ms. Mohamed, Mr. Bashmilah's wife, and other similarly situated individuals are victims of psychological torture. As victims of torture, they are entitled to reparations under international law and the Special Rapporteur should use this opportunity to invite the states involved in their psychological torture to begin the process of acknowledgment, apology, and repair.

Part 2. Family Members Who Were Separated under President Trump's Zero-Tolerance Policy and the De Facto Policy of Family Separation that Followed It Are Victims of Psychological Torture.

Six months into the Trump administration in the United States, immigration officials, directed by the highest levels of government, began forcibly separating parents and other primary caregivers from their children at the U.S.-Mexico border. This practice, which was later termed the "zero-tolerance policy," formally ended in June 2018. Since that time, immigration officials have continued to separate families by exploiting criteria that pre-existed the Trump administration in a de facto policy of family separation.

[100] *See e.g.*, Tanış and Others v. Turkey, Eur. Ct. H.R., No. 65899/01, paras. 218, 221 (Aug. 2, 2005) (finding that the wife of one of the missing men had suffered CIDT); Imakayeva v. Russia, Eur. Ct. H.R., No. 7615/02, para. 165–67 (Nov. 9, 2006) (concluding that the wife of one of the disappeared had suffered CIDT); Varnava and Others v. Turkey, Eur. Ct. H.R., Nos. 16064/90, 16071/90, 16073/90, para. 201–02 (Sept. 18, 2009) (finding that the wives of three of the missing men, among other relatives, were victims of CIDT).

The separation of families under the zero-tolerance policy and the subsequent de facto policy of family separation constitute psychological torture under international law. Family separation under both policies inflicts severe pain or suffering on the adults and the children. The U.S. government advanced these policies for impermissible purposes, including to deter additional migrants from arriving in the United States and to coerce asylum seekers already in the United States into terminating their pending asylum claims. Both purposes are colored by discriminatory animus against Latin American migrants. The U.S. government made no attempt to hide its objectives and intentionally and deliberately separated families to achieve such purposes. The Special Rapporteur should recognize family separations under these policies for what they are: psychological torture.

2.1 Thousands of Families Have Been Separated under the Trump Administration's Zero-Tolerance Policy and the Subsequent De Facto Policy of Family Separation.

Since the Trump administration took office, over 5,400 children have been separated from their families at the U.S.-Mexico border under the zero-tolerance policy and a subsequent de facto policy of family separation.[101]

a. The Zero-Tolerance Policy

In July 2017, the U.S. government began a pilot project for what would become its zero-tolerance policy.[102] U.S. Immigration and Customs Enforcement (ICE) replaced the Obama-era "Parental Interests Directive," which required that ICE not "unnecessarily disrupt the parental rights of both alien parents or legal guardians of minor children."[103] The Trump administration eliminated these protections, renaming its policy "Detention and Removal of Alien Parents or Legal Guardians."[104]

During this pilot phase, parents and other primary caregivers who irregularly crossed the border with children were criminally prosecuted and sent to ICE detention facilities, while their children

[101] Chantal Da Silva, *More than 5,400 Children Were Separated from their Parents by the Trump Administration, 'Shocking' New Tally Shows*, NEWSWEEK (Oct. 25, 2019), https://www.newsweek.com/trump-administration-family-separation-policy-aclu-1467715; Jasmine Aguilera, *Here's What to Know About the Status of Family Separation at the U.S. Border, Which Isn't Nearly Over*, TIME (Oct. 25, 2019), https://time.com/5678313/trump-administration-family-separation-lawsuits/.

[102] *USA: Policy of Separating Children from Parents Is Nothing Short of Torture*, AMNESTY INTERNATIONAL 29, n.90 (June 18, 2018), https://www.amnesty.org/en/latest/news/2018/06/usa-family-separation-torture/ [hereinafter Amnesty, *Separating Children*]; *see also* Jessalyn Schwartz, *Updated ICE Policy on the Detention and Removal of Alien Parents or Legal Guardians*, AM. BAR ASS'N (Apr. 23, 2018), https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2018/updated-ice-policy-detention-removal-alien-parent-legal-guardian/; Tory Johnson, *Family United Is Threatened by This New Immigration Enforcement Policy*, IMMIGR. IMPACT (Apr. 19, 2018), https://immigrationimpact.com/2018/04/19/parents-threatened-immigration-enforcement-policy/#.XicuY2hKjcs.

[103] *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*, U.S. IMMIGR. & CUSTOMS ENF'T 1 (Aug. 23, 2013), https://www.immigrantdefenseproject.org/wp-content/uploads/2013-ICE-Parental-Interests-Directive.pdf.

[104] *Detention and Removal of Alien Parents and Legal Guardians*, U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 29, 2017), https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf.

were classified as unaccompanied minors and transferred to separate facilities.[105] Hundreds of children were separated in this manner during this pilot phase, leading the American Civil Liberties Union (ACLU) to request class certification in their ongoing lawsuit *Ms. L v. Immigration and Customs Enforcement* to include the hundreds of individuals subjected to family separations that had occurred over the preceding year.[106]

The zero-tolerance policy was formalized on 6 April 2018. On that day, President Trump issued a Presidential Memorandum, directing federal agencies to report on efforts to end the practice of "catch and release," whereby individuals irregularly crossing the border were released from custody pending the resolution of their cases.[107] On the same day, then-Attorney General Sessions directed federal prosecutors "to adopt immediately a zero-tolerance policy" requiring criminal prosecution of those crossing the border irregularly to "the extent practicable."[108] Such prosecutions occur pursuant to U.S. criminal statutes, which make it a crime to irregularly cross the border.[109] Though it never reached such numbers, U.S. Customs and Border Patrol (CBP) estimated in May 2018 that it would separate 26,000 children from their families over the next five months under the zero-tolerance policy.[110]

