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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

SULEIMAN ABDULLAH SALIM, MOHAMED AHMED BEN SOUD, OBAIDULLAH (AS PERSONAL REPRESENTATIVE OF GUL RAHMAN),

Plaintiffs,

v.

JAMES ELMER MITCHELL and JOHN "BRUCE" JESSEN

Defendants.

No. 15-cv-0286 (JLQ)

PLAINTIFFS' PROPOSED JURY INSTRUCTIONS IN ACCORDANCE WITH LR 51.1

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In accordance with the Court's May 30, 2017 Order re: Pretrial Filings and Extending Deadlines (ECF No. 187), Plaintiffs hereby submit the following set of jury instructions for use at trial. Plaintiffs reserve the right to withdraw, amend and/or add to these instructions at any time before closing argument. Plaintiffs further reserve the right to object to Defendants' proposed jury instructions.

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SECTION 1: INTRODUCTORY INSTRUCTIONS

Instruction No. 1.1
Duty of Jury

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law. These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations. It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so. Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.[1]

[1] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.2 (March 2017).

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Instruction No. 1.2
Outline of Trial

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The Plaintiffs will then present evidence, and counsel for the Defendants may cross-examine. Then the defendants may present evidence, and counsel for the plaintiffs may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.[2]

[2] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.21 (March 2017).

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Instruction No. 1.3
Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties,

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the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. If any juror is exposed to any outside information, please notify the court immediately.[3]

[3] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.15 (March 2017) (citing *United States v. Pino-Noriega*, 189 F.3d 1089, 1096 (9th Cir. 1999) (for proposition that "[t]he practice in federal court of instructing jurors not to discuss the case until deliberations is widespread").

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Instruction No. 1.4
Publicity During Trial

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch or listen to any news media account or commentary about the case or anything to do with it. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.[4]

[4] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.16 (March 2017) (citing *United States v. Waters*, 627 F.3d 345, 364 (9th Cir. 2010) (reversing criminal conviction due to court's insufficient questioning of jury regarding negative publicity during jury deliberations); *see also* Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 2.2 (2013).

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Instruction No. 1.5
What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I may instruct you to accept as proved.[5]

[5] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.9 (March 2017).

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Instruction No. 1.6
What is Not Evidence

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they may say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you are instructed to disregard, is not evidence and must not be considered. In addition some evidence may be received only for a limited purpose; when I instruct you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.

(4) Anything you may see or hear when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.[6]

[6] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.10 (March 2017).

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Instruction No. 1.7
Direct and Circumstantial Evidence

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is proof of a chain of facts from which you could find that another fact exists, even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence. In making that decision, you must consider all the evidence in the light of reason, common sense, and experience.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience and common sense.[7]

[7] Judge Quackenbush stock instruction; Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.12 (March 2017).

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Instruction No. 1.8
Ruling on Objections

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been. Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.[8]

[8] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.13 (March 2017).

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Instruction No. 1.9
Bench Conferences and Recesses

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error. Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.[9]

[9] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.20 (March 2017).

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Instruction No. 1.10
Evidence for Limited Purpose

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.[10]

[10] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.11 (March 2017). *See also id.* (citing *United States v. McLennan*, 563 F.2d 943, 947-48 (9th Cir. 1977) (noting that "[a]s a rule, limiting instructions need only be given when requested and need not be given *sua sponte* by the court.") and *United States v. Marsh*, 144 F.3d 1229, 1238 (9th Cir. 1998) (when trial court fails to instruct jury in its final instructions regarding receipt of evidence for limited purpose, Ninth Circuit examines trial court's preliminary instructions to determine if court instructed jury on this issue)).

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Instruction No. 1.11
Claims and Defenses

To help you follow the evidence, I will give you a brief summary of the positions of the parties. According to the Plaintiffs:

Defendants James Mitchell and John Jessen, are psychologists who designed, implemented, and personally administered an experimental torture program for the U.S. Central Intelligence Agency. Defendants previously worked in a training program for U.S. servicemembers called the Survival Evasion Research and Escape (SERE) Program.

When the CIA's Counterterrorism Center (CTC) captured its first prisoner, Abu Zubaydah, it had no experience in interrogation. Defendants had never conducted or observed the interrogation of an actual prisoner, but they contracted with the CIA to consult on interrogations. In April 2002, Defendant Mitchell traveled to a secret prison where the CIA's prisoner was held. He made recommendations for inducing a psychological state of "helplessness" in Abu Zubaydah through the use of specific methods such as sleep deprivation.

When Defendant Mitchell's recommendations did not produce satisfactory results, Defendant Mitchell took the position that physical coercion should be used. Defendant Mitchell recommended that the CIA also contract with his friend, Defendant Jessen. Together, the two of them proposed that the CIA should consider techniques used during SERE training, a program designed to train service members to resist giving false confessions when subjected to methods that violate the Geneva Conventions.

Defendants designed a "psychologically-based" program in which they would use a specific set of methods to instill "fear and despair" in the people on whom those methods were used. They came up with a list of specific methods that included slamming a prisoner into walls, stuffing him into boxes, dressing him in diapers, hitting him, and forcing him to feel like he was drowning.

Defendants personally tested their program on the CIA's first prisoner, Abu Zubaydah. Over 17 days, Defendants repeatedly subjected Abu Zubaydah to their methods. During the application of their methods, Defendants witnessed firsthand as Abu Zubaydah went into involuntary spasms, vomited, cried, and hysterically begged Defendants to stop. Defendants continued to use their

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methods on Abu Zubaydah for nearly two weeks after they determined he did not have the information they sought. Defendants pronounced the interrogation a "success" because it induced "complete helplessness" in Abu Zubaydah, even though it resulted in no new threat information. Defendants told the CIA that the methods they used on Abu Zubaydah should be a "template" for future CIA prisoners.

As the CIA captured additional prisoners, the methods Defendants used during Abu Zubaydah's interrogation indeed became the "template" for a CIA program. The program expanded to multiple secret prisons or "black sites." One of the black sites was called COBALT. Plaintiffs Gul Rahman, Suleiman Abdullah Salim, and Mohamed Ben Soud were held at COBALT. Plaintiffs were subjected to Defendants' methods when they were held at COBALT between November 2002 and April 2004.

By November 2002, Defendants personally witnessed their methods in use at COBALT. It was at COBALT that Defendant Jessen personally interrogated one of the Plaintiffs, Gul Rahman. Defendant Jessen was in charge of assessing Mr. Rahman's "resistance posture," and tested at least one of Defendants' methods on him. Defendant Jessen concluded that Mr. Rahman "was impervious to it," and advised that, rather than using the more active methods, Mr. Rahman's interrogators should instead focus on "deprivations." Mr. Rahman was subjected to Defendants' sleep deprivation method; his hands were shackled overhead as he was kept standing for days at a time. Also at his interrogators' direction, Mr. Rahman was stripped naked or kept in a diaper in order to humiliate him.

Defendant Jessen advised the CIA that Mr. Rahman displayed a "sophisticated level of resistance training," because he "complained about poor treatment," and because Mr. Rahman told interrogators that he could not think because he was so cold. After several days during which Mr. Rahman had been kept in a diaper and deprived of sleep, and after Defendant Jessen observed that Mr. Rahman displayed early signs of hypothermia, Defendant Jessen recommended that the CIA "continue the environmental deprivations [Mr. Rahman] is experiencing" and told the CIA that Mr. Rahman was using "health and welfare" complaints as a "resistance" tactic. Four days after Defendant Jessen left COBALT, an interrogator had a brief session with Mr. Rahman "based on Jessen's recommendation that Rahman be left alone and

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environmental deprivations continued." Two days later, Mr. Rahman died of hypothermia.

After Mr. Rahman's death, Mr. Salim and Mr. Ben Soud were kidnapped and taken to COBALT in 2003. By January 2003, Defendants' methods had been formalized in official CIA guidance sent to COBALT. Plaintiffs Salim and Ben Soud were subjected to Defendants' methods while they were at the CIA's secret prison but were later released from CIA custody, and Mr. Salim was provided with a letter indicating that he posed no threat to the United States.

In March 2005, Defendants formed a company, Mitchell, Jessen & Associates. They received a no-bid contract from the CIA to run many aspects of the program. After testing and refining their methods on other prisoners, Defendants concluded that many of the methods they had experimentally devised, applied, and promoted were unnecessary. The CIA now admits that Defendants' own evaluation of their program's effectiveness created a conflict of interest. But before the program ended and their contracts were terminated, Defendants' company was paid $81 million.

The Plaintiffs have the burden of proving these claims. The Defendants deny those claims [INSERT DESCRIPTION TO BE PROVIDED BY THE DEFENSE].

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Instruction No. 1.12
Two or More Parties – Different Legal Rights

You should decide the case as to each Plaintiff and Defendant separately. Unless otherwise stated, the instructions apply to all parties.[11]

[11] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.8 (March 2017).

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Instruction No. 1.13
All Persons Equal Before the Law – Individuals

This case should be considered and decided by you as a dispute between persons of equal standing in the community, or equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals.[12]

[12] O'Malley, Grenig & Lee (formerly Devitt & Blackmar), *Federal Jury Practice & Instructions,* §103:11 (6th ed. 2011).

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Instruction No. 1.14
No Transcript Available to Jury

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.[13]

[13] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.17 (March 2017).

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Instruction No. 1.15
Taking Notes (if Court, within its discretion, permits)

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes. Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.[14]

[14] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.18 (March 2017) (noting that "[i]t is well settled in this circuit that the trial judge has discretion to allow jurors to take notes) (citing *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993) and Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures*, § 3.4 (2013)).

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Instruction No. 1.16
Questions to Witnesses by Jurors (if Court, within its discretion, permits)

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.[15]

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[15] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.19 (March 2017).

PROCEDURES

In the event the judge allows jurors to submit questions for witnesses, the judge may consider taking the following precautions and using the following procedures:

1. The preliminary instructions should describe the court's policy on juror-submitted questions, including an explanation of why some questions may not be asked. All juror-submitted questions should be retained by the clerk as part of the court record whether or not the questions are asked.
2. At the conclusion of each witness's testimony, if a juror has a written

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Instruction No. 1.17
Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability. Sometimes a witness may say something that is not consistent with something else he or she said.

Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may

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question it is brought to the judge.

3. Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room.
4. Counsel or the judge asks the question of the witness.
5. Counsel are permitted to ask appropriate follow-up questions.
6. The written questions are made part of the record.

