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Seeking Accountability for Torture

by Frank Goldsmith

Let us begin, in the manner of a law school examination question, with a hypothetical set of facts: North Carolina residents, acting through their North Carolina--based corporation, fly from North Carolina airports to distant places in order to kidnap and torture people. The detention and torture occur outside of the state. Are the residents and their corporation liable for their conduct?

Of course, the facts are not at all hypothetical. As exposed through the actions of organizations such as North Carolina Stop Torture Now (ncstn.org) and The Rendition Project (therenditionproject.org.uk) and the work of investigative journalists and the Council of Europe,[1] a North Carolina corporation, Aero Contractors Limited, and its employees and collaborators, were instrumental in carrying out the CIA's program of "Rendition, Detention, and Interrogation" (RDI) in the years following 9/11.[2] Aero, whose corporate headquarters is in Smithfield, operated aircraft owned by CIA front companies that were based at the Johnston County Airport and at the Global TransPark near Kinston.

Flight logs from the Federal Aviation Administration and international flight authorities have allowed experts to trace multiple rendition circuits of Aero-operated aircraft, mainly a Gulfstream V executive jet with registration number N379P and a Boeing business jet numbered N313P. The circuits began with departures from the Johnston County Airport or the Kinston Jetport and ended with returns to those same airports. In between, the aircraft visited locations that matched perfectly with the details of at least 34 cases of "extraordinary rendition," *i.e.*, the extra-legal abduction and transport for the purpose of indefinite, secret detention and abusive interrogation.[3]

The evidence reveals that these North Carolina-based aircraft, pilots, and crews flew to destinations all over the world to seize suspected terrorists and transport them at first mainly to the custody of allied security forces such as those in Egypt, Morocco, Ethiopia, Djibouti, Afghanistan, Iraq, Libya, Jordan, and even Syria, and later to a series of "black sites" (the CIA's term for its undisclosed prisons in other countries, which included prisons in Poland, Lithuania, Romania, and Thailand). In both types of settings, detainees were held secretly and indefinitely, without access to lawyers, family, or the Red Cross, and tortured during their interrogations. Some were later transported (sometimes in Aero aircraft) to the U.S Naval Base at Guantánamo Bay, Cuba, for indefinite detention, almost always without formal charges. The program was not only unquestionably unlawful, it was also unsuccessful, as documented in the declassified 525-page executive summary of the 2014 report of the U.S. Senate Select Committee on Intelligence.[4]

What happened to these men? According to a declassified but heavily redacted CIA memo, immediately upon seizure

and during transport each detainee was "securely shackled and is deprived of sight and sound though the use of blindfolds, earmuffs, and hoods." Upon arrival, his head and face were shaved. During interrogation process, the detainee was exposed to "white noise/loud sounds and constant light." He was required to be kept mostly nude but "diapered for sanitary purposes." He was required to be placed in a "vertical shackling position" for sleep deprivation, was to be subjected to "dietary manipulation," and a variety of slaps, blows, and "facial holds" were to be administered as needed. The techniques authorized included simulated drowning, various stress positions, and confinement in a "large box" or "small box," the latter being similar to the dimensions of a coffin. The treatment was so brutal that some interrogators could not tolerate observing it or being a part of it.[5]

And yet, according to the findings of the Senate Select Committee on Intelligence, the brutality yielded little, if any, usable intelligence. The report finds that the so-called "Enhanced Interrogation Techniques" were ineffective, either because the CIA had grabbed the wrong man, or because the information was already known, or because the answers were simply made up in hopes of ending the torture, or because less harsh methods were found to yield more reliable results. The committee found that the CIA had lied about the nature and extent of the interrogations, lied about the program's effectiveness, actively sought to obstruct the investigation, and had damaged the standing of the United States in the international community.

Does the law provide any avenue for prosecuting, civilly or criminally, those responsible for carrying out the RDI program?

There is no question that torture is illegal under international common law, international treaties to which the United States is a party, federal statutory law, and the common and statutory law of North Carolina.

