

# **The Right to Heal**

U.S. Veterans and Iraqi Organizations Seek Accountability  
for Human Rights and Health Impacts  
of Decade of U.S.-led War

Preliminary Report  
Submitted in Support of Request  
for Thematic Hearing Before the  
Inter-American Commission on Human Rights  
149<sup>th</sup> Period of Sessions

*Supplemented and Amended*

*Submitted by*

The Center for Constitutional Rights

*on behalf of*

Federation of Workers Councils and Unions in Iraq

Iraq Veterans Against the War

Organization of Women's Freedom in Iraq

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## Submitting Organizations

**Federation of Workers Councils and Unions in Iraq (FWCUI)** is a national unionist organization for the defense of rights of workers in Iraq, established since 2003, and has representatives in all main cities. FWCUI is known for its continuous positions against the newly introduced neo-liberal economic policies, and the new labor code which the FWCUI describes as “protecting the rights of employers while disempowering workers.”

**Iraq Veterans Against the War (IVAW)** was founded by Iraq war veterans in July 2004 at the annual convention of Veterans for Peace (VFP) in Boston to give a voice to the large number of active duty service people and veterans who are against this war, but are under various pressures to remain silent. From its inception, IVAW has called for: (1) Immediate withdrawal of all occupying forces in Iraq; (2) Reparations for the human and structural damages Iraq has suffered, and stopping the corporate pillaging of Iraq so that their people can control their own lives and future; and (3) Full benefits, adequate healthcare (including mental health), and other supports for returning servicemen and women.

**Organization of Women’s Freedom in Iraq (OWFI).** The Organization of Women’s Freedom in Iraq (OWFI), founded in 2003, is a truly pioneering national women’s organization dedicated to rebuilding Iraq on the basis of secular democracy and human rights for all. OWFI has developed innovative anti-violence and political empowerment strategies for women across Iraq. OWFI advocates on behalf of women who are most marginalized, including those who are incarcerated, widowed, displaced or battered.

**The Center for Constitutional Rights (CCR).** The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

## List of Abbreviations and Acronyms

AUMF	Authorization for the Use of Military Force
CIA	Central Intelligence Agency
CPA	Coalition Provisional Authority
DOD	Department of Defense
DU	Depleted Uranium
IBC	Iraq Body Count
IVAW	Iraq Veterans Against the War
IWL	Iraq War Logs
MST	Military Sexual Trauma
OWFI	Organization of Women's Freedom in Iraq
PTSD	Post-Traumatic Stress Disorder
TBI	Traumatic Brain Injury
WP	White Phosphorous

# I. Introduction:

## Why This Request?

The U.S.-led war in Afghanistan, begun on October 7, 2001, is now the longest running officially declared war in U.S. history.<sup>1</sup> Followed by the invasion of Iraq less than two years later on March 19, 2003, based on false claims about Iraq's possession of weapons of mass destruction, the combined so-called "War on Terror" has, by conservative estimates, resulted in deaths due to direct war violence of at least 330,000 people – including civilians, humanitarian workers, journalists and combatants of different nationalities.<sup>2</sup> The number of indirect deaths due to after-effects of fighting, unexploded munitions, malnutrition, damaged health infrastructure and environmental degradation resulting from these conflicts is likely four times the number of direct deaths – or more than one million.<sup>3</sup> Moreover, these figures do not include the toll the U.S.'s global "war on terror" has taken on people and communities in other countries where the U.S. war-making has spilled over, as in Yemen, nor the countries where the U.S. operated or made use of black sites and torture programs. The violent consequences of these wars have resulted in additional hundreds of thousands of casualties – physical, mental and emotional injuries to individuals and communities that in some cases cannot be healed and in others will take decades, indeed generations, to overcome, even with due and adequate reparations, which have not been made. For the millions of civilians impacted by these wars, who have lost loved ones, been displaced, harmed and terrorized by the direct and indirect effects of the war-making policies and practices of the U.S. and its few allies, the so-called war on terror has been instead a global war *of* terror.

On the ten-year anniversary of the invasion of Iraq, U.S. veterans of the war and civil society in Iraq unite in their struggle to heal and demand that the U.S. government take responsibility for the enduring harms inflicted by these misguided and illegal wars. Iraq Veterans Against the War, the Organization for Women's Freedom in Iraq, and the Federation of Workers Councils and Unions in Iraq jointly submit this request to the Inter-American Commission on Human Rights for a thematic hearing to identify and acknowledge the devastating and long-lasting health effects suffered by Iraqis and U.S.

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<sup>1</sup>While military involvement in Vietnam had been building for some time, the official formal beginning of the military intervention is dated from Congress's passage of the Tonkin Gulf Resolution in August 1964. U.S. troops were withdrawn 103 months later in March 1973. See, e.g., Rick Hampson, *Afghanistan: America's Longest War*, USA Today, May 28, 2010, available at [http://usatoday30.usatoday.com/news/military/2010-05-27-longest-war-afghanistan\\_N.htm](http://usatoday30.usatoday.com/news/military/2010-05-27-longest-war-afghanistan_N.htm).

<sup>2</sup>See Cost of War Project, *330,000 Killed by Violence, \$4 Trillion Spent and Obligated*, Watson Institution for International Studies, Brown University, available at <http://costsofwar.org/>.

<sup>3</sup>*Id.* See also, Neta C. Crawford, *Civilian Death and Injury in Iraq, 2003-2011*, Costs of War Project, Sept. 2011, available at <http://costsofwar.org/sites/default/files/articles/15/attachments/Crawford%20Iraq%20Civilians.pdf>.

servicemembers and the constellation, magnitude and scope of the grave human rights violations perpetuated by the U.S.'s conduct of the war and its responsibility for these harms. This report focuses in large part on harms that Iraqis and U.S. servicemembers share – physical and psychological trauma, serious health effects of exposure to highly toxic and carcinogenic materials and effects of sexual and gender-based violence by, and within, the military. In part, this report is based on interviews with active servicemembers who wish to remain anonymous. When such interviews are referenced, they are referred either by a pseudonym followed by an “\*” or by their interview number.

## Context and Overview of the U.S.'s Decade of War and Its Lasting Harms to Civilians and Those Sent to Fight

Labeling the wars in Iraq and Afghanistan as “freedom” operations, U.S. officials portrayed them as battles between good vs. evil. The war efforts, they argued, would establish democracy, rule of law, and freedom in the place of brutal autocratic regimes that violated human rights.<sup>4</sup> Paradoxically, though predictably, the wars in Iraq and Afghanistan themselves were illegal, undermined democratic principles that the U.S. espoused, and resulted in widespread and systematic human rights violations both at home and abroad, some of which are the subject of this request.

### *U.S.'s Failure or Refusal to Respect, Protect and Fulfill Rights to Life, Physical Integrity, Association, Equality, and Non-Discrimination as Occupier*

U.S. promises to promote democracy in Iraq have also been shown to be hollow. Soon after the invasion, the U.S. set up the Coalition Provisional Authority (CPA) which served as the transitional government until its dissolution in June 2004.<sup>5</sup> While in existence and under the authority of Paul Bremer, the CPA issued orders which opened the door to foreign investment, and attempted to privatize more than 200 state-owned firms.<sup>6</sup> Despite President Bush's assurance that the U.S. would “work on the development of free elections and free markets, free press and *free labor unions* in the Middle East,”<sup>7</sup> one law maintained by the CPA was Hussein's 1987 law prohibiting unions among workers in the public sector, which constitutes more than 70 percent of the

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<sup>4</sup> Speech to the World Affairs Council of Philadelphia by U.S. President George W. Bush, *The Struggle for Democracy in Iraq*, Dec. 12, 2005.

<sup>5</sup> James Dobbins, *Occupying Iraq: A history of the Coalition Provisional Authority*, XIII, RAND Corporation (2009). Seth G. Jones et al., RAND Corporation, *Records From Coalition Provisional Authority Shed Light on Occupation of Iraq*, May 12, 2009, available at <http://www.rand.org/news/press/2009/05/12.html>.

<sup>6</sup> Matthew Harwood, *Pinkertons at the CPA: Iraq's Resurgent Labor Unions Could Have Helped Rebuild the Country's Civil Society. The Bush Administration Of Course Tried to Crush Them*, Washington Monthly, Apr. 2005, available at <http://www.washingtonmonthly.com/features/2005/0504.harwood.html>.

<sup>7</sup> *Text of President Bush's 2004 State of the Union Address*, Washington Post, Jan. 20, 2004 (emphasis added).

nation's workforce.<sup>8</sup> The CPA continued to work to prevent unions from organizing, even reportedly arbitrarily arresting eight members of the Iraqi Federation of Trade Unions for their involvement in labor unions with no apparent basis and no explanation ever given.<sup>9</sup>

The U.S. also heavily influenced the drafting of Iraq's constitution, which then-U.S. Vice President Dick Cheney described as "progressive and democratic."<sup>10</sup> But the new Iraq constitution included a filter insisted upon by U.S.-backed religious-political extremists who desired to pursue a reactionary agenda to the secularism of the Hussein era. Ultimately the U.S. was responsible for pushing Iraq toward theocracy, helping to broker a constitution that established an official state religion and which invalidates any law contradicting established principles of that religion.<sup>11</sup> The new constitution further conditioned the rights to freedom of expression, press, assembly and peaceful protest on "public order and morality," a qualification subject to wide interpretation and rife with potential for abuse and criminalization of political expression.<sup>12</sup> Women activists in Iraq have pointed to these and related factors, including the Iraqi penal code's provision allowing men to discipline their wives "within certain limits prescribed by Islamic law, or custom" – channeled into the new era of Iraq governance by the U.S. – as serious setbacks which have served to create a climate in which many forms of violence against women have dramatically increased.<sup>13</sup>

### *Civilian "Casualties"*

President Bush assured U.S. soldiers that they were "sacrificing for the peace of Iraq and for the security of free nations."<sup>14</sup> The wars in Iraq and Afghanistan, however, have made these countries less secure and resulted in hundreds of thousands of violent deaths,

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<sup>8</sup> Harwood, *supra* note 6; See also, David Bacon, *Saddam's Labor Laws Live On*, The Progressive, Dec. 2003, available at <http://www.progressive.org/dec03/bac1203.html>.

<sup>9</sup> See Steve Early, *Iraqi Labor Unions Still Struggling with U.S. Occupation's Yoke*, Labor Notes, Aug. 21, 2012, available at <http://www.labornotes.org/blogs/2012/08/iraqi-labor-unions-still-struggling-us-occupation%E2%80%99s-yoke>; David Bacon, *From National Pride to War Booty*, CorpWatch, Dec. 15, 2003, <http://www.corpwatch.org/article.php?id=9408>.

<sup>10</sup> Yifat Susskind, MADRE, *Promising Democracy, Imposing Theocracy: Gender-Based Violence and the US War on Iraq*, Mar. 2007, available at <http://www.madre.org/index/resources-12/human-rights-reports-56/promising-democracy-imposing-theocracy-gender-based-violence-and-the-us-war-on-iraq-86.html#sub1.1> (quoting Dick Cheney, *Vice President's Remarks at a Luncheon for Arizona Victor 2006*, Aug. 15, 2006).

<sup>11</sup> See generally, Susskind, *supra* note 10. Iraq Constitution, Art. 2, Section A, available at <http://www.wipo.int/wipolex/en/details.jsp?id=10027>.

<sup>12</sup> *Id.* at Art. 36.

<sup>13</sup> Interview with Yanar Mohammed, Director of Organization for Women's Freedom in Iraq, Feb. 1, 2013. See also Susskind, *supra* note 10; Nadje Al-Ali and Nicola Pratt, *Conspiracy of Near Silence: Violence Against Iraqi Women*, Middle East Report, Spring 2011, available at [http://costsofwar.org/sites/default/files/articles/46/attachments/AIAlPratt\\_Heath%20combination%20paper%20on%20gender.pdf](http://costsofwar.org/sites/default/files/articles/46/attachments/AIAlPratt_Heath%20combination%20paper%20on%20gender.pdf).

<sup>14</sup> U.S. President George W. Bush, Speech to National Endowment for Democracy, available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/11/20031106-2.html>.

many of them civilian.<sup>15</sup> In October 2010, Wikileaks released U.S. Army field reports known as the Iraq War Logs (IWL), which gave the first official government tally of the death toll.<sup>16</sup> In total, the IWL detailed 109,032 deaths in Iraq from January 1, 2004 – December 31, 2009, 60.6% (or 66,081) of which were civilian deaths.<sup>17</sup> The IWL only reflect what troops actually witnessed<sup>18</sup> and organizations that track the loss of civilian life in Iraq estimate the total number of civilian deaths to be much greater. When the non-profit organization Iraq Body Count (IBC) cross referenced the IWL with its own death count for that time period, it determined that approximately 12,000 civilian deaths were not included in the IWL number.<sup>19</sup> In total, IBC estimates that over 150,000 violent deaths have been recorded since March 2003, with more than 122,000-134,000 (approximately 80-90%) of them civilian.<sup>20</sup> “Excess deaths,” which are those deaths above what would have normally been expected had the war not occurred including indirect deaths due to malnutrition, damaged health infrastructure, and environmental degradation, are much higher still. Researchers from Johns Hopkins University, Al Mustansiriya University, and Massachusetts Institute of Technology estimate that already by 2006 approximately 654,956 people had died directly and indirectly as a result of the war in Iraq.<sup>21</sup>

Likewise, there is a need to assess the number of “excess deaths” on the U.S. side of the equation beyond the numbers of those servicemembers killed in combat. One study in California has noted that the number of veterans under age 35 who died between 2005 and 2008 was three times higher than the number of California service members killed in Iraq and Afghanistan during the same period.<sup>22</sup> Veterans under age 35 were far more likely to commit suicide and die by other means than others of the same age with no military service.<sup>23</sup> Additionally, there are reports of increasing rates of homicide committed by returning veterans, who often also suffer from PTSD and other mental disorders.<sup>24</sup>

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<sup>15</sup> Human Costs of War Chart: Direct War Death in Afghanistan, Iraq, and Pakistan, October 2001- February 2013, available at [http://costsofwar.org/sites/default/files/HMCHART\\_2.pdf](http://costsofwar.org/sites/default/files/HMCHART_2.pdf).

<sup>16</sup> The IWL provides U.S. government data taken from January 1, 2004 – December 31, 2009 denoting every “Significant Action of War” as documented by U.S. Forces abroad. Iraq War Logs, available at WikiLeaks, <http://www.wikileaks.org/irq>.

<sup>17</sup> *Id.*

<sup>18</sup> John Tirman, *The Forgotten Wages of War*, New York Times, Jan. 3, 2012, available at [http://www.nytimes.com/2012/01/04/opinion/the-forgotten-wages-of-war.html?\\_r=0](http://www.nytimes.com/2012/01/04/opinion/the-forgotten-wages-of-war.html?_r=0).

<sup>19</sup> Iraq Body Count, <http://www.iraqbodycount.org/analysis/numbers/warlogs/>.

<sup>20</sup> *Id.*

<sup>21</sup> Gilbert Burnham, *The Human Cost of the War in Iraq: a Mortality Study, 2002-2006*, Johns Hopkins University, Al Mustansiriya University, and Massachusetts Institute of Technology (2006).

<sup>22</sup> Aaron Glantz, *After Service, Veterans Deaths Surge*, New York Times, Oct. 16, 2010, available at <http://www.nytimes.com/2010/10/17/us/17bcvets.html?pagewanted=all>

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., David Philipps, *Casualties of War, Part II: Warning Signs*, The Gazette, Jul. 28, 2009, available at <http://www.gazette.com/articles/html-59091-http-gazette.html>.

The number of civilian deaths in Afghanistan is much harder to estimate. In the early days of that war, General Tommy R. Franks famously said, “We don’t do body counts.”<sup>25</sup> In Afghanistan there is also no independent long running tally of civilian deaths like the IBC in Iraq.<sup>26</sup> However, the Costs of War project, a nonpartisan, nonprofit, scholarly initiative based at Brown University's Watson Institute for International Studies estimates that approximately 16,725 - 19,013 civilians have been killed in Afghanistan since the initial 2001 invasion.<sup>27</sup> The researchers acknowledge that these are conservative estimates based on third party reporting.<sup>28</sup> What can be lost in these staggering numbers is the story and life of each civilian killed.

### *Shared Trauma*

As set forth in more detail below, while there is still need for growing understanding and study of the effects of war and traumatic situations on servicemembers sent to fight, such as Post-Traumatic Stress Disorder (PTSD) and traumatic brain injuries (TBI), far less is known about the prevalence and experience of these same disorders in the Iraqi and Afghan populations. While acknowledging that the number of TBI cases is underestimated and underreported, the U.S. government still estimates that over 250,000 troops suffer from this disorder.<sup>29</sup> Similarly, the U.S. government estimates that 29% of veterans or one in four returning veterans have been diagnosed with PTSD.<sup>30</sup> These traumatic injuries have become so prevalent in returning veterans that they are often referred to as the “signature wounds” of the Iraq and Afghanistan wars.

Significantly, recent studies have shown that even troops who never set foot in a war zone but who are responsible for directing unmanned aerial (i.e. drone) attacks are reportedly suffering from PTSD as well.<sup>31</sup> Researchers are also continuing to delve more into the nature of “moral injury,” described as the psychological damage caused when servicemembers’ actions in battle conflict with their moral codes.<sup>32</sup> Indeed, the

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<sup>25</sup> Tirman, *supra* note 18.

<sup>26</sup> Neta C. Crawford, *Civilian Death and Injury in Afghanistan 2001-2011*, Sept. 13, 2011, available at <http://costsofwar.org/sites/default/files/articles/14/attachments/Crawford%20Afghanistan%20Casualties.pdf>.

<sup>27</sup> Human Costs of War Chart: Direct War Death in Afghanistan, Iraq, and Pakistan, October 2001 - February 2013, available at [http://costsofwar.org/sites/default/files/HMCHART\\_2.pdf](http://costsofwar.org/sites/default/files/HMCHART_2.pdf).

<sup>28</sup> Crawford, *supra* note 26.

<sup>29</sup> U.S. Congressional Research Service, *U.S. Military Casualty Statistics: Operation New Dawn, Operation Iraqi Freedom, and Operation Enduring Freedom*, Feb. 5, 2013.

<sup>30</sup> U.S. Congressional Research Service, *Report R41921: Mental Disorders Among OEF/OIF Veterans Using VA Health Care: Facts and Figures*, Feb. 4, 2013.

<sup>31</sup> See Elizabeth Bumiller, *Air Force Drone Operators Report High Levels of Stress*, New York Times, Dec. 18, 2011, available at [http://www.nytimes.com/2011/12/19/world/asia/air-force-drone-operators-show-high-levels-of-stress.html?\\_r=0](http://www.nytimes.com/2011/12/19/world/asia/air-force-drone-operators-show-high-levels-of-stress.html?_r=0).

<sup>32</sup> See Pauline Jelinek, *War Zone Killing: Vets Feel ‘Alone’ in Their Guilt*, Associated Press, Feb. 22, 2013, available at <http://bigstory.ap.org/article/im-monster-veterans-alone-their-guilt>; Jan Barry, *Moral Injury: Another*

fundamental illegality and injustice of the war is a factor contributing to and exacerbating the psychological harm for some servicemembers.<sup>33</sup> Another indication of the manifestation of the deep harms of these wars is the dramatically elevated suicide rate amongst servicemembers, which is nearly double the civilian suicide rate.<sup>34</sup>

Not least among the policies of the U.S. military that has given rise to serious health consequences is the brutal redeployment policy that exacerbated the trauma of the wars for many servicemembers. Repeated and rapid redeployment also gave rise to command overrides of medical opinions as to fitness for duty and resulted in military doctors downwardly adjusting their standards for assessing fitness for duty. The military's response to the health needs of returning servicemembers has also been deplorable in that it reportedly follows policies which often serve to discharge and deny servicemembers benefits for what are likely the manifestations of illness and trauma encountered during their military service. Indeed, one former Veterans Affairs researcher recently testified before a Congressional panel that officials in the Department of Veterans Affairs routinely manipulate or hide data that would support veterans' claims so as to avoid paying costly benefits.<sup>35</sup>

While there is still much more to be learned about the psychological impacts on returning servicemembers and appropriate and comprehensive institutional responses are urgently needed, much less is known or even discussed about the likely rates of PTSD, TBI and other harms among the populations where the wars are waged. In a study undertaken for the World Health Organization and the Iraq Ministry of Health, it was estimated that nearly half of the population suffers from some sort of psychological disorder due to the realities and consequences of the war, including the death of family members, forced displacement and living in a climate of fear and violence.<sup>36</sup> An Iraqi psychologist has

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*Hidden Wound of War*, DailyKos, Feb. 23, 2013, available at <http://www.dailykos.com/story/2013/02/25/1189664/-Moral-Injury-Another-Hidden-Wound-of-War>.

<sup>33</sup> See, e.g., Chris Hedges, *The Crucifixion of Tomas Young*, TruthDig, Mar. 10, 2013, available at [http://www.truthdig.com/report/item/the\\_crucifixion\\_of\\_tomas\\_young\\_20130310](http://www.truthdig.com/report/item/the_crucifixion_of_tomas_young_20130310).

<sup>34</sup> *Id.*; Nancy Berglas and Dr. Margaret C. Harrell, Center For New American Security, *Losing the Battle The Challenge of Military Suicide*, Oct. 2011, available at [http://www.cnas.org/files/documents/publications/CNAS\\_LosingTheBattle\\_HarrellBerglass.pdf](http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass.pdf).

<sup>35</sup> Kelly Kennedy, *Researcher: Vets' health Data Was Covered Up: Former VA Researcher to Testify Today Before House Panel*, USA Today, Mar. 13, 2013, available at <http://www.marinecorpstimes.com/news/2013/03/gannett-researcher-says-officials-covered-up-vets-health-data-031313/>.

<sup>36</sup> See Paula Mejia, *Wounds of War: PTSD in Iraqis and Veterans*, The Majalla, Oct. 10, 2010, available at <http://www.majalla.com/eng/2010/10/article55165470>; The Iraqi Mental Health Survey Study Group, *The Prevalence and Correlates of DSM-IV Disorders in the Iraq Mental Health Survey*, 8 WORLD PSYCHIATRY 97 (June 2009). In addition to the factors set out above, the study also recognizes the contributing factor of torture during the three decades under Saddam Hussein's rule to the population's mental health.

estimated that 28 percent of Iraqi children suffer some degree of PTSD and that “their numbers are steadily rising.”<sup>37</sup>

### *Toxic Legacy*

As set out further below, U.S. servicemembers and Iraqi civilians share a terrible toxic bond having been exposed to toxic munitions and carcinogenic waste over a decade that will have devastating effects for a long time to come. The largely unregulated use of burn pits to dispose of any and all materials, including hazardous waste, on U.S. military bases has left countless veterans with a wide range of illnesses including respiratory and neurological problems and cancer. In Iraq, cancer rates, birth defects and other illnesses have sky-rocketed since the U.S. invasion. Additionally, depleted uranium used by the U.S. military in Iraq has contaminated civilian areas across the country, exposing both U.S. servicemembers and civilians to an unparalleled risk of cancer and other illnesses, as well as having children with birth defects. Despite these grave and widespread harms, the U.S. has failed to provide for servicemembers injured by the toxic exposures, and has not taken action to study or decontaminate affected civilian areas or help treat the illnesses and health conditions of Iraqis suffering as a result. Some veterans who are suffering ill health effects after having been exposed to burn pits have brought civil cases against the private military contractors responsible for burning waste in that manner.<sup>38</sup> In February, the cases were dismissed on “political question” grounds.<sup>39</sup> The dismissal is now being appealed.

### *Lasting Effects of the Use of Inhumane Weapons*

In addition to the use of weapons containing depleted uranium and as discussed further below, U.S. officials have admitted to using napalm-class munitions and white phosphorous, an incendiary agent that can burn to the bone, in Fallujah and elsewhere. These weapons were often used in operations in populated areas and resulted in grave harm to civilians, including children. Similarly, the use of cluster munitions, which spread over a wide area and often fail to explode on impact, resulted in the indiscriminate killing of civilians. The remaining unexploded munitions continue to maim and kill more over time.

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<sup>37</sup> César Chelala, *Iraqi Children: Bearing the Scars of War*, The Globalist, Mar. 21, 2009, available at <http://www.theglobalist.com/StoryId.aspx?StoryId=7621>. See also Lourdes Garcia-Navarro, *Treating Iraqi Children for PTSD*, NPR, Aug. 25, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=93937972>.

<sup>38</sup> Adam Levine, *Halliburton, KBR sued for alleged ill effects of 'burn pits'*, CNN, Apr. 28, 2009, available at [http://articles.cnn.com/2009-04-28/us/burn.pits\\_1\\_burn-toxic-fumes-plaintiffs?s=PM:US](http://articles.cnn.com/2009-04-28/us/burn.pits_1_burn-toxic-fumes-plaintiffs?s=PM:US).

<sup>39</sup> *In re: KBR Burn Pit Litig.*, No. RWT 09md208, 2013 WL 709826 (D. Md. Feb. 27, 2013), available at [http://www.motleyrice.com/files/occupational-disease/memorandum\\_opinion\\_motion\\_to\\_dismiss.pdf](http://www.motleyrice.com/files/occupational-disease/memorandum_opinion_motion_to_dismiss.pdf).

## *Militarized Sexual and Gender-Based Violence*

Sexual and gender-based violence against civilians in Iraq and Afghanistan as well as among U.S. military personnel has been shown to be widespread and systemic. In U.S.-run detention facilities such as Abu Ghraib, sexual violence and psychological torture were commonly inflicted upon both female and male detainees, often in order to elicit information and/or to humiliate and degrade. Likewise, U.S. servicemembers, both male and female, have been subjected to sexual assaults by other members of the military at alarming rates. In 2011 the DOD reported over 3,000 cases of sexual assault while estimating that in 2010 only 13 percent of sexual assaults were likely reported.<sup>40</sup> In light of this, officials extrapolate that the number of 2010 sexual assaults in the military was in fact greater than 19,000.<sup>41</sup> A recent Pentagon health study showed that approximately one in five women experienced unwanted sexual contact by another servicemember with the Marines seeing the highest rate of sexual abuse with 30 percent of women reporting such experiences.<sup>42</sup> The study indicates rates of abuse are higher than suggested by earlier studies.

These sexual assaults often result in lasting physical harm and health issues as well as psychological wounds that can manifest into PTSD, increased suicidal tendencies, and other serious conditions. U.S. servicemembers who have experienced sexual assault at the hands of other servicemembers have historically faced daunting challenges in that the policies and practices of the U.S. military have served more often than not to blame the victims of the assaults and leave the perpetrators of assaults in place. Such practices have also often lead to the denial of health benefits to victims when they are suffering physical and/or deep psychological harm as a result of the sexual assaults. In February 2011, twenty-eight veterans of the U.S. military brought a civil case against past and present Secretaries of Defense alleging that they allowed policies and practices which fostered the climate in which the assaults could take place without adequate responses to deter and punish them.<sup>43</sup> A federal judge dismissed the case in December 2011 under a doctrine that prohibits servicemembers from bringing suits against the federal government arising

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<sup>40</sup> U.S. Department of Defense, *Department of Defense Annual Report On Sexual Assault in the Military: Fiscal Year 2011*, Apr. 2012, at [http://www.sapr.mil/media/pdf/reports/Department\\_of\\_Defense\\_Fiscal\\_Year\\_2011\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf).

<sup>41</sup> Department of Defense, *Department of Defense, Annual Report On Sexual Assault in the Military: Fiscal Year 2010*, Mar. 2011, available at [http://www.sapr.mil/media/pdf/reports/DoD\\_Fiscal\\_Year\\_2010\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [hereinafter SAPRO Report 2010].

<sup>42</sup> Greg Zoroya, *More Female Service Members Reporting Sexual Abuse: Abuse Rate Appears Significantly Higher Than Similar Survey Findings in 2008*, USA Today, April 23, 2013, available at <http://www.usatoday.com/story/news/nation/2013/04/22/women-military-sexual-assault/2103075/>.