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consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.[16]

[16] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.14 (March 2017).

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SECTION 2: INSTRUCTIONS ON TYPES OF EVIDENCE

Instruction No. 2.1
Impeachment Evidence – Witness (if applicable)

The evidence that a witness [e.g., has been convicted of a crime, lied under oath on a prior occasion, etc.] may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.[17]

[17] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.9 (March 2017) (citing Fed. R. Evid. 608–09 and *United States v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000) (finding that district court properly admitted impeachment evidence following limiting instruction to jury).

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Instruction No. 2.2
Foreign Language Testimony

You [are about to hear] [have heard] testimony of witnesses who [will be testifying] [testified] in their native languages with the assistance of an interpreter. Plaintiff Salim will be testifying via video deposition in Swahili, and Plaintiff Ben Soud will be testifying via video deposition in Arabic. Witnesses who do not speak English or are more proficient in another language testify through an official court interpreter. Even if you know Swahili, Arabic or Farsi, it is important that all jurors consider the same evidence. Therefore, you must accept the interpreter's translation of the witness's testimony, unless the Court directs you otherwise. You must disregard any different meaning.

This court seeks a fair trial for all, regardless of the language they speak and regardless of how well they may or may not speak English. Therefore, do not allow the fact that Plaintiffs require an interpreter to influence you in any way. You must not make any assumptions about a witness or a party based solely on the use of an interpreter to assist that witness or party.[18]

[18] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.8 (March 2017) (citing 28 U.S.C. § 1827 as to the use of interpreters); *see also United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (holding that district court properly instructed jury that it must accept translation of foreign language tape-recording when accuracy of translation is not in issue); *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes–Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995); Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 3.11.B (2013).

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Instruction No. 2.3
Deposition in Lieu of Live Testimony

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

The deposition of Mohamed Ben Soud, one of the Plaintiffs in this matter was taken on August 11, 2017 and the deposition of Suleiman Salim, another Plaintiff in this matter, was taken on March 14th and 15th, 2017. Additionally, the deposition of Jose Rodriguez was taken on March 7, 2017 and the deposition of John Rizzo was taken on March 20, 2017. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

You should not hold it against any witness that he is not here in person to testify. Nor should you place any significance on the behavior or tone of voice of any person reading the questions or answers.[19]

[19] Adapted from Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.4 (March 2017).

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Instruction No. 2.4
Transcript of Recording in English (when appropriate)

You are about to watch a recording that has been received in evidence. Please watch and listen to it very carefully. On the left side of the screen you will see a video of a witness who has given a deposition in this case and on the right side of the screen you will see a scrolling transcript of the recording to help you identify speakers and as a guide to help you listen to the recording. Please, however, bear in mind that the recording is the evidence, not the transcript. If you hear something different from what appears in the transcript, what you heard is controlling.[20]

[20] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.5 (March 2017) (citing *United States v. Delgado*, 357 F.3d 1061, 1070 (9th Cir. 2004), abrogated on other grounds by *United States v. Katakis*, 800 F.3d 1017, 1028 (9th Cir. 2015) (holding that district court properly instructed jury that transcripts were only aids to understanding and that recordings themselves were evidence); *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (noting that recording itself is evidence to be considered; transcript is merely aid)). Note, also, that the Ninth Circuit Jury Instructions Committee recommends that this instruction be given immediately before a recording is played so that the jurors are alerted to the fact that what they hear is controlling. It need not be repeated if more than one recording is played.

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Instruction No. 2.5
Expert Opinion

In this case, there will be/have been a number of witnesses, for both sides, who will testify/have testified to opinions and the reasons for their opinions. This opinion testimony is allowed, because of the education or experience of this witness. Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the reasons given for the opinion, and all the other evidence in the case.[21]

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[21] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.13 (March 2017) (citing Fed. R. Evid. 702-05). According to Federal Rule of Evidence 702, "[t]he purpose of expert testimony is to 'assist the trier of fact to understand the evidence or to determine a fact in issue' by providing opinions on 'scientific, technical, or other specialized knowledge.'" *Wagner v. County of Maricopa*, 701 F.3d 583, 589 (9th Cir. 2012) (quoting Fed. R. Evid. 702). Under Federal Rule of Evidence 703, an expert's opinion must be based on facts or data in the case that the expert has been made aware of or personally observed. Fed. R. Evid. 703. The facts and data need not be admissible so long as experts in the particular field would reasonably rely on such facts and data. *Id.*

This instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert," this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness's opinion and will protect against the jury's being "overwhelmed by the so-called 'experts.'" *See* Fed. R. Evid. 702 advisory committee's note (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994).

In addition, Fed. R. Evid. 703 (as amended in 2000) provides that facts or data that are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

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Instruction No. 2.6
Stipulations of Fact (if applicable)

The parties have agreed to certain facts to be placed in evidence. You must therefore treat these facts as having been proved.[22]

[22] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.2 (March 2017) (citing *United States v. Mikaelian*, 168 F.3d 380, 389 (9th Cir. 1999) and *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976), amended by 180 F.3d 1091 (9th Cir. 1999) ("When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed.").

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Instruction No. 2.7
Judicial Notice (if applicable)

The court has decided to accept as proved the fact that [state fact]. You must accept this fact as true.[23]

[23] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.3 (March 2017), cmt. noting: An instruction regarding judicial notice should be given at the time notice is taken. In a civil case, the Federal Rules of Evidence permit the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. Fed. R. Evid. 201(f). In a criminal case, however, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. *Id.*; *see United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (in a criminal case, "the trial court must instruct 'the jury that it may, but is not required to, accept as conclusive any fact judicially noticed'"); Ninth Circuit Model Criminal Jury Instruction 2.5 (2010) (Judicial Notice).

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Instruction No. 2.8
Charts And Summaries Not Received in Evidence (if applicable)

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.[24]

[24] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.14 (March 2017) (noting: This instruction applies only when the charts and summaries are not admitted into evidence and are used for demonstrative purposes. Demonstrative materials used only as testimonial aids should not be permitted in the jury room or otherwise used by the jury during deliberations) (citing *United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991); *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984) and Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 3.10.A (2013)).

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Instruction No. 2.9
Charts and Summaries Received in Evidence (if applicable)

Certain charts and summaries [may be] [have been] admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.[25]

[25] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.15 (March 2017) (noting: This instruction applies when the charts and summaries are received into evidence.) (citing *United States v. Anekwu*, 695 F.3d 967, 981 (9th Cir. 2012) ("[T]he proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under [Fed. R. Evid. Evid.] 1006.") (quoting *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979)); *United States v. Rizk*, 660 F.3d 1125, 1130-31 (9th Cir. 2011); Fed. R. Evid. 1006; Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 3.10.A (2013)).

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Instruction No. 2.10
Evidence in Electronic Format

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. You may request a paper copy of any exhibit received in evidence by sending a note through the clerk. If you need additional equipment or supplies or if you have questions about how to operate the computer or other equipment, you may send a note to the clerk, signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with the clerk present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any non juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non juror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court immediately and refrain from viewing such materials. Do not remove the computer or any electronic data from the jury room, and do not copy any such data.[26]

[26] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 2.16 (March 2017).

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SECTION 3 – SUBSTANTIVE CLAIM INSTRUCTIONS

Instruction 3.1
Alien Tort Statute

Plaintiffs' claims for torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes are brought under the Alien Tort Statute, a U.S. law that allows lawsuits claiming violations of international law to be decided in United States courts.

International law prohibits torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes. A person who is injured by any of these international law violations may sue in a United States court under the Alien Tort Statute. This is true even if the international law violations occur in another country.

The Plaintiffs allege that the Defendants violated their rights to be free from torture, cruel, inhuman or degrading treatment, non-consensual human experimentation, and war crimes. I will define those terms for you in a moment. If you find that the Plaintiffs have established that any of these rights protected by the Alien Tort Statute were violated, and if you find that the Defendants are responsible under any of the theories of liability presented in this case, then the Defendants are liable for ATS violations.[27]

[27] 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law or nations or a treaty of the United States."); *Sosa v. Alvarez-Machain,* 542 U.S. 692, 732-33 (2004); *Doe v. Nestle*, 766 F.3d 1013, 1018-19 (9th Cir. 2014); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994); *Bowoto v. Chevron Corp.,* No. 99-2506 (N.D. Cal.), Instructions to Jury (Final as Amended–11/25/08), ECF No. 2251 at 9.

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Instruction No. 3.2
Torture and Cruel, Inhuman or Degrading Treatment

Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud and ObaidUllah (as personal representative of Gul Rahman) contend that they suffered torture and cruel, inhuman or degrading treatment. Torture and cruel, inhuman, or degrading treatment are absolutely prohibited under both international law and U.S. law, and are a proper basis on which to sue in the courts of the United States. This prohibition derives from the international community's recognition of the inherent dignity of the human person and the universal respect for, and observance of, human rights and fundamental freedoms.[28] There are no exceptions to this prohibition. Neither war nor security nor any other exceptional circumstance can justify torture or cruel, inhuman, or degrading treatment of prisoners.[29]

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[28] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 23 I.L.M. 1027, Part 1, art. 1 (1984); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (holding that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under intentional law, a norm of *jus cogens*").

[29] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (listing no defense to violation of Common Article 3); *see Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31, 631 n.63 (2006) (Common Article 3 requires that "'nobody in enemy hands can be outside the law'") (citation omitted); U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2(2), Dec. 10, 1984, 1465 U.N.T.S. 85, implemented at 8 C.F.R. § 208.18 ("No exceptional circumstances whatsoever . . . may be invoked as a justification of torture."); *see, e.g.*, *Selmouni v. France*, 29 Eur. H.R. Rep. 403 (1999) ("Even in the most difficult circumstances, such as the fight against terrorism . . . , the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."); *see Miranda Alvarado v. Gonzales*, 449 F.3d 915, 932 n.13 (9th Cir. 2006) ("No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency may be invoked as a justification of torture.") (quoting CAT, art. 2.2). *See also* U.N. Committee Against Torture, "Concluding Observations of the Committee Against Torture" (1997) ("The Committee acknowledges the terrible dilemma

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Instruction No. 3.3
Torture and Cruel, Inhuman, or Degrading Treatment – Elements

To establish that he suffered torture, each plaintiff must prove by a preponderance of the evidence the following four elements:

First, that he was subjected to severe pain or suffering, whether physical or mental;[30]

Second, that the perpetrator intentionally inflicted this pain or suffering for the purpose of obtaining information or a confession; for punishment, intimidation, or coercion; or for any reason based on discrimination.[31]

Third, that the perpetrator acted under color of law, or in concert with the state.[32]

Fourth**,** that the pain or suffering did not arise solely from and was not inherent in or incident to lawful sanctions.[33]

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that Israel confronts in dealing with terrorist threats to its security, but as a State party to the Convention Israel is precluded from raising before this Committee exceptional circumstances as justification for [prohibited] acts."); *see also, e.g.*, *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, 456 ¶ 79 (1997) ("[T]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment . . . . Article 3 (art. 3) makes no provision for exceptions . . . even in the event of a public emergency threatening the life of the nation[.]").