Prior to the zero-tolerance policy, most adults irregularly entering the United States with children faced civil immigration proceedings and were not subject to criminal prosecution.[111] Families were held in ICE-operated family detention centers for a maximum of 20 days or released with an order to appear before immigration court on a particular date.[112] Families were only separated

[105] *See* text accompanying notes 111–115.
[106] Memorandum in Support of Motion for Class Certification at 5, Ms. L v. U.S. Immigration & Customs Enf't, No. 3:18-cv-00428-DMS-MDD, (S.D. Cal. Mar. 9, 2018), ECF No. 35-1.
[107] "*Ending "Catch and Release" at the Border of the United States and Directing Other Enhancements to Immigration Enforcement*, Presidential Memorandum for the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Health and Human Services, and the Secretary of Homeland Security, WHITE HOUSE (Apr. 6, 2018), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-state-secretary-defense-attorney-general-secretary-health-human-services-secretary-homeland-security/.
[108] *Memorandum for Federal Prosecutors Along the Southwest Border*, DEP'T OF JUSTICE (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download (emphasis added).
[109] *See* 8 U.S.C. § 1325 (2012) (crime of improper entry); 8 U.S.C. § 1326 (2012) (crime of reentry). The criminalization of migration in this manner is in it of itself a human rights concern as it often violates individuals' rights to liberty and security and promotes arbitrary detention, which is prohibited by international law. *See* Office of the High Commissioner of Human Rights, *The Criminalization of Irregular Migration*, https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/CriminalisationIrregularImmigration.pdf (last visited Feb. 16, 2020).
[110] *DHS Lacked Technology Needed to Successfully Account for Separated Migrant Families*, OFFICE OF INSPECTOR GENERAL 17–18 (Nov. 25, 2019), https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf.
[111] 8 U.S.C. § 1227 (2012) (civil grounds for removal).
[112] The U.S. government agreed to limit family detention to a maximum of 20 days in a 1997 settlement in the case of *Flores v. Reno*, 507 U.S. 292 (1993). *See also* Flores v. Lynch, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015) (interpreting the *Flores* settlement agreement to require a 20 day maximum of detention of children). For additional information about the *Flores* settlement agreement and resulting consent decree, see Beth Van Schaack, *Family Separations: Evolved Not Resolved*, JUST SECURITY (Oct. 16, 2018), https://www.justsecurity.org/61071/family-separations-evolved-resolved/.

if the adult had a serious criminal background or if there were questions as to whether the individual was in fact the parent or legal guardian of the child.[113]

As a result of the Trump administration's zero-tolerance policy, adults traveling with children were routinely criminally prosecuted. Because children could not be held in criminal custody, they were taken from their parents and deemed unaccompanied minors.[114] They were held in ICE custody until they could be transferred to the Office of Refugee Resettlement, run by the Department of Health and Human Services (HHS).[115]

Thousands of children were separated from their parents under this legal regime. The exact number of separated families was initially unclear. As a January 2019 report from HHS's Office of Inspector General explains:

> The total number of children separated from a parent or guardian by immigration authorities is unknown. Pursuant to a June 2018 Federal District Court order, HHS has thus far identified 2,737 children in its care at that time who were separated from their parents. However, thousands of children may have been separated during an influx that began in 2017, before the accounting required by the Court…[116]

In October 2019, the government told the ACLU that the number of family separations from the beginning of the pilot phase to that date totaled approximately 5,400 children—more than double the initially reported number.[117] This remains the most recent estimate of separated children.

The zero-tolerance policy was subject to numerous legal challenges and public opprobrium, including by scholars and practitioners who demonstrated how the zero-tolerance policy violates U.S. obligations under international law.[118] Following this widespread condemnation, on 20 June

[113] *Separated Children Placed in Office of Refugee Resettlement Care*, OFFICE OF INSPECTOR GENERAL (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf [hereinafter OIG, *Separated Children*].
[114] *See* 6 U.S.C. § 279(g)(2) (2012) (defining an unaccompanied alien child).
[115] *See* OIG, *Separated Children*, *supra* note 113.
[116] *Id.*
[117] *See* Da Silva, *supra* note 101; Aguilera, *supra* note 101.
[118] *See e.g.*, Anjali Mehta, Ashley Miller, & Nikki Reisch, *Arbitrary Detention of Asylum Seekers Perpetuates the Torture of Family Separation*, JUST SECURITY (Mar. 15, 2019), https://www.justsecurity.org/63255/arbitrary-detention-asylum-seekers-prolongs-torture-family-separation/; Amicus Brief, [Redacted] v. Whitaker (W.D. Tex. Feb. 14, 2019), https://chrgj.org/wp-content/uploads/2019/02/Redacted-GJC-et-al-Brief-Amici-Curiae-Feb-2019.pdf [hereinafter NYU Amicus Brief]; Beth Van Schaack, *The Torture of Forcibly Separating Children from their Parents*, JUST SECURITY (Oct. 18, 2018), https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/; *Ten Human Rights Standards Implicated by US Immigration Policy Changes*, INTERNATIONAL JUSTICE RESOURCE CENTER (June 27, 2018), https://ijrcenter.org/2018/06/27/ten-human-rights-standards-implicated-by-u-s-immigration-policy/; Meg Satterthwaite & Rebecca Riddell, *"Zero Tolerance" and the Detention of Children: Torture under International Law*, JUST SECURITY (June 21, 2018), https://www.justsecurity.org/58269/zero-tolerance-detention-children-torture-international-law/; Amnesty, *Separating Children*, *supra* note 102; Jillian Blake, *Trump Administration's Family Separation Policy Violates International Law*, INTLAWGRRLS (June 10, 2018), https://ilg2.org/2018/06/10/trump-administrations-family-separation-policy-violates-international-law/; *Emergency Request for Precautionary Measures*, Inter-Am. Comm'n. H.R. (May 31, 2018), https://texascivilrightsproject.org/wp-content/uploads/2018/05/20180531-Emergency-Request-For-Precautionary-