<sup>43</sup> See *Cioca, et al., v. Rumsfeld, et al.*, C.A. 1:11cv00151, United States District Court for the Eastern District of Virginia, Complaint. Available at <http://burkepllc.com/files/2011/11/FIRST-AMENDED-COMPLAINT.pdf>.

from matters deemed “incident” to their service.<sup>44</sup> An appeal of that decision is currently pending.

*U.S. ’s Reconstruction Debacle Not a Form of ‘Reparations’*

In March, the U.S. Special Inspector General for Reconstruction in Iraq issued its final report on the allocation of U.S. \$60 billion toward reconstruction in Iraq.<sup>45</sup> The report details a myriad of ways in which billions of dollars were ultimately wasted, including as a result of lack of accountability and oversight which also led to high levels of corruption. The report includes interviews with key Iraqi officials as well as U.S. officials involved at different levels and stages. The report quotes Iraq’s acting Minister of the Interior as saying, “With all the money the U.S. spent, you can go into any city in Iraq and you cannot find one building or project... You can fly a helicopter around Baghdad or other cities, but you cannot point a finger at a single project that was built and completed by the United States.”<sup>46</sup> With one chapter even entitled “Nation (Re)building by Adhocracy,” the report included other accounts of the U.S.’s failure to build reconstruction projects even in places that suffered widespread destruction as a result of battles waged there, as well as failed projects that in many cases were far over budget, with infrastructure and basic necessities still lacking. The report cited a United Nations report which noted that Iraq had “the second-highest amount of available water per capita in the Middle East,” but “its water quality was poor, violating Iraq National Standards and World Health Organization guidelines.”<sup>47</sup>

It is important to note that the funding allotted by the U.S. to “reconstruction,” which was ultimately mismanaged, misspent and in large part wasted, was never intended as a form of reparations for the damage or harm caused by the illegal war and the violations that flowed from it. Reparation is a principle of international law which holds that the violation resulting from an engagement between states carries an obligation to make reparation in an adequate form.<sup>48</sup> It is particularly relevant in situations of armed conflict. Reparations requires a wrongdoing party to redress damage caused to an injured party

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<sup>44</sup> See *Cioca, et al., v. Rumsfeld, et al.*, C.A. 1:11cv00151, United States District Court for the Eastern District of Virginia, Defendants’ Motion to Dismiss.

<sup>45</sup> Special Inspector General for Iraq Reconstruction, *Learning from Iraq: A Final Report From the Special Inspector General for Iraq Reconstruction*, Mar. 2013, available at <http://www.sigir.mil/learningfromiraq/index.html>.

<sup>46</sup> *Id.* at 14.

<sup>47</sup> *Id.* at 81.

<sup>48</sup> *Chorzow Factory Case* (Ger. V. Pol.), (1928), Permanent Court of Arbitration, P.C.I.J., Sr. A, No. 17 at 29.

and can include restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.<sup>49</sup>

In fact, Bush administration officials proclaimed that the Iraq war “would pay for itself” – or more to the point – that Iraq would pay for the U.S.’s war against it.<sup>50</sup> According to then-Defense Secretary Donald Rumsfeld, “the bulk of the funds for Iraq’s reconstruction will come from Iraqis – from oil revenues, recovered assets, international trade, direct foreign investment, as well as some contributions we’ve already received and hope to receive from the international community.”<sup>51</sup> None of the funds the U.S. directed toward Iraq reconstruction were done in any sense out of the obligation of a wrongdoer, but of an investor that expected to be able to recoup his investment.

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It is against this backdrop of multi-dimensional and grave harms on all sides of the war that the petitioning organizations request a hearing before the Commission to focus first on the trauma and harms shared by those most affected – the people in communities where these wars were fought and those sent to do the fighting.

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<sup>49</sup> See, e.g., Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of Dec. 16, 2005.

<sup>50</sup> Dan Murphy, *Iraq War: Predictions Made, and Results, A Look Back at Some of the Predicted US Outcomes for the Iraq War, and What Happened*, The Christian Science Monitor, Dec. 22, 2011, available at <http://www.csmonitor.com/World/Backchannels/2011/1222/Iraq-war-Predictions-made-and-results>.

<sup>51</sup> *Id.*

## Why the Need for a Hearing Before the Commission: Impunity for Grave and Ongoing Violations of Human Rights

The rule of law and basic human rights principles have also been casualties of the past decade which has seen the waging of aggressive war, policies of rendition and torture, indefinite and arbitrary detentions, increasing secrecy and even targeted, extra-judicial killings through the use of drones far beyond the context of armed conflict. Indeed, most efforts to seek redress or accountability within the U.S. harms resulting from these policies and practices have met dead ends judicially and repeated roadblocks politically.<sup>52</sup> Moreover, it is concerning that the U.S. government is using tactics honed in the wars in Iraq and Afghanistan in its ever-expanding “war on drugs” throughout Latin America.<sup>53</sup> The reverse is also true as it has been documented that violent tactics notoriously used by U.S. military and civilian officials in covert counter-insurgency operations in the 1980’s and 1990’s in Central America have been applied in Iraq.<sup>54</sup>

These are among the reasons that a hearing before the Inter-American Commission on Human Rights is urgently needed – in addition to the fact that it is imperative that the Commission hear the voices of those most affected by war. A hearing is required to identify the constellation, magnitude and scope of grave human rights violations resulting from an unaccountable war-making apparatus that poses a continued danger to both the region and the world if it is not checked or in some way called to account for the massive devastation it has wrought.

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<sup>52</sup> In all cases brought by victims or their families for torture, rendition and killing programs, the U.S. government has consistently sought to block those cases in the courts, asserting defenses of immunity, political question, special factors, and/or state secrets as reasons why courts should not allow the cases to proceed. And for the most part, courts have gone along with the government’s line. Recent cases for accountability and redress which the U.S. Department of Justice has opposed include *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012)(granting immunity to defendant John Yoo from suit filed by torture victim); *Doe v. Rumsfeld*, 683 F.3d 390, 391 (D.C. Cir. 2012) (finding lower court erred in not dismissing case brought by a U.S. citizen and former detainee in part on the basis of the “special factor” that “litigation of Doe’s case would require testimony from top military officials as well as forces on the ground, which would detract focus, resources, and personnel from the mission in Iraq.”); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (granting immunity to then -Secretary of Defense Rumsfeld from suit brought by Afghan and Iraqi victims of torture); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010) (upholding lower court’s finding that, “‘allegations’ of covert U.S. military or CIA operations in foreign countries against foreign nationals — [are] clearly a subject matter which is a state secret,” and therefore dismissing the case). See also Lisa Magarrell and Lorna Peterson, International Center for Transitional Justice, *After Torture: U.S. Accountability and the Right to Redress*, (Aug. 2010), available at <http://www.ictj.org/sites/default/files/ICTJ-USA-RightRedress-2010-English.pdf> (“a number of cases have been dismissed without ever reaching a hearing on the merits because courts have repeatedly declined to hear cases in which the government asserts that state secrets, classified evidence, evaluations of foreign policy, or national security issues are involved.”).

<sup>53</sup> Thom Shanker, *Lessons of Iraq Help U.S. Fight a Drug War in Honduras*, New York Times, May 5, 2012, available at <http://www.nytimes.com/2012/05/06/world/americas/us-turns-its-focus-on-drug-smuggling-in-honduras.html?pagewanted=all>.

<sup>54</sup> See Mona Mahmood et al., *Revealed: Pentagon’s Link to Iraqi Torture Centres: General David Petraeus and ‘Dirty Wars’ Veteran Behind Commando Units Implicated in Detainee Abuse*, The Guardian, Mar. 6, 2013, available at <http://www.guardian.co.uk/world/2013/mar/06/pentagon-iraqi-torture-centres-link>.

The following is a brief explanation of the legal paradigm governing war-making in the U.S. and some of the failed efforts to bring accountability and seek redress domestically for the human rights violations arising out of the past decade of war:

*War-making in the United States and Obstacles  
to Enforcement and Accountability*

The U.S. Constitution vests the power to declare war in Congress.<sup>55</sup> The constitutional delegation of this particular power to Congress was intended to give that body “the power to decide whether the United States should initiate any offensive military hostilities, however big or little, or for whatever purposes.”<sup>56</sup> Because of Congressional concern about executive drift into its constitutionally mandated authority and involvement of U.S. forces in situations of conflict in Korea and Vietnam without Congressional declarations of war, Congress passed the War Powers Resolution of 1973. The resolution was intended to put a limit on presidential power to commit U.S. forces to armed conflict without Congressional authorization.<sup>57</sup> The resolution requires the President to notify Congress within 48 hours of committing armed forces to any military action and prohibits the commitment of forces for more than 60 days without congressional authorization or a declaration of war.

Even with what many viewed as an unconstitutional concession or partial delegation of Congressional authority, the tensions and power struggles between the executive and legislative branches have resulted in repeated violations of even this constitutionally-mandated separation of power.<sup>58</sup> In 1981, in a situation that is still relevant to and has a number of direct implications for the situation in Iraq, the resolution’s requirements were ignored by President Ronald Reagan when he committed U.S. military forces to El Salvador and later to support the Contras in Nicaragua. Eleven members of Congress, represented by the Center for Constitutional Rights, challenged the U.S. military intervention in El Salvador as violating the War Powers Resolution.<sup>59</sup> While sympathetic to the aims of the litigation, the court dismissed the case on the grounds that it presented “unmanageable standards” for fact-finding on such claims. Later in 1990, fifty-four

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<sup>55</sup> U.S. Const. Art I, Section 8, Clause 11.

<sup>56</sup> See Testimony of Professor Jules Lobel before the Subcommittee on International Organizations, Human Rights and Oversight Committee on Foreign Affairs, U.S. House of Representatives, *War Powers for the 21<sup>st</sup> Century: The Constitutional Perspective*, Apr. 10, 2008, available at <http://democrats.foreignaffairs.house.gov/110/lob041008.htm>.

<sup>57</sup> War Powers Resolution of 1973, 50 U.S.C. 1541-1548.

<sup>58</sup> See Testimony of Professor Jules Lobel to House Foreign Affairs Subcommittee, *supra* note 56.

<sup>59</sup> See *Crockett v. Reagan*, Civ. A No. 81-1034, Order of Oct. 4, 1982, also found at 558 F. Supp. 893 (D.D.C. 1982), available at <http://openjurist.org/720/f2d/1355/crockett-v-reagan>.

members of Congress, also represented by the Center for Constitutional Rights, sought to challenge President George H.W. Bush's initiation of a military offensive in Iraq without first obtaining a declaration of war from Congress.<sup>60</sup> The Court denied their request to enjoin Bush's actions holding that such relief must be sought by a majority of the Congress.<sup>61</sup>

In the immediate aftermath of the attacks of September 11, 2001, Congress passed the Authorization for the Use of Military Force (AUMF), which granted sweeping war-making powers to the President to use all "necessary and appropriate force" against "nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."<sup>62</sup> In addition to allowing the President to exercise military force virtually anywhere in the world, this "authorization" was considered by many legal experts to be an unconstitutional delegation of the power to declare war by Congress to the President, who then would decide whether and when to wage war.<sup>63</sup> The AUMF quickly became the purported basis and justification for administration policies of: extraordinary renditions, which often involved kidnapping and illegal and often secret detention of hundreds of persons declared to be suspects – many of whom were later found to have had no connection to terrorist activity; the use of "black sites" and torture methods;<sup>64</sup> indefinite and prolonged detentions; the use of military commissions at Guantánamo Bay;<sup>65</sup> secret electronic surveillance without a

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<sup>60</sup> See *Dellums v. Bush*, Civ. A. No. 90-2866, Opinion of Dec. 13, 1990, also found at 752 F. Supp. 1141 (D.D.C. 1990), available at

[http://scholar.google.com/scholar\\_case?case=16581780212178521116&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=16581780212178521116&hl=en&as_sdt=2&as_vis=1&oi=scholar).

<sup>61</sup> *Id.* at 1151.

<sup>62</sup> See Authorization for the Use of Military Force, Public Law 107-40, 107<sup>th</sup> Congress (2001), Sec. 2. available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf>.

<sup>63</sup> See, e.g., Center for Constitutional Rights, *Restore. Protect. Expand. Amend the War Powers Resolution*, 2009, available at [http://ccrjustice.org/files/CCR\\_White\\_WarPowers.pdf](http://ccrjustice.org/files/CCR_White_WarPowers.pdf); See also, Seth Weinberger, *Presidential War Powers in a Never-Ending "War"*, ILSA J. OF INT'L & COMP. L. 13:1 (2006).

<sup>64</sup> See, e.g., International Committee of the Red Cross, *ICRC Report on Treatment of Fourteen 'High Value' Detainees' in CIA Custody* (2007); Association of the Bar of the City of New York & Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions*, (2004); Evan Perez, *Rendition Case Under Bush Gets Obama Backing*, Wall Street Journal, Feb. 10, 2009, available at <http://online.wsj.com/article/SB123422915277565975.html>; Marian Wang, *Under Obama Administration, Renditions – and Secrecy Around Them – Continue*, ProPublica, Sept. 6, 2011, <http://www.propublica.org/blog/item/as-rendition-controversy-reemerges-obama-admin-policies-murky>; Council of Europe, Parliamentary Assembly, Resolution 1507 (2006), *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1507.htm>; Scott Horton, *New CIA Docs Detail Brutal 'Extraordinary Rendition' Process*, Huffington Post, Sep. 28, 2009, available at [http://www.huffingtonpost.com/2009/08/28/new-cia-docs-detail-bruta\\_n\\_271299.html](http://www.huffingtonpost.com/2009/08/28/new-cia-docs-detail-bruta_n_271299.html).

<sup>65</sup> See, e.g., *Hamdan v. Rumsfeld*, Case No. 05-184, Opinion of the United States Supreme Court, 126 S.Ct. 2749, 548 U.S. 557 (2006), available at <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>.

warrant as required by the Constitution;<sup>66</sup> and later for the use of drones to commit purportedly “targeted” killings of alleged or suspected terrorists outside of armed conflict and without evidence of an imminent threat.<sup>67</sup> As described below, efforts to seek justice and accountability for violations of the human rights of victims of these policies have encountered obstacles judicially and politically. What is more worrying are reports that the current administration is debating whether the AUMF authorizes the use of all “necessary and appropriate force” to go after groups with little or no connection whatsoever to the organization responsible for the attacks of September 11, 2001.<sup>68</sup>

Less than two years after the passage of the AUMF, Congress passed the similar Authorization for Use of Military Force in Iraq on October 16, 2002, which cited as a key factor Iraq’s alleged development of weapons of mass destruction.<sup>69</sup> The theme of weapons of mass destruction was used to galvanize Congressional and political support for invading Iraq, though at the time there was a wealth of evidence that Iraq did not possess and was not close to possessing such weapons, a fact which was later proven incontrovertibly during the course of the war.<sup>70</sup> On June 10, 2008, twelve members of Congress introduced thirty-five articles of impeachment against President George W. Bush to the House of Representatives.<sup>71</sup> Included among the articles of impeachment were the false justification for the invasion of Iraq, the illegalities around the conduct of the war, the treatment, kidnapping and detention of detainees as part of the global “war on terror,” and the warrantless surveillance program.<sup>72</sup> The House voted 251 to 166 to refer the resolution to the Judiciary Committee for further consideration, which took no action on it.<sup>73</sup> Bush’s second term ended with no accountability whatsoever for the false representations justifying the invasion of Iraq.

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<sup>66</sup> U.S. Department of Justice White Paper on NSA Legal Authorities, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, Jan. 19, 2006, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv39.pdf>.

<sup>67</sup> Scott Shane and Charlie Savage, *Report on Targeted Killing Whets Appetite for Less Secrecy*, New York Times, Feb. 5, 2013, available at <http://www.nytimes.com/2013/02/06/us/politics/obama-slow-to-reveal-secrets-on-targeted-killings.html>. The leaked White Paper referred to in the story can be accessed here: [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf).

<sup>68</sup> Greg Miller and Karen DeYoung, *Administration Debates Stretching 9/11 Law to Go After new al-Qaeda Offshoots*, Washington Post, Mar. 6, 2013, available at [http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394\\_print.html](http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_print.html).

<sup>69</sup> Authorization for Use of Military Force Against Iraq, Pub.L. 107-243, 116 Stat. 1498, enacted Oct. 16, 2002, available at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/pdf/PLAW-107publ243.pdf>.

<sup>70</sup> See Sidney Blumenthal, *Bush Knew Saddam Had No Weapons of Mass Destruction: Exclusive: Two Former CIA Officers Say the President Squelched Top-secret Intelligence, and a Briefing by George Tenet, Months Before Invading Iraq*, Salon, Sept. 6, 2007, available at [http://www.salon.com/2007/09/06/bush\\_wmd/](http://www.salon.com/2007/09/06/bush_wmd/); Don Van Natta Jr., *Bush Was Set on Path to War, British Memo Says*, New York Times, Mar. 27, 2006, available at [http://www.nytimes.com/2006/03/27/international/europe/27memo.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/03/27/international/europe/27memo.html?_r=1&oref=slogin).

<sup>71</sup> Impeaching George W. Bush, President of the United States, of high crimes and misdemeanors,” H.Res. 1345, Jun. 11, 2008, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HE01258:@@@P>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

As the judiciary has closed itself off in past cases like *Crockett* and *Dellums* as a mechanism for challenging a president's unilateral decision to enter into armed conflict in violation of the Constitution, and as impeachment efforts have been unsuccessful even once it has been established that a Congressional authorization for the use of military force was obtained through false representations, there is no viable means domestically through which to challenge and check decisions which can have such far-reaching and egregious ramifications. Moreover, the United States has rejected other international mechanisms that could serve as independent arbiters of these situations. In 1986, the United States withdrew from the compulsory jurisdiction of the International Court of Justice just prior to that court's ruling that the U.S.'s covert war against Nicaragua, including the mining of its harbors, was in violation of international law.<sup>74</sup> More recently, the U.S. has not only refused to ratify the statute of the International Criminal Court but actively sought under the Bush administration to undermine that court's effectiveness and capacity by pressuring other countries not to ratify the treaty.<sup>75</sup>

### *Torture and Killing*

When reports began to surface about the U.S.'s extraordinary rendition program, indefinite detention and use of torture methods upon detainees at Guantánamo Bay and Abu Ghraib, efforts were undertaken to seek redress for some of the victims of these policies and practices with no success to date.<sup>76</sup> Recently, a report issued by a bi-partisan 11-member task force that conducted a lengthy investigation into detainee treatment at Abu Ghraib, Guantánamo Bay, Bagram and other detention centers and black sites, found that "it is indisputable that the United States engaged in the practice of torture" and that

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<sup>74</sup> See *The Republic of Nicaragua v. The United States of America*, Int'l Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, Jun. 27, 1986, available at <http://www.icj-cij.org/docket/index.php?sum=367&code=nus&p1=3&p2=3&case=70&k=66&p3=5>.

<sup>75</sup> See Pam Spees, *The International Criminal Court in RULE OF POWER OR RULE OF LAW?: AN ASSESSMENT OF U.S. POLICIES AND ACTIONS REGARDING SECURITY-RELATED TREATIES* (Nicole Deller, Arjun Makhijani, John Burroughs, eds., 2002).

<sup>76</sup> For a sample of analyses of these practices by United Nations bodies and experts and other international legal scholars, see, e.g., United Nations Committee Against Torture, Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America, CAT/C/USA/CO/2, Jul. 25, 2006, at ¶ 24, available at [http://www.unhcr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf) (recommending that the U.S. "rescind any interrogation technique, including methods involving sexual humiliation, 'water boarding,' 'short shackling' and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment"); United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, Feb. 27, 2006, at ¶ 87, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120>. See also M. Cherif Bassiouni, *THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION – IS ANYONE RESPONSIBLE?* (2010).

the discussions and decisions about the use of torture were undertaken at the highest levels of government.<sup>77</sup>

*Abu Ghraib and Other Torture Centers in Iraq.* When photos depicting torture and humiliating and degrading treatment by U.S. servicemembers of Iraqi detainees at Abu Ghraib first surfaced,<sup>78</sup> high-ranking officials in the Department of Defense and Bush administration rushed to lay the blame on lower level enlisted and non-commissioned officers, claiming that this was aberrant behavior.<sup>79</sup> However, in a report of the investigation into the situation at Abu Ghraib, Major General Antonio Taguba concluded that the torture and humiliating and degrading treatment were the product of structural and command failures or decisions made at higher levels and especially faulted the decision of command to make military intelligence officers and civilian contractors responsible for the military police units conducting detainee operations.<sup>80</sup>

Similar reports later surfaced about torture and other forms of cruel, inhuman and degrading treatment at Guantánamo Bay and a detention facility at Bagram Air Force Base in Afghanistan.<sup>81</sup> In 2004, three memos were leaked to the press which were drafted and signed by high-ranking staff at the U.S. Office of the Attorney General and Office of Legal Counsel of the U.S. Department of Justice which advised the Central Intelligence Agency, the Department of Defense and Office of the President on the use of so-called “enhanced interrogation techniques” which included various forms of torture and cruel, inhuman and degrading treatment which the authors advised could be regarded as legally permissible.<sup>82</sup> Later, a report by the Senate Armed Services Committee which was

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<sup>77</sup> *The Report of The Constitution Project’s Task Force on Detainee Treatment*, The Constitution Project (2013), available at <http://s3.documentcloud.org/documents/684407/constitution-project-report-on-detainee-treatment.pdf>.

<sup>78</sup> See Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, *New Yorker*, May 10, 2004, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact).

<sup>79</sup> See, e.g., *Editorial: The Abu Ghraib Spin*, *New York Times*, May 12, 2004, available at <http://www.nytimes.com/2004/05/12/opinion/12WED1.html?th>; William Saletan, *Rape Rooms: A Chronology: What Bush Said as the Iraq Prison Scandal Unfolded*, *Slate*, May 5, 2004, available at [http://www.slate.com/articles/news\\_and\\_politics/ballot\\_box/2004/05/rape\\_rooms\\_a\\_chronology.5.html](http://www.slate.com/articles/news_and_politics/ballot_box/2004/05/rape_rooms_a_chronology.5.html).

<sup>80</sup> A. Taguba, *Art. 15-6: Investigation of the 800th Military Police Brigade* (2004), available at <http://www.dod.mil/pubs/foi/detainees/taguba/> (citing instances of “sadistic, blatant, and wanton criminal abuse” at Abu Ghraib [hereinafter Taguba Report]).

<sup>81</sup> See Tim Golden, *In U.S. report, Brutal Details of Two Afghan Inmates’ Deaths*, *New York Times*, May 20, 2005, available at <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?ref=bagramairbaseafghanistan>; See also, Center for Constitutional Rights, *Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba*, Jul. 2006, available at [http://ccrjustice.org/files/Report\\_ReportOnTorture.pdf](http://ccrjustice.org/files/Report_ReportOnTorture.pdf).

<sup>82</sup> See *A Guide to the Memos on Torture*, *New York Times*, available at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html>. See also David Johnston and James Risen, *The Reach of War: The Interrogations; Aides Say Memo Backed Coercion Already in Use*, *New York Times*, Jun. 27, 2004, available at <http://www.nytimes.com/2004/06/27/world/reach-war-interrogations-aides-say-memo-backed-coercion-already-use.html>. See also *Joint Expert Opinion: Liability of the Six Defendants*, submitted in the Central Court for Preliminary Criminal Proceedings No. 6, Summary Procedure 134/2009, available at <http://www.ccrjustice.org/files/FINAL%20English%20Lawyers%20Responsibility%20Submission.pdf>.

released in full in 2009, further confirmed that the legal memos had served to “redefine torture,”<sup>83</sup> and “distorted the meaning and intent of anti-torture laws, [and] rationalized the abuse of detainees”<sup>84</sup> and led to the torture of detainees in U.S.-run facilities in Iraq, Afghanistan and Guantánamo Bay and to the killings of two detainees in Afghanistan.<sup>85</sup> The Committee additionally concluded that senior administration officials were responsible for the torture program:

The abuse of detainees in U.S. custody cannot simply be attributed to the actions of “a few bad apples” acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.<sup>86</sup>

In addition to the Senate Armed Services Committee’s finding that the deaths of Mullah Habibullah and Dilawar were the result of serious ill treatment at Bagram, a recent report by The Constitution Project of an investigation by a bi-partisan task force into detainee treatment looked at the military and government response to their deaths. The Constitution Project’s report found that in terms of accountability for the killings: “One after one, military court-martial panels were reluctant to punish comrades who had been following the operating procedures in place and listening to the instructions of their leadership.”<sup>87</sup>

Similarly, there are reports of deaths of detainees at Guantánamo Bay under highly suspicious circumstances. Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami died in detention in June 2006 when they were reported as having been found dead in their cells. Government officials described the deaths as suicides by hanging but a military whistleblower who served at the Guantánamo detention facility described their deaths as the result of their cruel and inhuman treatment at a black site located at the base.<sup>88</sup> To date, there has been no full investigation into their deaths in light of the

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<sup>83</sup> Report by the Senate Armed Services Committee on Detainee Treatment, 110<sup>th</sup> Congress, 2<sup>nd</sup> Session, Nov. 20, 2008 at xv, available at <http://documents.nytimes.com/report-by-the-senate-armed-services-committee-on-detainee-treatment#p=1>.

<sup>84</sup> *Id.* at xxvii.

<sup>85</sup> *Id.* at 152.

<sup>86</sup> *Id.* at xii.

<sup>87</sup> The Constitution Project, *supra* note 77 at 72.

<sup>88</sup> Scott Horton, *The Guantánamo “Suicides”: A Camp Delta Sergeant Blows the Whistle*, Harper’s (Mar. 2010), available at <http://harpers.org/archive/2010/03/the-guantanamo-suicides>.

accounts by whistleblowing guards.<sup>89</sup> Moreover, a civil case brought by the relatives of the deceased was dismissed.<sup>90</sup>

More recently, a joint investigation undertaken by The Guardian and BBC Arabic has surfaced evidence which shows that high-ranking officials in the Bush Administration were closely involved in and linked to secret detention and torture centers in Iraq and other serious human rights abuses.<sup>91</sup> The investigation revealed that former Defense Secretary Donald Rumsfeld appointed retired Colonel James Steele to help organize paramilitaries and commando units from 2003 to 2005 and again in 2006.<sup>92</sup> Steele reported directly to Rumsfeld and reportedly “knew everything that was going on there...the torture, the most horrible kinds of torture.”<sup>93</sup> The appointment of Steele for service in Iraq was extremely controversial as he had previously worked as a military advisor from 1984-1986 in El Salvador where he reportedly trained counter-insurgency commandos who were documented as having committed serious human rights abuses there.<sup>94</sup>

Despite clear and still emerging evidence of a policy and practice by the Bush administration that encouraged and facilitated the torture and serious ill-treatment that led to the deaths of detainees in Iraq, Afghanistan, Guantánamo Bay and elsewhere, no high-level administration or military officials have been held accountable for these serious human rights violations. Due to the complete failure by the competent authorities to hold Bush and other senior administration officials accountable for violations resulting from these programs, efforts have been undertaken to use international law and other national jurisdictions to seek justice. In February 2011, the Center for Constitutional Rights, the International Federation for Human Rights and the Berlin-based European Center for Constitutional and Human Rights announced they would be filing complaints on behalf of torture victims with the Swiss government urging an investigation and prosecution of

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<sup>89</sup> *Id.*

<sup>90</sup> See, Memorandum Opinion of Feb. 16, 2010, in *Talal Al-Zahrani, et al, v. Donald Rumsfeld, et al*, Civil Action No. 09-0028, United States District Court for the District of Columbia, available at <http://www.ccrjustice.org/files/Memorandum%20Opinion.pdf>.