First, the prohibition of torture is a firmly established principle of customary international human rights law, *jus cogens*, which is recognized as binding on all nations and actors and from which no derogation may be permitted.[6] Torture is also explicitly prohibited by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter CAT), which the United States signed in 1988 and formally ratified in 1994.[7] CAT broadly defines torture and provides that it may not be justified by the order of a superior officer or public authority. Under CAT, torture is never justified: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[8] Torture is also prohibited under Article 7 of the International Covenant on Civil and Political Rights (1966) (hereinafter ICCPR) ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.")[9] Finally, the 1949 Geneva Conventions, together with Common Article III and the 1977 Protocols all prohibit torture. Geneva III, applicable to prisoners of war, provides: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." Common Article III, applicable to all categories of persons, prohibits not only torture, but all "outrages upon personal dignity, in particular humiliating and degrading treatment."

Torture also violates federal statutory law. Article 4 of CAT requires that each state party insure that its domestic law criminalize not only torture and attempted torture, but also acts constituting complicity or participation in torture. In partial compliance with this obligation, in 1994 Congress passed 18 U.S.C. § 2340A (hereinafter the Torture Act), which criminalizes acts of torture or attempted torture committed outside the United States by a person who is either a national of the United States or is found within the United States, regardless of nationality. The act also punishes conspiracies to violate its provisions. The Torture Act was first applied in *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010). As the court notes, the facts of the case, graphically stated in the opinion, "are riddled with extraordinary cruelty and evil." *Id.* at 783. Belfast, the son of former Liberian president Charles Taylor, was born in Massachusetts but returned to Liberia to operate a state-sponsored paramilitary unit that engaged in extensive and horrific acts of torture and murder. Belfast made the mistake of re-entering the United States in 2006 on a false passport, where he was arrested at Miami International Airport and ultimately indicted for violating the Torture Act. After a month-long trial, he was convicted and sentenced to 97 years' imprisonment. The court rejected Belfast's constitutional challenge to the statute and held that, consistent with the mandate of CAT, the American courts had jurisdiction over his extraterritorial crimes and over his person, since Belfast was a United States citizen.

Given that torture is clearly unlawful, no matter the governmental justification offered, and can be prosecuted against American citizens and persons present in this country even if the acts occurred elsewhere, what can be done to seek accountability on the part of those, such as Aero Contractors and its associates, who acted in concert with the CIA to kidnap, detain without lawful process, and torture suspected terrorists?[10] The answer lies less in the availability of legal remedies than in marshalling political will.

First, as *Belfast* illustrates, any citizen of this country, and any non-citizen found in this country, can be prosecuted under the Torture Act. Because the Torture Act criminalizes conspiracies to commit torture, a United States Attorney

could seek indictments against corporations or persons—say, corporate principals, pilots, and their crews—who participate in a scheme to kidnap and torture people abroad. Those responsible could also be prosecuted federally for a conspiracy to violate civil rights.

State law also offers remedies. N.C. Gen. Stat. §14-39 provides:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; . . .

It can hardly be denied that kidnapping to torture someone falls within the scope of the statute.[11] Acts in North Carolina that are part of a conspiracy to commit kidnapping elsewhere could be prosecuted under North Carolina's law of conspiracy, which requires only proof of an agreement by two or more persons to perform an unlawful act or to perform a lawful act in an unlawful manner. *State v. Rozier*, 69 N.C. App. 38, 48, 316 S.E.2d 893 (1984). "It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime." *Id.*, 69 N.C. App. at 51. See also *State v. Worrell*, 119 N.C. App. 592, 459 S.E.2d 63 (1995). A creative prosecutor could doubtless also charge for conspiracy to commit other criminal offenses, including aggravated assault, false imprisonment, or for being an accessory before the fact to such crimes.

But those remedies depend upon a prosecutor's willingness to bring criminal charges. What about civil suits for relief?[12] To date, the primary stumbling block has been the abuse of the so-called "state secrets doctrine," which in recent years has been expanded to permit dismissal of claims in their entirety where the judge is persuaded that prosecution of the suit will inevitably require the disclosure of information that could damage national security. The seminal case is *United States v. Reynolds*, 345 U.S. 1 (1953); as developed in that case, the doctrine was one of evidence, whereby upon a claim by the government that national security would be implicated, the court would review the evidence to determine its admissibility, weighing the parties' respective interests.