2018, President Trump issued Executive Order 13,841, which stated that it is "the policy of this Administration to maintain family unity."[119] This Executive Order formally ended the zero-tolerance policy.

b. De Facto Policy of Family Separation

While family separation pursuant to the zero-tolerance policy has ended, hundreds of families continue to be separated under a de facto policy of family separation. Instead of criminally prosecuting all parents or other primary caregivers who arrive with children, CBP now flags parents and other caregivers at unprecedented levels for fraud, disease, or past criminal history.[120] Like with the zero-tolerance policy, flagged parents are detained in ICE facilities while their children are deemed unaccompanied minors and transferred to HHS custody.[121] This practice continues family separation by exploiting pre-existing criteria used to decide whether to remove children from their families out of concerns for their best interest.

Under previous administrations, U.S. immigration officials would separate families when the parent or other primary caregiver was determined to be a threat to the child's safety or faced a medical emergency.[122] Separations under such criteria were rare.[123] But in the first year following the Executive Order ending the zero-tolerance policy, 911 children were separated from their families under this immigration practice.[124] An ACLU review of these cases

Measures_Redacted.pdf; Precautionary Measure No. 505-18, Inter-Am. Comm'n. H.R., Res. 63/2018 (Aug. 16, 2018), https://texascivilrightsproject.org/wp-content/uploads/2018/08/20180820-IACHR-Precautionary-Measures.pdf.

[119] Exec. Order No. 13,841, *Affording Congress an Opportunity to Address Family Separation* (June 20, 2018), https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation/.

[120] *Myth vs. Fact: DHS Zero-Tolerance Policy*, DEP'T OF HOMELAND SEC. (June 18, 2018), https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy.

[121] In years past, families with similar circumstances would not have been separated. *See* Miriam Jordan & Caitlin Dickerson, *U.S. Continues to Separate Migrant Families Despite Rollback of Policy*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html; Alan Gomez, *Despite Ban, Separating Migrant Families Continues in Some Cases*, USA TODAY (Feb. 21, 2019), https://www.usatoday.com/story/news/politics/2019/02/21/trump-administration-breaks-up-some-migrant-families-heres-how-cbp-border-sabraw-separate/2836085002/; Ginger Thompson, *Families Are Still Being Separated at the Border, Months After "Zero Tolerance" Was Reversed*, PROPUBLICA (Nov. 27, 2018), https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed; *see also* note 123, *infra*.

[122] *Unaccompanied Children: Agency Efforts to Reunify Children Separated from Parents at the Border*, OFFICE OF INSPECTOR GENERAL 13 n.33 (Oct. 2018), https://www.gao.gov/products/gao-19-163.

[123] Staff at the Office of Refugee Resettlement in the Department of Health and Human Services confirm that historically, prior to the implementation of the zero-tolerance policy, they received "small numbers of separated children, citing reasons such as the parent experiencing a medical problem that precluded caring for the child." *Separated Children Placed in Office of Refugee Resettlement Care*, OFFICE OF INSPECTOR GENERAL 3 n.6 (Jan. 2019), https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf. Jeh Johnson, the former Secretary of Homeland Security under President Obama was asked about family separation under the Obama administration. He replied: "I can't say that it never happened. There may have been some exigent situation, some emergency. There may have been some doubt about whether the adult accompanying the child was in fact the parent of the child. I can't say it never happened but not as a matter of policy or practice." Scott Simon, *Jeh Johnson on Immigration and Trump*, NPR (June 9, 2018), https://www.npr.org/2018/06/09/618496706/jeh-johnson-on-immigration-and-trump.

[124] 911 children have been separated from their families between June 26, 2018 and June 29, 2019. *See* Order Granting in Part and Denying in Part Plaintiffs' Motion to Enforce Preliminary Injunction at 7 n.4, Ms. L. v. U.S.

demonstrates how U.S. immigration officials exploited the criteria under which families can be lawfully separated to perpetuate a de facto policy of family separation.[125]

U.S. immigration officials cited criminal history as the reason for separating 678 of the 911 families.[126] While the government failed to include details in many of these cases, a review of those with information reveals that families were separated because the parents had been charged *or* convicted of minor crimes including traffic offenses, marijuana or other drug possession, shoplifting, and destruction of property valued at 5 dollars. Forty-eight parents were separated solely based on past immigration convictions and do not have any other criminal history listed. Of the 179 cases where the government included a date for the prior conviction, the average charge was 10 years old. 185 of these separations involved children under the age of five.

Forty-four additional families were separated because the parent or primary caregiver had an alleged gang affiliation, despite not having a criminal background. But a closer look reveals that many of those accused of gang affiliation had actually been the targets of gangs and had fled their countries of origin to escape gang violence. Immigration officials likewise separated families based on abuse or neglect, without properly investigating whether such harm actually took place. In one case, a two-year-old was separated from her father because she was malnourished, but immigration officials failed to take into account that the pair had arrived from an extremely impoverished community in Guatemala with high rates of malnutrition.