<sup>91</sup> Mahmood, *supra* note 54.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Rumsfeld famously told the press that “the Salvador Option” was needed for Iraq. See Michael Hirsch and John Barry, “*The Salvador Option*”: *The Pentagon May Put Special-Forces-Led Assassination or Kidnapping Teams in Iraq*, Newsweek, Jan. 9, 2005, available at <http://web.archive.org/web/20050110030928/http://www.msnbc.msn.com/id/6802629/site/newsweek/>. Steele was also implicated in the Iran-Contra scandal, in which senior officials in the administration of then President Ronald Reagan secretly facilitated arms sales to Iran in order to fund the Nicaraguan Contras, as official government funding had been prohibited by Congress. See Christopher Drew, *Testimony on Contras Still Haunts Colonel*, Chicago Tribune, Jul. 7, 1991, available at [http://articles.chicagotribune.com/1991-07-07/news/9103170482\\_1\\_iran-contra-james-steele-special-prosecutor-lawrence-walsh](http://articles.chicagotribune.com/1991-07-07/news/9103170482_1_iran-contra-james-steele-special-prosecutor-lawrence-walsh); See also, Peter Maass, *The Way of Commandos*, New York Times Magazine, May 1, 2005, available at <http://www.nytimes.com/2005/05/01/magazine/01ARMY.html?pagewanted=all&position=>.

former President George W. Bush when it was learned that Bush would be traveling to Switzerland.<sup>95</sup> His trip was cancelled on the eve of filing the complaints, which meant that the complaints could not be pursued since the basis of Swiss jurisdiction depended on his presence there.

Subsequently, a similar complaint was filed by the Center for Constitutional Rights and the Canadian Centre for International Justice with the Canadian Attorney General upon learning of Bush's plans to speak at an event there. Canada failed to act on the request while Bush was present in the country and a complaint was subsequently filed with the United Nations Committee Against Torture citing Canada's failure to act in accordance with its obligations under the Convention. The Committee has subsequently requested that the government of Canada respond to the complaint.<sup>96</sup> Similarly, with regard to Defense Secretary Rumsfeld, the Center for Constitutional Rights and its partners have undertaken efforts in France and Germany to initiate criminal investigations into his responsibility for torture and war crimes under their laws requiring their authorities to investigate and prosecute complaints when a suspected torturer or war criminal is on their territory.<sup>97</sup>

Since 2009, the Center for Constitutional Rights and other human rights organizations have been engaged in efforts in Spain to address the U.S.'s torture program. One of those cases was brought against Bush administration lawyers, collectively known as the "Bush Six," including the authors of the aforementioned "Torture Memos," for their role in the torture program and for aiding and abetting the torture and other serious abuses of persons detained at U.S.-run facilities at Guantánamo and other overseas facilities.<sup>98</sup> In April 2011, the presiding judge issued a ruling staying the case temporarily in Spain, transferring it to the U.S. Department of Justice for further proceedings.<sup>99</sup> Victims' representatives appealed the decision and the case will next go before the Spanish Constitutional Court. There has been no further action in the United States with regard to these charges. In another case pending in Spain which is investigating the torture

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<sup>95</sup> See Preliminary "Indictment for Torture" of George W. Bush: Brought Pursuant to the Convention Against Torture, available at <http://www.ccrjustice.org/files/FINAL%207%20Feb%20BUSH%20INDICTMENT.pdf>.

<sup>96</sup> See Letter of Ibrahim Salama, Director of the Human Rights Treaties Division, to Katherine Gallagher, Senior Staff Attorney at the Center for Constitutional Rights, of Jan. 22, 2013, available at <http://www.ccrjustice.org/files/UN%20CAT%20Response.pdf>.

<sup>97</sup> See German War Crimes Complaint Against Donald Rumsfeld, et al., available at <http://www.ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al>. See French War Crimes Complaint Against Donald Rumsfeld, et al., available at <http://www.ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld%2C-et-al>.

<sup>98</sup> For more information and copies of the filings, see *The Spanish Investigation Against the "Bush Six"* at <http://ccrjustice.org/spain-us-torture-case>.

<sup>99</sup> See Preliminary Report, Summary Proceedings 0000134/2009 of Court for Preliminary Criminal Proceedings No. 006, Apr 13, 2011, available at <http://ccrjustice.org/files/13%20April%202011%20Order%20ENG.pdf>; (Español) <http://ccrjustice.org/files/13%20April%202011%20Order%20SPAN.pdf>.

program, the judge ruled in January 2012 that the court has jurisdiction over the case and in January 2013 formally admitted the Center for Constitutional Rights and the European Centre for Constitutional and Human Rights into the case as representatives of two former Guantánamo detainees.<sup>100</sup>

### *Private Military Contractors*

As noted in the Taguba report, private contractors played a significant role in the torture and ill-treatment of detainees at Abu Ghraib. To date, there have been no domestic prosecutions of employees of the contractors who were involved in the egregious mistreatment of detainees. Victims of torture at Abu Ghraib have brought civil cases against contractors who were involved the unlawful treatment of detainees, including torture and other war crimes, as interrogators and interpreters. After nearly five years of struggling to maintain their cases, one case has recently settled and the second is on course to go to trial in 2013.

### *The Case of Maher Arar: Extraordinary Rendition and Torture*

In January 2004, Maher Arar brought a case in New York against high-ranking administration officials seeking accountability and redress for his rendition to Syria where he was tortured, forced to falsely confess, and then released after one year without ever being charged.<sup>101</sup> His detention and arrest occurred when he was traveling through a New York airport on his way home to Canada. The government of Canada later officially apologized for having provided erroneous information to the United States which led to his detention and subsequent rendition but to date the United States government has refused to provide an apology for the horrific violations of Mr. Arar's fundamental rights.<sup>102</sup> Mr. Arar fought for six years to keep the case alive until the U.S. Supreme Court allowed an appellate court's decision dismissing the case to stand.<sup>103</sup> The appellate court and an *en banc* appellate court found that allowing Mr. Arar's claims to proceed

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<sup>100</sup> *Suhail Najim Abdullah Al Shimari, et al., v. Caci International, Inc.*, Case No. 1:08-cv-00827, United States District Court for the Eastern District of Virginia, Alexandria Division. For more information, see the Center for Constitutional Rights' case page, available at <http://www.ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al>.

<sup>101</sup> *Maher Arar v. John Ashcroft, et al.*, Case No. No. 04-CV-0249, United States District Court for the Eastern District of New York. For more information, please see the Center for Constitutional Rights' case page, available at <http://www.ccrjustice.org/ourcases/current-cases/arar-v-ashcroft>.

<sup>102</sup> *Harper Apologizes for Canada's Role in Arar's 'Terrible Ordeal'*, CANWEST News Service, Jan. 27, 2007, available at <http://www.canada.com/topics/news/national/story.html?id=54e0c760-750d-4b18-9f6d-15501296a7b2&k=69081>.

<sup>103</sup> *Maher Arar v. John Ashcroft, et al.*, Case No. 09-923, Supreme Court of the United States, cert denied June 14, 2010.

would interfere with national security and foreign policy.<sup>104</sup> A dissenting judge observed that the court’s decision gave federal officials license to “violate constitutional rights with virtual impunity.”<sup>105</sup>

### *Kill Lists and Drones*

In 2010, the Center for Constitutional Rights filed suit on behalf of Dr. Nasser Al-Aulaqi against President Barack Obama, the Secretary of the Department of Defense, and the Director of the CIA challenging and seeking to enjoin their decision authorizing the targeted killing of his son, U.S. citizen Anwar Al-Aulaqi, in violation of the constitution and international law. Dr. Al-Aulaqi’s case was dismissed on the grounds that he did not have legal standing to challenge the targeting of his son and that the case raised “political questions” that were not subject to judicial review. On September 30, 2011, U.S. drone strikes killed Anwar Al-Aulaqi, along with U.S. citizen Samir Khan and three others. Two weeks later, on October 14, 2011, the U.S. launched another drone strike at an open-air restaurant in Yemen, killing Anwar Al-Aulaqi’s 16-year-old U.S. citizen son, Abdulrahman, and six other civilian bystanders, including another minor. On July 18, 2012, the Center for Constitutional Rights again brought a case seeking accountability and redress for the unconstitutional killings of three U.S. citizens, Anwar and Abdulrahman Al-Aulaqi and Samir Khan.<sup>106</sup>

### *Punishing Whistleblowers*

In May 2010, Private First Class Bradley Manning, a U.S. Army analyst, was arrested and charged with a number of offenses based on his now admitted leak of classified information to Wikileaks. During the course of his detention, he was held in so-called prevention-of-injury status, which amounted to months-long periods of solitary confinement during which he was often forced to remain without clothing and his eyeglasses, conditions of confinement that prompted an international outcry as forms of

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<sup>104</sup> *Maher Arar v. John Ashcroft*, et al., Case No. 06-4216-cv, United States Court of Appeals, Second Circuit, Opinion Affirming Dismissal of Case, 532 F. 3d 157 (2d. Cir. 2008), available at [http://scholar.google.com/scholar\\_case?case=4195309659193362053&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=4195309659193362053&hl=en&as_sdt=2&as_vis=1&oi=scholar). See also, *Arar v. Ashcroft*, 585 F. 3d 559 (2d Cir. 2009) (en banc). available at <http://ccrjustice.org/files/Decision%20on%20Plaintiff's%20Petition%20for%20Rehearing%20En%20Banc%2011.02.09.pdf>.

<sup>105</sup> *Arar v. Ashcroft*, 532 F. 3d 157 (2008), available at [http://scholar.google.com/scholar\\_case?case=4195309659193362053&hl=en&as\\_sdt=2&as\\_vis=1&oi=scholar](http://scholar.google.com/scholar_case?case=4195309659193362053&hl=en&as_sdt=2&as_vis=1&oi=scholar) at 88.

<sup>106</sup> *Nasser Al-Aulaqi, et al., v. Leon E. Panetta, et al.*, Case No. 1:12-cv-01192, United States District Court for the District of Columbia. For more information, please see the Center for Constitutional Rights’ case page, available at <http://www.ccrjustice.org/targetedkillings>.

torture and cruel, inhuman or degrading treatment.<sup>107</sup> Manning pled guilty to 10 of the 22 charges against him on Feb. 28, 2013. He faces up to twenty years imprisonment on the charges.

Among the revelations resulting from Manning's efforts to "blow the whistle," was video which showed a U.S. helicopter firing upon journalists and other civilians as well as a van that was attempting to come to the aid of those who had been fired upon. Ultimately, two children riding in the van were wounded and their father was killed along with at least eleven others.<sup>108</sup> But the leaks also led to the lengthy investigation mentioned above by The Guardian and BBC-Arabic into the role and involvement of retired Col. James Steele and former Defense Secretary Rumsfeld in the detention centers in Iraq where torture and other forms of serious ill-treatment were utilized.<sup>109</sup> At the time of his guilty plea, Manning told the court: "I believe that if the general public, especially the American public, had access to the information contained [in released tables] this could spark a domestic debate on the role of the military and our foreign policy in general...as it related to Iraq and Afghanistan."<sup>110</sup>

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It is in this context of utter impunity and lack of any means of real redress that the undersigned organizations appeal to the Commission for an airing of these matters to help identify and acknowledge the harms as violations of human rights and of the U.S.'s duties under international law and, more specifically, under the American Convention on the Rights and Duties of Man. The Commission has long understood the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man to have extraterritorial application. Under Article 1(1), the American Convention on Human Rights explicitly covers "all persons subject to [the] jurisdiction" of the State parties. While the American Declaration does not include a provision designating its jurisdiction, the Commission has applied the same jurisdictional standards as under the

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<sup>107</sup> See Juan Mendez, *Addendum to Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the United Nations General Assembly*, A/HRC/19/61/Add.4, Feb. 29, 2012, at 74, available at [http://image.guardian.co.uk/sys-files/Guardian/documents/2012/03/12/A\\_HRC\\_19\\_61\\_Add.4\\_EFSONly-2.pdf](http://image.guardian.co.uk/sys-files/Guardian/documents/2012/03/12/A_HRC_19_61_Add.4_EFSONly-2.pdf); Ed Pilkington, *Bradley Manning's Treatment Was Cruel and Inhuman, UN Torture Chief Rules*, The Guardian, Mar. 12, 2012, available at <http://www.guardian.co.uk/world/2012/mar/12/bradley-manning-cruel-inhuman-treatment-un>; *Letter from Amnesty International to Robert M. Gates*, Jan. 19, 2011, available at <http://www.allvoices.com/contributed-news/7975698-amnesty-criticizes-conditions-of-bradley-mannings-confinement>.

<sup>108</sup> See Glenn Greewald, *Wikileaks Releases Video of Slaughter in Iraq*, Salon, Apr. 5, 2010, available at [http://www.salon.com/2010/04/05/iraq\\_49/](http://www.salon.com/2010/04/05/iraq_49/); Elisabeth Bumiller, *Video Shows U.S. Killing of Reuters Employees*, New York Times, Apr. 5, 2010, <http://www.nytimes.com/2010/04/06/world/middleeast/06baghdad.html>.

<sup>109</sup> See Mahmood, *supra* note 54.

<sup>110</sup> *Bradley Manning: A Whistleblowing Hero?*, Al Jazeera, Mar. 5, 2013, available at <http://www.aljazeera.com/programmes/insidestoryamericas/2013/03/20133591256924844.html>.

American Convention.<sup>111</sup> Indeed, recognizing that “individual rights are inherent to the human being” and that all the American states are obligated to respect those rights, the Commission has affirmed that in some cases, “the exercise of [the Commission’s] jurisdiction over extraterritorial events is *not only consistent with but required by* the applicable rules.”<sup>112</sup>

Specifically, the Commission has held that a State Party “may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state’s own territory.”<sup>113</sup> The Commission’s decisions have addressed different ways in which a State’s liability for extraterritorial violations may arise such as when a State is exercising authority and effective control in the territory of another state<sup>114</sup> and/or when there is a “causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual.”<sup>115</sup>

The focus of the determination of “authority and control” warranting jurisdiction is not tied to any “formal, structured, and prolonged legal relation” between states.<sup>116</sup> Applying this standard, the Commission has held that it had jurisdiction over human rights violations committed by U.S. actors occurring in Grenada, Guantánamo Bay, and Bermuda.<sup>117</sup> Additionally, in a case concerning the U.S. military intervention in Panama, the Commission held that when “use of military force has resulted in noncombatant deaths, personal injury, and property loss, the human rights of the noncombatants are

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<sup>111</sup> *Coard, et al. v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. at ¶ 37 (1999) (finding the U.S. violated several articles of the American Declaration based on actions taken in Grenada); *Armando Alejandro Jr. and Others v. Cuba*, Case 11.589, Report No. 86/99, [OAS/Ser.L/V/II.104 doc. 10 rev. at] ¶ 23 (1999)(finding jurisdiction where the state party acted in international airspace).

<sup>112</sup> *Id.* (emphasis added)

<sup>113</sup> *Victor Saldaño v. Argentina*, Inter-Am. Comm’n H.R., Report No. 38/99, OEA/Ser.L/V/II.95 doc. 7 rev. at 289 ¶ 17 (1998).

<sup>114</sup> *Id.* at ¶ 19 (“jurisdiction is a notion linked to authority and effective control, and not merely to territorial boundaries”).

<sup>115</sup> *Ecuador ex rel. Molina v. Colombia*, Inter-State Petition IP-02, Inter-Am. Comm’n H.R. Report No. 112/10, OEA/Ser.L/V/II.140 doc. 10 (2010), see also, *Alikhani v. United States*, Case 4618/02, Inter-Am. Comm’n H.R. Report No. 63/05, ¶ 42 (2005)(finding jurisdiction where the victim was arrested in international airspace); *Coard, et al. v. United States*, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/ser.L/V/II.106, doc. 3 rev. at ¶ 37 (1999)(finding the U.S. violated several articles of the American Declaration based on actions taken in Grenada); *Armando Alejandro Jr. and Others v. Cuba*, Case 11.589, Report No. 86/99, [OAS/Ser.L/V/II.104 doc. 10 rev. at] ¶ 23 (1999)(finding jurisdiction where the state party acted in international airspace).

<sup>116</sup> *Ecuador ex rel. Molina v. Colombia*, *supra* note 115, ¶¶ 98-99; see also, *Victor Saldaño v. Argentina*, *supra* note 113, at 289 ¶ 19 (1998)(“jurisdiction is a notion linked to authority and effective control, and not merely to territorial boundaries” and the focus should be on whether the State has “authority and control” over the alleged victim.)

<sup>117</sup> *Alikhani v. United States*, *supra* note 115; Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am. C.H.R., OEA/Ser.L/V/II.117, doc 5 rev. 1 P 80 (Mar. 13, 2002).

implicated” and the Commission is authorized to consider the subject-matter of cases arising therefrom.<sup>118</sup>

As such, the IACHR has jurisdiction over the human rights violations described herein. During the wars, the U.S. exercised authority and control over physical territory in Iraq and Afghanistan. Moreover, as demonstrated in this request, there is a clear nexus between the U.S. actions and inactions and the harm suffered by both servicemembers and civilians in Iraq and Afghanistan.

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<sup>118</sup> *Salas and Others v. United States (U.S. Military Action in Panama)*, No. 10.573, Report No. 31/93, Oct. 14, 1993.

## II. Human Traumas of a Violent Decade Past, Present, and Future

### A. The U.S.'s Use of Inhumane Weapons and Toxic Legacy

During the now more than ten years of war, the U.S. military used weapons which are exceptionally injurious and will have long-lasting effects on people and communities where these wars have been fought. The military's use of white phosphorous, napalm, and cluster munitions caused numerous civilian deaths and injuries. Children in particular have been – and in the case of cluster bombs continue to be – victims of these inhumane weapons. Additionally, through the use of weapons containing depleted uranium and the practice of indiscriminately burning highly toxic and carcinogenic military waste, the U.S. military has created a toxic legacy that has harmed and will continue to harm people in these communities as well as U.S. servicemembers exposed to these toxins for years to come.

#### *White Phosphorus*

Leading up and subsequent to the U.S. invasion of Iraq in 2003, U.S. officials characterized Saddam Hussein as a “dangerous man” who used chemical weapons against his own people.<sup>119</sup> This claim was at least in part based on a report by the Department of Defense that Saddam used white phosphorous – which the report classified as a chemical weapon – against the Kurds in 1991.<sup>120</sup> Yet, when the U.S. military used the very same chemical agent in the Battle of Fallujah in 2004, U.S. military officials claimed that it was a “legitimate tool of the military.”<sup>121</sup> Focusing on its

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<sup>119</sup> Brian Knowlton, *Whatever the weapons result, he says, Saddam was a threat: Bush defends Iraq intelligence*, New York Times, Jan. 28, 2004, available at [http://www.nytimes.com/2004/01/28/news/28iht-prexy\\_ed3\\_1.html](http://www.nytimes.com/2004/01/28/news/28iht-prexy_ed3_1.html).

<sup>120</sup> U.S. Department of Defense, *Possible use of phosphorous chemical weapons by Iraq in Kurdish areas along the Iraqi-Turkish-Iranian borders*, available at [http://www.gulflink.osd.mil/declassdocs/dia/19950901/950901\\_22431050\\_91r.html](http://www.gulflink.osd.mil/declassdocs/dia/19950901/950901_22431050_91r.html); see also Peter Popham, *U.S. intelligence classified white phosphorus as chemical weapon*, The Independent, Nov. 23 2005, available at <http://www.independent.co.uk/news/world/americas/us-intelligence-classified-white-phosphorus-as-chemical-weapon-516523.html>.

<sup>121</sup> *US general defends phosphorus use*, BBC News, Nov. 20, 2005, available at <http://news.bbc.co.uk/2/hi/americas/4483690.stm>; see also Captain James T. Cobb, First Lieutenant Christopher A. LaCour and Sergeant First Class William H. Hight, *The Fight for Fallujah*, Field Artillery Mag., Mar.-Apr. 2005, at 26, available at <http://www.globalsecurity.org/military/library/report/2005/2-2AARlow.pdf>.

dual use to illuminate targets and create smokescreens, U.S. officials argued that white phosphorous was a “conventional” and not a “chemical” weapon.<sup>122</sup>

At the same time, the U.S. military acknowledged that it used white phosphorous “as an incendiary weapon against enemy combatants” and exploited its chemical properties “to flush out” insurgents in Iraq.<sup>123</sup> In a report appearing in the official publication of the U.S. Army Field Artillery Corps, three military officers described using white phosphorous in Fallujah “as a potent psychological weapon against the insurgents in trench lines and spider holes . . . fir[ing] ‘shake and bake’ missions at the insurgents, [and] using [white phosphorous] to flush them out and [heavy explosives] to take them out.” In the same memorandum, the officials further described “sav[ing] our [white phosphorous] for *lethal missions*.”<sup>124</sup>

The use of white phosphorus in battle zones such as Fallujah and other areas with concentrations of civilians is extremely concerning in light of the severe injuries the chemical causes. More troubling still is the fact that munitions containing white phosphorous often have “broad area effect, which increases the risk of their being used indiscriminately.”<sup>125</sup> While U.S. officials attempted to qualify the ways in which the chemical was used as technically legally permissible and touted efforts to avoid civilian casualties, “reports from the battleground suggest troops firing these [white phosphorous] shells did not always know who they were hitting and . . . there remain widespread reports of civilians suffering extensive burn injuries.”<sup>126</sup>

White phosphorous can cause “thermal and chemical burns, respiratory damage, circulatory shock, asphyxiation, and carbon monoxide poisoning, often leading to slow and painful death.”<sup>127</sup> The burns caused by white phosphorous are especially severe and excruciating because when exposed to oxygen the chemical will burn until it is exhausted

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<sup>122</sup> *US Used White Phosphorous in Iraq*, BBC News, Nov. 16, 2005, available at [http://news.bbc.co.uk/2/hi/middle\\_east/4440664.stm](http://news.bbc.co.uk/2/hi/middle_east/4440664.stm).

<sup>123</sup> *U.S. Official Admits Phosphorus Used as Weapon in Iraq*, CBC News, Nov. 16, 2005, available at <http://www.cbc.ca/news/world/story/2005/11/16/phosphorus-fallujah051116.html>.

<sup>124</sup> Cobb et al., *The Fight for Fallujah*, *supra* note 121 at 26 (emphasis added).

<sup>125</sup> Human Rights Watch and Harvard Law School’s International Human Rights Clinic, *Memorandum to Convention on Conventional Weapons Delegates: The Human Suffering Caused by Incendiary Munitions*, Mar. 2011, at 2, available at <http://harvardhumanrights.files.wordpress.com/2011/04/sufferingweapons.pdf> [hereinafter *Memorandum to Convention*].

<sup>126</sup> Andrew Buncombe and Solomon Hughes, *The fog of war: white phosphorus, Fallujah and some burning questions*, *The Independent*, Nov. 15, 2005, available at <http://www.independent.co.uk/news/world/americas/the-fog-of-war-white-phosphorus-fallujah-and-some-burning-questions-515345.html>.

<sup>127</sup> Human Rights Watch and Harvard Law School’s International Human Rights Clinic, *Strengthening the Humanitarian Protections of Protocol III on Incendiary Weapons*, Aug. 2011, at 3, available at [http://www.hrw.org/sites/default/files/related\\_material/2011\\_arms\\_incendiariesstrengtheningthehumanitarianprotectionsofpiii\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/2011_arms_incendiariesstrengtheningthehumanitarianprotectionsofpiii_0.pdf) [hereinafter *HRW Report on Protocol III*]; see also Agency for Toxic Substances and Disease Registry, Center for Disease Control, *White Phosphorous: Health Effects*, Sep. 1997, available at <http://www.atsdr.cdc.gov/toxprofiles/tp103-c2.pdf>.

and is very difficult to remove.<sup>128</sup> Moreover, if white phosphorous enters the bloodstream through open wounds, it can cause multiple organ failure and, consequently, even burns that only cover 10 percent of a person's body can still prove deadly.<sup>129</sup>

In addition to the initial burning effects of the chemical agent, white phosphorous can cause long term health effects. First, burns from white phosphorous can result in long lasting physical injury due to intense scarring, as well as psychological trauma.<sup>130</sup> Second, effects of white phosphorus may be intergenerational. A 2012 study undertaken in Gaza found a strong correlation between birth defects in newborns and families in which one or both parents were exposed to white phosphorus.<sup>131</sup> Given that the areas exposed to white phosphorous in Iraq were also exposed to depleted uranium, as discussed further below, it is difficult to determine which contaminant is the source of escalating birth defects there. However, the evidence of intergenerational effects of white phosphorus at the very least demonstrates the need for further research.

Given the especially cruel effects of white phosphorus, its use in heavily populated areas like Fallujah likely fails the proportionality test under international law, which prohibits "any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>132</sup> Additionally, the manner of its uses may also violate the U.S.'s obligations under the United Nations Convention on Certain Conventional Weapons and the Chemical Weapons Convention.<sup>133</sup> Most importantly for purposes of the Commission and from a human rights perspective, deaths resulting from the use of white phosphorous and the long term health effects and consequences to people and communities in Iraq from the use of the chemical constitute a violation of the rights to life and preservation of health and well-being protected by the American Declaration.

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<sup>128</sup> *Memorandum to Convention*, *supra* note 125 at 9-10.

<sup>129</sup> *Id.* at 10.

<sup>130</sup> *Id.* at 4.

<sup>131</sup> Naim, et al., *Birth Defects in Gaza: Prevalence, Types, Familiarity and Correlation with Environmental Factors*, 9 INT. J. ENVIRON. RES. PUBLIC HEALTH 1732 (May 7, 2012), at 13, available at <http://www.mdpi.com/1660-4601/9/5/1732>

<sup>132</sup> This requirement is part of customary international law. International Commission of the Red Cross (ICRC) Customary International Humanitarian Law Database, "Rule 14: Proportionality in Attack," available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14).

<sup>133</sup> The United States ratified the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, on March 24, 1995, and the Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons on January 21, 2009. The United States ratified the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction on April 25, 1997.

## Cluster Bombs

Cluster bombs are weapons which eject hundreds of “submunitions” or smaller “bomblets” and pose a significant danger to civilian populations because they can cover a broad area and because not all of their subparts explode on impact, constituting a future safety risk to anyone who may later encounter them.<sup>134</sup> According to a joint report by UNICEF and the United Nations Development Programme on the issue, Iraq is “amongst the world’s most contaminated countries.”<sup>135</sup> Official U.S. documents from October 2003 indicate that the U.S. military used 10,782 cluster bombs which could hold between 1.7 and 2 million of submunitions.<sup>136</sup> While the exact number of casualties caused by cluster bombs is unknown due to lack of monitoring and insecurity in areas where they were used, a disability advocacy organization estimated when it issued its report in May 2007 that at least 1,704 casualties occurred since March 2003.<sup>137</sup> In Afghanistan, while the exact number of cluster bombs dropped is unknown, in 232 recorded air strikes the U.S. dropped approximately 1,228 cluster munitions, which included 248,056 submunitions.<sup>138</sup> The U.S. military deployed the munitions in Iraq and Afghanistan in a manner that displayed an utter failure to take all necessary precautions to protect civilians. According to Human Rights Watch, the repeated use of cluster bombs in residential neighborhoods in Iraq “represented one of the leading causes of civilian casualties in the war.”<sup>139</sup> In one particularly well-documented incident in the Iraqi town of Al-Hilla, U.S. cluster munitions killed or injured 163 civilians, not including post-strike casualties from unexploded munitions.<sup>140</sup> One doctor who directs a hospital in Al-Hilla reported that 90 percent of the injuries the hospital treated during the war were caused by cluster bomb submunitions.<sup>141</sup> Similarly, in Afghanistan, the U.S. military deployed cluster munitions in villages with large concentrations of civilians.<sup>142</sup> In some areas of Afghanistan, the U.S. dropped bomblets with bright yellow casings that were the same color as food packets the U.S. previously dropped.<sup>143</sup>

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<sup>134</sup> See e.g., Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* 6 (2003), available at <http://www.hrw.org/sites/default/files/reports/usa1203.pdf> [hereinafter *Off Target*].