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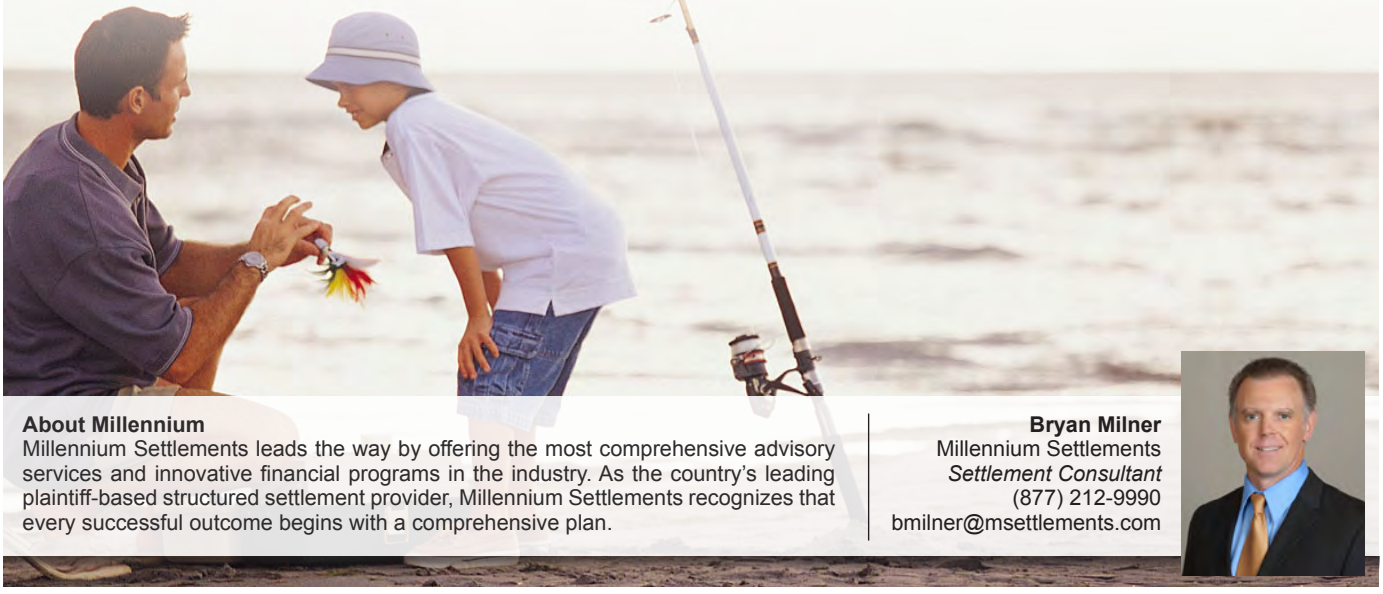

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After 9/11, the doctrine has been applied not merely to exclude evidence, but to dismiss entire suits by torture victims without any weighing of the parties' interests, even where the information in question is already in the public domain.[13] However, a recent case brought by the ACLU against two psychologists who allegedly devised the interrogation techniques used by the CIA was allowed to proceed, and according to press reports it has just been settled.[14] The case is important and provides plaintiffs with a guide to overcoming the state secrets doctrine.[15]

But there are other means of achieving accountability. Apart from efforts by individuals to seek relief for the abuse they suffered at the hands of their torturers, the public should be made aware of its government's actions, and North Carolinians should become informed of the complicity of their own residents and officials. To that end, the North Carolina Commission of Inquiry on Torture (NCCIT) was established. NCCIT is a 501(c)3 organization set up to investigate and encourage public debate about the role that North Carolina played in facilitating the U.S. torture program carried out between 2001 and 2009. This non-governmental inquiry responds to the lack of recognition by North Carolina's publicly elected officials, as well as to citizens' need to know how their tax dollars and state assets were used to support unlawful detention, torture, and rendition. The NCCIT is in the process of investigating and documenting North Carolina's involvement in the CIA's torture program and our state's obligations under international, federal, and domestic law. The Commission has scheduled two days of hearings in Raleigh on November 30 and December 1, 2017. It hopes that its efforts will serve as a model for other accountability efforts and will help create momentum for full official transparency and accountability for the RDI program. NCCIT encourages all who are interested to visit its website, nccit.org, to learn more. ◆