Taken together, these examples show that the Trump administration is not separating families only in cases that are in the best interest of the child. Instead, the administration is exploiting rarely used pre-existing criteria that allow for lawful separation in a de facto policy of family separation.

The Trump administration is likely to continue separating families in this way. On 13 January 2020, Judge Dana Sabraw, who is presiding over the *Ms. L v. Immigration and Customs Enforcement* class action, declined to "engage in prospective oversight" of the government's use of factors like criminal history and neglect and abuse in their separation decisions.[127] Judge Sabraw's refusal to intervene means that the Trump administration can continue exploiting such criteria to separate families, allowing a de facto policy of family separation to remain in place.

2.2 The Psychological Harm Experienced by the Separated Families Meets the Definition of Torture under International Law.

Immigr. & Customs Enf't, No. 18cv0428 DMS (MDD) (Jan. 13, 2020), ECF No. 509 [hereinafter Ms. L Preliminary Injunction Order] (noting that 911 children were separated: 678 based on criminal conduct, 71 based on gang affiliation, 20 based on lack of fitness or child safety concerns, 46 based on unverified familial relationships, and 24 based on illness); *see also* Aguilera, *supra* note 101.

[125] The ACLU presented a review of these cases in a memorandum in their ongoing *Ms. L v. Immigration and Customs Enforcement* litigation. *See* Memorandum in Support of Motion to Enforce Preliminary Injunction at 7–15, Ms. L. v. U.S. Immigr. & Customs Enf't, No. 18cv0428 DMS (MDD) (July 30, 2019), ECF No. 439-1 [hereinafter ACLU Memorandum].

[126] The facts in this paragraph and the subsequent paragraph are drawn from the ACLU Memorandum, *supra* note 125, at 7–15.

[127] Ms. L Preliminary Injunction Order, *supra* note 124 at 25.

In line with the elements of torture under the CAT, family members who were separated under the zero-tolerance policy or who were subjected to the de facto policy of family separation are victims of psychological torture when they i) endure severe pain or suffering, ii) the state separates them for the impermissible purposes of either deterring additional migrants from arriving in the U.S. and/or coercing them into terminating their pending asylum claims, and iii) when the state expresses discriminatory animus towards them as a group.

a. Severe Pain or Suffering

To constitute torture under CAT, the act or acts in question must inflict severe pain or suffering, whether physical or mental.[128] The government practice of separating families at the border inflicts severe pain or suffering on both the adults and the minor children. Family separation surpasses the severity threshold under international law because it causes immediate trauma as well as long-lasting psychological effects, which are aggravated by the potentially indefinite duration of such separation as a result of the ongoing detention or deportation of one or more of the separated family members.

Federal courts have acknowledged the severity of suffering that intentional family separation inflicts on both adult parents and children.[129] For example, several U.S. district courts and the Ninth Circuit Court of Appeals have held that the injury inflicted by "separation of a parent from his or her child" constitutes an irreparable harm; that is, the injury is actual, certain, and great.[130] In the *Ms. L* class action case, the district court described the mental suffering inflicted by family separation as "agonizing," "traumatic," "brutal," and "egregious."[131]

Medical experts have also recognized that the psychological harm inflicted by family separation is severe on both the impacted adults and children. The American Academy of Pediatricians has described the mental and physical effects of family separation as so stressful that some adult family members experience "musculoskeletal, gastrointestinal, respiratory, and neurologic" distress.[132] An Amnesty International report based on interviews with adult family members separated from their minor children similarly documented incidents of increased blood pressure levels, illness, insomnia, and memory lapses among those adults, linked to the fear of remaining

[128] CAT, *supra* note 51, at art. 1(1).
[129] Leiva Perez v. Holder, 640 F.3d 962 (9th Cir. 2011); Ms. L. v. U.S. Immigr. & Customs Enf't, 310 F. Supp. 3d 1133 (S.D. Cal. 2018); Washington v. United States, No. C18-939 MJP (W.D. Wash. Aug. 8, 2018); M.G.U. v. Nielsen, 325 F. Supp. 3d 111 (D.D.C. 2018).
[130] Ms. L, 310 F. Supp. at 1146; Leiva Perez, 640 F.3d at 969-70; Washington v. United States, No. C18-939 MJP (W.D. Wash. Aug. 8, 2018).
[131] Ms. L, 310 F. Supp. at 1145-46. *See also* M.G.U., 325 F. Supp. 3d at 122 (noting that family separation can "induce profound hopelessness, despair, depression and even suicidal urges") (internal quotation marks omitted).
[132] Julie Linton, *et al.*, *Detention of Immigrant Children,* AMERICAN ACADEMY OF PEDIATRICS (May 2017), https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf; *see also* Julie Linton, *Examining the Failures of the Trump Administration's Inhumane Family Separation Policy Congressional Testimony*, AMERICAN ACADEMY OF PEDIATRICS (Feb. 7, 2019), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Linton%20testimony%20FINAL_1.pdf; Sarah G. Hassink, *Letter to DHS Secretary Jeh Johnson on Behalf of American Academy of Pediatrics* (July 24, 2015), https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf.

separated.[133] Many other experts have documented and analyzed the immense psychological trauma that results from such separations.[134] These effects are especially acute with regard to children, who are still developing both mentally and physically.[135] As such, international human rights law has recognized that the threshold at which a certain treatment can constitute torture is lower when children are the ones being abused.[136]