<sup>135</sup> UNICEF/UNDP, *Overview of Landmines and Explosive Remnants of War in Iraq* 4 (2009), available at [http://reliefweb.int/sites/reliefweb.int/files/resources/8EB360688B867BBC492575E60022B140-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/8EB360688B867BBC492575E60022B140-Full_Report.pdf).

<sup>136</sup> *Off Target*, supra note 134 at 80.

<sup>137</sup> Handicap International, *Circle of Impact: The Fatal Footprint of Cluster Munitions on People and Communities* (2007) at 106 available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/02/circle-of-impact-may-07.pdf> [hereinafter *Circle of Impact*].

<sup>138</sup> *Id.* at 94.

<sup>139</sup> *Off Target*, supra note 134, at 85.

<sup>140</sup> *Circle of Impact*, supra note 137, at 106.

<sup>141</sup> *Off Target*, supra note 134, at 85.

<sup>142</sup> *Circle of Impact*, supra note 137, at 100.

<sup>143</sup> Y.K.J. Yeung Sik Yuen, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Human Rights and Weapons of Mass Destruction, or With Indiscriminate Effect, or of a Nature to Cause Superfluous Injury or Unnecessary Suffering: Working paper submitted by Y.K.J. Yeung Sik Yuen in accordance with Sub-Commission resolution 2001/36\** (Jun. 27, 2002), at 28,

Unexploded cluster submunitions pose significant risks to children, as they are less cognizant of the risks posed by the weapons and are likely to be attracted by their unique appearance. In fact, it is believed that 60 percent of casualties caused by unexploded submunitions in Iraq were children under the age of 15.<sup>144</sup> The U.S.'s efforts to provide redress for these tragic deaths and injuries, in particular to children, have been abysmal. For example, one military official working out of Baghdad reported,

[There were] substantially more individuals who came in my office that filed claims that were valid, that I knew were valid, but I couldn't pay. Because of the rules associated with the funding, I didn't always have, week to week, enough money to pay all of the valid claims...I remember one claim where the gentleman...his children were injured by the cluster munition, and they had been playing out in their field, the 13th of August in 03. They saw the object...were attracted to it, went near it, picked it up or touched it, and it detonated. And one of the boys had his arm blown off; the girl had extensive burns on one side of her body; and the other boy had his eye shot out. And so I was able to pay \$3,000 for the injuries to his children.<sup>145</sup>

According to the U.S. Department of State, the U.S. has invested more than \$209 million in Iraq towards clearing landmines, unexploded ordnance and leftover conventional weapons.<sup>146</sup> As reported by the United Nations and acknowledged by the State Department, however, “[a]n estimated 1,863 square kilometers (719 square miles) of land in Iraq are reported to contain as many as 20 million landmines and millions more pieces of unexploded ordnance. As many as 1,670 Iraqi cities, towns and villages remain at risk from explosive hazards.”<sup>147</sup>

The United States has failed to ratify the Convention on Cluster Munitions, relying instead on the much weaker Convention on Certain Conventional Weapons.<sup>148</sup> In a recent report on the status of its compliance with the Conventional Weapons Convention, which covered August 2009 through September 2010, the U.S. reported that “[d]uring the reporting period of time, the United States was not in control of any territory that contains

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available at

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/22481f4157de6274c1256c00004c29bb/\\$FILE/G0214167.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/22481f4157de6274c1256c00004c29bb/$FILE/G0214167.pdf) [hereinafter Commission on Human Rights Working Paper].

<sup>144</sup> *Circle of Impact*, *supra* note 137, at 107.

<sup>145</sup> *Id.* at 10.

<sup>146</sup> Press Release, U.S. Department of State, U.S. Conventional Weapons Destruction Program in Iraq, PRN: 2012/091 (Jan. 20, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/01/182316.htm>.

<sup>147</sup> *Id.*

<sup>148</sup> *United States Aims Low on Cluster Munitions*, Human Rights Watch, Nov. 15, 2011, available at <http://www.hrw.org/news/2011/11/15/united-states-aims-low-cluster-munitions>.

ERW (explosive remnants of war).”<sup>149</sup> It is critical that the U.S.’s obligation for removing these remnants be clearly articulated and acknowledged by the Inter-American Commission.

### *Napalm-type Incendiaries*

Due to the indiscriminate manner in which napalm is frequently used and the suffering it causes, the international community has largely condemned the use of the incendiary napalm as a weapon of war.<sup>150</sup> In 1996, the United Nations Sub-Commission on Human Rights grouped napalm as “a weapon of mass destruction or with indiscriminate effects” whose use is “incompatible with human rights and humanitarian law.”<sup>151</sup>

Despite the international condemnation of the use of napalm, the U.S. has used a functional equivalent – Mark-77 – since 2003.<sup>152</sup> Initially, the U.S. government denied using napalm, stating that new reports to the contrary were “patently false.”<sup>153</sup> The U.S. even misinformed its closest allies. In fact, the British armed forces minister Adam Ingram stated, “No napalm has been used by coalition forces in Iraq either during the war-fighting phase or since.”<sup>154</sup> Mr. Ingram clarified in a later statement that this included the napalm like Mark-77 bombs.<sup>155</sup> However, in June 2005, Mr. Ingram drafted a retraction letter, reversing his earlier position and confirming that coalition forces had in fact used Mark-77 bombs in Iraq.<sup>156</sup> In this letter, the minister claimed he had been “misinformed” by the U.S. and that the 1st Marine Expeditionary Force used Mark-77 bombs during initial invasion of Iraq between March 31 and April 2, 2003.<sup>157</sup>

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<sup>149</sup> U.S. Report on Steps Taken to Implement Article 3 of the Protocol: Clearance Removal or Destruction of Explosive Remnants of War (Sept. 2010), available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/35955136CB206E31C12578CE0063741C/\\$file/USA+2010.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/35955136CB206E31C12578CE0063741C/$file/USA+2010.pdf).

<sup>150</sup> See, e.g., *Practice Relating to Rule 85. The Use of Incendiary Weapons against Combatants*, International Committee for the Red Cross, Customary International Humanitarian Law Database (as of Mar. 2013), available at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule85](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule85).

<sup>151</sup> United Nations Sub-Commission on Human Rights, Res. 1996/16 (Aug. 29, 1996), Sect. 1 and preamble.

<sup>152</sup> See James W. Crawley, *Officials Confirm Dropping Firebombs on Iraqi Troops: Results are ‘Remarkably Similar’ to Using Napalm*, San Diego Union-Tribune, Aug. 5, 2003, available at

<http://www.commondreams.org/headlines03/0805-01.htm>; See also, Lindsay Murdoch, *Dead Bodies Are Everywhere*, Sydney Morning Herald, Mar. 22, 2003, available at <http://www.smh.com.au/articles/2003/03/21/1047749944836.html>.

<sup>153</sup> *Id.*

<sup>154</sup> George Monbiot, *The US used chemical weapons in Iraq – and then lied about it*, The Guardian, Nov. 14, 2005, available at <http://www.guardian.co.uk/politics/2005/nov/15/usa.iraq>.

<sup>155</sup> *Id.*

<sup>156</sup> Letter from the U.K. Minister of State for the Armed Forces to MP Linda Riordan, June 13, 2005, available at [http://www.rainews24.rai.it/ran24/inchiesta/foto/documento\\_ministero.jpg](http://www.rainews24.rai.it/ran24/inchiesta/foto/documento_ministero.jpg) (responding to controversy over whether the U.S. and UK forces used napalm); see also Colin Brown, *US lied to Britain over Use of Napalm in Iraq War*, The Independent, Jun. 17, 2005, available at <http://www.commondreams.org/headlines05/0617-01.htm>.

<sup>157</sup> *Id.*

Although the U.S. retired the chemical incendiary mixture known as napalm (designated as Mark 47 by the U.S. Department of Defense) in 2001, the chemical composition of Mark 77 bombs is similar and produces similar harms.<sup>158</sup> According to a U.S. procurement request for Mark 77 bombs, these “[f]irebombs rupture upon impact and spread burning fuel gel on surrounding objects.”<sup>159</sup> Dr. Robert M. Gould, Chair of the Security Committee of Physicians for Social Responsibility, explained that,

The material in the MK77 is not classic napalm, it is a modern version of the substance with an identical purpose. To claim that material from a bomb set to explode in a fireball containing a mix of fuel and polystyrene is not intended to stick to the skin defies all reason.<sup>160</sup>

Napalm class weapons create horrific suffering for people – whether soldier or civilian – who come into contact with it. It can cause death through severe burns or asphyxiation.<sup>161</sup> Upon ignition, napalm “rapidly deoxygenates” the available air, making it extremely difficult to impossible for people in the area to breathe.<sup>162</sup> While the U.S. condemned Saddam Hussein for using this type of weapon, the U.S. would subject Iraqis to the exact same type of brutality during its initiation of “Operation Iraqi Freedom.”

#### *Depleted Uranium*

Depleted uranium (DU), a man-made, radioactive metal that is byproduct of the enrichment process of uranium, is approximately 1.7 times heavier than lead, making it highly effective for armor-piercing munitions and protective armor plating.<sup>163</sup> The U.S. military used the metal extensively in the first Gulf War and then again in the 2003 invasion and occupation.<sup>164</sup> DU can affect human health through its radioactive as well

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<sup>158</sup> See Crawley, *supra* note 152.

<sup>159</sup> Procurement notice for Mark firebombs, 13-- MK77 Mod 5 Firebomb, NSN: 1325-01-286-3586; P/N: 923AS652; approximately 993 Each, Sources Sought Notice, Federal Business Opportunities Database (Posted Jan. 13, 2004), available at [http://www.iraqanalysis.org/local/644\\_MK77procurementnotice.pdf](http://www.iraqanalysis.org/local/644_MK77procurementnotice.pdf).

<sup>160</sup> Press Statement, Physicians for Social Responsibility, Jun. 23, 2005, available at <http://www.iraqanalysis.org/publications/355>.

<sup>161</sup> GlobalSecurity.org, *Napalm*, available at <http://www.globalsecurity.org/military/systems/munitions/napalm.htm>.

<sup>162</sup> *Id.*

<sup>163</sup> Ian Fairlie, United Nations Institute for Disarmament Research, *The Health Hazards of Depleted Uranium* (2008), at 1, available at <http://www.einiras.org/pub/details.cfm?lng=en&id=92541>.

<sup>164</sup> *US to Use Depleted Uranium*, BBC News, Mar. 18, 2003, available at [http://news.bbc.co.uk/2/hi/in\\_depth/2860759.stm](http://news.bbc.co.uk/2/hi/in_depth/2860759.stm). The DOD has not revealed the *amount* of depleted uranium used in the most recent wars, however it has acknowledged the manner in which it was used: “DU is currently used in kinetic cartridges for the Army’s 25mm BUSHMASTER cannon (M2/3 Bradley Fighting Vehicle), the 105mm cannon (M1 and M60 series tanks) and the 120mm cannon (M1A1 and M1A2 Abrams Tank). The Heavy Armor variant of the M1A1, the M1A1 (HA), also employs layered DU for increased armor protection. Army Special Forces also use small caliber DU ammunition on a limited basis. The Marines use DU tank rounds in their own M1-series tanks as well as a 25mm DU round in the GAU-12 Gatling gun on Marine AV-8 Harriers. The Army uses small amounts of DU as an epoxy catalyst for two anti-personnel mines: the M86 Pursuit Deterrent Munition and the

as chemical properties. Experts note that DU can result in harm to the health of humans as in four ways, i.e. as (1) a toxic heavy metal; (2) a genotoxic (carcinogenic and mutagenic) agent from its chemical properties; (3) a genotoxic agent from its radiation; and (4) an endocrine disruptor.<sup>165</sup> When depleted uranium hits a target, it vaporizes into a fine dust, which if inhaled, will settle as fine particles into a person's lungs, bone, kidney, skeletal tissue, reproductive system, brain, and other organs.<sup>166</sup>

Since the wars in Iraq, the incidence of infant mortality, birth defects, and cancer in Iraq has sharply increased – a fact which many attribute to the U.S. military's use of DU.<sup>167</sup> According to reports, official statistics from the Iraqi government indicate that the cancer rate skyrocketed after the first Gulf War begun in 1991.<sup>168</sup> Before that war, the rate was 40 out of 100,000 but rose abruptly by 1995 to 800 out of 100,000.<sup>169</sup> The cancer rate then doubled between 1995 and 2005, to 1,600 out of 100,000 people with cancer.<sup>170</sup> It is believed the actual cancer rates may be even higher.<sup>171</sup>

Research has indicated that those areas that experienced heavy fighting during the U.S. invasion, like Fallujah, have seen a sharp and steep rise in cancer rates. A survey of 711 households covering the period from 2005-2009 in Fallujah showed that cancer rates, in particular for leukemia, brain tumors, and female breast cancer, were significantly higher than expected when compared to nearby countries.<sup>172</sup> One researcher has described Fallujah as having “the highest rate of genetic damage in any population ever studied.”<sup>173</sup> Basrah, another location of battles during the war and which has been heavily contaminated with waste metal, has also seen elevated cancer rates. Childhood leukemia

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Area Denial Artillery Munition. The Air Force uses a 30mm DU round in the GAU-8 Gatling gun on the A-10. The 20mm DU round developed by the Navy for use in its shipboard PHALANX Close In Weapons System (CIWS).” U.S. Department of Defense, *Development of DU Munitions*, available at [http://www.gulflink.osd.mil/du/du\\_tabe.htm](http://www.gulflink.osd.mil/du/du_tabe.htm).

<sup>165</sup> See Fairlie, *supra* note 163 at 4.

<sup>166</sup> *Id.*; See also NGO Coordination Committee for Iraq, *Environmental Contamination from War Remnants in Iraq 5* (Jun. 2011) available at <http://www.iauiraq.org/documents/1375/images...unitionsHumanHealthinIraq.pdf> [hereinafter, NCCI Report].

<sup>167</sup> *Falluja Doctors Report Rise in Birth Defects*, BBC News, Mar. 4, 2010, available at <http://news.bbc.co.uk/2/hi/8548707.stm>; *Huge rise in birth defects in Falluja; Iraqi former battle zone sees abnormal clusters of infant tumours and deformities*, The Guardian, Nov. 13, 2009, available at <http://www.guardian.co.uk/world/2009/nov/13/falluja-cancer-children-birth-defects/>; Dahr Jamail, *Iraq: War's Legacy of Cancer*, Al Jazeera, Mar. 15, 2013, available at <http://www.aljazeera.com/indepth/features/2013/03/2013315171951838638.htmlz>.

<sup>168</sup> Jamail, *supra*.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Chris Busby, Malak Hamdan, and Entesar Ariabi, *Cancer, Infant Mortality and Birth Sex-Ratio in Fallujah, Iraq 2005–2009*, INT. J. ENVIRON. RES. PUBLIC HEALTH 2010, 7, 2828 at 2835, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2922729/pdf/ijerph-07-02828.pdf>.

<sup>173</sup> Ross Caputi, *The victims of Fallujah's health crisis are stifled by western silence*, The Guardian, Oct. 25, 2012, available at <http://www.guardian.co.uk/commentisfree/2012/oct/25/fallujah-iraq-health-crisis-silence>.

rates in Basrah more than doubled between 1993 and 2007.<sup>174</sup> The residents of Abu Al-Khasib village, located 20 kilometers south of Basrah, have lived surrounded by “piles of metal that accumulated from the remnants of the war.”<sup>175</sup> Local activists note that “wind is blowing rusted debris from these piles, which is reaching people, their houses, their food, and their lungs.”<sup>176</sup> Local authorities estimate that in the Basrah area alone 46,000 tons of such debris remains.<sup>177</sup>

Birth defects have also skyrocketed. Recent scientific studies strongly suggest that DU is a teratogen that can interfere with the pre-natal development of a fetus, and many have attributed the U.S. military’s use of DU to the elevated birth defect rates in Iraq.<sup>178</sup> One doctor in Fallujah reported that as of December 29, 2011 she had personally logged 699 cases of birth defects since October 2009.<sup>179</sup> This amounts to a rate of 14.7 per cent of all babies born in Fallujah, which is 14 times greater than the birth defect rate in Hiroshima and Nagasaki after the U.S. nuclear bombing.<sup>180</sup> The same doctor revealed in a recent interview that even a decade after the war, the remarkably high birth defect rate of 14.7% had not dropped, and may be even higher due to underreporting.<sup>181</sup> Local reporting collected by Federation of Workers’ Councils and Unions corroborate this account, with one doctor at a local maternity hospital noting that he sees at least twelve cases of severe defects a month.<sup>182</sup> Many of the children die soon after birth but others survive with deformities so rare they have not been given a medical name.<sup>183</sup> As an initial step to determining causality, researchers have analyzed the hair of parents of children with

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<sup>174</sup> Amy Hagopian, *Trends in Childhood Leukemia in Basrah, Iraq, 1993–2007*, 100 AMERICAN J. OF PUBLIC HEALTH 1081 (June 2009), available at <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2009.164236>.

<sup>175</sup> Federation of Workers’ Councils and Unions in Iraq Report (Feb. 19, 2013) (on file with CCR).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Rita Hindin, *Teratogenicity of depleted uranium aerosols: A review from an epidemiological perspective*, 4 ENVIRONMENTAL HEALTH: A GLOBAL ACCESS SCIENCE SOURCE 17 (Aug. 26, 2005). See also U.S. Department of Veterans Affairs, *Depleted Uranium*, Sep. 5, 2012, available at [http://www.publichealth.va.gov/exposures/depleted\\_uranium/index.asp](http://www.publichealth.va.gov/exposures/depleted_uranium/index.asp); See also, Alaani et al., *Uranium and other contaminants in hair from the parents of children with congenital anomalies in Fallujah, Iraq*, 5 CONFLICT AND HEALTH 15 (2011), available at <http://www.biomedcentral.com/content/pdf/1752-1505-5-15.pdf> (Finding increased levels of Uranium in parents of children who suffered birth defects).

<sup>179</sup> Dahr Jamail, *Fallujah babies: Under a new kind of siege*, Al Jazeera, Jan. 6, 2012, available at <http://www.aljazeera.com/indepth/features/2012/01/2012126394859797.html>.

<sup>180</sup> *Id.*

<sup>181</sup> Dahr Jamail, *Iraq: War’s Legacy of Cancer*, Al Jazeera, Mar. 15, 2013, available at <http://www.aljazeera.com/indepth/features/2013/03/2013315171951838638.htmlz>.

<sup>182</sup> Federation of Workers’ Councils and Unions in Iraq Report, *supra* note 175.

<sup>183</sup> Dahr Jamail, *Fallujah babies: Under a new kind of siege*, Al Jazeera, Jan. 6, 2012, available at <http://www.aljazeera.com/indepth/features/2012/01/2012126394859797.html> (“There are not even medical terms to describe some of these conditions because we’ve never seen them until now”).

congenital anomalies in Fallujah and found an unusually high level of contamination by metals, including uranium and lead.<sup>184</sup>

One area that has not been subject of formal inquires into the effects of DU and other sources of contamination is the Iraqi district of Haweeja, located just miles from Joint Base Balad and the U.S. Forward Operating Base McHenry. This district has also seen an alarmingly high rise in the number of severe birth defects.<sup>185</sup> It is believed that DU munitions may have been stored and/or tested in the area which was also the largest burn pit used by the military in Iraq, the possible effects of which are discussed further below. Women's groups have undertaken surveys which indicate that one quarter of newborns are suffering from disabilities.<sup>186</sup> The Haweeja district has a population of roughly 109,000 people, yet a local clinic reports that there are 400-600 incidences of severe birth defects.<sup>187</sup> Advocates report that the villages suffering from the most defects and cancer are the ones immediately down-wind of a U.S. base training field.<sup>188</sup> Independent investigation, study and research are needed to determine the cause of the high rate of birth defects.

In 2010, Iraq's Minister of Human Rights declared he would sue the U.S. and the U.K. for their use of depleted uranium in Iraq and resulting effects on people in Iraq.<sup>189</sup> On August 17, 2012, the Iraqi government announced that it would form a high national committee to lead a large campaign to fight the spread of cancer in the country, but according to local reporting, efforts by the Iraqi government have not progressed.<sup>190</sup>

Serious health effects related to depleted uranium had been indicated in the years prior to the 2003 invasion. British veterans of the 1991 Gulf War were found to have between double to 14 times the average level of chromosome abnormalities in their genes.<sup>191</sup> A 2001 study by the U.S. government of 21,000 veterans who had served in the first Gulf War found that their children were two to three times more likely to have birth defects.<sup>192</sup>

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<sup>184</sup> M. Al-Sabbak, *Metal Contamination and the Epidemic of Congenital Birth Defects in Iraqi Cities*, 89 BULL. ENVIRON. CONTAM. TOXICOLOGY 937 (Sep. 2012) available at [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464374/pdf/128\\_2012\\_Article\\_817.pdf](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3464374/pdf/128_2012_Article_817.pdf).

<sup>185</sup> Organization of Women's Freedom in Iraq Report on Hawijah (on file with CCR); Interview with Yanar Mohammed.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Iraq to Sue US, Britain over depleted uranium bombs*, Press TV, Feb. 1, 2010, available at <http://edition.presstv.ir/detail/117557.html>.

<sup>190</sup> Federation of Workers' Councils and Unions in Iraq Report, *supra* note 175.

<sup>191</sup> Nic Fleming and Mark Townsens, *Gulf veteran babies 'risk deformities'*, The Guardian, Aug. 10, 2001, available at <http://www.guardian.co.uk/politics/2002/aug/11/uk.politicalnews>.

<sup>192</sup> H. Kang, C Magee, C. Mahan, K. Lee, F. Murphy, L. Jackson, G. Matanoski, *Pregnancy Outcomes Among U.S. Gulf War Veterans: A Population-based Survey of 30,000 Veterans*, ANN. EPIDEMIOLOG 2001, 11:504-511; See also, *Study: Gulf War vets' children have more birth defects*, Associated Press, Oct. 6, 2001, available at [http://onlineathens.com/stories/100601/hea\\_1006010063.shtml](http://onlineathens.com/stories/100601/hea_1006010063.shtml).

The same study also noted a higher rate of miscarriages in the studied population.<sup>193</sup> Despite these disturbing statistics, in 2003, after concerns were raised about the U.S.'s continued use of DU weapons, a Pentagon spokesperson dismissed the concerns about serious health effects and confirmed that there were no "plans for a DU clean-up in Iraq."<sup>194</sup> Since then U.S. Department of Defense and Department of Veterans Affairs have done little to acknowledge the likely linkages and to adequately diagnose, treat or prevent the widespread health effects that appear to be linked to depleted uranium.

In fact, concerns have been raised over the limited testing that the Department of Defense has done. In particular, a group of veterans who faced unusual symptoms underwent testing for DU exposure. Testing by the DOD found a negative result, whereas German tests indicated high levels of depleted uranium remaining in their bodies.<sup>195</sup> One of the tested soldiers stated, "[t]heir test just isn't as sophisticated....And when we first asked to be tested, they told us there wasn't one. They've lied to us all along."<sup>196</sup>

Given the dramatic rise of cancer rates and birth defects in communities that were exposed to weapons made with depleted uranium, independent epidemiological research is critically needed to document these effects and research whether the cause was depleted uranium or other contaminants in order to help determine responsibility and identify a proper and appropriate response to the crisis.

### *Burn Pits*

According to the Department of Defense, the U.S. military primarily disposed of its solid waste, including electronics, jet fuel, batteries, munitions and weapons, biomedical waste from combat and medical care, paint, Styrofoam, and rubber tires, in open burn pits in Iraq and Afghanistan, especially during the initial phases of the wars there.<sup>197</sup> While the Department of Defense never released complete information on the locations, frequency, and average burn times of the pits, it did confirm that, as of November 2009, burn pits were used in 14 out of 41 small-sized military sites, 30 of the 49 medium sites, and 19 of the 25 large sites in Iraq.<sup>198</sup> In 2009, U.S. law restricted the use of burn pits and

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<sup>193</sup> *Id.*

<sup>194</sup> Alex Kirby, *US rejects Iraq DU clean-up*, BBC News, Apr. 14, 2003, available at <http://news.bbc.co.uk/2/hi/sci/tech/2946715.stm>.

<sup>195</sup> *U.S. Soldiers Are Sick of It*, Associated Press, Aug. 12, 2006, available at <http://www.wired.com/techbiz/media/news/2006/08/71585?currentPage=all>.

<sup>196</sup> *Id.*

<sup>197</sup> Institute of Medicine, *Long-term health consequences of exposure to burn pits in Iraq and Afghanistan* (2011), at 15, 17, available at [http://www.nap.edu/openbook.php?record\\_id=13209&page=15](http://www.nap.edu/openbook.php?record_id=13209&page=15) [hereinafter IOM Study]. See also U.S. Department of Veterans Affairs Information Page on Burn Pits, available at <http://www.publichealth.va.gov/exposures/burnpits/index.asp>.

<sup>198</sup> *Id.* at 16.

consequently in Iraq most active burn pits had closed by the end of 2010.<sup>199</sup> In Afghanistan, however, burn pits were active as late as 2011 in 126 out of the 137 small-size sites, 64 of the 87 medium sites, and 7 of the 18 large military sites.<sup>200</sup> As recently as December 2012, there remained at least sixty three recorded burn pits.<sup>201</sup> These numbers can be misleading though as camps with less than 100 people are not required to report their use of burn pits.<sup>202</sup>

Complaints from veterans prompted a series of inquiries by the Defense Department and Congress into the use and effects of burn pits.<sup>203</sup> The Department of Defense commissioned a study by the U.S. Institute of Medicine, which was unable to determine from the available research whether burn pits would have long lasting effects on exposed servicemembers.<sup>204</sup> At the same time, the commission did find that five or more of the chemicals detected at Joint Base Balad, one of the largest burn pits that burned solid waste 24 hours a day, 7 days a week, could result in “cancers, liver toxicity and reduced liver function, kidney toxicity and reduced kidney function, respiratory toxicity and morbidity, neurologic effects, blood effects...cardiovascular toxicity and morbidity, and reproductive toxicity.”<sup>205</sup>

The U.S. Department of Veteran Affairs, however, currently claims that “research does not show evidence of long-term health problems” associated with burn pits.<sup>206</sup> The Department of Defense also reports that the incidence of negative health effects for those who were deployed to military bases with burn pits was the same as or better than those who were never deployed.<sup>207</sup>

In contradiction to these official statements minimizing the health hazards of burn pits, leaked reports authored by military officials within the Department of Defense suggest that there was considerable concern internally over the risk that burn pits posed to military personnel. For instance, in December 2006, Lt. Col. Darrin L. Curtis, Ph.D., P.E., a Bioenvironmental engineer with the U.S. Armed Forces, submitted a memorandum concluding that the burn pit at Balad presented “an acute health hazard for individuals” and noting that “it [was] amazing that the burn pit ha[d] been able to operate

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<sup>199</sup> *Id.* at 19; Kevin Freking, *Health Answers Sought About Burned-off War Garbage*, Associated Press, Jan. 26, 2013, available at <http://bigstory.ap.org/article/lawmakers-require-va-track-effects-burn-pits>.

<sup>200</sup> IOM Study, *supra* note 197, at 16.

<sup>201</sup> Freking, *supra* note 199.

<sup>202</sup> *Id.*

<sup>203</sup> IOM Study, *supra* note 197, at 13, 18-20.

<sup>204</sup> *Id.* at 114 (finding the epidemiologic studies to be inconsistent in quality and incomplete).

<sup>205</sup> *Id.*

<sup>206</sup> See U.S. Department of Veteran Affairs website at <http://www.publichealth.va.gov/exposures/burnpits/>.