[30] CAT, Part 1, art. 1; Torture Victim Protection Act of 1991 ("TVPA"), P.L. 102-256, 106 Stat. 73, sec. 3(b)(1); *Hilao v. Estate of Marcos*, 103 F.3d 789, 792 (9th Cir. 1996) (recognizing trial court's jury instructions based on definitions in CAT and Torture Victim Protection Act).

[31] CAT, Part 1, art. 1.

[32] CAT, Part 1, art. 1; *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) ("A private individual will be held liable under the ATS if he 'acted in concert with' the state, i.e., 'under color of law.'").

[33] CAT, Part 1, art. 1; TVPA sec. 3(b)(1); 8 C.F.R. § 208.18(a)(3).

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To establish that he suffered cruel, inhuman and degrading treatment, each plaintiff must prove these same elements by a preponderance of the evidence, with the only difference being that he needs not establish that he endured severe pain or suffering. Instead, as I will instruct you in a moment, each Plaintiff must show that he endured cruel, inhuman, and degrading treatment.

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Instruction No. 3.4
Preponderance of the Evidence

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.[34]

[34] Ninth Circuit Jury Instructions Committee, Manual of Model Civil Jury Instructions, Instruction No. 1.6 (March 2017).

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Instruction No. 3.5
Torture and Cruel, Inhuman, or Degrading Treatment – First Element
("Severe pain or suffering, whether physical or mental")

As I mentioned a few moments ago, Plaintiffs' claims for torture and cruel, inhuman, or degrading treatment differ only with respect to the severity of pain required.

Thus, for purposes of torture, each Plaintiff must establish that he suffered severe pain or suffering. The term "severe" means of a great degree, as opposed to mild or moderate.[35] "Severe pain or suffering" includes, in addition to physical pain or suffering, mental suffering, which can also be the basis of a finding of torture. In evaluating the severity of the pain and suffering Plaintiffs endured, you should consider the duration, frequency, and intensity of the methods they endured, as well as the permanence or lasting effects of the methods.[36]

Even if you find that Plaintiffs did not suffer from severe enough harm to constitute torture, you may still find that they endured cruel, inhuman, and degrading treatment.[37] The term "cruel, inhuman and degrading treatment" includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, but which fall short of torture. Cruel, inhuman or degrading treatment arouses feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral

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[35] Merriam-Webster online dictionary.

[36] *See Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345-46 (N.D. Ga. 2002) (considering the frequency, intensity, and duration of abuse, as well as long term psychological harm, in concluding that Plaintiffs established torture).

[37] CAT, art. 16; *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1028 (C.D. Cal. 2009) *aff'd in part, rev'd in part on other grounds and remanded*, 671 F.3d 736 (9th Cir. 2011) *cert. granted, judgment vacated*, 133 S. Ct. 1995, 185 L. Ed. 2d 863 (2013) and aff'd, 722 F.3d 1109 (9th Cir. 2013) ("[F]ederal courts have begun to recognize that "there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment," and that CIDT "is therefore actionable under the ATCA.").

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resistance.[38] The difference between torture and cruel, inhuman and degrading treatment is the intensity of the suffering inflicted.[39] To satisfy this element, each Plaintiff must only show that he endured treatment that was cruel, inhuman or degrading.

Treatment is "cruel" if it causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[40]

Treatment is "inhuman" if it deliberately causes mental or physical, suffering which, in the particular situation, is unjustified.[41]

Treatment is "degrading" if its effect is such as to arouse feelings of fear, anguish, or inferiority capable of humiliating or debasing the plaintiff.

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[38] *Keenan v. United Kingdom*, No. 27229/95, 2001-V Eur. Ct. H.R. 242, ¶ 110.

[39] Restatement (Third) of Foreign Relations Law of the United States § 702, reporters' note 5 ("The difference between torture and cruel, inhuman, or degrading treatment or punishment 'derives principally from a difference in the intensity of the suffering inflicted.'") (quoting *Ireland v. United Kingdom,* 25 Pub. Eur. Ct. Hum. Rts., ser. A. para. 167 (1978)); *Wiwa v. Royal Dutch Petroleum Co.,* No. 96 CIV. 8386 (KMW), 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002) ("The Court is satisfied that Owens Wiwa and Jane Doe have alleged 'cruel, inhuman, or degrading' conduct that, while falling short of torture and summary execution, violates international law and is hence cognizable under the ACTA.").

[40] *Prosecutor v. Delalic*, Case no. IT-96-21-T ¶ 552 (ICTY Trial Chamber Nov. 16, 1988) ("cruel treatment constitutes an intentional act or omission . . . which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.").

[41] *The Greek Case*, [1969] Y.B. Eur. Conv. On H.R. 12A at 186 ("The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable.").

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Degrading treatment need not be deliberate, that is, the person engaged in such treatment did not have to intend to degrade; what matters is the effect.[42]

In deciding whether treatment caused severe pain or suffering, or whether it was cruel, inhuman, or degrading, you should consider whether an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or various forms of mistreatment. The severity of the acts over that lasting period should be assessed as a whole in order to determine whether the treatment at issue was cruel, inhuman or degrading.[43]

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[42] *Kudla v. Poland*, 35 Eur. Hum. Rts. Rep. 11, ¶ 92 (Oct. 26, 2000) ("The Court . . . has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them."); *Peers v. Greece*, 33 Eur. Hum. Rts. Rep. 51, ¶ 74 (April 19, 2001) (confirming that the absence of positive intent to humiliate or debase does not rule out a finding of degrading treatment).

[43] *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 182 (Mar. 15 2002) ("[T]o the extent that an individual has been mistreated over a prolonged period of time, or that he or she has been subjected to repeated or variousforms of mistreatment, the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, [or] follow a pattern[.]"); *see also, e.g.*, *Aydin v. Turkey*, No. 23178/94, 25 Eur. H.R. Rep. 251, ¶ 86 (1997) (examining "the accumulation of acts of physical and mental violence inflicted on the applicant")

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Instruction No. 3.6
Torture and Cruel, Inhuman, or Degrading Treatment – Second Element ("Intentionally inflicted for the purpose of obtaining information or a confession; for punishment, intimidation, or coercion; or for any reason based on discrimination")

The phrase "intentionally" means that the individual acts deliberately with the purpose or conscious desire to cause a result – here, pain or suffering.[44]

Whether one acted intentionally may not ordinarily be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. You may infer a person's intent from the totality of the circumstances, including, in this case, from the severity of the pain and suffering and from whether such pain or suffering was inflicted to accomplish a prohibited purpose, such as obtaining information or for intimidation or coercion.[45] In

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[44] *United States v. Velasco-Medina*, 305 F.3d 839, 845 (9th Cir. 2002) (quoting *U.S. v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000)).

[45] *See* Oona Hathaway, *et al.*, *Tortured Reasoning: The Intent to Torture Under International & Domestic Law*, 52 VA. J. INT'L. L. 792, 820 (2012) ("When an alien sues for damages under the ATS, domestic courts, much like the international tribunals, . . . have inferred intent from the facts and circumstances, including the severity of the pain and suffering, the nature of official action, and the evidence of a prohibited purpose."); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (inferring intent to inflict pain by analyzing factual allegations of pain and suffering, official action, and prohibited purpose); *Dragan Dimitrijevic v. Serbia and Montenegro*, U.N. Doc. CAT/C/33/D/207/2002, U.N. Comm. Against Torture (Nov. 29, 2004) (inferring intent to inflict pain from the infliction of pain and suffering for the purpose of advancing the investigation); *Jovica Dimitrov v. Serbia and Montenegro*, U.N. Doc. CAT/C/34/D/171/2000 (May 3, 2005) (inferring intent to inflict pain based on the nature and purpose of the police beatings the victim experienced); *Prosecutor v. Anto Furundija*, Case No. IT-95-17/1-T, ¶¶ 257, 264-67 (ICTY Dec. 10, 1998) (inferring intent to inflict pain when the pain or suffering was inflicted for a prohibited purpose); *Aksoy v. Turkey*, 1996-VI Eur. Ct. H.R. 2260 (1996) (inferring intent to inflict pain where the totality of the facts and circumstances showed that pain and suffering had been inflicted for a prohibited purpose).

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evaluating a person's intent, you may consider any statement made or done or omitted by that person, and all other facts and circumstances in evidence which indicate his or her state of mind.

When I use the terms "information," "intimidation," or "coercion," I mean these terms as they are used in common language.

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Instruction No 3.7
Torture and Cruel, Inhuman, or Degrading Treatment – Third Element
("The perpetrator acted under the color of law")

One who inflicts torture acts "under color of law" or "in concert with the state" when he voluntarily participates in some action together with the Government.[46] An individual and the Government conduct action together when they work together closely,[47] as when the action entails repeated instances of cooperation,[48] or when the private actor is contracted to perform some ongoing service for the Government.[49] I instruct you that the Central Intelligence Agency (CIA) is part of the Government.

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[46] *Pfizer*, 562 F.3d at 188 ("A private individual will be held liable under the [Alien Tort Statute] if he 'acted in concert with' the state, i.e. 'under color of law.' In making this determination, courts look to the standards for finding state action in claims brought under 42 U.S.C. § 1983.") (citation omitted); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) ("A private individual may be liable under § 1983 if she . . . entered joint action with a state actor."); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action [] exists where a private party is 'a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.'")

[47] *Franklin*, 312 F.3d at 444 ("action may be 'under color of state law' where there is 'significant' state involvement in the action.") (citation omitted); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1325 (S.D. Fla. 2011) ("Plaintiffs must allege a close relationship between the government and [private defendants with regard to the challenged action]").