Furthermore, the continuous and potentially indefinite nature of family separation, particularly where the adult remains in immigration detention, may deprive parents of communication with, or even knowledge of the whereabouts of, their minor children. This prolongation of separation exacerbates the harm experienced by both adult family members and minor children upon their initial separation. Jack Shonkoff, M.D., Director of the Center on the Developing Child at Harvard University, testified before Congress that prolonged separation "inflicts increasingly greater harm as each week goes by."[137] The continuous nature of the separation is another indication that the harm caused by family separation rises to the level of "severe pain or suffering" under CAT, and its potentially indefinite nature only makes such suffering more severe.[138] Therefore, the immediate trauma inflicted by, and the continuous nature of the harm resulting from, family separation plainly reaches the threshold of severity required to constitute torture under international law.

b. The State's Impermissible Purposes

The U.S. government has carried out the practice of family separation under the zero-tolerance policy and the de facto policy that succeeded it to deter migration to the United States and to coerce asylum-seekers into giving up their claims.

[133] *See* Amnesty, *Separating Children*, *supra* note 102, at 36, 40.
[134] *See e.g.*, Beth Van Schaack, *The Torture of Forcibly Separating Children from their Parents*, JUST SECURITY (Oct 18, 2018), https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/ (discussing the psychological harm associated with early childhood trauma in the context of family separation and providing resources to relevant scientific studies); Hearing *Before the House Comm. on Energy & Commerce*, 116th Cong. (2019) (testimony of Dr. Jack Shonkoff, Director, Center on the Developing Child, Harvard University), https://developingchild.harvard.edu/about/press/migrant-family-separation-congressional-testimony-dr-jack-p-shonkoff/ [hereinafter Shonkoff Testimony]; Steve Turnham, *Experts Say Psychological Impact of Family Separation on Par with Abuse*, ABC NEWS (June 18, 2018), https://abcnews.go.com/Politics/experts-psychological-impact-family-separation-par-abuse/story?id=55981817; Allison Abrams, *Damage of Separating Families*, PSYCHOLOGY TODAY (June 22, 2018), https://www.psychologytoday.com/us/blog/nurturing-self-compassion/201806/damage-separating-families; Dylan Gee, *I Study Kids who were Separated from their Parents. The Trauma could Change their Brains Forever*, VOX (June 20, 2018), https://www.vox.com/first-person/2018/6/20/17482698/tender-age-family-separation-border-immigrants-children; Heather Stringer, *Psychologists Respond to a Mental Health Crisis at the Border*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2018), https://www.apa.org/news/apa/2018/border-family-separation.
[135] Van Schaack, *supra* note 134.
[136] *See e.g., Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez*, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015), https://undocs.org/A/HRC/28/68.
[137] Shonkoff Testimony, *supra* note 134.
[138] *See also* Working Group on Enforced or Involuntary Disappearances, General Comment on Enforced Disappearance as a Continuous Crime, U.N. Doc. No. A/HRC/16/49 (Jan. 26, 2011).

i. Family Separations Are Carried Out for the Impermissible Purpose of Deterring Individuals from Migrating to or Seeking Asylum in the United States.

Statements by public officials demonstrate that the government has used family separation as a coercive and intimidating tactic aimed at deterring individuals from migrating to or seeking asylum in the United States, though many have lawful and valid claims. The Convention Against Torture makes clear that the intended target of punishment, intimidation, or coercion need not be the person experiencing the acts of torture; suffering inflicted on one person to punish or change the behavior of others still amounts to torture.[139] As such, using the psychological torture inflicted upon families in the United States to deter other families from traveling to the U.S. can constitute an impermissible purpose under the CAT.

When the Trump administration began considering a policy of family separation, top government officials expressed that its purpose would be deterrence. In March 2017, John Kelly, who was then DHS Secretary and would go on to be White House Chief of Staff before resigning from the Trump administration, was asked on CNN whether the administration was considering separating children from their parents at the border. He replied: "Yes I'm considering, in order to deter more movement along this terribly dangerous network. I am considering exactly that."[140] Moreover, in a March 2017 meeting with immigration officers, DHS official John Lafferty discussed the idea of family separation as a way to curb the numbers of individuals crossing the border into the United States.[141]

In January 2018, then-DHS Secretary Kirstjen Nielsen told the Senate Judiciary Committee that family separation was a tool that would "discourage parents from bringing their children here."[142] In May 2018, John Kelly, who had become White House Chief of Staff by that time but had yet to resign, called family separation a "tough deterrent."[143] In the same interview, he also stated that "a big name of the game is deterrence."[144] From these statements, it is clear the Trump administration made no attempts to hide that deterrence constituted an underlying purpose of family separations.

[139] *See* CAT, *supra* note 51, at art. 1(1) (defining the impermissible purpose element of torture as extending to impacts on the victim or "a third person").
[140] Daniella Diaz, *Kelly: DHS Is Considering Separating Undocumented Children from their Parents at the Border*, CNN (March 7, 2017), https://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/.
[141] Julia Ainsley, *Trump Admin Discussed Separating Moms, Kids to deter Asylum-Seekers in Feb. 2017*, NBC NEWS (June 18, 2018), https://www.nbcnews.com/politics/immigration/trump-admin-discussed-separating-moms-kids-deter-asylum-seekers-feb-n884371. Moreover, in August 2017, Gene Hamilton, then-assistant to then-Attorney General Jeff Sessions, requested that aides "generate paperwork laying out everything we could do to deter immigrants from coming to the U.S. illegally." *See* Jonathan Blitzer, *How the Trump Administration Got Comfortable Separating Immigrant Kids from their Parents*, NEW YORKER (May 30, 2018), https://www.newyorker.com/news/news-desk/how-the-trump-administration-got-comfortable-separating-immigrant-kids-from-their-parents.
[142] *See Senate Hearing with DHS Secretary Nielsen*, C-SPAN (Jan. 16, 2018), https://www.c-span.org/video/?c4709347/separation-families [hereinafter Nielsen Senate Testimony].
[143] *Transcript: White House Chief of Staff John Kelly's Interview with NPR*, NPR (May 11, 2018), https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr [hereinafter NPR interview].
[144] *Id.*