<sup>207</sup> U.S. Department of Defense Fact Sheet, *Epidemiological Studies of Health Outcomes Among Troops Deployed to Burn Pit Sites Report 2* (Oct. 2010), available at [http://fhq.osd.mil/pdfs/AFHSC\\_Report\\_FACT\\_SHEET\\_FINAL\\_2010\\_10\\_13.pdf](http://fhq.osd.mil/pdfs/AFHSC_Report_FACT_SHEET_FINAL_2010_10_13.pdf).

without restrictions over the past few years without significant engineering controls...”<sup>208</sup> Similarly, a 2011 internal Department of Defense memorandum noted that analysis of air samples from Bagram Air Field in Afghanistan taken over eight years indicated that “there may be an increased risk of long term adverse health conditions as a result of the poor air quality [there]” including “reduced lung function or exacerbated chronic bronchitis, chronic obstructive pulmonary disease (COPD), asthma, atherosclerosis, or other cardiopulmonary diseases” and that the “primary contributor” to the poor air quality was the base’s burn pit.<sup>209</sup>

Independent clinical studies also raise concerns about the long term health effects of burn pits in Iraq and Afghanistan. For instance, a study published in the *New England Journal of Medicine* in 2011 found a high prevalence of a rare lung disease called constrictive bronchiolitis in formerly healthy soldiers and noted their common exposure to open-air burn pits as one possible cause.<sup>210</sup> Another study found that servicemembers who served in Iraq and Afghanistan are at greater risk of having new-onset respiratory symptoms compared with troops who were stationed elsewhere, and also listed burn pits as one of the potential causes.<sup>211</sup> A 2012 study on animal subjects found that the dust from burn pits significantly impaired cardiovascular systems and immune cells in destroying T-cells.<sup>212</sup>

Reports from individual servicemembers also suggest that burn pits have had negative effects on their health. Russell Keith, a paramedic working at Joint Base Balad, described how he “could tell when the wind had blown dark green plumes from burn pits toward base living areas” and how subsequently “long lines formed for sick call, with troops coughing up blood, vomiting and complaining of nausea or burning lungs.”<sup>213</sup> A number of veterans have begun collecting stories from soldiers suffering after exposure

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<sup>208</sup> U.S. Department of Air Force Memorandum by Lt. Col. Darrin L. Curtis, Ph.D., P.E., a former Bioenvironmental engineer with the U.S. Armed Forces, Dec. 20, 2006, *available at* <http://defensebaseactblog.files.wordpress.com/2009/03/air-force-memo.pdf>; *See also* Testimony of Lt. Col. Darrin L. Curtis, Ph.D., P.E. before the Senate Democratic Policy Committee, Nov. 6, 2009, *available at* <http://dpc.senate.gov/hearings/hearing50/curtis.pdf>.

<sup>209</sup> Memorandum for Record, Department of the Army, Air Quality Summary on Bagram Air Field (BAF) (Apr. 15, 2011) *available at* [http://www.wired.com/images\\_blogs/dangerroom/2012/05/KSCN0007a.jpg](http://www.wired.com/images_blogs/dangerroom/2012/05/KSCN0007a.jpg).

<sup>210</sup> M. King, R. Eisenberg, J. Newman, J. Tolle, F. Harrell Jr., H. Nian, M. Ninan, E. Lambright, J. Sheller, J. Johnson, R. Miller, *Constrictive Bronchiolitis in Soldiers Returning from Iraq and Afghanistan*, 365 *NEW ENGLAND JOURNAL OF MEDICINE* 222 (Jul. 21, 2011).

<sup>211</sup> A. Szema, W. Salihi, K. Savary, J. Chen, *Respiratory Symptoms Necessitating Spirometry Among Soldiers with Iraq/Afghanistan War Lung Injury*, 53 *JOEM* 961 (Sep. 2011).

<sup>212</sup> A. Szema, N. Qamar, R. Razi, L. Levine, T. Reub, T. Zimmerman, *Meeting Abstract: A Novel Model Of Iraq War Lung Injury: Peribronchiolar Airway Inflammation In Mice Treated With Burn Pit Dust From Iraq*, 185 *AMERICAN JOURNAL OF RESPIRATORY AND CRITICAL CARE MEDICINE* (May 2012). *See also* Katie Drummond, *Combat ‘Burn Pits’ Ruin Immune Systems, Study Shows*, *Wired Magazine*, May 23, 2012, *available at* <http://www.wired.com/dangerroom/2012/05/burn-pits/>.

<sup>213</sup> David Zucchini, *Veterans Speak Out Against Burn Pits*, *Los Angeles Times*, Feb. 18, 2010, *available at* <http://articles.latimes.com/2010/feb/18/nation/la-na-burn-pits18-2010feb18/2>.

from burn pits.<sup>214</sup> One 44-year-old soldier reported that after being ill from burn pit exposure in Iraq he had to undergo major surgery and hospitalization in the U.S. and “[e]ver since I have gradually gotten sicker and sicker to the point that I can no longer work, drive, ride my Harley [motorcycle], or even play basketball or softball or golf with my kids.”<sup>215</sup> Another servicemember, Air Force Major Kevin Wilkins, suffered headaches approximately six months after his first tour, which he attributed to burn pit exposure. Within one year after his first deployment, Wilkins died from a brain mass which a physician suspected was the result of chemical exposure.<sup>216</sup>

Similarly disturbing is the difficulty many of these injured veterans face in seeking benefits and accountability from the Department of Veterans’ Affairs.<sup>217</sup> In 2009, a number of veterans sued the contractors who oversaw some of the burn pits,<sup>218</sup> but the case was dismissed in February 2013 in part because the federal court determined that it implicated a political question best decided by other branches of government.<sup>219</sup> For example, one service member, who worked at Balad and now has seven tumors and constrictive bronchitis, was asked to pay hundreds of thousands of dollars for medical care that the U.S. government declined to cover.<sup>220</sup> When Staff Sergeant Ochs sought assistance from a medical facility at a U.S. base, blood tests indicated significant elevations in his white and red blood cell counts, yet “doctors sent him home with Ibuprofen.”<sup>221</sup> Several months later he was diagnosed at a civilian medical facility as having Leukemia; he died the next year. Ochs’ family is still fighting with the Department of Defense to release his medical records.<sup>222</sup> Another service member, who was interviewed by IVAW, described how his wife (also in the military) can no longer

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<sup>214</sup> See e.g., Burn Pits Action Center, *Personal Stories*, available at <https://sites.google.com/site/burnpits/stories>; and Burnpits 360, *Personal Stories*, available at <http://www.burnpits360.org/blog/2011/01/06/Burn-Pit-Stories.aspx>. For a detailed account of one veteran’s struggle with cancer believed to be related to burn pit exposure, see the regular journal of deceased conscientious objector and IVAW member Joshua Casteel. Joshua Casteel, personal website including “Caringbridge Journal,” available at <http://joshuacasteel.com/>.

<sup>215</sup> Tim Wymore, *Personal Story of Tim Wymore*, BurnPits360.org, Jan. 6, 2011, available at <http://www.burnpits360.org/blog/2011/01/06/Burn-Pit-Stories.aspx>.

<sup>216</sup> Jill Wilkins, *Personal Story of Kevin Wilkins*, BurnPits360.org, Jan. 12, 2011, available at <https://sites.google.com/site/burnpits/stories/jillwilkinsusafmajorkevinewilkins-deceased>. These stories are just some of the countless experiences of veterans who died or face debilitating injuries resulting from the pits.

<sup>217</sup> The Department of Veterans Affairs may provide benefits for health problems related to burn pits, however there is no presumption that such illnesses are service related, and difficulty in securing benefits without such a presumption has been widely reported. See, James Risen, *Veterans Sound Alarm Over Burn-Pit Exposure*, New York Times, Aug. 6, 2010, available at [http://www.nytimes.com/2010/08/07/us/07burn.html?\\_r=0](http://www.nytimes.com/2010/08/07/us/07burn.html?_r=0); *U.S. Soldiers Are Sick of It*, Associated Press, Aug. 12, 2006, available at <http://www.wired.com/techbiz/media/news/2006/08/71585?currentPage=all>.

<sup>218</sup> Adam Levine, *Halliburton, KBR Sued for Alleged Ill Effects of ‘Burn Pits,’* CNN, Apr. 28, 2009 [http://articles.cnn.com/2009-04-28/us/burn.pits\\_1\\_burn-toxic-fumes-plaintiffs?\\_s=PM:US](http://articles.cnn.com/2009-04-28/us/burn.pits_1_burn-toxic-fumes-plaintiffs?_s=PM:US).

<sup>219</sup> *In re: KBR Burn Pit Litig.*, *supra* note 39.

<sup>220</sup> *Personal Story of MSGT Jesse J Baca*, BurnPits360.org, Jan. 8, 2011, available at <http://www.burnpits360.org/blog/2011/01/06/Burn-Pit-Stories.aspx>.

<sup>221</sup> R.B. Stuart, *Leukemia: A Soldiers Souvenir From the Burn Pits of Iraq*, The Huffington Post, Feb. 3, 2009, available at [http://www.huffingtonpost.com/r-b-stuart/leukemia-a-soldiers-souve\\_b\\_162841.html](http://www.huffingtonpost.com/r-b-stuart/leukemia-a-soldiers-souve_b_162841.html).

<sup>222</sup> *Id.*

walk as a result of avascular necrosis, which he believes was caused by her exposure to the chemicals admitted from burn pits in Iraq. When her supervising officers were informed of a change in duties so that she may seek treatment, “they treated her like she was the scum of the earth, especially when she had the nerve to speak up for soldiers’ rights.”<sup>223</sup>

In January 2013, President Obama signed legislation requiring the Veterans Affairs Department to establish a registry to track veterans who were exposed to burn pits.<sup>224</sup> In February 2013, in response to the aforementioned 2011 Institute of Medicine Study, the Veterans Affairs Department announced that it planned to conduct a long-term study of the possible health effects of burn pits on servicemembers using findings gained from the registry.<sup>225</sup> Unfortunately, this study process will take years to complete. The relevant departments should be encouraged to take all appropriate action to expedite the study where possible, and to take measures to address the pressing concerns of veterans in the interim. Moreover, there should be outreach to veterans about the burn pit registry, many of whom may not be aware of its existence.

Further, oversight of this research is necessary to ensure unbiased results. A former VA researcher revealed that the Department of Veterans Affairs purposefully manipulated or hid research finding health risks for servicemembers who served in Iraq or Afghanistan. In prepared testimony given under oath to the U.S. House Committee on Veterans Affairs in March 2013, epidemiologist Steven Coughlin revealed that, “If the studies produce results that do not support the office of public health’s unwritten policy, they do not release them,” and other data is “manipulated to make them unintelligible.”<sup>226</sup>

Unfortunately, what studies and accounts that do exist with regard to burn pits often do not specifically address the harm to civilians located near bases. Although the Institute of Medicine report on the potential effects of burn pits looked at cancer risk for exposures of servicemembers up to 15 months, the research committee “sought, but did not find, epidemiologic information on health effects seen in Iraqi civilians living near bases with burn pits or other sources of combustion products.”<sup>227</sup> Little is known about those soldiers or civilians who spent years in the vicinity of these pits, including children whose most critical development took place during that time. The U.S. government

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<sup>223</sup> Interview with Dan Michaels\* at Ft. Hood, Texas, Aug. 14, 2012.

<sup>224</sup> Dignified Burial and Other Veterans’ Benefits Improvement Act of 2012, S. 3202, 158 CONG. REC. H7442, available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3202enr/pdf/BILLS-112s3202enr.pdf>; see also, Patricia Kime, *Burn Pit Registry for Veterans Signed Into Law*, The Navy Times, Jan. 10, 2013, available at <http://www.navytimes.com/news/2013/01/military-burn-pit-legislation-signed-011013w/>.

<sup>225</sup> Department of Veterans Affairs, *Initial Research on the Long-Term Health Consequences of Exposure to Burn Pits in Iraq and Afghanistan*, 78 FR 7860, 7860-61 (Feb. 4, 2013), available at <https://federalregister.gov/a/2013-02264>.

<sup>226</sup> Kelley Kennedy, *Researcher says officials covered up vets’ health data*, USA Today, Mar. 13, 2013, available at <http://www.usatoday.com/story/news/nation/2013/03/13/whistleblower-alleges-veterans-affairs-cover-up/1979839/>.

<sup>227</sup> IOM Study, *supra* note 197, at 28.

should fund independent studies to determine the health effects of burn pits on civilian populations in Iraq and Afghanistan who lived next to bases with burn pits, and ensure appropriate care and treatment for those suffering as a result.

## B. The Traumatic Injuries of a Decade of War

In contrast to past U.S. wars, the wars in Iraq and Afghanistan have been characterized by protracted counter-insurgency campaigns, urban patrols, and the absence of a clearly defined frontline.<sup>228</sup> Certain types of casualties – traumatic wounds including mental health conditions and cognitive impairments, particularly post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) – appear to have risen at dramatic rates.<sup>229</sup> Based on data collected by the U.S. military, the incidence of mental health disorders, including adjustment disorders, depressive and anxiety disorders, and PTSD, have increased by approximately 65 percent among active servicemembers over the last twelve years.<sup>230</sup> These often unacknowledged harms have become so common that many recent reports have referred to them as the “signature wounds” of the Afghanistan and Iraq conflicts.<sup>231</sup>

In order to maintain wars in two theaters without instituting a draft, U.S. commanders have routinely redeployed injured and traumatized servicemembers at an unprecedented pace, at times in contravention of their physicians’ medical orders. The government has resisted adoption of policies and institutional reforms necessary to ensure the protection of those with mental health conditions and has fostered a military culture that stigmatizes seeking mental health care, failed to properly screen for mental health issues, and failed to provide sufficient counseling and medical resources.

Neglect of these injuries has far-reaching consequences seen in the staggering number of suicides committed by veterans, the number of individuals involuntarily medically discharged or discharged for behavioral infractions linked to traumatic injuries, and in the increased rates of family violence, incarceration, unemployment, and homelessness already visible among veterans of the Iraq and Afghanistan wars.<sup>232</sup> The U.S. government’s failure to fully acknowledge and respond to traumatic injuries also can lead

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<sup>228</sup> Kenneth T. MacLeish, *Armor and Anesthesia: Exposure, Feeling, and the Soldier’s Body*, 26 MED. ANTHROPOLOGY Q., 49, 51 (2012).

<sup>229</sup> *Id.* at 3.

<sup>230</sup> Army Forces Surveillance Center, *Medical Surveillance Monthly Reports*, Vol. 19 No. 6, June 2012, [http://www.afhsc.mil/viewMSMR?file=2012/v19\\_n06.pdf](http://www.afhsc.mil/viewMSMR?file=2012/v19_n06.pdf).

<sup>231</sup> Terri L. Tanielian & Lisa Jaycox, *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* 3 (2008).

<sup>232</sup> Vanessa Williamson and Erin Mulhall, *Invisible Wounds: Psychological and Neurological Injuries Confront a New Generation of Veterans* (January 2009), available at [http://iava.org/files/IAVA\\_invisible\\_wounds\\_0.pdf](http://iava.org/files/IAVA_invisible_wounds_0.pdf).

to harmful and violent behavior at home and abroad. As one soldier explained, “what we see getting off of the planes and entering the hospitals today is going to turn into something worse long term. And they are not prepared for it. You cannot put a Band-Aid over a gaping wound.”<sup>233</sup>

U.S. government policies and practices jeopardize the health and wellbeing of the men and women who serve in the armed forces, resulting in violations of their rights to health and causing a ripple effect that can result in the violation of the human rights held by others. As the U.S. government’s response to its own servicemembers has been wholly inadequate, it has utterly failed to acknowledge traumatic injuries amongst civilians where these wars were waged, despite the all-too predictable gravity of these harms. The lack of treatment for such injuries has been further exacerbated by the diversion of funding from healthcare to military and policing operations in Iraq.

### *Traumatic Brain Injuries*

Due to the nature of these counter-insurgency campaigns, servicemembers in today’s battlefields are frequently and repeatedly exposed to blasts from improvised explosive devices (IEDs) and grenades. While advancements in armor and medical care may decrease the incidence of fatal injuries, the potential for serious injury has been redirected,<sup>234</sup> as blasts that would have once killed cause great trauma and stress to the brain.<sup>235</sup>

The U.S. military defines TBI as “a traumatically induced structural injury and/or physiological disruption of brain function as a result of an external force” that is accompanied by a loss or decrease of consciousness, loss of memory, alteration in mental state (confusion, disorientation, etc.), neurological deficits (weakness, loss of balance, sensory loss, etc.), and intracranial lesion.<sup>236</sup> TBI ranges from mild to severe<sup>237</sup> and can result in blurred vision, seizure disorder, permanent memory loss, and even death.<sup>238</sup> It may also cause give rise to increased impulsive aggression, defined as “a hair trigger

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<sup>233</sup> Interview with Josue Gomez\* at Fort Hood, Texas, Mar. 2012.

<sup>234</sup> MacLeish, *supra* note 228.

<sup>235</sup> Tanielian, *supra* note 231, at 6.

<sup>236</sup> In 2007, the Assistant Secretary of Defense for Health Affairs released a memorandum defining TBI, setting forth a list of criteria identifying a battery of symptoms--physical, cognitive, behavioral/emotional--to help in the diagnosis TBI, and providing reporting requirements and procedures. Assistant Secretary of Defense for Health Affairs, Memorandum: Traumatic Brain Injury: Definition and Reporting, Oct. 1, 2007 [Hereinafter Health Affairs Memorandum].

<sup>237</sup> Lisa A. Brenner, *Neuropsychological Test Performance in Soldiers With Blast-Related Mild TBI*, 24 NEUROPSYCHOLOGY 160 (2010).

<sup>238</sup> Health Affairs Memorandum, *supra* note 236.

response to a stimulus that results in an agitated state and culminates in an aggressive act.”<sup>239</sup>

Even mild forms of TBI can have lasting or permanent effects and be devastating for servicemembers. According to the Defense Department, about 77 percent of TBI cases are “mild,” which it describes as being in a “confused or disoriented state lasting less than 24 hours; loss of consciousness for up to thirty minutes; memory loss lasting less than 24 hours.”<sup>240</sup> The Department of Defense has indicated that “red flags” for mild TBI include: slurred speech, seizures, repeated vomiting, double vision, headaches, disorientation, and weakness or numbness in arms and legs.<sup>241</sup> Servicemembers with mild TBI report poor general health, missed workdays, and have higher incidences of depression.<sup>242</sup> Another recent study also found that the vast majority of TBI cases in servicemembers are accompanied by mental health disorders.<sup>243</sup>

TBI is increasingly prevalent among veterans and current soldiers of the Iraq and Afghanistan Wars. A 2013 report by the U.S. Congressional Research Service estimates that 255,330 members of the military suffer from TBI.<sup>244</sup> These numbers may be just the tip of the iceberg due to inadequate diagnostic exams and their inconsistent use, as well as ineffective recordkeeping. As acknowledged by Major Remmington Nevin, an Army epidemiologist, “It’s obvious that we are significantly underestimating and underreporting the true burden of traumatic brain injury.”<sup>245</sup>

The government uses the Automated Neuropsychological Assessment Metrics (ANAM) exam, but uses only 6 of the 29 tests typically used to diagnosis TBI.<sup>246</sup> Dr. Michael Russell, then Chief of the Neurocognitive Assessment Branch in the Office of the Army Surgeon General, described the test in a 537 page report as “not a good diagnostic instrument” that “failed at the most basic level” and that was selected by the U.S. military

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<sup>239</sup> Kevin Greve, *Personality and neurocognitive correlates of impulsive aggression in long-term survivors of severe traumatic brain injury*, 15 BRAIN INJURY 255 (2001), available at [http://www.uni-graz.at/~schulter/impulsive\\_aggression.pdf](http://www.uni-graz.at/~schulter/impulsive_aggression.pdf).

<sup>240</sup> U.S. Congressional Research Service, *U.S. Military Casualty Statistics: Operation New Dawn, Operation Iraqi Freedom, and Operation Enduring Freedom*, Feb.5, 2013 [hereinafter *U.S. Military Casualty Statistics*].

<sup>241</sup> Health Affairs Memorandum, *supra* note 236.

<sup>242</sup> Charles Hoge, *Mild Traumatic Brain Injury in U.S. Soldier Returning from Iraq*, 358 THE NEW ENGLAND JOURNAL OF MEDICINE 453 (Jan. 31, 2008), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA479403>.

<sup>243</sup> Brent Taylor, *Prevalence and Costs of Co-occurring Traumatic Brain Injury With and Without Psychiatric Disturbance and Pain Among Afghanistan and Iraq War Veteran VA Users*, 50 MEDICAL CARE 342 (2012).

<sup>244</sup> *U.S. Military Casualty Statistics*, *supra* note 240. See also Spencer Ackerman, *The Cost of War Includes at Least 253,330 Brain Injuries and 1,700 Amputations*, Wired, Feb. 8, 2013, available at <http://www.wired.com/dangerroom/2013/02/cost-of-war/>.

<sup>245</sup> *Id.*

<sup>246</sup> Ackerman, *supra* note 244; Christian T. Miller, *Brain Injuries Remain Undiagnosed in Thousands of Soldiers*, ProPublica, Jun. 7, 2010, available at <http://www.propublica.org/article/brain-injuries-remain-undiagnosed-in-thousands-of-soldiers>.

because of nepotism.<sup>247</sup> One study found that the government's ANAM test process failed to capture 40% of soldiers affected with TBI.<sup>248</sup>

Although the ANAM was given to over one million soldiers before deployment, the U.S. government only administered the test to a small fraction of troops upon their return. As a result, the 42 million dollars spent on pre-tests and a congressional order mandating screening servicemembers for TBI were useless.<sup>249</sup> At Fort Hood, interviews of servicemembers reveal that many soldiers, even those who reported exposure to IEDs, explosions, or other blast pressure during deployments, were never given the ANAM test. One soldier reported that he experienced multiple explosions during his tours and as a result had a "cloudy" memory, but was never tested for TBI.<sup>250</sup> The failure to properly screen and conduct follow-up for potential TBI translates into a lack of injury-related health benefits upon discharge, and the responsibility to diagnose and treat then falls onto the already overwhelmed VA health system.

Poor recordkeeping exacerbates the failure to diagnose and treat TBI. Thousands of medical records that documented brain injuries in the early stages of both wars have been lost or destroyed, leaving an unknown number of soldiers with latent TBI undiagnosed and untreated. Dr. Russell has described how records were destroyed when troops had to move, stating that "the reality is that for the first several years in Iraq everything was burned. If you were trying to dispose of something you took it out and you put in it a burn pan and you burned it."<sup>251</sup> Army epidemiologist Major Nevin pointed out that this could lead to problems for soldiers who complained of latent injuries relating to concussions or TBI. If no evidence of a soldier being in a blast exists and there is no visible physical injury, it was even less likely that the soldier would be treated.<sup>252</sup>

#### *Post-Traumatic Stress Disorder*

TBI frequently overlaps with another prominent traumatic war injury: Post-Traumatic Stress Disorder (PTSD).<sup>253</sup> PTSD is defined as a pathologic response to trauma lasting more than four weeks that develops after a person has experienced or witnessed a traumatic or terrifying event in which serious physical harm occurred or was

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<sup>247</sup> Dr. Michael Russell, Chief of the Neurocognitive Assessment Branch in the Office of the Army Surgeon General, *The DoD ANAM Program: A Critical Review of Supporting Documentation*, available at <http://www.propublica.org/documents/item/268330-the-dod-anam-program-a-critical-review-of>.

<sup>248</sup> Miller, *supra* note 246.

<sup>249</sup> Daniel Zwerdling, *Military's Brain-Testing Program a Debacle*, NPR, Nov. 28, 2011, available at <http://www.npr.org/2011/11/28/142662840/militarys-brain-testing-program-a-debacle>.

<sup>250</sup> Interview with Mark Simons at Fort Hood, Texas, Aug. 2012.

<sup>251</sup> Miller, *supra* note 246.

<sup>252</sup> *Id.*

<sup>253</sup> Tanielian, *supra* note 231, at 47.

threatened.<sup>254</sup> While all warfare can expose servicemembers to violence and shock, the unconventional characteristics of the wars in Iraq and Afghanistan, coupled with repeated and rapid-fire redeployment, have led to dramatic numbers of servicemembers suffering from PTSD,<sup>255</sup> which not only adversely affects their lives, but those of their families and communities as well.

PTSD is one of the most pressing traumatic injuries affecting veterans and active duty servicemembers of the Afghanistan and Iraq Wars. A recently study by the Congressional Research Service (CSR) reported that 29% of veterans receiving VA health care from 2002 to 2012 have been diagnosed with PTSD.<sup>256</sup> A report by the Institute of Medicine estimates that 13-20% of veterans and active servicemembers suffer from PTSD.<sup>257</sup> A 2010 report examined 29 separate reports relating to servicemembers affected by PTSD, and found between 4-20% had been diagnosed, but that nearly 50% of veterans who sought various treatments screened positive for PTSD.<sup>258</sup> Based on the various studies, the most commonly reported figure by news organizations is that 1 in 5 veterans or active duty servicemembers currently suffer from some form of PTSD.

Moreover, recent studies highlight the significance of combat exposure “[o]ver mere war-zone deployment as contributing to new onset PTSD.”<sup>259</sup> A survey of existing research on PTSD estimated that 4-17% of U.S. troops returning from Iraq had combat-related PTSD, compared to 3-6% of U.K. troops.<sup>260</sup> Veterans have also described other experiences in the military that may lead to PTSD, including the perceived threat of exposure to biological, chemical, and radiological weapons, exposure to suffering of civilians, difficult living and working conditions, unpredictability of length of deployment, sexual and gender harassment and assault, and ethno-cultural stressors for minority soldiers.<sup>261</sup>

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<sup>254</sup> Roy R. Reeves, *Diagnosis and Management of Posttraumatic Stress Disorder in Returning Veterans*, 107 JAOA 182 (May 2007).

<sup>255</sup> *Id.*

<sup>256</sup> The CSR notes certain “data limitations,” including underreporting of PTSD symptoms by veterans as a result of stigmatization and the possibility that “veterans using VA health care are not representative of all OEF/OIF veterans or the broader veteran population.” U.S. Congressional Research Service, Report R41921: *Mental Disorders Among OEF/OIF Veterans Using VA Health Care: Facts and Figures* (Feb. 4, 2013).

<sup>257</sup> Institute of Medicine, *Treatment for Posttraumatic Stress Disorder in Military and Veteran Populations: Initial Assessment* xiii (2012).

<sup>258</sup> Rajeev Ramchand et al., *Disparate Prevalence Estimates of PTSD Among Service Members who Served in Iraq and Afghanistan: Possible Explanations*, 1 J. OF TRAUMATIC STRESS 59 (Feb. 2010).

<sup>259</sup> Greg M. Reger, *Deployed to Exposure and Medication Treatments for PTSD*, PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY 5, Aug. 6, 2012.

<sup>260</sup> Lisa Richardson et al., *Prevalence Estimates of Combat-Related PTSD: A Critical Review*, 44 AUSTRIAN & NEW ZEALAND J. OF PSYCHIATRY 4 (Jan. 2010).

<sup>261</sup> Brett Litz, *The Returning Veteran of the Iraq War: Background Issues and Assessment Guidelines*, in IRAQ WAR CLINICIAN GUIDE 21 (2004), available at <http://www.humana-military.com/library/pdf/iraq-war-clinician-guide-iii.pdf>; Suris and Lind, *Military Sexual Trauma: A Review of Prevalence and Associated Health Consequences in Veterans*, TRAUMA, VIOLENCE, & ABUSE 9: 250, 259 (2008).