[48] *Howerton v. Gabica,* 708 F.2d 380, 384-85 (9th Cir.1983) (finding conduct of private actor "under color of law" because there was "more than a single incident" of cooperation between private actor and the State).

[49] *Stypmann v. City and County of San Francisco,* 557 F.2d 1338, 1341–42 (9th Cir.1977) (finding joint activity between police and private towing company where police designated the vehicles to be towed, the towing destination, and notified the vehicle's owner of the infraction, tow, and procedures for remedy,

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Instruction No. 3.8
Torture and Cruel, Inhuman, or Degrading Treatment – Fourth Element ("pain or suffering did not arising solely from and was not inherent in or incident to lawful sanctions")

When I use the term "lawful sanctions," I mean judicially imposed sanctions and other enforcement actions authorized by law, including imprisonment, in response to a previously committed crime or violation. This means that the pain and suffering someone might experience from being imprisoned after being found guilty and sentenced does not count as torture. Lawful sanctions do not include the infliction of pain and suffering for the purpose of obtaining information or a confession; for punishment, intimidation, or coercion. To find that pain or suffering arose solely from lawful sanctions requires a finding that a person has been properly subjected to a lawful punishment, such as a conviction for committing a crime. If a person is just suspected of a crime, rather than convicted of a crime, then that person cannot be lawfully punished.[50]

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and private company contracted to provide the towing and storage services); *Goichman v. Rheuban Motors, Inc.,* 682 F.2d 1320, 1322 (9th Cir.1982) (same).

[50] 8 C.F.R. § 208.18(a)(3) ("Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.").

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Instruction No. 3.9
Non-Consensual Human Experimentation

Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud, and Obaid Ullah (as personal representative of Gul Rahman) contend that they suffered non-consensual human experimentation for which the Defendants are liable. Conducting experiments on human beings without their consent is prohibited under international law and is a proper basis on which to sue in the courts of the United States. This prohibition derives from the international response to experiments conducted by Nazi doctors, which were universally condemned as a violation of basic human rights and civilized morality.[51] The purpose of this prohibition is "to put an end for all time to criminal practices of which certain prisoners have been the victims, and also to prevent wounded or sick in captivity from being used as 'guinea-pigs' for medical experiments."[52]

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[51] *United States of America v. Karl Brandt,* et al.*, (Medical Case)*, II LAW REPORTS OF TRIALS OF WAR CRIMINALS 183 (1946); *United States v. Stanley*, 483 U.S. 669, 687 (1987) (Brennan, J., concurring in part and dissenting in part) ("The medical trials at Nuremberg in 1947 deeply impressed upon the world that experimentation with unknowing human subjects is morally and legally unacceptable.").

[52] COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 139 (J. Pictet ed., 1952); *see also* JEAN DE PREUX, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 141 (A.P. de Henry trans., 1960) ("The intention was to abolish forever the criminal practices inflicted on thousands of persons during the Second World War."). Both the US government and the Supreme Court have relied on the ICRC's commentaries when interpreting the Geneva Conventions. *See* DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 569 (2015); *Hamdan v. Rumsfeld*, 548 US 557, 631 (2006).

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Instruction No. 3.10
Nonconsensual Human Experimentation – Elements

To establish that he suffered non-consensual human experimentation, each plaintiff must prove by a preponderance of the evidence the following four elements:

First, that he was a human subject of research involving an intervention or interaction with him;[53]

Second, that the research was not carried out for his physical or mental health; [54]

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[53] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 184-85 (2d Cir. 2009); 45 C.F.R. § 46.116; *United States v. Brandt,* 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181-82 (1949) ("Nuremberg Code"); International Covenant on Civil and Political Rights, art. 7, GA Res. 2200A (XXI), UN Doc. A/6316 (1966); World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects,* art. III(a), G.A. Res. (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 UST 3114, 75 UNTS 31, art. 1, 3 (Aug. 12, 1949) (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 UST 3217, 75 UNTS 85, art. 3, 12 (Aug. 12, 1949) (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 6 UST 3316, 75 UNTS 135, art. 3, 13 (Aug. 12, 1949) (Geneva Convention III); Convention Relative to the Protection of Civilian Persons in Time of War, 6 UST 3516, 75 UNTS 287, art. 3, 32 (Aug. 12, 1949) (Geneva Convention IV); COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 54 (J. Pictet ed., 1952); Rome Statute of the International Criminal Court, art. 8(2)(e)(xi), UN Doc. A/CONF.183/9 (July 17, 1998); International Covenant on Civil and Political Rights, art. 7, GA Res. 2200A (XXI), UN Doc. A/6316 (1966).

[54] Geneva Convention III, art. 13; Geneva Convention IV, art. 32; Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the

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Third, that the research seriously endangered his physical or mental health; [55]

Fourth, that the research was performed on him without his informed consent;[56] and

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Protection of Victims of International Armed Conflicts, 1125 UNTS 3, art. 11 (June 8, 1977) (Protocol I); Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, art. 5(2)(e) (June 8, 1977); Rome Statute of the International Criminal Court, art. 8(2)(b)(x).

[55] Rome Statute of the International Criminal Court, art. 8(2)(b)(x), 8(2)(e)(xi); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 22, GA Res. 43/173, UN Doc. A/RES/43/173 (Dec. 9, 1988); United Nations Standard Rules for the Treatment of Prisoners, Rule 32(1)(d), GA Res. 70/175, UN Doc. A/70/175 (Jan. 8. 2016); Standard Minimum Rules for the Treatment of Prisoners, Council of Europe Committee of Ministers, art. 22, No. R (73) 5 (1973). *See also* Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, Report, Nat'l Comm'n for the Protection of Human Subjects of Biomedical & Behavioral Research, Dep't of Health, Educ. & Welfare, at 15-16 (1978) (Belmont Report) ("the most likely types of harms to research subjects are those of psychological or physical pain or injury"); *id.* at 17 ("Brutal or inhumane treatment of human subjects is never morally justified."); Nuremberg Code ("The experiment should be so conducted as to avoid all unnecessary physical and mental suffering and injury."); *id.* (noting of experiments for which Nazi doctors were ultimately convicted, "All of the experiments were conducted with unnecessary suffering and injury but very little, if any, precautions were taken to protect or safeguard the human subjects from the possibilities of injury, disability, or death. In every one of the experiments, the subjects experienced extreme pain or torture, and in most of them they suffered permanent injury, mutilation, or death[.]").

[56] *Pfizer*, 562 F.3d at 184-85; 45 C.F.R. § 46.116; Nuremberg Code; International Covenant on Civil and Political Rights, art. 7; World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects,* art. III(a); Arab Charter on Human Rights, art. 9, adopted September 15, 1994, *reprinted in* 18 Hum. Rts. L.J. 151 (1997); Universal

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Fifth, the perpetrator acted under color of law, or in concert with the state.[57]

Declaration on Bioethics and Human Rights, art. 6(2), UNESCO General Conference (Oct. 19, 2005).

[57] *Pfizer*, 562 F.3d at 188 ("A private individual will be held liable under the ATS if he 'acted in concert with' the state, i.e., 'under color of law.'").

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Instruction No. 3.11
Nonconsensual Human Experimentation – First Element
("Human Subject of research involving an intervention or interaction with him")

A "human subject" is an individual who is alive at the time of the research about whom an investigator obtains either data through interaction or intervention with the individual.[58]

An "intervention" is a physical procedure performed on a human subject to obtain data, or a manipulation of the human subject or his environment for the purpose of research.[59] An intervention is "for the purpose of research" when the research purpose is greater than any purpose of benefitting the physical or mental health of the human subject.[60]

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[58] 45 C.F.R. §. 46.102(f)

[59] 45 C.F.R. §. 46.102(f).

[60] *See generally* George J. Annas & Catherine L. Annas, *Legally Blind*, 30 J. Contemporary Health L. & Pol'y 1 (2014) (treatment of neonatal infants should be regulated as research where different from what physicians would have imposed in a purely therapeutic context); George J. Annas, *The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and Beyond*, 2 Health Matrix 119, 134 (1992) ("the primary goal of clinical trials is 'not to deliver therapy. It's to answer a scientific question so that the drug can be available for everybody once you've established safety and efficacy.'") (citation omitted); M. Cherif Bassiouni, *An Appraisal of Human Experimentation*, 72 J. Crim. L. & Criminology 1597, 1597 (1981) ("[Human experimentation's] main objective is the acquisition of new scientific knowledge rather than therapy."); *id.* at 1605 ("The doctor-patient relationship should be distinguished from medical experimentation in its purest form. In the latter the controlled clinical experiment does not purport to benefit the subject; instead the subject helps the medical scientist."); Geneva Convention III, art. 13 (prohibiting human experimentation "not justified by the medical, dental or hospital treatment of the prisoner concerned or carried out in his interest"); Geneva Convention IV, art. 32 (prohibiting human experimentation "not necessitated by the medical treatment of a protected person"); Protocol I, art. 11 (June 8, 1977) (prohibiting "any medical procedure . . . not indicated by the state of health of the person

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An "interaction" is communication or interpersonal contact between an investigator and a human subject.[61]

"Research" is an attempt to answer a question by collecting data or information, analyzing the data or information, and drawing conclusions from the results in an attempt to contribute to generalizable knowledge. Activities which meet this definition constitute research whether or not they are conducted or supported under a program which is considered research for other purposes.[62]

Research attempts to contribute to "generalizable knowledge" when *any* of the following is true: the knowledge increases theoretical understanding in an established field of study; the primary beneficiaries of the research are other practitioners, beyond those conducting the experiment; the results are expected to apply to a larger population, beyond the individuals from whom the data was

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concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure"); Protocol II, art. 5(2)(e) (same); Rome Statute of the International Criminal Court, art. 8(2)(b)(x) (prohibiting human experimentation "not justified by the medical, dental or hospital treatment of the prisoner concerned or carried out in his interest").

[61] 45 C.F.R. § 46. 102(f).

[62] 45 C.F.R. § 46.102(d); California State University San Marcos, "Definition: Guidelines for Defining Systematic Investigation and Generalizable Knowledge," Graduate Studies and Research, https://www.csusm.edu/gsr/irb/documents/policy_guidelines/definition.html; Council for International Organizations of Medical Services (CIOMS), International Ethical Guidelines for Biomedical Research Involving Human Subjects, guideline 4 (3rd ed.2002), *superseding id.* (2nd ed.1993); Belmont Report, at 3; M. Cheriff Bassiouni, *et al.*, An Appraisal of Human Experimentation in International Law and Practice, 72 J. Crim. L. & Criminology, 1597, 1597 (1981) (human experimentation is "anything done to an individual to learn how it will affect him").