The government's statements about deterrence continued. In May 2018, then-Attorney General Jeff Sessions explained that:

> Today we are here to send a message to the world: we are not going to let this country be overwhelmed.… I have put in place a 'zero tolerance' policy for illegal entry… If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law.[145]

In this statement, Sessions is explicitly linking family separations to preventing the country from being "overwhelmed" by immigrants, showing the deterrence purpose underlying the initiative.

The Trump administration has continued to justify family separations with a rationale of deterrence. Steven Wagner, then-Acting Assistant Secretary of HHS, told reporters on 19 June 2018 that "we expect that the new policy will result in a deterrence effect, we certainly hope that parents stop bringing their kids on this dangerous journey and entering the country illegally. So we are prepared to continue to expand capacity as needed."[146]

Even after President Trump formally ended the zero-tolerance policy with Executive Order 13,841, his administration continued to use the language of deterrence, showing that it remains an impermissible purpose of the de facto policy of family separation that followed the zero-tolerance policy. On 1 November 2018, President Trump said that "[n]o nation can allow itself to be overwhelmed by uncontrolled masses of people rushing their border… And I will therefore take every lawful action at my disposal to address this crisis."[147] When asked about family separations, President Trump replied, "when they hear they're not going to be separated, they come many, many times over."[148] Other high level officials have continued to comment that whether families are kept together or separated impacts the overall number of new arrivals, showing that a primary purpose of family separations is deterrence.[149] Taken together, these

[145] *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration*, DEP'T OF JUSTICE (May 7, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions [hereinafter AG Sessions Remarks]. In an interview with Laura Ingraham on Fox News, Sessions was asked concerning the family separation policy, "Are you considering it a deterrent?" Sessions answered, "I see that the fact that no one was being prosecuted for this was a factor in a fivefold increase in four years in this kind of illegal immigration." He continued, "So, yes, hopefully people will get the message…" *See* Philip Bump, *Here Are the Administration Officials Who Have said that Family Separation Is Meant as a Deterrent*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/politics/wp/2018/06/19/here-are-the-administration-officials-who-have-said-that-family-separation-is-meant-as-a-deterrent/ (quoting Sessions' June 2018 interview with Laura Ingraham on Fox News).

[146] Bump, supra note 145.

[147] *Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, WHITE HOUSE (Nov. 1, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/ [hereinafter Trump 2018 Remarks].

[148] *Id.*

[149] *Press Briefing by Acting ICE Director Matthew Albence*, WHITE HOUSE (Oct. 10, 2019), https://www.whitehouse.gov/briefings-statements/press-briefing-acting-ice-director-matthew-albence/ (noting that the ability to "present as a family" is a "pull factor" that "allow[s] people to come to this country" and has led to a "spike with regard to crossings"); *Press Briefing by Acting CPB Commissioner Mark Morgan*, WHITE HOUSE (Nov.

statements suggest that the purpose underlying the de facto policy of family separation, like the zero-tolerance policy that preceded it, is deterrence.

ii. In Separating Families, the State Also Advances the Impermissible Purpose of Coercing Families to Terminate their Asylum Claims.

The Trump administration also utilizes family separation to coerce asylum-seekers already in the United States into terminating their pending asylum claims. Under both the zero-tolerance policy and the de facto policy of family separation that followed it, government officials presented parents and other primary caregivers with two options: they could either continue to pursue their asylum claims and remain separated from their children, or they could terminate their asylum claims and be reunited with their children through deportation.[150]

The U.S. Commission on Civil Rights, a federal government agency created by the Civil Rights Act, reviewed family separations under the zero-tolerance policy. It found that the government used "coercive tactics" and failed to provide families with due process.[151] Specifically, the Commission determined that the government's policies "can coerce parents into withdrawing what may be valid asylum applications or otherwise impairing their immigration proceedings, for fear of what may be happening to their children."[152] Migrants themselves as well as immigration attorneys and human rights advocates have all reported instances of asylum seekers being given the choice between termination of asylum claims with a promise of reunification through deportation or continuing their claims while remaining separated from their children.[153]

14, 2019), https://www.whitehouse.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan-2/ (citing the fact that single adults have surpassed families as a reason why "numbers are down").

[150] Chris Hayes & Brian Montopoli, *Exclusive: Trump administration plans expanded immigrant detention*, MSNBC (Mar. 3, 2017), https://www.msnbc.com/all-in/exclusive-trump-admin-plans-expanded-immigrant-detention ("Under the plan under consideration, DHS would break from the current policy keeping families together. Instead, it would separate women and children after they've been detained – leaving mothers to choose between returning to their country-of-origin with their children, or being separated from their children while staying in detention to pursue their asylum claim."); *see also* American Immigration Council & American Immigration Lawyers Association, *The Use of Coercion by U.S. Department of Homeland Security (DHS) Officials Against Parents Who Were Forcibly Separated From Their Children* (Aug. 23, 2018), https://americanimmigrationcouncil.org/sites/default/files/general_litigation/the_use_of_coercion_by_u.s._department_of_homeland_security_officials_against_parents_who_were_forcibly_separated_from_their_children_public_fin_0.pdf [hereinafter AILA Report].