## *Moral Harm*

Moral harm is increasingly being observed and reported in many U.S. troops that have served in the Iraq and Afghanistan.<sup>262</sup> Unlike physical injuries, moral injuries are not readily diagnosable and are often linked to violent and suicidal behavior in returning troops.<sup>263</sup> Clinicians have defined moral injuries as long term severe distress that arises from “perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations.”<sup>264</sup> Common experiences that create moral injuries include shooting enemy combatants, shooting civilians, viewing dismembered body parts, and being unable to assist wounded civilians or other troops.<sup>265</sup> A recent study found that “being the agent of killing or failing to prevent death or injury was associated with general psychological distress and suicide attempts.”<sup>266</sup> In 2003 alone, 34% of soldiers reported killing enemy combatants, 31% had handled human remains, 60% had been unable to assist wounded women and children and 20% had “endorsed responsibility” for the death of a non-combatant.<sup>267</sup>

Moral injuries are often falsely attributed to PTSD or similar conditions,<sup>268</sup> but are distinguishable because they stem from guilt over an action taken or not taken, while PTSD most commonly involves re-experiencing past trauma relating to the threat to a soldier’s life.<sup>269</sup> Moral injuries strike at the core of a soldier’s morality and conscience while PTSD relates to a soldier’s fear.<sup>270</sup> One servicemember interviewed by IVAW explained his experience, stating “no matter if you’re for the war or against the war – I don’t think it deals with politics – I think the idea of killing your common man can directly affect people psychologically... it will resonate within the darkest parts of your brain. I mean, who was that person?”<sup>271</sup> Importantly, diagnoses for PTSD will not always reveal a moral injury and the limited available treatment for PTSD has not proven effective in treating moral injury.<sup>272</sup>

This lack of response to moral injury has already had a significant impact on returning troops and their families. In 2003, while securing the area around Saddam Hussein’s

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<sup>262</sup> Brett T. Litz et al., *Moral injury and moral repair in war veterans: A preliminary model and intervention strategy*, 29 CLINICAL PSYCHOLOGY REVIEW 696 (2011).

<sup>263</sup> *Id.* at 700.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 696.

<sup>266</sup> Shira Maguen & Brett T. Litz, *Moral Injury in Veterans of War*, 23 PTSD RESEARCH QUARTERLY NO.1, 1 (2012), available at <http://www.ptsd.va.gov/professional/newsletters/research-quarterly/v23n1.pdf>.

<sup>267</sup> Litz, *supra* note 261.

<sup>268</sup> Maguen, *supra*, note 266 at 2.

<sup>269</sup> Litz, *supra* note 262 at 697.

<sup>270</sup> Tony Dokoupil, *A New Theory of PTSD and Veterans: Moral Injury*, The Daily Beast, Dec. 3, 2012, available at <http://www.thedailybeast.com/newsweek/2012/12/02/a-new-theory-of-ptsd-and-veterans-moral-injury.html>.

<sup>271</sup> Interview with Cody DeSousa\*at Fort Hood, Texas, March 2012.

<sup>272</sup> Maguen, *supra* note 266 at 1.

fallen statue in Baghdad, the Second Battalion, 23<sup>rd</sup> Marine Regiment exchanged gunfire with insurgents in the middle of the crowded square.<sup>273</sup> After firing, the members of the Marine battalion realized that several civilians, including an infant, had been shot.<sup>274</sup> While all of the soldiers survived this altercation, their lives were irrevocably changed. One out of every two members of the battalion suffered from “debilitating psychic wounds.”<sup>275</sup> For instance, Lance Corporal Walter Smith returned to the U.S. and murdered the mother of his two children.<sup>276</sup> While the military investigation into this battalion noted signs of PTSD, clinical psychologist Brett Litz found that the symptoms of the surviving members of this battalion did not fit the fear induced PTSD framework.<sup>277</sup> Instead, Litz attributed the problems of over 50% of this battalion to moral injuries based on interviews in which the troops attributed their problems to shame and regret instead of fear.<sup>278</sup>

Moral harm is not limited to soldiers that have participated in active combat in Iraq and Afghanistan.<sup>279</sup> Brandon Bryant, an Air force veteran, operated the targeting system for Predator Drones for nearly five years.<sup>280</sup> During this time, Bryant was far removed from any live combat, operating his missions from an Air force base in New Mexico.<sup>281</sup> One mission involved firing on a suspected combatant’s house in Afghanistan. After following orders to fire the missile, Bryant saw a child walk out of the house on the video feed before the building was destroyed.<sup>282</sup> In another mission, the drone strike killed two men instantly and dismembered another.<sup>283</sup> Mr. Bryant stated that after these missions he would feel “disconnected from humanity” for weeks.<sup>284</sup> He began to have difficulty sleeping, lost contact with many friends and his girlfriend, and passed out at the air force base after coughing up blood.<sup>285</sup> Doctors diagnosed him with PTSD.<sup>286</sup>

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<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> Nicola Abé, *The Woes of an American Drone Operator*, Spiegel Online International, Dec. 14, 2012, <http://www.spiegel.de/international/world/pain-continues-after-war-for-american-drone-pilot-a-872726.html>.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

## *Unprecedented Suicide Rates*

Some of the most disturbing evidence of these endemic mental health problems is the extremely high suicide rate among veterans of the Iraq and Afghanistan Wars, which has progressively increased year after year, reaching its peak last year when according to the Department of Defense more than 349 took their own lives across the four branches of the military.<sup>287</sup> That number amounts to one suicide every 25 hours and means that more soldiers took their own lives than died in combat.<sup>288</sup> That rate is nearly double the civilian suicide rate.<sup>289</sup>

Research indicates that stress associated with deployment, and redeployment, combat intensity, and the stigma surrounding mental health issues – all of which are also known to increase the risk for mood disorders, anxiety disorders, PTSD, and substance-related disorders – have been linked to suicide-related deaths among military personnel.<sup>290</sup> In addition, servicemembers who commit suicide are more likely to have been diagnosed with a mental health condition.<sup>291</sup> A February 2013 study found that servicemembers with mild TBI have a higher risk of suicide.<sup>292</sup>

## *The Military's Response*

According to the American Psychological Association, there are “significant barriers to receiving mental health care in the Department of Defense (DOD) and Veterans Affairs (VA) system.”<sup>293</sup> Research suggests that only 29%-54% of servicemembers with mental health difficulties seek treatment.<sup>294</sup> Barriers include a military culture that stigmatizes seeking treatment, an inhumane redeployment policy that prevents healing, and excessive wait times at the VA.

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<sup>287</sup> Bill Briggs, *Military suicide rate hit record high in 2012*, NBC News, Jan. 14, 2013, available at [http://usnews.nbcnews.com/\\_news/2013/01/14/16510852-military-suicide-rate-hit-record-high-in-2012?lite](http://usnews.nbcnews.com/_news/2013/01/14/16510852-military-suicide-rate-hit-record-high-in-2012?lite).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*; Center For New American Security, *Losing the Battle The Challenge of Military Suicide* (Oct. 2011), [http://www.cnas.org/files/documents/publications/CNAS\\_LosingTheBattle\\_HarrellBerglass.pdf](http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass.pdf).

<sup>290</sup> Sandra A. Black et al., *Prevalence and Risk Factors Associated With Suicides of Army Soldiers 2001–2009*, *MILITARY PSYCHOLOGY*, Oct. 7, 2011 at 433.

<sup>291</sup> Kathleen E Bachynski, *Mental health risk factors for suicides in the US Army, 2007-8*, *INJURY PREVENTION*, Mar. 2012, available at <http://timemilitary.files.wordpress.com/2012/03/inj-prev-2012-bachynski-injuryprev-2011-040112.pdf>.

<sup>292</sup> Craig Bryan, *Loss of Consciousness, Depression, Posttraumatic Stress Disorder, and Suicide Risk Among Deployed Military Personnel With Mild Traumatic Brain Injury*, 28 *JOURNAL OF HEAD TRAUMA REHABILITATION* 13, (Jan./Feb. 2013).

<sup>293</sup> American Psychological Association Presidential Task Force on Military Deployment Services for Youth, Families and Servicemembers, *The Psychological Needs of U.S. Military Servicemembers and Their Families: A Preliminary Report 4* (Feb. 2007), available at <http://www.apa.org/releases/MilitaryDeploymentTaskForceReport.pdf>.

<sup>294</sup> Greg M. Reger, *Deployed to Exposure and Medication Treatments for PTSD*, *PSYCHOLOGICAL TRAUMA: THEORY, RESEARCH, PRACTICE, AND POLICY* 1 (August 6, 2012).

Major General Dana Pittard, who commands Fort Bliss, one of the nation's largest Army bases, publicly commented, "I have now come to the conclusion that suicide is an absolutely selfish act. I am personally fed up with soldiers who are choosing to take their own lives so that others can clean up their mess. Be an adult, act like an adult, and deal with your real-life problems like the rest of us."<sup>295</sup> Although he later retracted his statement, this sentiment reflects the stigmatizing culture that many soldiers describe as pervasive within the U.S. military, in which mental health related injuries are minimized by their superiors.<sup>296</sup>

In a study conducted by clinical psychologists, about 50 percent of soldiers and Marines in Iraq who tested positive for a psychological problem reported that they were concerned that they would be seen as weak by their fellow servicemembers, and almost one in three of these troops worry about the effect of a mental health diagnosis on their career.<sup>297</sup> The attitudes of high-ranking officers cultivate these fears. For example, 21 percent of soldiers who screened positive for mental health problems said they avoided treatment because their "leaders discourage the use of mental health services."<sup>298</sup> One soldier at Fort Hood reported, "When you try to bring a [mental health] issue to [superiors] they play it off thinking it's not a big deal or thinking that it doesn't really matter."<sup>299</sup> Another said, "I think the number one thing is for the military, as a whole, to admit that there is trauma. To admit it, and then to embrace it. Not to make it out to be something there is stigma around... something negative where you're viewed as weak for trying to get that care."<sup>300</sup>

More than 500,000 servicemembers returned from their deployments with a serious mental illness.<sup>301</sup> Only about half of servicemembers in need of help seek psychiatric care, and only half of those get adequate treatment.<sup>302</sup>

### *Returning the Wounded to Battle - the U.S. Military's Redeployment Policy*

Exacerbating these conditions is the U.S. military's deployment policy, which requires servicemembers to complete multiple tours of duty at unprecedented pace and length as

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<sup>295</sup> Yochi Dreazen, *A General's Blog Post Undermines Army Suicide-Prevention Efforts*, The Atlantic Monthly, May 22, 2012, available at <http://www.theatlantic.com/national/archive/2012/05/a-generals-blog-post-undermines-army-suicide-prevention-efforts/257523/>.

<sup>296</sup> Reger, *supra* note 294.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Interview with Cody DeSousa\* at Fort Hood, Texas, Mar. 2012.

<sup>300</sup> Interview with Kevin Snyder\* at Fort Hood, Texas, Aug. 2012.

<sup>301</sup> Mental Health Advisory Team (MHAT) V, *Report: Operation Iraqi Freedom 06-08, Operation Enduring Freedom 8* (Feb. 14, 2008), [http://www.armymedicine.army.mil/reports/mhat/mhat\\_v/Redacted1-MHATV-4-EB-2008-Overview.pdf](http://www.armymedicine.army.mil/reports/mhat/mhat_v/Redacted1-MHATV-4-EB-2008-Overview.pdf).

<sup>302</sup> *Id.*

compared to previous wars.<sup>303</sup> Not only are a higher proportion of the armed forces being deployed, but breaks between deployments have been drastically shortened and infrequent.<sup>304</sup>

Many soldiers suffering from mental health injuries are also redeployed without proper treatment or time to heal. While one out of 10 soldiers who have completed one deployment suffers from PTSD or a similar disorder, the rate jumps to one in five with two deployments and one in three with a third deployment.<sup>305</sup> As per Department of Defense Instruction 6490.07, servicemembers with deployment-limiting conditions, including mental health disorders, PTSD, and TBI, can still be deployed if a waiver is granted.<sup>306</sup> Waivers are both sought and approved by commanding officers, with physicians only providing “input.”<sup>307</sup> One soldier who was non-deployable for medical reasons reported that a Major asked her, ““Do you feel like you can deploy? I can change it.””<sup>308</sup>

One of the key considerations in granting a waiver is the “maximization of mission accomplishment.”<sup>309</sup> As a result of this policy, military officers can satisfy an increased need for troops by simply redeploying injured servicemembers. As one soldier put it, “With this battalion, all it is is a numbers game. If they feel that they need you out, they’re gonna kick you out. If they feel they can get a little bit more work into you, it doesn’t matter what your case may be, it doesn’t matter how injured you may be, they’re going to work you until you’re fully broken.”<sup>310</sup> Another servicemember described how “[his] unit was so low in numbers that we actually took soldiers into Afghanistan who were on crutches.”<sup>311</sup>

The policies allowing multiple deployments and denying servicemembers care and time to heal erode the morale of entire units, weaken the individual’s resilience and can impact soldiers’ treatment of civilians abroad. In an extreme example of this, Staff Sergeant Robert Bales committed one of the most gruesome known attacks on civilians during either war in the Kandahar province of Afghanistan on March 11, 2012. Sergeant

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<sup>303</sup> John D. Otis, *Complicating Factors Associated with Mild Traumatic Brain Injury: Impact on Pain and Posttraumatic Stress Disorder Treatment*, 18 J. CLINICAL PSYCHO. MED. SETTINGS 145, 146 (2011).

<sup>304</sup> *Id.*

<sup>305</sup> Mark Thompson, *Invisible Wounds: Mental Health and the Military*, TIME Magazine, Aug. 22, 2010, available at [http://org2.democracynaction.org/o/5966/p/salsa/web/tellafriend/public/?tell\\_a\\_friend\\_KEY=2572](http://org2.democracynaction.org/o/5966/p/salsa/web/tellafriend/public/?tell_a_friend_KEY=2572).

<sup>306</sup> U.S. Department of Defense DoD instruction 6490.07: Deployment-Limiting Medical Conditions for Servicemembers and DoD Civilian Employees, available at <http://www.dtic.mil/whs/directives/corres/pdf/649007p.pdf>.

<sup>307</sup> *Id.*

<sup>308</sup> Interview with Kimberly Macarthur\* at Fort Hood, Texas, Apr. 2012.

<sup>309</sup> U.S. Department of Defense DoD instruction 6490.07, *supra* note 306, at ¶ 3(a).

<sup>310</sup> Interview with Cody DeSousa\* at Fort Hood, Texas, Mar. 2012.

<sup>311</sup> Interview with Kevin Snyder \* at Fort Hood, Texas, Aug. 2012.

Bales killed sixteen civilians in cold blood from two different cities over the course of the same day.<sup>312</sup> Among the dead were nine children and eleven members of the same family.<sup>313</sup> Bales was a decorated soldier on his fourth tour of duty, but according to his defense counsel, committed these offenses after suffering from a traumatic brain injury<sup>314</sup> and PTSD as a result of a March 8, 2012 roadside bombing.<sup>315, 316</sup>

Another tragic example of the combined effects of moral injury, PTSD and is that of John Needham, who joined the military in 2006 and was assigned to unit 2-12, nicknamed the “Lethal Warriors.” Deployed to the most violent areas in Iraq, at one point in 2007 his unit was losing a soldier a day.<sup>317</sup> Over two tours, 33 of the soldiers in this unit had been killed.<sup>318</sup> According to Needham, he witnessed horrible atrocities and depravity among his fellow soldiers.<sup>319</sup> That same summer, an improvised explosive device (IED) killed five of his comrades. Shortly thereafter, Needham was scheduled to return home, when he received orders extending his tour in Iraq. He described something in him “snapping” and not long after, tried to commit suicide. Instead of getting treatment, Needham was ridiculed and punished by his superiors.<sup>320</sup>

Finally, Needham returned from the war with a Purple Heart and Army Commendation Medal for protecting his team during an ambush, but also with PTSD and TBI after surviving multiple improvised explosive device (IED) and grenade attacks.<sup>321</sup> Feeling the weight of what he witnessed in Iraq, he sent a letter to the Army detailing the war atrocities committed by his unit.<sup>322</sup> Needham describes being unable to maintain a regular civilian lifestyle, feeling his life spun out of control, and needing help.<sup>323</sup> Only two months after being discharged, Needham killed his girlfriend with his bare hands

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<sup>312</sup>U.S. now counts 17 dead in Afghan massacre, USA Today, Mar. 22, 2012, available at <http://usatoday30.usatoday.com/news/world/afghanistan/story/2012-03-22/17-dead-in-afghan-massacre/53704660/1>.

<sup>313</sup> *Id.*

<sup>314</sup> James Dao, *At Home, Asking How ‘Our Bobby’ Became War Crime Suspect*, New York Times, Mar. 18, 2012, available at [http://www.nytimes.com/2012/03/19/us/sgt-robert-bales-from-small-town-ohio-to-afghanistan.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/19/us/sgt-robert-bales-from-small-town-ohio-to-afghanistan.html?pagewanted=all&_r=0).

<sup>315</sup> *Robert Bales Defense Team Begins Building Case on PTSD*, Christian Science Monitor, Mar. 18, 2012, available at <http://www.csmonitor.com/USA/Military/2012/0318/Sgt.-Robert-Bales-Defense-team-begins-building-case-on-PTSD>.

<sup>316</sup> For discussion of the effects of multiple deployments and soldier trauma on soldiers’ treatment of Afghan civilians, see *Afghan Massacre Sheds Light on Culture of Mania and Aggression in U.S. Troops in Afghanistan*, Democracy Now, Mar. 16, 2012, available at [http://www.democracynow.org/2012/3/16/afghan\\_massacre\\_sheds\\_light\\_on\\_culture](http://www.democracynow.org/2012/3/16/afghan_massacre_sheds_light_on_culture).

<sup>317</sup> Paloma Esquivel, *Combat follow soldiers home*, Los Angeles Times, Dec. 21, 2008, available at <http://articles.latimes.com/2008/dec/21/local/me-battalion21>.

<sup>318</sup> *Id.*

<sup>319</sup> Chris Young Ritzen, *War Damaged Vet Kills Girlfriend; Is PTSD to Blame?*, CBS News, Jul. 11, 2012, available at [http://www.cbsnews.com/8301-18559\\_162-57460995/war-damaged-vet-kills-girlfriend-is-ptsd-to-blame/](http://www.cbsnews.com/8301-18559_162-57460995/war-damaged-vet-kills-girlfriend-is-ptsd-to-blame/).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

after a heated argument. Needham could not explain what he had done claiming that he loved her. Needham would become one of nine soldiers from his unit to be arrested for senseless, gruesome, and shockingly random murders, attempted murders or manslaughter.<sup>324</sup> While awaiting trial, Needham died from an apparent overdose of pain killers.

### *Discharging Servicemembers with TBI and PTSD*

Instead of treating servicemembers' traumatic injuries, the military often discharges them for reasons associated with the symptoms of their injuries, such as behavioral infractions or substance abuse problems. One study found that Marines with PTSD were 11 times more likely to be discharged for misconduct.<sup>325</sup> Similarly, servicemembers with mild TBI are twice as likely to be discharged from the military for reasons related to drug and alcohol abuse and those with moderate TBI were five times as likely.<sup>326</sup> Though substance abuse is often a symptom of a traumatic injury or disorder, discharge for substance abuse has different implications for benefits than does a discharge for medical issues. In 2012, the New York Times reported that military commanders sometimes pressure clinicians to issue unwarranted psychiatric diagnoses in order to discharge troops and avoid giving them benefits.<sup>327</sup> The military has discharged at least 31,000 service-members for "personality disorder" since 2001.<sup>328</sup>

### *The Effect of Traumatic Injuries on Servicemembers, Their Families and Communities*

The U.S. government's failure to appropriately treat mental health injuries, such as TBI and PTSD, has had destructive effects on the lives of servicemembers. Though the effects of the Iraq and Afghanistan wars continue to unfold, studies already suggest that PTSD, TBI, depression and other combat-related mental disorders are associated with higher rates of mortality and negatively influence health, drug abuse, employment, productivity, and wages.<sup>329</sup> Untreated PTSD increases anger and irritability, which elevates the risk of violence, and has been associated with criminal activity after servicemembers return

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<sup>324</sup> David Phillips, LETHAL WARRIORS (2011). See also, David Philipps, *Casualties of War, Part II: Warning Signs*, The Gazette, Jul. 28, 2009, available at <http://www.gazette.com/articles/html-59091-http-gazette.html>.

<sup>325</sup> Robyn M Highfill-McRoy, *Psychiatric diagnoses and punishment for misconduct: the effects of PTSD in combat deployed Marines*, BMC PSYCHIATRY (2010), available at <http://www.biomedcentral.com/1471-244X/10/88>.

<sup>326</sup> Tanielian, *supra* note 231, at 135.

<sup>327</sup> James Dao, *Branding a Soldier with Personality Disorder*, New York Times, Feb. 24, 2012, available at <http://www.nytimes.com/2012/02/25/us/a-military-diagnosis-personality-disorder-is-challenged.html?pagewanted=all>.

<sup>328</sup> *Id.*

<sup>329</sup> Tanielian, *supra* note 231, at 6.

home from deployment.<sup>330</sup> One study found that Iraq and Afghanistan war veterans who suffer from anger and emotional outbursts as a result of PTSD are more than twice as likely as other veterans to be arrested for criminal activity.<sup>331</sup> The nature of military training itself as well as the military's failure to reintegrate soldiers and veterans upon their return also contributes to the perpetration of violence.

The U.S. government's failure to appropriately treat PTSD can have traumatic effects on the families of servicemembers. Research suggests that spouses and intimate partners are the primary support systems for veterans living with PTSD and as a result frequently experience secondary trauma.<sup>332</sup> Data show that veterans with PTSD are likely to have "difficulties maintaining emotional intimacy," and have a "greatly elevated risk of divorce."<sup>333</sup> Male veterans with PTSD were two to three times more likely to engage in intimate partner violence compared to those without PTSD—a rate up to six times higher than the general civilian population.<sup>334</sup> Despite these devastating effects on communities and families, the U.S. government has failed to appropriately address PTSD amongst soldiers and veterans.

#### *Traumatic Injuries of Civilians in Iraq and Afghanistan*

While the U.S. government frequently fails to appropriately identify and respond to traumatic injuries suffered by servicemembers, the psychological damage caused to the civilian population in Iraq and Afghanistan is rarely even mentioned.<sup>335</sup> Both the World Health Organization and Iraq's Health Ministry report that nearly half of the Iraqi population suffers from some sort of psychological disorder resulting from the war, including the death of family members, forced displacement, and living in a climate of fear and violence.<sup>336</sup> The underfunding and lack of physicians in Iraq, which are directly caused by the war, have exacerbated these mental health conditions. Since the U.S. invasion of Iraq, large portions of state funds have been diverted from social services like

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<sup>330</sup> Eric B. Elbogen, *Criminal Justice Involvement, Trauma, and Negative Affect in Iraq and Afghanistan War Era Veterans*, 80 J. OF CONSULTING AND CLINICAL PSYCHOL. 1097, 1099 (2012).

<sup>331</sup> *Id.*; See also *Combat Veterans with PTSD, Anger Issues More Likely to Commit Crimes: New Report*, Huffington Post, Oct. 10, 2012, available at [http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crime-report\\_n\\_1951338.html](http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crime-report_n_1951338.html).

<sup>332</sup> Tanielian, *supra* note 231, at 143.

<sup>333</sup> Williamson and Mulhall, *supra* note 232, at 9.

<sup>334</sup> Andra L. Teten, *Intimate partner aggression perpetrated and sustained by male Afghanistan, Iraq, and Vietnam veterans with and without posttraumatic stress disorder*, 9 J INTERPERS VIOLENCE 1612 (Sept. 35, 2010).

<sup>335</sup> Paula Mejia, *Wounds of War: PTSD in Iraqis and Veterans*, The Majalla, Oct. 10, 2010, available at <http://www.majalla.com/eng/2010/10/article55165470>.

<sup>336</sup> In addition to the factors set out above, the study also recognizes the contributing factor of torture during the three decades under Saddam Hussein's rule to the population's mental health. The Iraqi Mental Health Survey Study Group, *The Prevalence and Correlates of DSM-IV Disorders in the Iraq Mental Health Survey*, 8 WORLD PSYCHIATRY 97, 109 (2009).

health care to military operations.<sup>337</sup> The chronic underfunding of hospitals has resulted in dangerously low supplies of medical instruments, drugs, blood supplies,<sup>338</sup> electricity, water, air-cooling and sewage systems, solid waste-disposal, beds, and intensive care resources.<sup>339</sup> There were 34,000 physicians registered in Iraq before the 2003 invasion.<sup>340</sup> By 2006, an estimated 17,000 had left, 2,000 had been murdered, and 250 had been kidnapped.<sup>341</sup>

The lack of access to mental health treatment is especially acute. Iraq has only an estimated 200 psychologists for a population of over 31 million people.<sup>342</sup> Traumatic injuries have had a particularly devastating impact on the children of Iraq. Iraqi psychologist Dr. Haider Maliki has estimated that “28% of Iraqi children suffer some degree of PTSD, and their numbers are steadily rising.”<sup>343</sup> It is widely believed that these numbers are vastly underreported, leaving a large number of civilians suffering debilitating psychological wounds without help or recourse.

Afghanistan presents an even more difficult challenge to assess the impact traumatic injuries have had on the population. One official with the Afghan Health Ministry stated, “Everyone in Afghanistan has been mentally affected by war . . . [e]veryone needs help, and very few can get it.”<sup>344</sup> Citing a lack of funding and a lack of education about mental health disorders, the official noted that most treatments come in the form of religious remedies or by locking up those who are afflicted with mental disorders in make-shift asylums.<sup>345</sup> There are only 200 beds in Afghanistan for mental-health patients that have been afflicted by the war.<sup>346</sup>

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<sup>337</sup> Inter-agency Information and Analysis Unit, *Access to Quality Health Care in Iraq: A gender and Life-Cycle Perspective* (Jul./Aug. 2008), available at <http://www.humanitarianresponse.info/document/access-quality-health-care-iraq-gender-and-life-cycle-perspective>.

<sup>338</sup> *Id.*

<sup>339</sup> International Red Cross Committee, *Iraq: putting the health-care system back on its feet*, Jul. 29, 2010, <http://www.icrc.org/eng/resources/documents/update/iraq-update-290710.htm>.

<sup>340</sup> Michael E. O’Hanlon, The Brookings Institution *Iraq Index: Tracking Variables of Reconstruction & Security in Post-Saddam Iraq*, (2006), available at <http://www.brookings.edu/fp/saban/iraq/index.pdf>.

<sup>341</sup> *Id.*

<sup>342</sup> Mejia, *supra* note 335.

<sup>343</sup> César Chelala, *Iraqi Children: Bearing the Scars of War*, The Globalist, Mar. 21, 2009, available at <http://www.theglobalist.com/StoryId.aspx?StoryId=7621>; See also Lourdes Garcia-Navarro, *Treating Iraqi Children for PTSD*, NPR, Aug. 25, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=93937972>.

<sup>344</sup> Anna Badkhen, *Afghanistan: PTSDland*, Pulitzer Center on Crisis Reporting, Aug. 13, 2012, available at <http://pulitzercenter.org/reporting/afghanistan-post-traumatic-stress-disorder-mental-health-care-genocide-violence>.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.*

### III. Sexual and Gender-based Violence and Persecution

#### A. Military Sexual and Gender-Based Violence

The U.S.'s wars and occupations in Iraq and Afghanistan have left behind their own legacy of gender-based violence. During the wars, it has now been established that senior administration officials authorized the use of torture and other cruel, inhuman and degrading treatment, including sexual violence and psychological abuse which was in fact inflicted upon scores of people in Iraq and Afghanistan. Sexual and gender-based violence has also been internalized, as evidenced by the documentation of alarming rates of sexual assaults of U.S. servicemembers by other servicemembers, enabled by Department of Defense policies and practices that foster a climate in which these acts can be committed with virtual impunity.