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originally collected; or the results are intended to be replicated in other settings.[63]

[63] California State University San Marcos, "Definition: Guidelines for Defining Systematic Investigation and Generalizable Knowledge."

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Instruction No. 3.12
Nonconsensual Human Experimentation – Second Element
("research was not carried out for his physical or mental health")

Research is not carried out for the physical or mental health of the subject when its predominant purpose is not to improve the health or wellbeing of the human subject physically or mentally.[64]

[64] *See generally* Annas & Annas, *Legally Blind*, 30 J. Contemporary Health L. & Pol'y 1; Annas, *The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and Beyond*, 2 Health Matrix at 134; Bassiouni, *An Appraisal of Human Experimentation*, 72 J. Crim. L. & Criminology at 1597, 1605; Geneva Convention III, art. 13 (prohibiting human experimentation "not justified by the medical, dental or hospital treatment of the prisoner concerned or carried out in his interest"); Geneva Convention IV, art. 32 (prohibiting human experimentation "not necessitated by the medical treatment of a protected person"); Protocol I, art. 11 (prohibiting "any medical procedure . . . not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure"); Protocol II, art. 5(2)(e) (same); Rome Statute of the International Criminal Court, art. 8(2)(b)(x) (prohibiting human experimentation "not justified by the medical, dental or hospital treatment of the prisoner concerned or carried out in his interest").

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Instruction No. 3.13
Nonconsensual Human Experimentation – Third Element
("the research seriously endangered his physical or mental health")

Research seriously endangers the physical or mental health or a human subject when it exposes the subject to a significant risk of substantial pain or injury, either physical or psychological.[65]

[65] *See* Sigrid Mehring, *Medical War Crimes*, 12 Max Planck Yearbook of United Nations Law 229, 236 (2011) ("To actually be considered a serious danger, the effect of the medical procedure must affect the person in a 'long-lasting or crucial' manner. Usually, medical procedures without a therapeutic purpose meet these criteria."); *id.* at 246 ("biological experiments may seriously endanger the physical or mental health or integrity of the persons subjected to them when they are non-therapeutic, not justified by medical reasons, and not carried out in the interest of the research subject. There is thus no 'result' requirement—death does not have to ensue, a 'mere' threat to the health and integrity of the research subject suffices."); *see also* Merriam-Webster Online Dictionary, *available at* merriam-webster.com/dictionary (defining "seriously" as "to a serious extent," "endanger" as "to bring into danger or peril," and "peril" as "exposure to the risk of being injured, destroyed, or lost"); 18 U.S.C. § 3C1.2 (defining sentencing enhancement of "reckless endangerment during flight" in pertinent part as "creat[ing] a substantial risk of death or serious bodily injury"); Belmont Report, at 15 ("when expressions such as 'small risk' or 'high risk' are used, they usually refer . . . both to the chance (probability) of experiencing harm and the severity (magnitude) of the envisioned harm").

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Instruction No. 3.14
Nonconsensual Human Experimentation – Fourth Element
("the research was performed on him without his informed consent")

A human subject provides "informed consent" only when *all* of the following are true: in a language understandable to the subject, the subject is informed of the nature and purpose of the research, including the nature and duration of the subject's participation, and the extent and probability of any risks or benefits which may result to the subject or others as a result of the research, and the subject is further informed that his participation is voluntary and he may terminate his participation at any time, and the subject freely gives his consent.[66]

Under international law, a prisoner cannot provide informed consent for human experimentation.[67]

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[66] 45 C.F.R. § 46.116; *United States v. Brandt,* 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181 (1949) ["Nuremberg Code"]; World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects,* art. I(9), G.A. Res. (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000);CIOMS, International Ethical Guidelines for Biomedical Research Involving Human Subjects, guideline 4, cmt. to guideline 4.

[67] United Nations Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), http://www.refworld.org/docid/453883fb0.html ("The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment.").

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Instruction No. 3.15
Nonconsensual Human Experimentation – Fifth Element
("the perpetrator acted under color of law, or in concert with the state")

One who conducts non-consensual human experimentation acts "under color of law" or "in concert with the state" when he voluntarily participates in some action together with the Government.[68] An individual and the Government conduct action together when they work together closely,[69] as when the action entails repeated instances of cooperation,[70] or when the private actor is contracted to perform some ongoing service for the Government.[71] As

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[68] *Pfizer*, 562 F.3d at 188 ("A private individual will be held liable under the [Alien Tort Statute] if he 'acted in concert with' the state, i.e. 'under color of law.' In making this determination, courts look to the standards for finding state action in claims brought under 42 U.S.C. § 1983.") (citation omitted); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2002) ("A private individual may be liable under § 1983 if she . . . entered joint action with a state actor."); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action [] exists where a private party is 'a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions.'")

[69] *Franklin*, 312 F.3d at 444 ("action may be 'under color of state law' where there is 'significant' state involvement in the action.") (citation omitted); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1325 (S.D. Fla. 2011) ("Plaintiffs must allege a close relationship between the government and [private defendants with regard to the challenged action]").

[70] *Howerton v. Gabica,* 708 F.2d 380, 384-85 (9th Cir.1983) (finding conduct of private actor "under color of law" because there was "more than a single incident" of cooperation between private actor and the State).

[71] *Stypmann v. City and County of San Francisco,* 557 F.2d 1338, 1341–42 (9th Cir.1977) (finding joint activity between police and private towing company where police designated the vehicles to be towed, the towing destination, and notified the vehicle's owner of the infraction, tow, and procedures for remedy, and private company contracted to provide the towing and storage services); *Goichman v. Rheuban Motors, Inc.,* 682 F.2d 1320, 1322 (9th Cir.1982) (same).

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discussed earlier, the Central Intelligence Agency (CIA) is part of the Government.

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Instruction No. 3.16
War Crimes

Plaintiffs Suleiman Abdullah Salim, Mohamed Ahmed Ben Soud and Obaid Ullah (as personal representative of Gul Rahman) contend that they were subjected to torture; cruel, inhuman and degrading treatment; and medical, scientific or biological experiments without their consent while detained in the context of an international armed conflict. Torture, cruel treatment and experimentation are war crimes in violation of the laws and customs applicable in times of armed conflict.[72] Private parties need not act under color of law to be found liable for war crimes.[73]

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[72] *Kadic v. Karadzic,* 70 F.3d 232, 242-43 (2d Cir. 1995) (recognizing that violations of the Geneva Conventions during an international conflict constitute war crimes for which private individuals can be held liable); Restatement (Third) of the Foreign Relations Law of the United States, pt. II, introductory note (1986); Beth Stevens et al., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, at 167 (2d ed. 2008) (noting that courts have repeatedly found that claims of war crimes are cognizable under the ATS); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1331 (S.D. Fla. 2011) (holding that "[w]ar crimes are recognized violations of the law of nations under the ATS."); *see also Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003) (noting more generally that "[c]ustomary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II."); Customary IHL 156; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, art. 51; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, art. 147.

[73] *Kadic,* 70 F.3d at 239-41; *see also Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1267 (11th Cir. 2009), *abrogated in other respects by Mohamed v. Palestinian Auth.,* 132 S.Ct. 1702 (2012) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual. . . .The war crimes exception dispenses with the

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Instruction No. 3.17
War Crimes – Elements

To establish a violation of the Alien Tort Statute for war crimes, each plaintiff must prove by a preponderance of the evidence the following two elements:

> ***First***, that he was subjected to torture; cruel, inhuman or degrading treatment; and/or non-consensual human experimentation – as each has been defined above; and
>
> ***Second***, that he was subject to this treatment, which constitutes serious violations of international laws and customs,[74] during a non-international armed conflict.

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state action requirement for claims under the ATS."); *In re Chiquita Brands,* 792 F. Supp. 2d at 1331 (noting that "a claim for war crimes does not require state action"); *Romero v. Drummond Co.,* 552 F.3d 1303, 1316 (11th Cir. 2008) (holding that "[u]nder the Alien Tort Statute, state actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation.")

[74] Customary IHL 156; International Committee of the Red Cross, *Rule 156. Definition of War Crimes, available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#refFn_47_29 (maintaining an authoritative list of grave breaches of the Geneva Conventions and identifying "torture or inhuman treatment, including biological experiments" as war crimes during both international and non-international armed conflicts); Rome Statute, Article 8; *see also Geneva Conventions,* Aug. 12, 1949, articles 5, 51, 130, 147 (each of the four Geneva Conventions provides that "willful killing, torture or inhuman treatment, including biological experiments, [and] willfully causing great suffering or serious injury to body or health," constitute grave breaches of the Conventions); *see also* 18 U.S.C. § 2441 (defining "war crimes" as any "grave breach in any of the international conventions signed at Geneva 12 August 1949"); *Kadic,* 70 F.3d at 242 ("Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violation of the law of war.")

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When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true. You should base your decision on all of the evidence, regardless of which party presented it.[75]

A "non-international armed conflict" occurs when there is a conflict between two parties where one of the parties involved is nongovernmental in nature.[76]

As previously explained, torture, CIDT and human experimentation all constitute war crimes in non-international armed conflicts[77] so if you find that the elements of those claims – as described earlier – have been satisfied, Plaintiffs have met their burden of establishing that Defendants committed war crimes.

Note, however, that for non-consensual human experimentation to be a war crime, a human subject must be under the power or control of one other than their own party to the conflict,[78] and the Defendants must have known that the research would seriously endanger the physical or mental health of human

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[75] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.6 (March 2017).

[76] Geneva Convention, 1949, common art. 3; *Prosecutor v. Dordevic,* Case No. IT-05-87/1-T, Public Judgment ¶ 1525 (Feb. 23, 2011).

[77] Customary IHL 156; International Committee of the Red Cross, *Rule 156. Definition of War Crimes, available at* https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156#refFn_47_29 (maintaining an authoritative list of grave breaches of the Geneva Conventions and identifying "torture or inhuman treatment, including biological experiments" as war crimes during both international and non-international armed conflicts); Rome Statute, Article 8; *see also Geneva Conventions,* Aug. 12, 1949, articles 5, 51, 130, 147 (each of the four Geneva Conventions provides that "willful killing, torture or inhuman treatment, including biological experiments, [and] willfully causing great suffering or serious injury to body or health," constitute grave breaches of the Conventions).