[151] U.S. Commission on Civil Rights, *Letter to Attorney General Sessions and DHS Secretary Nielsen* (June 15, 2018), https://www.usccr.gov/press/2018/06-15-18-letter.pdf [hereinafter USCCR Review].

[152] *Id.*

[153] Dara Lind, *Trump's DHS Is Using an Extremely Dubious Statistic to Justify Splitting up Families at the Border*, VOX (May 8, 2018), https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families ("In some cases, according to immigration lawyers, parents separated from their children have begged to withdraw their asylum applications — on the logic that it would be easier for them to reunify their families in their home countries."); Amnesty, *Separating Children*, *supra* note 102, at 31 (documenting what happened at immigration hearings, including how one woman was given the express choice of terminating her asylum claim so she could be reunited with her grandson for deportation or continuing her asylum claim without him); Jay Root & Shannon Najambadi, *Kids in Exchange for Deportation: Detained Migrants Say They Were Told They Could Get Kids Back on Way Out of US*, TEXAS TRIBUNE (June 24, 2018), https://texastribune.org/2018/06/24/kids-exchange-deportation-migrants-claim-they-were-promised-they-could

Using family separation to coerce asylum seekers to give up their claims has continued after the end of the zero-tolerance policy, demonstrating that this impermissible purpose also underlies the administration's de facto policy of family separation. After the Trump administration issued the Executive Order formally ending the zero-tolerance policy, the government continued to state that the objective of reunification of separated families is for removal, implying that DHS would only reunite families in order to deport them while keeping them separated if the adult chooses to continue pursuing their asylum claim. The government explained that they "have a process established to ensure that family members know the location of their children and have regular communication after separation to ensure that those adults who are subject to removal are reunited with their children for the purposes of removal."[154] This government explanation does not discuss reunification for individuals with pending asylum claims who are not yet subject to deportation. By not including this option, the Trump administration is implying that reunification can only happen when individuals give up their asylum claims and are deported.

Similarly, a few weeks after the formal end of the zero-tolerance policy, ICE told a group of about 60 separated fathers that they could be "be removed without their child, be removed with their child, or continue to fight their case for asylum."[155] ICE did not inform parents that they had the right to continue their asylum claims while being reunified with their children. By telling parents that the only way to be reunited with their children is through deportation, ICE is using the threat of continued family separation to coerce parents to terminate their pending asylum petitions, even though many applicants may have valid claims.

Coercing asylum seekers into giving up their asylum cases represents an impermissible purpose of family separations, and evidence of such coercion constitutes evidence of psychological torture sufficient to meet the CAT definition.

iii. The U.S. Government Intentionally Carries Out these Policies.

To meet the definition of torture under the CAT, the acts must be intentionally inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[156] The U.S. government's policies of family separation are and were intentionally inflicted on migrant families by government officials. Decision-makers at the highest levels of the U.S. government have intentionally promoted the practice of forcible family separation. President Trump's 20 June 2018 Executive Order states that the Administration has had no choice but to "separat[e] alien families," thereby admitting that such family separations were deliberate.[157] Former Attorney General Jeff Sessions, former White House Chief of Staff

(including an interview with an asylum seeker from Honduras who agreed to sign a voluntary removal order after being promised to be reunited with his six year old daughter).

[154] *Fact Sheet: Zero-Tolerance Prosecution and Family Reunification*, U.S. Dep't of Homeland Security (June 23, 2018), https://www.dhs.gov/news/2018/06/23/fact-sheet-zero-tolerance-prosecution-and-family-reunification.

[155] AILA Report, *supra* note 150, at 6.

[156] CAT, *supra* note 51, at art. 1(1).

[157] Exec. Order No. 13,841, *supra* note 119.

John Kelly, and former DHS Secretary Kirstjen Nielsen have each explicitly stated that the United States has intentionally utilized the tactic of family separation.[158]

The act of family separation has been effectuated by government agents, including employees and contractors of CBP and HHS, who have been involved in physically separating family members.[159] As just one example, Amnesty International documented that "DHS officials tore apart four Central American families at once in the same room."[160] These reports show what is incredibly clear: the practice of family separation is an intentional act, authorized by high-level government officials and implemented by their agents.

c. Discriminatory Animus

The impermissible purposes of deterrence and coercion are based on discrimination, which underlies the practice of family separation. To constitute torture under CAT, the treatment must be carried out for an impermissible purpose including "for any reason based on discrimination of any kind."[161] The impermissible purposes of deterrence and coercing migrants to give up pending asylum claims are based on discrimination, thereby meeting this requirement of the torture definition.