There has been a great deal of writing on the pervasiveness of sexual violence in armed conflict, both as a strategy of war and conquest and as a by-product of militarized aggression.<sup>347</sup> Researchers have found that the U.S. military's hyper-masculine environment promotes rigid gender roles, conflates male homosexuality and femininity with weakness, and, like other institutions that sustain hyper-masculine values, displays higher rates of sexual harassment and assault.<sup>348</sup> San Francisco State University political science professor Aaron Belkin notes that "a rape culture" exists in the military, which he describes as,

...an organization that is very masculinist and that places a lot of value on dominance and power and subordination. You also have a system that's trying to train people to overcome inhibitions against violence. So, to produce a warrior we have to train people how to become violent. In the training scenario you create a...dynamic where commanders have almost unlimited authority over people

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<sup>347</sup> See, e.g., Susan Brownmiller, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); Rhonda Copelon, *Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law*, *HASTING WOMEN'S LAW JOURNAL* 5(2):243-66; Ustinia Dolgopol, *Rape as a War Crime – Mythology and History* in *COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS* (1998).

<sup>348</sup> See J. Turchik & S. Wilson, *Sexual Assault in the US Military: A Review of the Literature and Recommendations for the Future*, 15 *AGGRESSION AND VIOLENT BEHAVIOR* 267, 271 (2010); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 *DUKE LAW JOURNAL* 651-781 (1995), available at [http://scholarship.law.duke.edu/faculty\\_scholarship/81](http://scholarship.law.duke.edu/faculty_scholarship/81).

they are in charge of. When you put these three factors together, you have a recipe for rape.<sup>349</sup>

The military further enables a culture of sexual violence through the number of offenders who make up its ranks and the resulting normalization of violent behavior. Studies of Navy recruits found higher rates of men who had perpetrated sexual assaults prior to joining the military than a similar sample of men attending college.<sup>350</sup> Several military branches, including the Army and Air Force, do not require that people convicted of sexual assault be banned from service.<sup>351</sup>

*Sexual and Gender-based Violence  
in U.S.-Operated Detention Centers and Among Civilians*

In April 2004, the Abu Ghraib detainee abuse scandal came to light, and images of detainees placed in humiliating poses, naked, taunted by male and female American soldiers were broadcast around the world. While senior U.S. officials attempted to blame these acts on a few “bad apples,” a number of government investigations found that the violence was a product of structural or command failures or decisions made at higher levels.<sup>352</sup> Though responsibility for the abuses can be found at the highest levels of the U.S. government and with private military contractors, there have been no criminal investigations or prosecutions of senior U.S. government officials or contractors for their role in developing policies and allowing or encouraging practices that led to the abuse.<sup>353</sup>

U.S. military personnel and government contractors subjected detainees, men and women alike, to sexual violence. With the express purpose of humiliating detainees to elicit intelligence, those working at the Abu Ghraib prison on behalf of the U.S. government forced detainees to wear women’s underwear, simulate sex, masturbate, or have oral sex with other detainees,<sup>354</sup> and even sodomized detainees.<sup>355</sup> In a military investigation into the abuses, Major General Antonio Taguba found photographs and videos of naked female detainees, and of a U.S. military officer

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<sup>349</sup> Aaron Belkin, BRING ME MEN: MILITARY MASCULINITY AND THE BENIGN FAÇADE OF AMERICAN EMPIRE (2012), quoted in *US military scandal: A culture of rape?*, Al Jazeera, Aug. 4, 2012, available at <http://www.aljazeera.com/programmes/insidestoryamericas/2012/08/201284114116811951.html>.

<sup>350</sup> See Turchik and Wilson, *supra* note 348, at 270.

<sup>351</sup> Service Women’s Action Network, *Military Sex Offender Registration: Frequently Asked Questions*, available at <http://servicewomen.org/wp-content/uploads/2012/08/MilitarySexOffenderRegistryFAQs.pdf>.

<sup>352</sup> See, e.g., Senate Armed Services Committee Report, *supra* note 83 at xv. See also Taguba Report, *supra* note 80, at 20.

<sup>353</sup> See, e.g., Center for Constitutional Rights (CCR) and European Center for Constitutional and Human Rights (ECCHR), *Amicus Brief in Support of The Association for The Dignity of Male and Female Prisoners of Spain in Their Appeal Pending Before the Spanish Supreme Court*, Case No. 134/2009 (Sep. 25, 2009), available at <http://ccrjustice.org/files/2012-09-25%20CCR%20ECCHR%20Amicus%20Brief%20to%20Supreme%20Court%20FINAL.pdf>.

<sup>354</sup> See, Taguba Report, *supra* note 80 at 16-17.

<sup>355</sup> *Id.*, at 17.

“having sex” with a female Iraqi detainee.<sup>356</sup> One female prisoner of Abu Ghraib reported that her cellmate, who had been unconscious for two days, told her that she had been raped over 17 times by U.S. forces.<sup>357</sup>

The Abu Ghraib scandal was illustrative of a larger problem of gender-based and sexualized violence in U.S.-operated prisons. An attorney representing female detainees in Abu Ghraib explained that such abuse by U.S. guards was “happening [in detention centers] all across Iraq.”<sup>358</sup> In 2005, the Iraqi National Association for Human Rights issued a report outlining the abuse of female detainees in various detention centers in Iraq and documenting “systematic rape by the investigators.”<sup>359</sup> In some instances, U.S. forces brought wives and daughters to prisons and threatened to rape them unless their male relatives confessed.<sup>360</sup> In Al-Mosul, Iraq, U.S. forces arrested the female relatives of Iraqi fighters so that the men would surrender.<sup>361</sup>

While in detention, women continued to suffer from physical and psychological abuse, and were subjected to inhumane living conditions.<sup>362</sup> In 2005, U.K. member of Parliament Ann Clwyd verified a report that U.S. soldiers tortured an elderly Iraqi woman by attaching a harness to her and riding her like a donkey.<sup>363</sup> In the Al-Babel prison, girls were held with the adult population rendering them vulnerable to sexual assault and rape.<sup>364</sup> In a letter smuggled out of the prison in 2003, one female detainee of Abu Ghraib described how American guards had raped (in some cases impregnating) the female detainees held at the prison and forced them to strip naked in front of men.<sup>365</sup>

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<sup>356</sup> *Id.*, at 16-17.

<sup>357</sup> Monitoring Net of Human Rights in Iraq (MHRI), *First Periodical Report* (Aug. 20 2005), at 15, available at <http://www.brusselstribunal.org/pdf/mhri-1-eng.pdf> [hereinafter MHRI First Periodical Report].

<sup>358</sup> Luke Harding, *The other prisoners*, *The Guardian*, May 19, 2004, available at <http://www.guardian.co.uk/world/2004/may/20/iraq.gender>.

<sup>359</sup> See Anna Badkhen, *Rape's Vast Toll in Iraq War Remains Largely Ignored: Many Rape Victims Have Escaped to Jordan But Still Don't Have Access to Treatment and Counseling*, *The Christian Science Monitor*, Nov. 4 2008, available at [http://www.csmonitor.com/World/Middle-East/2008/1124/p07s01-wome.html?nav=topic-tag\\_topic\\_page-storyList](http://www.csmonitor.com/World/Middle-East/2008/1124/p07s01-wome.html?nav=topic-tag_topic_page-storyList).

<sup>360</sup> See e.g., International Committee of the Red Cross, *Report of the International Committee of the Red Cross on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and Interrogation* (Feb. 2004), at ¶ 36, available at <http://cryptome.org/icrc-report.htm#3.%20TREATMENT%20DURING%20INTERROGATION>; See also Organization of Women's Freedom in Iraq, *OWFI Summer 2006 Report* 11, available at [http://www.globalfundforwomen.org/storage/images/stories/3getinvolved/blog/owfi\\_report.pdf](http://www.globalfundforwomen.org/storage/images/stories/3getinvolved/blog/owfi_report.pdf) (reporting on the case of Ahmad Ibrahim Mahmoud Al Jibouri of Kirkuk who was arrested for allegedly trying to shoot down a US helicopter. While in detention, US soldiers allegedly raped his wife and daughter in front of him in order to elicit his confession. His wife was detained for two-and-a-half years.).

<sup>361</sup> MHRI First Periodical Report, *supra* note 357, at 17.

<sup>362</sup> *Id.* at 15-17.

<sup>363</sup> Harding, *supra* note 358.

<sup>364</sup> MHRI First Periodical Report, *supra* note 357, at 17.

<sup>365</sup> Harding, *supra* note 358.

Similarly, the United Nations Assistance Mission to Afghanistan documented detainee torture and abuse in 2011 that included beatings, threats of sexual assault, twisting and wrenching of genitals and the application of electric shock, causing the International Security Assistance Force (ISAF) to temporarily suspend the transfer of prisoners in eight provinces.<sup>366</sup> There is a dearth of data or information on the U.S. detention of women in Afghanistan, a lack of transparency that further enables human rights violations completely hidden from public scrutiny or judicial bodies.<sup>367</sup>

With regard to sexual violence committed outside of the detention context, while the exact number may never be known, there have been a number of reports of rape and sexual abuse of civilians at the hands of U.S. military personnel in Iraq and Afghanistan. In March 2006, for instance, five American soldiers were involved in the rape and murder of a young Iraqi girl, Abeer Qassim al-Jabani.<sup>368</sup> The soldiers burned Abeer's body and murdered her father, mother, and sister.<sup>369</sup> On March 11, 2012, Robert Bales, and possibly other U.S. soldiers, killed 16 Afghan villagers.<sup>370</sup> The Afghan parliamentary mission that investigated the massacre found that two of the women killed had been raped before their death.<sup>371</sup>

### *Sexual and Gender-based Violence Against U.S. Servicemembers*

There has been growing awareness in the last few years about the alarming rates of military sexual trauma (MST) and gender-based violence within the military. The Department of Defense itself recorded 3,158 reports of sexual assault in 2010, a number that increased by 1% to 3,192 in

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<sup>366</sup> Human Rights Watch, *World Report 2012: Afghanistan, Country Summary*, Jan. 2012, available at [http://www.hrw.org/sites/default/files/related\\_material/afghanistan\\_2012.pdf.pdf](http://www.hrw.org/sites/default/files/related_material/afghanistan_2012.pdf.pdf).

<sup>367</sup> Jaqueline Pimpinelli, Detained by U.S Project, New York Law School, *Is the United States Detaining Women in Afghanistan?*, Jan. 6, 2012, available at [http://www.detainedbyus.org/is-the-united-states-detaining-women-in-afghanistan/#\\_ftn11](http://www.detainedbyus.org/is-the-united-states-detaining-women-in-afghanistan/#_ftn11).

<sup>368</sup> *Iraq rape soldier given life sentence*, The Guardian, Nov. 17, 2006, available at <http://www.guardian.co.uk/world/2006/nov/17/iraq.usa1>.

<sup>369</sup> See e.g., Julie Rawe and Bobby Ghosh, *A Soldier's Shame*, TIME Magazine, Jul. 9, 2006, available at <http://www.time.com/time/magazine/article/0,9171,1211562,00.html>. One of the perpetrators, Steven Green is now serving five life terms for his crime. The other soldiers have served/are serving time in military prison for their varying roles in the attack. See also, Mail Foreign Service, *'I Didn't Think of Iraqis as Humans,' Says U.S. Soldier Who Raped 14-Year-Old Girl Before Killing Her and Her Family*, The Daily Mail, Dec. 21 2010, available at <http://www.dailymail.co.uk/news/article-1340207/I-didnt-think-Iraqis-humans-says-U-S-soldier-raped-14-year-old-girl-killing-her-family.html>.

<sup>370</sup> See, e.g., Taimoor Shah, *U.S. Sergeant Is Said to Kill 16 Civilians in Afghanistan*, New York Times, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/world/asia/afghanistan-civilians-killed-american-soldier-held.html?pagewanted=all>; *U.S. Pays Afghans \$50K Per Shooting Death*, Associated Press, Mar. 25, 2012, available at [http://www.cbsnews.com/8301-202\\_162-57404080/u.s-pays-afghans-\\$50k-per-shooting-death/?tag=contentMain;contentBody](http://www.cbsnews.com/8301-202_162-57404080/u.s-pays-afghans-$50k-per-shooting-death/?tag=contentMain;contentBody).

<sup>371</sup> Agencies, *US Forces Raped Two Afghan Women*, The Siasat Daily, Mar. 17, 2012, available at <http://www.siasat.com/english/news/us-forces-raped-two-afghan-women>; Press TV, *US Forces Raped Two Women in Kandahar Carnage: Parliamentary Commission*, Countercurrents.org, Mar. 18, 2012, available at <http://www.countercurrents.org/ptv180312.htm>.

2011.<sup>372</sup> The DOD estimates, however, that only 13.5% of sexual assaults in 2010 were actually reported.<sup>373</sup> Based on the results of the military's 2010 Workplace and Gender Relations Survey of Active Duty Members, where service-members self-report sexual assaults, officials estimate that the number of sexual assaults in the military in 2010 was in fact 19,000.<sup>374</sup> The VA has implemented a national screening program through which all veterans seeking healthcare are asked whether they have experienced sexual violence by fellow servicemembers. Data from this program shows that 1 in 5 women and 1 in 100 men respond "yes." However, the VA cautions that "general sexual trauma is frequently underreported" and the "data speak only to the rate of [military sexual trauma] among Veterans who have chosen to seek VA healthcare," suggesting that the number of servicemembers who have experienced sexual violence in the military is even higher.<sup>375</sup> Different military reports have concluded that 55%-78% of women and 38% of men have been sexually harassed.<sup>376</sup> Research studies conclude that one in three servicewomen has been sexually assaulted, compared to one in six civilian women,<sup>377</sup> which totals over half a million female veterans.<sup>378</sup>

The DOD acknowledges that 86% of sexual assault survivors do not report these crimes.<sup>379</sup> As the DOD's 2010 survey of active duty servicemembers revealed, 23% of women and 26% of men indicated the offender was someone in their chain of command.<sup>380</sup> A 2006 survey supported this finding, determining that 24.7% of respondents who did not report rape would have had to

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<sup>372</sup> U.S. Department of Defense, *Annual Report On Sexual Assault in the Military: Fiscal Year 2011* (Apr. 2012), at 33, available at [http://www.sapr.mil/media/pdf/reports/Department\\_of\\_Defense\\_Fiscal\\_Year\\_2011\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [hereinafter SAPRO Report 2011].

<sup>373</sup> U.S. Department of Defense, *Annual Report On Sexual Assault in the Military: Fiscal Year 2010* (Mar. 2011), at 97, available at [http://www.sapr.mil/media/pdf/reports/DoD\\_Fiscal\\_Year\\_2010\\_Annual\\_Report\\_on\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf) [hereinafter SAPRO Report 2010] (reporting that there were 2,617 reports of sexual assault to DOD authorities in fiscal year 2010).

<sup>374</sup> *Id.*, at 366.

<sup>375</sup> U.S. Department of Veterans Affairs, *Military Sexual Trauma: Factsheet*, Aug. 2012, available at [http://www.mentalhealth.va.gov/docs/mst\\_general\\_factsheet.pdf](http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf).

<sup>376</sup> U.S. Department of Veterans Affairs, *How Common is PTSD?*, Jul. 5, 2007, available at <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>; See also Murdoch M., Nichol K., *Women Veterans' Experiences With Domestic Violence and With Sexual Harassment While They Were in the Military*, ARCH FAM MED 4: 411 (1995); U.S. Department of Veterans Affairs, *Military Sexual Trauma: Issues in Caring for Veterans*, Jul. 20, 2009, at <http://www.ptsd.va.gov/professional/pages/military-sexual-trauma.asp> (last visited Apr. 2, 2013).

<sup>377</sup> U.S. Department of Labor, Women's Bureau, *Trauma-Informed Care for Women Veterans Experiencing Homelessness: A Guide for Service Providers*, at 11, available at <http://www.dol.gov/wb/trauma/> (last visited Mar. 17, 2013); Suris and Lind, *supra* note 261, at 252. Suris and Lind note that average rates of sexual assault as high as 43% have been documented among female veterans. *Id.* at 253.

<sup>378</sup> U.S. Department of Veterans Affairs, VetPop2007, at: <http://www.va.gov/VETDATA/Demographics/Demographics.asp> (last updated Jan. 10, 2010). The number of current female veterans is estimated at over 1.8 million.

<sup>379</sup> See SAPRO Report 2010, *supra* note 373, at 98.

<sup>380</sup> See U.S. Department of Defense, *2010 Workplace and Gender and Relations Survey of Active Duty Members* (Mar. 2011), at 5, available at [http://www.sapr.mil/media/pdf/research/DMDC\\_2010\\_WGRA\\_Overview\\_Report\\_of\\_Sexual\\_Assault.pdf](http://www.sapr.mil/media/pdf/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf).

report to the rapist and 33.4% would have had to report to a friend of the rapist.<sup>381</sup> The survey also demonstrated a correlation between experiencing sexual violence within the military and being discharged at a younger age or voluntarily leaving military careers earlier than expected,<sup>382</sup> showing that survivors must often choose between “continuing their military employment at the expense of frequent contact with their perpetrators, or ending their careers in order to protect themselves.”<sup>383</sup>

Military investigations of sexual violence against servicemembers are reportedly often cursory and not taken seriously, resulting in few convictions. In 2011, according to DOD statistics, of the 3,192 reported cases of sexual assault, only 1,518 of the reports of sexual assault were determined to be able to be pursued for disciplinary action following investigation, a 22% decrease from 2010.<sup>384</sup> Less than 8% went to trial, and only 191 accused, or less than 6%, were convicted, of which only 148 were jailed while 122 were discharged.<sup>385</sup> More than 10% were permitted to resign or were discharged in lieu of being court-martialed altogether.<sup>386</sup> It is more likely that convictions result in reductions in rank than confinement and fines are more common than discharges.<sup>387</sup> Moreover, one in three people convicted of sexual assault remain in the military, as the Navy is currently the only military branch that discharges servicemembers convicted of these crimes.<sup>388</sup>

Attempts at accountability in the U.S. court system as opposed to the military justice system have been equally unsuccessful. In 2011, *Cioca et al. v. Rumsfeld et al.*, a case challenging the military’s creation of an atmosphere that led to epidemic levels of sexual assault, was filed on

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<sup>381</sup> See Anne G. Sadler et al., *Factors Associated with Women’s Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 267 (2003), available at <http://ccasa.org/wp-content/themes/skeleton/documents/Rape-in-the-Military-Environment.pdf>.

<sup>382</sup> *Id.* at 266.

<sup>383</sup> Testimony of Rep. John Hall, Chairman, Subcommittee on Disability Assistance and Memorial Affairs, *Healing the Wounds: Evaluating Military Sexual Trauma Issues*, Joint Hearing Before the Subcommittee on Disability Assistance and Memorial Affairs and the Subcommittee on Health of the Committee on Veterans’ Affairs, U.S. House of Representative, May 2010, available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57023/html/CHRG-111hhrg57023.htm>.

<sup>384</sup> See SAPRO Report 2011, *supra* note 372, at 32 (showing that 1,518 cases were considered “actionable” in 2011). See also Service Women’s Action Network, *Briefing Paper: Department Of Defense (DoD) Annual Report On Sexual Assault In The Military, Fiscal Year (FY) 2011*, available at [http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4\\_17\\_12.pdf](http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4_17_12.pdf); Service Women’s Action Network, *Rape, Sexual Assault, and Sexual Harassment in the Military: Quick Facts*, Jul. 2012, available at <http://servicewomen.org/wp-content/uploads/2012/10/Final-RSASH-10.8.2012.pdf>.

<sup>385</sup> See SAPRO Report 2011, *supra* note 372, at 45.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*; Office of the Chief of Naval Operations, Policy 1752.3, May 27, 2009, available at <http://doni.daps.dla.mil/Directives/01000%20Military%20Personnel%20Support/01-700%20Morale,%20Community%20and%20Religious%20Services/1752.3.pdf>. See also Service Women’s Action Network, *Rape, Sexual Assault and Sexual Harassment in the Military*, *supra* note 384.

behalf of 28 servicemember plaintiffs who had survived harassment and assault.<sup>389</sup> The government argued that the case should be dismissed pursuant to a doctrine that immunizes against harm to servicemembers which is incident to their service. In this case, the government argued that the sexual assaults the plaintiffs experienced arose out of their service in the armed forces and therefore should not be subject to the court's jurisdiction.<sup>390</sup> The court granted the government's request to dismiss the case, a decision that is currently on appeal.<sup>391</sup>

### *Effects on and Risks to Specific Populations*

Studies demonstrate that assault often happens down the chain of command and enlisted servicemembers are more likely to be sexually harassed or assaulted than officers.<sup>392</sup> Demographic factors, such as “[l]ow sociocultural power (i.e., lower age, less education, non-White, and single marital status) and low organizational power (i.e., lower pay grade and fewer years of active-duty service),” work to place some servicemembers at a higher risk for sexual assault.<sup>393</sup>

Studies have also found, predictably, that sexual violence within the military often leads to disruptive psychological after-effects including post-traumatic stress disorder (PTSD), anxiety disorders, depression, increased suicide risk, feelings of numbness, trouble with sleeping, concentration, and memory, irritability, and anger.<sup>394</sup> Physiological effects range from chronic pain and problems with weight, eating, and gastrointestinal functions to sexual difficulties.<sup>395</sup> Survivors enduring these after-effects are more likely to feel unsafe or on edge; to experience difficulty connecting with or trusting people; to enter or stay in abusive relationships; to encounter difficulties in relationships, marriages, and parenting; and to overuse alcohol and drugs.<sup>396</sup>

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<sup>389</sup> See *Cioca, et al., v. Rumsfeld, et al.*, C.A. 1:11-cv-00151, United States District Court for the Eastern District of Virginia, Complaint. Available at <http://burkepllc.com/files/2011/11/FIRST-AMENDED-COMPLAINT.pdf>.

<sup>390</sup> See *Cioca, et al., v. Rumsfeld, et al.*, C.A. 1:11-cv-00151, United States District Court for the Eastern District of Virginia, Defendants' Motion to Dismiss, Sept. 20, 2011.

<sup>391</sup> See *Cioca, et al., v. Rumsfeld, et al.*, C.A. 1:11-cv-00151, United States District Court for the Eastern District of Virginia, Order of Dismissal, Dec. 13, 2011.

<sup>392</sup> See *2010 Workplace and Gender and Relations Survey of Active Duty Members*, *supra* note 380; Nicole T. Buchanan, *Comparing Sexual Harassment Subtypes Among Black and White Women by Military Rank: Double Jeopardy, The Jezebel, and the Cult of True Womanhood*, 32 *PSYCHOLOGY OF WOMEN QUARTERLY*, 347, 347-349 (2008).

<sup>393</sup> Turchik, *supra* note 348, at 269-70 (citing Harned, M. S. et al., *Sexual assault and other types of sexual harassment by workplace personnel: A comparison of antecedents and consequences*, *JOURNAL OF OCCUPATIONAL HEALTH PSYCHOLOGY* 7, 174-188 (2002) (studying sociodemographic variables in relation to sexual victimization in a sample of over 20,000 military women)).

<sup>394</sup> U.S. Department of Veterans' Affairs, *Military Sexual Trauma*, available at <http://www.ptsd.va.gov/public/pages/military-sexual-trauma-general.asp>; see also Lisa K. Foster, Scott Vince, *California's Women Veterans: The Challenges and Needs of Those Who Served*, California Research Bureau, Aug. 2009, at 35, available at <http://www.library.ca.gov/crb/09/09-009.pdf>; Military Sexual Trauma: Factsheet, *supra* note 375.

<sup>395</sup> See *Military Sexual Trauma: Factsheet*, *supra*, note 375.

<sup>396</sup> *Id.*; see also Foster and Vince, *supra* note 394, at 35.

Survivors of sexual violence within the military display high rates of PTSD, with one study showing that women who experienced sexual violence by servicemembers were nine times more likely to develop PTSD than women with no sexual assault histories, and other studies demonstrating that exposure to sexual assault in the military can be a greater risk factor for developing PTSD than combat exposure.<sup>397</sup> A study of female veterans found that 60% of those who had experienced military sexual trauma suffered from PTSD, a rate that was 40% higher than those who had experienced other forms of trauma.<sup>398</sup> Another study that focused on male and female veterans from U.S. operations in Afghanistan and Iraq, specifically, found PTSD in 52.5% of male subjects and 51.1% of female subjects who screened positive MST.<sup>399, 400</sup> The study concluded that “women and men who reported a history of military sexual trauma were significantly more likely than those who did not to receive a mental health diagnosis, including posttraumatic stress disorder (PTSD), other anxiety disorders, depression, and substance use disorders.”<sup>401</sup>

*Women.* The Department of Veterans Affairs (VA) screening program has identified MST in 20% of female veterans of Iraq and Afghanistan,<sup>402</sup> though different studies have shown rates among all female veterans as high as 48% for sexual assault and, for veterans under the age of 50, as high as 90% for sexual harassment.<sup>403</sup> U.S. Congress member and House Armed Services Committee member Niki Tsongas relates that a female soldier told her, “Ma’am, I am more afraid of my own soldiers than I am of the enemy.”<sup>404</sup> In addition to a higher incidence of PTSD, studies also show that women who have experienced sexual violence by servicemembers are three times more likely to experience depression.<sup>405</sup> Women also encounter additional barriers to obtaining care in response to sexual violence within the military—according to VA data, while all veterans experience difficulty accessing VA disability compensation for military sexual

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<sup>397</sup> Suris and Lind, *supra* note 261, at 259; Fontana, A. and Rosenheck, R., *Duty-Related and Sexual Stress in the Etiology of PTSD Among Women Veterans Who Seek Treatment*, PSYCHIATRIC SERVICES (1998); Kang H, Dalager N, Mahan C, Ishii E., *The Role of Sexual Assault on the Risk of PTSD Among Gulf War Veterans*, ANNALS OF EPIDEMIOLOGY 15(3) 191, 193-94 (2005); C. Goldzweig et al., *The State of Women Veterans’ Health Research: Results of a Systematic Literature Review*, 21 JOURNAL OF GENERAL INTERNAL MEDICINE 82, 88 (2006).

<sup>398</sup> D. Yaeger, N. Himmelfarb, A. Cammack, J. Mintz., *DSM-IV Diagnosed Posttraumatic Stress Disorder in Women Veterans With and Without Military Sexual Trauma*, 21 J GEN INTERN MED., S65 (2006), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513167/>.

<sup>399</sup> R. Kimerling, et al, *Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning From Afghanistan and Iraq*, 100 AMERICAN JOURNAL OF PUBLIC HEALTH 1409, 1411 (2010), available at <http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2009.171793>.

<sup>400</sup> The U.S. Department of Veterans Affairs (VA) defines military sexual trauma (MST) as “psychological trauma, which in the judgment of a VA mental health professional, resulted from a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training.” See U.S. Department of Veterans Affairs, *Military Sexual Trauma: Factsheet*, (Aug. 2012), available at [http://www.mentalhealth.va.gov/docs/mst\\_general\\_factsheet.pdf](http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf).

<sup>401</sup> Kimerling, *see supra* note 399, at 1410-11.

<sup>402</sup> See Women’s Bureau, U.S. Department of Labor, *supra* note 377, at 11.

<sup>403</sup> C. Goldzweig et al., *supra* note 397; Murdoch M. and Nichol, K., *Women Veterans’ Experiences with Domestic Violence and With Sexual Harassment While They Were in the Military*, 4 ARCH FAM MED 411 (1995). See also Suris and Lind, *supra* note 261, at 254-58 (compiling rates of MST as found by various studies).

<sup>404</sup> Rep. Niki Tsongas, *A Cultural Change is Needed*, Huffington Post, Jan. 28, 2013, available at [http://www.huffingtonpost.com/rep-niki-tsongas/invisible-war-military-sexual-assault\\_b\\_2564501.html](http://www.huffingtonpost.com/rep-niki-tsongas/invisible-war-military-sexual-assault_b_2564501.html).