[78] Protocol I, art. 11(4), 1125 UNTS 3 (June 8, 1977).

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subjects.[79] An actual injury is not required for the act to amount to a war crime; it is enough to endanger the life or health of the person through such an act.[80]

[79] Rome Statute of the International Criminal Court, art. 30(2)(b).

[80] Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary,* Cambridge University Press, 2003, pp. 130 and 233.

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SECTION 4 – THEORIES OF LIABILITY INSTRUCTION

Instruction No. 4.1
Overview of Liability

Plaintiffs contend the Defendants are responsible for their own acts and for acts of violence committed against the Plaintiffs by others acting on behalf of the CIA. Plaintiffs contend that Defendants committed torture, non-consensual human experimentation and war crimes against Plaintiffs. Plaintiffs also contend that Defendants are liable for the acts of others. In law, a person can be liable for acts they did not personally commit, under various "theories of liability." A theory of liability explains why one individual is legally responsible for the actions of another individual.

A number of theories have been presented to you in this case: aiding and abetting, conspiracy, joint criminal enterprise and planning. Each of these is separate. A plaintiff need only prove one theory of liability to make a person fully responsible for another person's conduct. If you find against plaintiffs on any one theory, such a finding does not affect any other theory. You must still individually consider plaintiffs' other theories of liability.

Plaintiffs contend that Defendants are responsible for acts of people working on behalf of the CIA because each Defendant planned, aided and abetted, and conspired with the CIA to subject Plaintiffs to the claims alleged and described above. Under the law, when one person orders that torture be carried out, one provides or prepares the tools for executing torture, and another physically inflicts torture or causes mental suffering, all such persons are equally accountable.[81]

[81] Prosecutor v. Furundžija, Case No. IT-95-17/1/T, Judgment ¶¶ 253–254 (Dec. 10 1998) ("[W]hen "one person orders that torture be carried out," "one provides or prepares the tools for executing torture," and "another physically inflicts torture or causes mental suffering . . . international law renders all the aforementioned persons equally accountable.").

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Instruction No. 4.2
Aiding and Abetting

Plaintiffs have alleged in their complaint that Defendants James E. Mitchell and John "Bruce" Jessen aided and abetted the torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation that Plaintiffs suffered. If you find that Defendants aided and abetted any of these offenses, they are liable under the Alien Tort Statute.[82]

[82] *Doe I v. Nestle, USA*, 766 F.3d 1013 (9th Cir. 2014).

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Instruction No. 4.3
Aiding and Abetting – Elements

Defendants may be found liable, even if they did not commit the act or acts constituting these offenses if they aided and abetted the action. To prove a defendant liable for aiding and abetting, Plaintiffs must prove by a preponderance of evidence:

> ***First***, that torture; cruel, inhuman or degrading treatment; war crimes; or human experimentation was committed by someone;[83]
>
> ***Second***, that the defendants provided acts and conduct of assistance, encouragement and/or moral support to those committing torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation;[84]
>
> ***Third***, that this assistance had a substantial effect on the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation;[85] and
>
> ***Fourth***, that the particular defendant at issue knew, or was aware of the substantial likelihood, that his acts would assist in the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation.[86]

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[83] Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions*, Instruction 5.1 (Mar. 2017).

[84] *Doe v. Nestle*, 766 F.3d 1013, 1026 (9th Cir. 2013); *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 475 (SCSL Sept. 26, 2013); *see also In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

[85] *Nestle*, 766 F.3d at 1026; *Taylor*, ¶ 475.

[86] *Nestle*, 766 at 1023 (noting that the "knowledge standard dates back to the Nuremberg tribunals," that the "International Criminal Tribunals for Rwanda and the former Yugoslavia consistently apply a knowledge standard," and that "after conducting an extensive review of customary international law, the Appeals Chamber of the Special Court for Sierra Leone recently affirmed this

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Instruction No. 4.4
Aiding and Abetting – First Element
("torture, cruel, inhuman, or degrading treatment, war crimes, or human experimentation, was committed by someone")

In order to find aiding and abetting liability, you must first find that someone committed torture, cruel, inhuman, or degrading treatment, war crimes or human experimentation, as defined above.[87] I may refer to the person who committed the underlying offense as the perpetrator or principal.

It is not required that you identify the specific person who physically inflicted the underlying offense. A defendant may be convicted for having aided and abetted a crime even if the principal perpetrators have not been identified, charged or tried.[88]

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knowledge standard") (citing *Zyklon B Case,* 1 Law Reports of Trials of War Criminals 93 (1946); *The Flick Case*, 6 T.W.C. 1216–17, 1220–21; *The Ministries Case,* 14 T.W.C. 622; *Prosecutor v. Blagojevic,* No. IT–02–60–A, ¶ 127 (ICTY, May 9, 2007); *Prosecutor v. Kayishema,* No. ICTR–95–1–T, ¶ 205 (ICTR, May 21, 1999); *Khulumani,* 504 F.3d at 277–79; *Exxon,* 654 F.3d at 33–34; *Taylor,* ¶ 483); *see generally Taylor*, ¶ 436–38, ¶ 445; *Prosecutor v. Radavon Karadžić*, Case No. IT-95-5/18-T, Judgment ¶¶ 577 (ICTY Mar. 24, 2016) (mens rea for aiding and abetting is knowledge and "if an accused is aware that one or more crimes would probably be committed, and one of these crimes is in fact committed, he is deemed to have intended the facilitation of the commission of that crime and is guilty as an aider and abettor); *Prosecutor v. Nyiaramashuko*, Case No. ICTR-98-42, Judgment ¶¶ 2213-2257 (Dec. 14, 2015) (upholding conviction for aiding and abetting on the basis of knowledge).

[87] *See* Ninth Circuit Criminal Instructions, Instruction 5.1.

[88] *Taylor* ¶370 ("The Appeals Chamber agrees with the ICTY Appeals Chambers that —a defendant may be convicted for having aided and abetted a crime even if the principal perpetrators have not been tried or identified.").

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Instruction No. 4.5
Aiding and Abetting – Second Element
("The defendants provided acts and conduct of assistance, encouragement and/or moral support to those committing torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation")

The term "assistance" encompasses practical assistance, encouragement and/or moral support to those perpetrating the offenses.[89]

The terms "encouragement" and "moral support" mean that the assistance provided a service that reassured the perpetrators.[90]

The assistance need not take any particular form or be tangible, so long as it has a substantial effect on the crimes.[91]

[89] *Nestle*, 766 F.3d at 1026; *Taylor*, ¶ 475.

[90] *Furundzija*, Trial Judgment, ¶¶ 199-204.

[91] *Taylor*, ¶ 475; *Furundzija*, Trial Judgment, ¶ 232.

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Instruction No. 4.6
Aiding and Abetting – Third Element
("the assistance had a substantial effect on the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation")

Substantial assistance need not be physical help—it can include advice or encouragement that has a substantial effect on the violation.[92] An aider or abettor can provide assistance at a time and place removed from the actual crime, such as before a crime has been committed.[93]

When I say that the assistance had to have a substantial effect on the commission of the torture, cruel, inhuman or degrading treatment, war crimes or human experimentation, I mean that the violation most probably would not have occurred in the same way without someone acting in the role that the accomplice in fact assumed.[94]

So, when I use the term "substantial effect," you should understand that this does not require that the aider and abettor actually carried out the violation or have been a but-for cause of it.[95] You may find the defendants liable even if the crimes could have been carried out through different means or with the

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[92] Taylor ¶ 371 ("International tribunals have never required that, as a matter of law, an aider and abettor must provide assistance to the crime in a particular manner, such as providing assistance to the physical actor that is then used in the commission of the crime."); *Prosecutor v. Simic*, IT-95-9-T, ¶ 162 (ICTY Oct. 17, 2003) ("The acts of aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in the commission of the crime.").

[93] *Taylor*, ¶ 480.

[94] *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997).

[95] *Taylor*, ¶522; *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, ¶ 48 (ICTY July 29, 2004); *Prosecutor v. Brdanin*, IT-99-36-A, Appeal Judgment, ¶348 (ICTY April 3, 2007); *Prosecutor v. Kunarac*, IT-96 -23-T & IT-96-23/1-T, Trial Judgment, ¶ 391 (ICTY Feb. 22, 2001).

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assistance of another.[96] You may also find the Defendants liable even if other people also assisted the violations.[97] And there is no requirement that the Defendants had the ability to control anyone who physically inflicted the violations.[98]

Defendants did not need to be in the room to be liable, and you can find that the crimes would have taken place even without their help. All Plaintiffs have to show is that Defendants affected the way in which the violations were committed.[99] In other words, all that is required is that the violation would not have occurred in the same way without Defendants' acts.

I instruct you that providing the means or training by which a violation of the law is carried out is sufficient to meet this requirement.[100]

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[96] *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 257-58; *see also Prosecutor v. Karadzic*, Case No. IT-95-5/18-T, Judgment (Mar. 24, 2016).

[97] *Taylor* ¶516 ("as a matter of law, an accused need not be the only source of assistance in order for his acts and conduct to have a substantial effect on the commission of the crimes").

[98] Taylor ¶ 370 ("[F]or aiding and abetting liability, it is not necessary as a matter of law to establish whether the accused had any power to control those who committed the offences.").

[99] *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 219 (ICTY Dec. 10, 1998) (that the defendant's actions served to "modify" the way in which the act was committed suffices).

[100] *S. African Apartheid*, 617 F. Supp. 2d at 259.

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Instruction No. 4.7
Aiding and Abetting – Fourth Element
("defendant knew, or was aware of the substantial likelihood, that his acts would assist in the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation")

Defendants need not share the perpetrator's intent to commit the wrongful acts.[101] The law requires only that an accused must know, or be aware of the substantial likelihood that the consequence of his conduct will be that he will be assisting another in committing torture, cruel, inhuman or degrading treatment, war crimes or human experimentation.[102]

It is not necessary for the aider/abettor to know that his acts would have a substantial effect on the commission of the violations.[103] In addition, the aider and abettor need not have knowledge of the precise violation that was intended or that was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.[104]

Finally, there is no requirement that an aider and abettor know the identities of the victims who are ultimately hurt. In other words, to be liable,

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[101] *Taylor*, ¶ 446; *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Judgment, ¶ 205 (ICTR May 21, 1999) ("[T]he accused need not necessarily have the same *mens rea* as the principal offender."); *Furundzija*, ¶¶ 245 ("[I]t is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime. Instead, the clear requirement in the vast majority of the cases is for the accomplice to have knowledge that his actions will assist the perpetrator in the commission of the crime.").