In their study of the zero-tolerance policy, the U.S. Commission on Civil Rights, a government agency, found that their concerns about the policy were "exacerbated by the apparent animus directed at Mexican and Central American immigrants by the Administration, giving rise to questions of unwarranted discrimination on the basis of national origin."[162] The Commission further noted that the government's approach "appears to discriminate against families on the basis of their national origin."[163]

The underlying discriminatory animus noted by the Commission rests on evidence including statements made by President Trump and other top level officials from his administration. On 16 May 2018, at the height of the government's implementation of the zero-tolerance policy, President Trump, referring to the "people coming into the country," said that "[y]ou wouldn't believe how bad these people are. These aren't people. These are animals."[164] Such comments

158 AG Sessions Remarks, *supra* note 145 ("If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."); NPR interview, *supra* note 143 (including statements by John Kelly describing family separation as a "technique" that would see "a much faster turnaround on asylum seekers."); Nielsen Senate Testimony, *supra* note 142 (describing family separation as a "way to enforce our laws").
159 *See* J.S.R. v. Sessions, 330 F. Supp. 3d 731, 736 (D. Conn. 2018) (observing that minor children are separated from their parental figures by DHS and detained in Department of Health and Human Services' Office of Refugee Resettlement (ORR) or DHS custody); Southwest Envt'l Ctr. v. Sessions, No. 2:18-cv-000632 WJ-KRS, 2018 U.S. Dist. LEXIS 198220, at 4 (D.N.M. Nov. 20, 2018).
160 Amnesty, *Separating Children*, *supra* note 102, at 6.
161 CAT, *supra* note 51, at art. 1(1).
162 USCCR Review, *supra* note 151 (internal citations omitted).
163 *Id.*
164 *Remarks by President Trump at a California Sanctuary State Roundtable*, WHITE HOUSE (May 16, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-california-sanctuary-state-roundtable/; *see also* @realDonaldTrump, TWITTER (June 18, 2018, 9:50 AM), https://twitter.com/realdonaldtrump/status/1008708576628625408 ("Children are being used by some of the worst criminals on earth as a means to enter our country."); @realDonaldTrump, TWITTER (Oct. 22, 2018, 8:37 AM),

build on what President Trump said from the first day of his presidential campaign, when he referred to migrants who irregularly cross the border as people with "lots of problems" and that "they're rapists" and "bringing crime."[165]

President Trump is not the only government official to make such statements. In a May 2018 interview, then-White House Chief of Staff John Kelly expressed a discriminatory motivation for the policy, explaining that the people coming over the border are "not people that would easily assimilate into the United States into our modern society. They're overwhelmingly rural people in the countries they come from – fourth, fifth, sixth grade educations are kind of the norm. They don't speak English, obviously that's a big thing. They don't speak English. They don't integrate well, they don't have skills."[166]

Civil society and the media have further documented the animus based on race and national origin emanating from the most senior levels of the Trump administration.[167] For example, on 18 November 2018, five months after the zero-tolerance policy had ended, President Trump referred to what he called "caravans" forming in Honduras and El Salvador as being filled with "unbelievably rough people."[168] Statements like this one show that discrimination against Latin American migrants constitute the impermissible purpose of family separations under both the zero-tolerance policy and the de facto policy that succeeded it, meeting this element of the torture definition.

2.3 Conclusion

The U.S. government's forcible separation of families under the zero-tolerance policy and the subsequent de facto policy of family separation constitutes psychological torture under international law. It inflicts severe pain or suffering on both the adults and the children. It is carried out for the impermissible purposes of deterring additional migrants from coming to the United States and coercing migrants already in the United States into giving up their pending asylum claims. Underlying these purposes is discriminatory animus, expressed at the highest levels of the U.S. government. As such, the Special Rapporteur should find that the intentional and deliberate separation of families constitutes psychological torture. Additionally, the Special Rapporteur should call for the immediate reunification of all separated families in a manner that preserves the rights of individuals to apply for asylum and avoids reunification through deportation. As victims of torture, these families are entitled to reparations from the United States under international law. The Special Rapporteur should urge the United States to begin the process of acknowledgement, apology, and repair with respect to these victims.

https://twitter.com/realDonaldTrump/status/1054351078328885248 (referring to the "Caravan heading to the Southern Border," President Trump said that "Criminals and unknown Middle Easterners are mixed in").

165 *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?arc404=true.

166 NPR interview, *supra* note 143.

167 *See e.g.*, Amnesty, *Separating Children*, *supra* note 102, at 28–31; David & Graham, et al., *An Oral History of Trump's Bigotry*, ATLANTIC (June 2019), https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/.

168 Trump 2018 Remarks, *supra* note 147.

Submission Conclusion

The U.N. Special Rapporteur on Torture has an important opportunity to educate the U.N. Human Rights Council about psychological torture. The NYU Global Justice Clinic believes that the Special Rapporteur should use this opportunity to make clear that the U.S. government has used, and continues to inflict, psychological torture on families.

Under the George W. Bush administration, many of the close relatives of the men who were subjected to the extraordinary rendition program were subjected to psychological torture. Women like Zahra Ahmed Mohamed and the spouse of Mohamed Bashmilah were forced to endure the severe pain and suffering associated with witnessing their loved ones' abductions and the uncertainty of not knowing what had happened to them. The states involved punished these women, by withholding information, thwarting their attempts to locate their spouses, and actively lying about their whereabouts. As their experiences meet the elements of the CAT torture definition, the Special Rapporteur should recognize that Ms. Mohamed, Mr. Bashmilah's wife, and other similarly situated individuals are victims of psychological torture, entitled to reparations under international law.

Under the Donald J. Trump administration, the United States has subjected families to psychological torture through the zero-tolerance policy and the de facto policy of family separation that followed. As documented by medical and psychological professionals, separated families, especially children, endure severe pain or suffering as a result of the separation. Statements from the highest levels of the administration show that the purposes of family separation are to deter additional families from traveling to the United States and to coerce those in the country to withdraw their pending asylum claims and face deportation. These impermissible purposes are colored by discriminatory animus based on national origin. The Special Rapporteur should establish that these intentional and deliberate actions of the Trump administration constitute psychological torture, and that the victims are entitled to cessation of the violations and reparations under international law.