<sup>405</sup> Hankin, C.S., et al., *Prevalence of Depressive and Alcohol Abuse Symptoms Among Women VA Outpatients Who Report Experiencing Sexual Assault While in the Military*, 12 J TRAUMA STRESS. 601–12 (1999).

violence-related PTSD, men receive higher compensation ratings than women for VA disability claims for such claims.<sup>406</sup>

*Men.* Although prevalence rates of military sexual violence are higher among female veterans compared to male veterans, given that men vastly outnumber women in the military, the number of men suffering from military sexual trauma is about equal to that of women.<sup>407</sup> In a 2003 study, VA universal screening identified 31,797 cases of men's military sexual violence and in 2005, 6,227 additional cases were identified.<sup>408</sup> Male survivors of sexual violence tend to exhibit more persistent and treatment-resilient psychological trauma symptoms,<sup>409</sup> especially in areas of sexual functioning, as compared to female survivors.<sup>410</sup> Factors such as the emphasized need for cohesion in military units, the threat of ridicule by attackers and other military colleagues of the survivor, potential promulgation of accusations that the survivor is gay, and cultural stereotypes that promote stoicism, denial of pain, and emotional control discourage men from reporting sexual violence committed against them.<sup>411</sup>

*Sexual and Gender Minorities.* Servicemembers who are sexual or gender minorities, including those who identify as lesbian, gay, bisexual, transgender and intersex ("LGBTI"), face additional risks on account of pervasive discrimination against them in the military. Many gay and lesbian survivors are targeted *because* of their sexual orientation. Although "Don't Ask Don't Tell" (DADT)—the military's policy of discharging LGBTI servicemembers upon disclosure of their sexual orientation or gender identity—has now been repealed, military culture encouraging stigma, prejudice and anti-LGBTI aggression continues to lead to underreporting for fear of stigma and ostracism.<sup>412</sup>

In such a hostile environment, combined with the lack of LGBTI research in the military, figures on LGBTI servicemembers suffering from military sexual trauma are incomplete.<sup>413</sup> Experiences that correlate with sexual assault are common among LGBTI servicemembers; in a 2010 RAND study sponsored by DOD, 91% of respondents were put at risk of blackmail or manipulation, 29% indicated having been teased and mocked, and 7% reported threats or injuries by other military members because of their sexual orientation.<sup>414</sup> In another study, 47.2% of respondents

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<sup>406</sup> See Service Women's Action Network, *Rape, Sexual Assault, and Sexual Harassment in the Military: Quick Facts*, *supra* note 384.

<sup>407</sup> See Suris and Lind, *supra* note 261, at 251; Tim Hoyt, *Military Sexual Trauma in Men: A Review of Reported Rates*, J. OF TRAUMA & DISSOCIATION 244, 244 (2011). Hoyt notes that averaging across studies covering the past 30 years, approximately 0.09% of male servicemembers, with a range of 0.02% to 6%, report military sexual trauma each year. For a comprehensive overview of all major studies that have calculated male military sexual trauma rates, see Table 1 in the aforementioned article, from pages 247-52.

<sup>408</sup> Hoyt, *supra* at 245.

<sup>409</sup> Carol O'Brien, *Difficulty Identifying Feelings Predicts the Persistence of Trauma Symptoms in a Sample of Veterans Who Experiences Military Sexual Trauma*, 196 J. OF NERVOUS & MENTAL DISEASE 252, 252 (2008). Although women demonstrate more PTSD, men's symptoms of military sexual trauma tend to be more persistent and longer lasting.

<sup>410</sup> *Id.*

<sup>411</sup> See Hoyt, *supra* note 407, at 254-255.

<sup>412</sup> See generally Derek J. Burks, *Lesbian, Gay, and Bisexual Victimization in the Military: An Unintended Consequence of "Don't Ask, Don't Tell?"* AMERICAN PSYCHOLOGIST Vol. 66, No. 7, 604 (2011).

<sup>413</sup> *Id.*

<sup>414</sup> RAND Corporation, *Sexual Orientation and U.S. Military Personnel Policy* (2013), at 267, available at [http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND\\_MG1056.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1056.pdf).

indicated that they had suffered at least one instance of verbal, physical, or sexual assault related to sexual orientation, with 8% of respondents having experienced sexual assault within the military.<sup>415</sup> These are large numbers given that approximately 65,000 active servicemembers and one million veterans are likely gay or lesbian.<sup>416</sup> Given the low rates of reporting of sexual abuse and the stigma against homosexuality, LGBTI servicemembers are especially less likely to report sexual assault for fear of being outed and subject to harassment; before the repeal of DADT, survivors were also at risk of being discharged for homosexual behavior.<sup>417</sup> The policy had a more severe effect on female and non-white servicemembers, as they were disproportionately discharged under DADT, demonstrating intersectional discrimination.<sup>418</sup>

Trans\*<sup>419</sup> servicemembers are at great risk of sexual violence. A survey of trans\* servicemembers and veterans revealed that 26% of respondents had experienced physical assault and 16% had been raped.<sup>420</sup> And trans\* servicemembers may be at greater risk for suicide than gender-conforming servicemembers. A recent report of trans\* people in the U.S. showed that 64% of trans\* individuals who have experienced sexual assault have attempted suicide.<sup>421</sup> Additionally, trans\* servicemembers experience particular barriers when accessing health care including stigma, lack of knowledge from care providers, lack of medical discretion, and fear of being outed. In a survey of trans\* servicemembers and veterans, 10% reported being turned away from the VA due to being trans\*.<sup>422</sup> Many also reported experiencing discrimination from VA doctors (22%), non-medical staff (21%), and nurses (13%).<sup>423</sup>

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While there has been increasing awareness of and study of the effects of sexual violence on U.S. servicemembers, the U.S. has failed to acknowledge and fully address the systemic nature of this violence that is fueled by its military culture.<sup>424</sup> The U.S. government and military have failed

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<sup>415</sup> Burks, *supra* note 412, at 607.

<sup>416</sup> Gary Gates, *Gay Men and Lesbians in the U.S. Military: Estimates from Census 2000* (2004), at iii, available at [http://www.urban.org/UploadedPDF/411069\\_GayLesbianMilitary.pdf](http://www.urban.org/UploadedPDF/411069_GayLesbianMilitary.pdf).

<sup>417</sup> See Turchik and Wilson, *supra* note 348, at 274 ; Burks, *supra* note 412, at 609.

<sup>418</sup> B. Stalsburg, Service Women's Action Network, *Lesbian, Gay, Bisexual and Transgender Women in the Military: The Facts* (2010), available at <http://servicewomen.org/wp-content/uploads/2012/10/Final-DADT-Fact-Sheet-10.4.12.pdf>; Servicemembers Legal Defense Network, *Conduct Unbecoming* (2003), at 43-45, available at [http://sldn.3cdn.net/d7e44bb7ad24887854\\_w6m6b4y13.pdf](http://sldn.3cdn.net/d7e44bb7ad24887854_w6m6b4y13.pdf).

<sup>419</sup> The umbrella term "trans\* identity" encapsulates a wide range of people whose gender identities differ from the genders they were assigned at birth or from binary notions of gender, including people who identify as genderqueer, transgender, and transsexual. See Vaden Health Center Stanford, Stanford University, *Glossary of Transgender Terms*, available at [http://vaden.stanford.edu/health\\_library/transgendertermglossary.html](http://vaden.stanford.edu/health_library/transgendertermglossary.html).

<sup>420</sup> Karl Bryant and Kristen Schilt, The Palm Center and the Transgender American Veterans Association (TAVA), *Transgender People in the U.S. Military: Summary and Analysis of the 2008 Transgender American Veterans Association Survey*, (2008), available at <http://www.palmcenter.org/system/files/TGPeopleUSMilitary.pdf>.

<sup>421</sup> Grant, J., Mottet, L., and Tanis, J., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

<sup>422</sup> Bryant and Schilt, *supra* note 420, at 8.

<sup>423</sup> *Id.*

<sup>424</sup> In April 2012, Defense Secretary Panetta announced new policy initiatives to battle MST, including a directive that senior officers now handle all sexual assault cases, though it remains to be seen whether this shift will allow survivors to report with less devastating consequences. See, Lisa Daniel, *Panetta, Dempsey Announce Initiatives to*

altogether to begin to fully acknowledge and respond to the full extent of the lasting harm of the sexual violence that has been well-documented against civilians in Iraq, who are undoubtedly suffering in both similar and different ways from post-traumatic stress and other physical and psychological harms.

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*Stop Sexual Assault*, American Forces Press Service, Apr. 16, 2012, available at <http://www.defense.gov/news/newsarticle.aspx?id=67954>. In 2012, President Obama signed into law the National Defense Authorization Act (“NDAA”), which incorporated many provisions of the Defense Sexual Trauma Response and Good Governance (“STRONG”) Act introduced in 2010. See National Defense Authorization Act for Fiscal Year 2011, available at <http://www.gpo.gov/fdsys/pkg/CRPT-111hrpt491/pdf/CRPT-111hrpt491.pdf>; Congresswoman Niki Tsongas, Press Release, *Tsongas Statement on the Passage of the National Defense Authorization Act*, Dec. 12, 2012, available at <http://tsongas.house.gov/press-releases/tsongas-statement-on-passage-of-the-national-defense-authorization-act1/>. Despite these policy shifts, their practical impact is questionable as one news source undertook a comprehensive review of the DOD’s approach to sexual assault policy over the past 20 years and concluded that “Despite over 20 years of such ‘zero tolerance’ directives and policies, some 10 years of record keeping and seven years in operation for SAPRO [DOD’s Sexual Assault Prevention and Response Office], there has been no marked decrease in sexual assault or uptick in the rate of convictions.” See Molly O’Toole, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, Huffington Post, Oct. 6, 2012, available at [http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department\\_n\\_1834196.html](http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html). See also Service Women’s Action Network, *Rape, Sexual Assault, and Sexual Harassment: Quick Facts*, *supra* note 384; Defense Task Force on Sexual Harassment and Violence at the Military Service Academies reports, available at <http://www.dtic.mil/dtfs/research.html>, and SAPRO annual reports, available at <http://www.sapr.mil/index.php/annual-reports> for similar results.

## B. U.S.'s Failure to Meet its Due Diligence Obligations to Respect, Protect and Fulfill the Rights to Life and Personal Security, Equality and Non-Discrimination of Women and Sexual and Gender Minorities During Occupation

Shortly after the U.S. invasion of Iraq, reports show that violence against women began to proliferate.<sup>425</sup> More than 400 Iraqi women were abducted and raped within the first four months of U.S. occupation.<sup>426</sup> Reports now show that the rates of many forms of violence against women skyrocketed during the period when the U.S. exercised *de jure* or *de facto* authority and control in Iraq.<sup>427</sup> Yet rather than taking firm and concrete action to protect women against such egregious violations of their rights to life and personal security given the U.S.'s role in dismantling the country's social fabric and its position as the occupying power, U.S. authorities often looked the other way as they sought to make strategic alliances with extremist and reactionary politico-religious forces.<sup>428</sup> These policies and practices helped to foster a climate of gender-based persecution, i.e. the severe deprivation of women's fundamental rights on the basis of their gender as that offense is defined in Article 7 of the Rome Statute of the International Criminal Court.<sup>429</sup>

Likewise, in Afghanistan, human rights organizations, women's organizations and news outlets have reported numerous acts of sexual violence against women by not only anti-government forces – which proliferated in the country due to the U.S.'s military offensive – but also U.S.-supported Afghan troops and police.<sup>430</sup> The perpetrators are rarely punished, particularly when they have connections with the U.S.-installed Afghan government. Amnesty International interviewed and documented cases of sexual violence perpetrated by government officials and armed groups supported by the central government—actors rarely held accountable for their

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<sup>425</sup> See, e.g., generally Al-Ali and Pratt, *supra* note 13; Susskind, *supra* note 10.

<sup>426</sup> *More than 400 Iraqi Women Kidnapped, Raped in Post-war Chaos*, Agence France-Presse, Aug. 24, 2003, available at <http://reliefweb.int/report/iraq/more-400-iraqi-women-kidnapped-raped-post-war-chaos-watchdog>.

<sup>427</sup> See, e.g., generally Al-Ali and Pratt, *supra* note 13.

<sup>428</sup> See generally, Susskind, *supra* note 10.

<sup>429</sup> “Persecution” is defined at Article 7(2) of the Rome Statute of the International Criminal Court as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Article 7(1) of the Rome Statute provides that gender is a prohibited basis of persecution.

<sup>430</sup> See e.g., Statement by Michelle Bachelet Under-Secretary-General and Executive Director of UN Women, *UN Women Condemns Violence Against Afghan Women and Calls for Justice*, Jul. 13, 2012, available at <http://www.unwomen.org/2012/07/un-women-condemns-violence-against-afghan-women-and-calls-for-justice/> (A condemnation of Afghan Government following the case of rape and mutilation of a young woman by U.S trained local Afghan police); See also, Human Rights Watch, *Killing You is A Very Easy Thing For Us: Human Rights Abuses in Southeast Afghanistan*, Jul. 2003, at 24-30, available at <http://www.hrw.org/sites/default/files/reports/afghanistan0703.pdf> (discussing cases of rape by government military and police forces of women and children); M.H. Hasrat and Alexandra Pfefferle, *Violence Against Women In Afghanistan*, Afghanistan Independent Human Rights Commission (AIHRC), Biannual Report 1391 at 23, available at [http://www.aihrc.org.af/media/files/VAW\\_Final%20Draft-20.12.pdf](http://www.aihrc.org.af/media/files/VAW_Final%20Draft-20.12.pdf).

crimes.<sup>431</sup> In focus groups with Amnesty International, women provided direct testimonies of rape and abduction by armed groups and linked it to the power they wield and the widespread circulation of arms.<sup>432</sup> Some women have committed or attempted to commit suicide as a result of sexual assaults.<sup>433</sup> Yet the violence perpetrated by actors like the Afghan police does not prevent the U.S. from recruiting these same actors to support its military offensive.<sup>434</sup> Moreover, even in the absence of explicit support from the U.S. government, many perpetrators are protected by leaders within the Afghan government. For example, President Karzai was reported to have pardoned three politically well-connected men convicted of gang-raping a woman at bayonet-point.<sup>435</sup>

In Iraq, as early as 2006, militants known to have strong ties with the U.S.-backed government<sup>436</sup> were carrying out a campaign against men and children suspected of being homosexual or who had been forced into prostitution.<sup>437</sup> At the beginning of 2009, reports emerged of hundreds of men murdered because they were suspected of being gay.<sup>438</sup> In 2012, a new wave of killing was condemned by leading Iraqi civil society organizations, which reported the torture and killing of dozens of men suspected to be homosexual in different cities in Iraq.<sup>439</sup> Police have done very little to investigate and stop these murders; on the contrary, there is evidence of their complicity in targeting sexual minorities.<sup>440</sup> Nor did the U.S. military work to protect women and sexual minorities from these attacks when it wielded effective authority, control and influence.<sup>441</sup>

### *Trafficking*

The wars have also left women and children vulnerable to sex trafficking. The Organization of Women's Freedom in Iraq (OWFI) documented more than 70 cases of trafficking and forced

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<sup>431</sup> Amnesty International, *Afghanistan: Women Still Under Attack - a Systematic Failure to Protect*, May 2005, available at <http://www.amnesty.org/en/library/asset/ASA11/007/2005/en/21078ed1-d4e7-11dd-8a23-d58a49c0d652/asa110072005en.pdf>.

<sup>432</sup> *Id.* at 21.

<sup>433</sup> M.H. Hasrat and Alexandra Pfefferle, *supra* note 430, at 23.

<sup>434</sup> See e.g., Gareth Porter, *Child Rapist Police Return Behind U.S., UK Troops*, Interpress, Jul. 29, 2009, available at <http://www.ipsnews.net/2009/07/afghanistan-child-rapist-police-return-behind-us-uk-troops/>.

<sup>435</sup> Kate Clark, *Afghan President Pardons Men Convicted of Bayonet Gang Rape*, The Independent, Aug. 24 2008, available at <http://www.independent.co.uk/news/world/asia/afghan-president-pardons-men-convicted-of-bayonet-gang-rape-907663.html>.

<sup>436</sup> Susskind, *supra* note 10.

<sup>437</sup> Jennifer Copestake, *Gays flee Iraq as Shia death squads find a new target: Evidence shows increase in number of executions as homosexuals plead for asylum in Britain*, The Guardian, Aug. 5 2006, available at <http://www.guardian.co.uk/world/2006/aug/06/gayrights.iraq>.

<sup>438</sup> Human Rights Watch, *They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq*, Aug. 2009, at 2, available at <http://www.hrw.org/sites/default/files/reports/iraq0809web.pdf>.

<sup>439</sup> See Press Release, Organization of Women's Freedom In Iraq (OWFI), *Campaign of Iraqi Gay Killings by Smashing Skulls with Concrete Blocks*, Mar. 2, 2012, available at <http://equalityiniraq.com/press-release/150-campaign-of-iraqi-gay-killings-by-smashing-skulls-with-concrete-blocks>.

<sup>440</sup> Human Rights Watch, *supra* note 438, at 4.

<sup>441</sup> See Susskind, *supra* note 10.

prostitution, of which 65% were of minors, in 2008<sup>442</sup> and estimates that hundreds of women and girls are sold into sexual slavery each year, sometimes by families made destitute by the war. In one instance, a criminal ring in reportedly Diyala trafficked 128 women to Saudi Arabia via Mosul in 2007.<sup>443</sup> As members of the criminal ring allegedly included two members of the Diyala Governorate Council, one security officer, and three policemen, the case was closed with no charges filed.<sup>444</sup>

Similarly, the U.S.-led conflict in Afghanistan has exacerbated the country's poverty and security problems, driving many girls and women into the sex trade.<sup>445</sup> Young Afghan boys are similarly sexually exploited and trafficked.<sup>446</sup> According to the U.S. government and international organizations, Afghanistan became "a source, transit, and destination country for men, women, and children subjected to forced labor and sex trafficking."<sup>447</sup> Notably, U.S. government contractors have been implicated in sex trafficking in Afghanistan.<sup>448</sup> As in Iraq, very few of the perpetrators of trafficking in Afghanistan are prosecuted, as the majority of those responsible for trafficking (more than 32%) reportedly wield significant political power.<sup>449</sup>

Victims of sex trafficking in Iraq and Afghanistan receive little protection by the government, as most victims are referred to the care of civil society and non-governmental organizations. As of 2010, only one NGO-managed shelter existed in Kabul specifically for women victims of

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<sup>442</sup> The Organization of Women's Freedom in Iraq, *Prostitution and Trafficking in Iraq* (2010), at 10, available at <http://equalityiniraq.com/images/stories/pdf/prostitutionandtrafficking-OWFIreport.pdf>.

<sup>443</sup> *Id.* at 18-20. See also Human Rights Watch, *At a Crossroads: Human Rights in Iraq Eight Years After the US-Led Invasion*, Feb. 2011, at 17, available at <https://www.cimicweb.org/cmo/ComplexCoverage/Documents/Iraq/Human%20rights%20after%20invasion.pdf> [hereinafter *At a Crossroads*].

<sup>444</sup> The Organization of Women's Freedom in Iraq, *supra* note 442, at 18-20. See also, *At a Crossroads*, *supra* note 443, at 17.

<sup>445</sup> On poverty being a major cause for sex trafficking, see, Afghanistan Independent Human Rights Commission, *Summary Report on Investigation of Causes and Factors of Trafficking in Women and Children*, Jul. 2011, at 3, available at [http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_report\\_156.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_report_156.pdf). On the dire economic conditions in Afghanistan caused by the current policies, see, UN News Center, *Human Rights Abuses Exacerbating Poverty in Afghanistan UN Report Finds*, Mar. 30, 2010, available at <http://www.un.org/apps/news/story.asp?NewsID=34239&Cr=#.UUZh-BkQa-Q>.

<sup>446</sup> See International Organization for Migration, *Trafficking in Persons in Afghanistan: Field Survey Report* (2008), available at [http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/afghanistan/iom\\_report\\_trafficking\\_afghanistan.pdf](http://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/afghanistan/iom_report_trafficking_afghanistan.pdf) [hereinafter IOM 2008 Report]. See also Afghanistan Independent Human Rights Commission, *supra* note 445.

<sup>447</sup> U.S. Department of State, Office to Monitor and Combat Trafficking in Persons, *Trafficking in Persons Report: Afghanistan* (2012), available at <http://www.state.gov/j/tip/rls/tiprpt/2012/192366.htm>. See also e.g., IOM 2008 Report, *supra* note 446.

<sup>448</sup> See e.g., *Former ArmorGroup North America Director of Operations Files False Claims Act Whistleblower*, Reuters, Sept. 10, 2009, available at <http://www.reuters.com/article/2009/09/10/idUS129866+10-Sep-2009+PRN20090910>. See also Charles Keyes, *Whistleblower sues Afghanistan Security Contractor*, CNN International, Sept. 11 2009, available at <http://edition.cnn.com/2009/WORLD/asiapcf/09/10/afghanistan.embassy.whistleblower/>.

<sup>449</sup> See Afghanistan Independent Human Rights Commission Report, *supra* note 445, at 5.

trafficking.<sup>450</sup> In Iraq, OWFI has been threatened with being stripped of its NGO status by the U.S.-created and supported NGO Assistance Office in Iraq for creating shelters for women victims of sex trafficking and other forms of abuse.<sup>451</sup>

*U.S.-Created and Supported Legal System in Iraq Enabling  
Gender-Based Violence and Persecution*

In addition to failing to protect women in Iraq from the proliferation of violence directed against them while the U.S. exercised full *de jure* authority and control and later *de facto* control as an ongoing occupying force, the U.S. was intimately involved in the process of drafting Iraq's new constitution and transitioning a new legal framework.<sup>452</sup> Through this process, the U.S. severely undermined the status and rights of women to life and personal security as well as equality and non-discrimination. Despite the U.S. rhetoric that the war and occupation would improve the rights of women, not only did U.S. authorities make no attempts to amend laws that immunized perpetrators of gender-based violence, they helped bring about a constitutional paradigm that immeasurably worsened women's status and hopes for political participation in the new era.<sup>453</sup>

The Coalition Provisional Authority let stand provisions in the Iraqi Penal Code and Personal Status law that immunized perpetrators of gender-based violence in stark contrast to the U.S.'s active reform or repeal of much of Saddam Hussein's legislation aimed at protecting the Iraq's centralized economy. As a result of the U.S. authorities' refusal to prioritize the rights to equality, life and personal security of women, the Iraqi Penal Code still provides immunity for acts of violence committed by those "exercising a legal right," which includes a husband's punishment of his wife within the limits prescribed by law or custom.<sup>454</sup> As a result of this legal endorsement, men are rarely arrested or prosecuted for violence against female relatives.<sup>455</sup> Indeed, these provisions have helped create conditions in which the rate of honor killings is increasing.<sup>456</sup>

At the same time, U.S. authorities were actively and directly involved in brokering a new constitution that further erodes and undermines women's status in Iraq. In spite of protests by

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<sup>450</sup> See U.S. Department of State, *Trafficking in Persons Report: Afghanistan*, Office to Monitor and Combat Trafficking in Persons (2010), available at <http://www.state.gov/j/tip/rls/tiprpt/2010/142759.htm>.

<sup>451</sup> Interview with Yanar Mohammed, President of the Organization of Women's Freedom in Iraq (OWFI), Feb. 1 2013.

<sup>452</sup> Susskind, *supra* note 10.

<sup>453</sup> Aaron D. Pina, Congressional Research Service, Report for Congress, *Women in Iraq: Background and issues for U.S. Policy*, Jun. 23 2005, available at <http://fpc.state.gov/documents/organization/50258.pdf>. Although the report states that the Penal Code and the Personal Status Law are an obstacle to gender equality in Iraq, it does not mention any initiative by U.S. government to reform these discriminatory legislations. See also, Susskin, *supra* note 10.

<sup>454</sup> See Iraqi Penal Code ¶ 41(1) available at [http://law.case.edu/saddamtrial/documents/Iraqi\\_Penal\\_Code\\_1969.pdf](http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf).

<sup>455</sup> Al-Ali and Pratt, *supra* note 13.

<sup>456</sup> See Susskin, *supra* note 10.

Iraqi women's groups, the new constitution established an official state religion to which all future laws must conform, incorporated religious doctrine as a source of law,<sup>457</sup> and allows citizens to choose between the civil Personal Status Code and religious law for family matters.<sup>458</sup> This has led to many women being forced to submit to unaccountable religious courts by their husbands and family members.<sup>459</sup> These provisions were insisted upon by the U.S.'s closest allies in Iraq, who belonged to reactionary politico-religious forces. The constellation of these legal provisions and endorsement by the U.S. were serious setbacks for women and have served to create a climate in which many forms of violence against and persecution of women, along with impunity for such crimes, have dramatically increased.<sup>460</sup>

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<sup>457</sup> See e.g., Edward Wong, *Iraqi Constitution May Curb Women's Rights*, New York Times, Jul. 20, 2005, available at [http://www.nytimes.com/2005/07/20/international/middleeast/20women.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2005/07/20/international/middleeast/20women.html?pagewanted=all&_r=0) (explaining how the draft constitution was already viewed as regressive to women's rights in Iraq and protested against by many feminist groups before it came in force). See also, Nathan J. Brown, Carnegie Endowment for International Peace, Democracy and Rule of Law, Policy Outlook, *Iraq's Constitutional Process Plunges Ahead* (2005), at 9, 11, available at <http://carnegieendowment.org/files/PO19Brown.pdf>; Susskind, *supra* note 10.

<sup>458</sup> Iraqi Constitution, translated to English, available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=230000](http://www.wipo.int/wipolex/en/text.jsp?file_id=230000)

<sup>459</sup> Interview with Yanar Mohammed, Feb. 1, 2013.

<sup>460</sup> *Id.*; See also, Susskind, *supra* note 10; Al-Ali and Pratt, *supra* note 13.

## Conclusion

On behalf of those who are suffering and will continue to suffer from the human rights and health impacts of the decade of U.S.-led war, the petitioning organizations seek acknowledgement and accountability for the war as well as the war crimes and rights abuses perpetrated therein. Accountability for the toxic legacy of war must begin with acknowledgement and comprehensive, unbiased, scientific study of the problems caused by the U.S.'s use of toxic munitions and burn pits, which has resulted in drastically increased rates of birth defects, cancers and other disabilities; along with the immediate discontinuation and prohibition of the use of inhumane weapons discussed herein. Funding, assistance and resources must be provided to those servicemembers and Iraqi families who suffer as a result of their toxic exposures, including funding for medical treatment, cancer treatment centers and research, and reparations for affected families.

The U.S. must respect the right to the preservation of health by providing benefits, fully funding healthcare, scientific studies and other support for returning U.S. servicemembers, including reforming military structures that impede seeking and providing care. Further, the U.S. must fulfill its obligation to research and fully treat mental health and traumatic injuries suffered by U.S. servicemembers and Iraqis, which have resulted in an increase in suicides and violence in communities that have already suffered immeasurable loss. To this end, the military must also respect servicemembers' right to follow their medical plan without interruption through redeployment, and must guarantee their ability to get a medical discharge.

Accountability, reforms and resources are needed to address the gender-based violence in Iraq, including accountability for the violence suffered by Iraqis at the hands of the U.S. military and U.S.-trained security forces. Systemic reforms and accountability are needed to end sex trafficking and to protect, re-integrate, and empower the trafficked population and other survivors. Likewise, accountability is needed for the widespread and systemic sexual violence within the military, including improved services and access to justice for survivors of military sexual assault.

To stem continued human rights abuses and provide justice for past violations, the structural damages Iraq has suffered as a result of war must be addressed including reparations to rebuild public infrastructure, cessation of the forced economic policies which have led to corruption and disintegration of Iraq's economy at the cost of the Iraqi populace and sovereignty, and providing accountability for ongoing rights violations by the regime set up and supported by the U.S. There must also be a restoration of cultural artifacts.

Finally, in the spirit of this collaborative effort between both Iraqi civilians and U.S. veterans, the undersigned organizations appeal for spaces for impact-based testimonies by affected communities to facilitate the process of recovery and reconciliation, with all affected parties able to seek care, healing, and accountability without retaliation or stigma. The organizations therefore request a thematic hearing as an essential part of that process.