[102] *Taylor*, ¶¶ 438, 445.

[103] *Taylor*, ¶ 439.

[104] *Prosecutor v. Blaskic*, IT-95-14-A, Appeal Judgment, ¶ 50 (ICTY July 29, 2004); *Prosecutor v. Furundzija*, IT-95-17/1-T, Trial Judgment, ¶ 246 (ICTY Dec. 10, 1998).

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Defendants needed to know that they were assisting wrongful acts but they did not need to know who the victims would be.[105]

[105] *See, e.g.*, *Nestle*, 766 F.3d at 1025-26 (no allegation that defendants had "subjective motive to harm children" or knew identities of plaintiffs); Trial of Bruno Tesch and Two Others ("Zyklon B"), British Military Court, Hamburg, 1-8 Mar. 1946, Vol. I, Law Reports, p. 93 (defendants convicted without ever visiting camp where crimes took place and with no allegation that defendants knew victims); *see generally Doe v. Drummond Co.*, No. 2:09-CV-01041-RDP, 2010 WL 9450019, at *11 n.24 (N.D. Ala. Apr. 30, 2010) (finding "no authority for Defendants' contention that [Defendant] must have known of specific identities of those murdered . . . to potentially be held liable for aiding and abetting extrajudicial killings"); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 584 (E.D.N.Y. 2005) (noting that it is "well within the mainstream of aiding and abetting liability" to hold a defendant liable based only on the "general awareness of [his] role as part of an overall illegal activity, and the defendant's knowing and substantial assistance to the principal violation").

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Instruction No. 4.8
Conspiracy

Plaintiffs contend that James E. Mitchell and John "Bruce" Jessen conspired with agents of the United States in the commission of torture, cruel, inhuman or degrading treatment; and/or non-consensual human experimentation of Plaintiffs. Defendants may be found liable for these claims, even if they did not commit the act or acts constituting the offense.[106]

[106] *Estate of Marcos,* 103 F.3d at 776; *Sarei v. Rio Tinto, PLC,* 487 F.3d 1193, 1202 (9th Cir. 2007), *on reh'd en banc,* 550 F.3d 822 (9th Cir. 2008); *Doe v. Saravia,* 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (landmark ATS cases where plaintiffs alleged conspiracy as a theory of liability); *In re Terrorist Attacks on September 11, 2001,* 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005) (conspiracy claim for aircraft highjacking); *Eastman Kodak Co.,* 978 F. Supp. At 1091-92 (recognizing conspiracy liability for unlawful arbitrary detention.

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Instruction No. 4.9
Conspiracy - Elements

Plaintiffs have satisfied their burden of proving that Defendants are liable for conspiracy to commit torture, cruel, inhuman or degrading treatment; and/or non-consensual human experimentation if you find that they have shown the following:

> ***First***, two or more persons, including each Defendant, agreed to commit torture, cruel, inhuman or degrading treatment; and/or non-consensual human experimentation;
>
> ***Second***, the Defendants knew or should have known of at least one of the goals of the conspiracy and intended to help accomplish it or knew or should have known that torture, cruel, inhuman or degrading treatment and/or non-consensual human experimentation were the reasonably foreseeable consequences of the unlawful scheme; and
>
> ***Third,*** torture, cruel, inhuman or degrading treatment and/or non-consensual human experimentation were/was committed by someone who was a member of the agreement in furtherance of the conspiracy.[107]

[107] Ninth Circuit Criminal Instructions, Instruction 8.2; *Cabello v. Fernandez-Larios,* Case No. 99-cv-528, ECF No. 352, Instruction 18 (S.D. Fla. May 24, 2004) (approving similar instruction); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (affirming lower court); *Estate of Marcos*, 103 F.3d at 776 (approving jury instruction that the defendant would be "liable if it found either that (1) Marcos directed, ordered, *conspired* with, or aided the military in torture, summary execution, and 'disappearance' or (2) if Marcos knew of such conduct by the military and failed to use his power to prevent it."); *see also Halberstam v. Welch,* 705 F.2d 472, 477 (D.C. Cir. 1983); *In re Sumitomo Copper Litig.,* 120 F. Supp. 2d 328, 339 (S.D.N.Y. 2000); *Kashi v. Gratsos,* 790 F.2d 1050, 1055 (2d Cir. 1986).

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Instruction No. 4.10
Conspiracy – First Element
("two or more persons, including each Defendant, agreed to commit torture, CIDT and/or non-consensual human experimentation")

For a conspiracy to have existed, Plaintiffs did not have to show that the conspirators met with alleged co-conspirators, made a formal agreement or that they agreed on every detail of the conspiracy.[108] An agreement to commit torture, CIDT and/or non-consensual human experimentation may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged co-conspirators.[109]

[108] *Halberstam,* 705 F.2d at 477 (citing W. Prosser, *Law of Torts,* § 46 at 292 (4th ed 1971); 16 Am. Jur. 2d *Conspiracy*, ¶ 68 (1979)); 20 N.Y. Jur. 2d Conspiracy – Civil Aspects § 20.

[109] *Bowoto v. Chevron Texaco Corp.,* No. 99-2506 (N.D. Cal.,), Order on Defendants' Motion for Summary Judgment on Plaintiffs' Claims 10 Through 17, ECF No. 1640 at 19 (Aug. 14, 2007); 20 N.Y. Jur. 2d Conspiracy – Civil Aspects § 20; *Bedard v. La Bier,* 20 Misc. 2d 614, 616 (Sup. 1959).

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Instruction No. 4.11
Conspiracy – Second Element
("the Defendants knew or should have known of at least one of the goals of the conspiracy and intended to help accomplish it or knew or should have known that torture, CIDT and/or non-consensual human experimentation were the reasonably foreseeable consequences of the unlawful scheme")

While Plaintiffs are not required to prove that either Defendant personally committed torture, CIDT or non-consensual human experimentation, or that Defendants knew all of the details of the agreement or identities of all the other participants of the conspiracy,[110] in order to find conspirator liability, Plaintiffs must show that Defendants knew, or should have known, of the conspiracy's unlawful objective.[111] Defendants' knowledge of, and intent to further, the goals of the conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators and other circumstances.[112]

Defendants are responsible not only for the particular wrongful act or acts that, to their knowledge, the co-conspirators agreed to commit, but they are also responsible for the natural and probable consequences of any wrongful act of the conspiracy done to further the purpose of the conspiracy, including acts that the

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[110] 20 N.Y. Jur. 2d Conspiracy – Civil Aspects § 20; *Bedard v. La Bier,* 20 Misc. 2d 614, 616 (Sup. 1959).

[111] *Moore v. Brewster,* 96 F.3d 1240, 1245 (9th Cir. 1996) ("The indispensable elements of civil conspiracy include a wrongful act and knowledge on the part of the alleged conspirators of [the conspiracy's] unlawful objective."); *Jones v. Chicago,* 856 F.2d 985, 992 (7th Cir. 1988) (a defendant need not agree to the details of the conspiratorial scheme or even know who the other conspirators are, so long as he understands the general objectives of the scheme, accepts them, and agrees to do his part to further them); *see also United States v. Andolschek,* 142 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.); *Ungar,* 211 F. Supp. 2d at 100 (same).

[112] *Kidron v. Movie Acquisition Corp.,* 40 Cal. App. 4th 1571, 1582 (Cal. App. 2d Dist. Dec. 13, 1995) (quoting *Wyatt v. Union Mortg. Co.,* 24 Cal. 3d 773, 785 (Cal. 1979)); *Moore,* 96 F.3d at 1245 (citing same).

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conspirator did not intend as part of the agreed-upon objective but that were nevertheless a natural and foreseeable consequence of the conspiracy.[113]

[113] *Halberstam,* 705 F.2d at 487 (a conspirator is liable for the acts of his co-conspirators if they are the reasonably foreseeable consequences of the unlawful scheme); *see also Ungar v. Islamic Republic of Iran,* 211 F. Supp. 2d 91, 100 (D.D.C. 2002) (citing *Pinkerton v. United States,* 328 U.S. 640, 647-48, 663 (1946) (which holds: "Defendant who does not directly commit a substantive offense may nevertheless be liable if the commission of the offense by a co-conspirator in furtherance of the conspiracy was reasonably foreseeable to the defendant as a consequence of their criminal agreement."); *United States v. Bruno,* 383 F.3d 65, 89 (2d Cir. 2004); *SEC v. Yun,* 148 F. Supp. 2d 1287, 1292 (M.D. Fla. 2001); *Williams v. Fedor,* 69 F. Supp. 2d 649, 666 (M.D. Pa. 1999); 20 N.Y. Jur. 2d Conspiracy – Civil Aspects § 10 ("it is not essential that one be fully aware of the conspiracy's objects and aims").

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Instruction No. 4.12
Conspiracy – Third Element
("torture, CIDT and/or non-consensual human experimentation was committed by someone who was a member of the agreement in furtherance of the conspiracy")

In order to find this element, you must find that someone committed torture, cruel, inhuman, or degrading treatment, war crimes or human experimentation, as defined above. Each member of the conspiracy is liable for the actions of the other conspirators performed during the course and in furtherance of the conspiracy.[114] A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable.[115]

[114] *See fns.* 69, 71; 20 N.Y. Jur. 2d Conspiracy – Civil Aspects § 10.

[115] *Halberstam,* 705 F.2d at 482.