1. See the groundbreaking work of Stephen Grey in his book *Ghost Plane* (MacMillan Publishers, 2007); see also Trevor Paglen and A.C. Thompson, *Torture Taxi* (Melville House 2006). See also S. Raphael *et al.*, "Tracking rendition aircraft as a way to understand CIA secret detention and torture in Europe," *International Journal of Human Rights*, 20:1, 78-103 (2015); and see Working Document No. 8 of the European Parliament's Temporary Committee on the Alleged Use of European Countries for the Transport and Illegal Detention of Prisoners, examining the companies linked to the CIA, the aircraft used by the CIA, and the European countries in which the CIA aircraft made stopovers.

2. Aero was incorporated in 1979 as a successor to the CIA's Air America company.

3. See D. Weissman *et al.*, "The North Carolina Connection to Extraordinary Rendition and Torture," Immigration & Human Rights Policy Clinic, UNC School of Law (2012), detailing the specific activities of Aero Contractors and their connection to the rendition and torture of named detainees.

4. The summary may be found at https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf. The entire report, which still has not been publically released, runs to about 6,700 pages.

5. The torture had devastating effects on its victims. See Matt Apuzzo et al., *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. Times (Oct. 9, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html [http://perma.cc/LU84-J37R]; and see Bloche, *Toward a Science of Torture?*, 95 Texas L. Rev. 1329 (2017) at 1354.

6. J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Vol. I, Rule 90, pp. 315-19 (2005). Customary international law constitutes "those clear and unambiguous rules by which States universally abide, or to which they accede, out of a sense of legal obligation and mutual concern. . . ." *Flores v. S. Peru Copper Corp.*, 406 F.3d 65, 84 (2d Cir. 2003). The Universal Declaration of Human Rights (UDHR), which does not have the status of a treaty, is nonetheless an example of such clear and unambiguous rules that constitute "fundamental human rights," UDHR Preamble. UDHR Article 5 provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." See also U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), ¶7, p.7: "The unwritten or customary law of war is binding upon all nations. It will be strictly observed by the United States." FM 27-10 explicitly prohibits torture. ¶93.

7. Under Article VI, Clause 2 of the Constitution, a ratified treaty has equal status to an act of Congress. That is, a treaty *is* law of the United States. *See, e.g.*, Jordan J. Paust, *International Law as Law of the United States* 99-105, 120 (2d ed.2002).

8. CAT, Art. 1, § 2.

9. The ICCPR was not ratified by the United States until 1992, and then only with certain expressed reservations, although there is no doubt that the covenant's prohibition against torture is binding. Cf. *Igartua-De La Rosa v. U.S.*, 417 F.3d 145 (1st Cir. 2005).

10. See generally the thorough treatment of the topic of accountability for torture by the UNC School of Law Human Rights Policy Lab (Prof. D. Weissman, Faculty Advisor) and North Carolina Stop Torture Now (Christina Cowger, Coordinator), *Assessing Recent Developments: Achieving Accountability for Torture* (UNC School of Law, 2016).

11. "Terrorizing" a victim simply means "putting that person in some high degree of fear, a state of intense fright or apprehension." *State v. Harrelson*, 169 N.C. App. 257, 610 S.E.2d 407 (2005) (quoting cases).

12. Article 14 of CAT provides: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

13. *El Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011). In *Mohamed*, the Government was permitted to intervene to invoke the doctrine.

14. *Salim et al. v. Mitchell et al.*, 1:16-mc-01799-KBJ (E.D. Wash. 2017).

15. Space does not permit full examination here of the full scope of potential avenues for judicial redress. For example, relief may also be sought in international or national tribunals outside the United States, where a country's participation in rendition and torture violates that state's own obligations under international or domestic law. The European Court of Human Rights and courts in the U.K. and Australia have adjudicated several cases concerning the role other countries have played in the United States' RDI program. See *Assessing Recent Developments: Achieving Accountability for Torture*, supra n.10, at pp. 98-120. And see generally 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); Satterthwaite, *The Legal Regime Governing Transfer of Persons in the Fight Against Terrorism* (New York: NYU School of Law, 2010).