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Instruction No. 4.13
Joint Criminal Enterprise

Plaintiffs contend that James E. Mitchell and John "Bruce" Jessen entered into a joint criminal enterprise with agents of the United States in the commission of torture, cruel, inhuman or degrading treatment; and/or non-consensual human experimentation of Plaintiffs. Defendants may be found liable for these claims, even if they did not commit the act or acts constituting the offense.[116] Courts have recognized that, when crimes are part of the implementation of a plan or program, it is often the case that multiple people are responsible. In other words, if crimes were committed as part of a larger program, responsibility is shared both by the people whose role it was to physically commit the crimes, as well as by those who agreed on the common plan and participated in other ways.[117]

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[116] *Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) ("The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability . . . .") (citing *Prosecutor v. Tadíc*, Judgment, Case No. IT–94–1–A (ICTY App. Chamber, July 15, 1999); *Prosecutor v. Milutinovíc*, Decision on Dragoljub Ojdaníc's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT–99–37–AR72, ¶ 26 (ICTY App. Chamber, May 21, 2003)); *see Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 190 (July 15, 1999) (*Tadic*, AJ) (recognizing that joint criminal enterprise involves a multiplicity of individuals performing distinct but interrelated acts in a coordinated, non-hierarchical, and distributed fashion); *see also id.* at ¶ 191; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeal Judgement, ¶ 95 (Feb. 25, 2004) (*Vasiljevic*, AJ); *Prosecutor v. Dordevic*, Case No. IT-05-87/1-T, Public Judgement ¶ 1860 (Feb. 23, 2011) (*Dordevic,* PJ).

[117] *Tadic* AJ ¶ 190; *Taylor* ¶ 385 (Where "crimes were committed in the implementation of a plan, [or] program . . . the crimes were committed, as a matter of fact, not by the physical actors alone, but by the organised participation and contributions of many persons"); *see generally* Antonio Cassese, *The Proper Limits of Individual Responsibility Under the Doctrine of Joint Criminal Enterprise,* 5 J. Int'l Crim. Just. 109-33 (2007).

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Instruction No. 4.14
Joint Criminal Enterprise – Elements

Plaintiffs have satisfied their burden of proving that Defendants are liable for engaging in a joint criminal enterprise in the commission of torture, cruel, inhuman or degrading treatment; and/or non-consensual human experimentation if you find that they have shown the following by a preponderance of evidence:

> ***First***, that two or more persons, including each Defendant, agreed on a common plan, design or purpose to commit torture, CIDT and/or non-consensual human experimentation;
>
> ***Second*****,** each Defendant participated in the common plan, design or purpose by assisting or contributing to the execution of the common purpose and torture, CIDT and/or non-consensual human experimentation was committed by someone who was a member of the joint criminal enterprise; and
>
> ***Third***, each Defendant intended for torture, CIDT and/or non-consensual human experimentation to occur or knew or should have known that torture, CIDT and/or non-consensual human experimentation was reasonably foreseeable.[118]

[118] *Dordevic* PJ ¶¶ 1864-1865; *Tadic* AJ ¶¶ 196, 203-204, 220, 227-228; *Prosecutor v. Krajisnik,* Case No. IT-00-39-A, Appeal Judgment, ¶ 697 (Mar. 17, 2009) (*Krajisnik* AJ); *Prosecutor v. Brdjanin,* Case No. IT-99-36-T, Trial Judgment, ¶¶ 265, 411 (Sept. 1, 2004) (Brdjanin TJ); *Prosecutor v. Milutinovic*, Case No. IT-00-29-2, Trial Judgment, (Vol. I) ¶ 111 (Feb. 26, 2009) (*Milutinovic* TJ); *Lizarbe v. Rondon,* 642 F. Supp. 2d 473, 490 (D. Md. 2009).

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Instruction No. 4.15
Joint Criminal Enterprise – First Element
("that two or more persons, including each Defendant, agreed on a common plan, design or purpose to commit torture, CIDT and/or non-consensual human experimentation")

To show that Defendants agreed on a "common plan, design or purpose" to commit the above referenced violations, Plaintiffs must show that each Defendant, and at least one other person, came to an express or implied agreement that a crime would be committed.[119] For a joint criminal enterprise to have existed, it is not necessary that the members made a formal agreement or that they agreed on every detail of the enterprise.[120] An agreement to participate in a joint criminal enterprise can be inferred from the circumstances.[121]

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[119] *Krajisnik* TJ, ¶ 883; *Prosecutor v. Popovic, Beara, Nikolic, Borovcanin, Tolimir, Miletic, Gvero, Pandurevic and Trbic,* Case No. IT-05-88-PT, Decision on Motions Challenging the Indictment Pursuant to Rule 72 of the Rules, ¶ 20 (May 31, 2006); *See also* Merriam-Webster online dictionary (defining "plan" as "a method for achieving an end," "design" as " to create, fashion, execute, or construct according to a plan," and "purpose" as "something set up as an object or end to be attained").

[120] *See id., fn. 77; Tadic* AJ ¶ 227 ("There is no necessity for this purpose to have been previously arranged or formulated. It may materialize extemporaneously and be inferred from the facts"); *Vasiljevic* AJ ¶¶ 100, 109 (same); *see also Krajisnik* TJ ¶¶ 883-84; *Kvocka* AJ ¶ 116; *Brdanin* TJ ¶ 262.

[121] *Tadic* AJ ¶ 227; *Vsiljevic* AJ ¶ 100; *Milutinovic,* TJ (Vol. I) ¶ 102.

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Instruction No. 4.16
Joint Criminal Enterprise – Second Element
("each Defendant participated in the common plan, design or purpose by assisting or contributing to the execution of the common purpose and torture, CIDT and/or non-consensual human experimentation was committed by someone who was a member of the joint criminal enterprise")

In order to find this element, you must find that someone committed torture, cruel, inhuman, or degrading treatment, war crimes or human experimentation, as defined above. Each member of the joint criminal enterprise is liable for the actions of the other co-perpetrators performed during the course–and in furtherance—of the common plan, design or purpose. In other words, Defendants' participation in the joint criminal enterprise need not involve the commission of a specific crime but it may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[122] A Defendant need not physically participate in, be physically present at, or be a necessary cause of the crime, provided that he contributed in some manner to the common plan that resulted in its commission.[123]

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[122] "[T]he accused must have participated in the common design, either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose." *Dordevic,* PJ ¶ 1863; *Tadic*, AJ ¶¶ 196, 202-203, 227-228, 675. The accused's contribution need not be substantial or necessary to achieve the common criminal purpose but should at least be a significant one. *Dordevic,* PJ ¶ 1863; *Krajisnik*, AJ ¶¶ 675; *Trial of Feurstein and others,* Proceedings of a War Crimes Trial held at Hamburg, Germany (Judgement of 24 August 1948); *Tadic*, AJ ¶ 199. "The accused need merely act or fail to act 'in some way [. . .] directed to the furtherance of the common plan or purpose.'" *Dordevic,* PJ ¶ 1863 (quoting *Tadic,* AJ ¶229).

[123] *Prosecutor v. Kvocka,* Case No. IT-98-30/1-A, Appeal Judgment, ¶¶ 97-99, 112 (Feb. 28, 2005) (*Kvocka* AJ); *Krajisnik,* AJ ¶¶ 883(iii); *Prosecutor v. Krnojelac,* Case No. IT-97-25-T, Judgment ¶ 81 (Mar. 15, 2002).

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Instruction No. 4.17
Joint Criminal Enterprise – Third Element
("each Defendant intended for torture, CIDT and/or non-consensual human experimentation to occur or knew or should have known that torture, CIDT and/or non-consensual human experimentation was reasonably foreseeable")

Defendants are liable for torture, CIDT and non-consensual human experimentation that occurred as part of their joint criminal enterprise where all members of the joint criminal enterprise act pursuant to a common design and possess the same criminal intent.[124] Intent may be inferred from knowledge combined with continuing participation.[125] Defendants are also liable when one of the members of the joint criminal enterprise commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the joint criminal enterprises common purpose.[126] In other words, a defendant is liable so long as it was reasonably foreseeable on the basis of the information available to the defendant that the crime or underlying offense would be committed.[127] "Reasonably foreseeable" does

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[124] *Dordevic,* PJ ¶ 1864; *Tadic,* AJ ¶¶ 220, 228.

[125] *Dordevic,* PJ ¶ 1864; *Krajisnik,* AJ ¶ 697.

[126] *Tadic* AJ, ¶ 204 (liability exists in "cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."); *Vasiljevic* AJ ¶ 100 (same).

[127] In *Lizarbe v. Rondon,* 642 F. Supp. 2d 473, 490 (D. Md. 2009), the court found that: "The concept of joint criminal enterprise provides for joint liability where there is a common design to pursue a court of conduct where: '(i) the crime charged was a natural and foreseeable consequence of the execution of [the] enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of [the] enterprise, and, with that awareness, participated in [the]enterprise." (quoting *Prosecutor v. Brdjanin,* Case No. IT-99-36-T, Trial Judgement, ¶ 265 (Sept. 1, 2004)); *see also Dordevic,* PJ ¶ 1865; *Milutinovic*, TJ (Vol. I), ¶ 111; *Tadic*, AJ ¶¶ 204, 227-228; *Brdanin*, AJ ¶ 411.

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not mean a "probability" that a crime would be committed, just that the possibility of a crime being committed is substantial enough to be foreseeable.[128]

[128] *Radovan Karadžic*, Case No. IT-95-5/18-AR72.4, Appeals Chamber, Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability on JCE, 25 June 2009, ¶ 18 (no requirement of a "probability" that a crime would be committed, only that the possibility of a crime being committed is substantial enough that it is foreseeable to the accused).

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Instruction No. 4.18
Planning

Plaintiffs contend that Defendants James E. Mitchell and John "Bruce" Jessen planned the torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation that Plaintiffs suffered. If you find that Defendants planned any of these offenses, they are liable under the Alien Tort Statute.[129]

[129] *See* United Nations Security Council, *Statute for the International Criminal Tribunal for the Former Yugoslavia*, art. 7(1) (May 25, 1993), *amended* May 17, 2002, *available at* http://www.refworld.org/docid/3dda28414.html ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."); United nations Security Council Statute for the International Criminal Tribunal for Rwanda, art. 6(1) (Nov. 8, 1994), *amended* Oct. 13, 2006, *available at* http://www.refworld.org/docid/3ae6b3952c.html (same); *Stanislav Galic*, Case No. IT-98-29-T, Trial Judgment, 5 Dec. 2003, ¶ 168; *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, ¶ 480.

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Instruction No. 4.19
Planning – Elements

Defendants may be found liable, even if they did not commit the act or acts constituting these offenses. To prove a defendant liable for planning, Plaintiffs must prove by a preponderance of evidence:

First, the defendant participated in designing an act or omission;[130]

Second, the act or omission was committed by someone, resulting in the torture; cruel, inhuman or degrading treatment; war crimes; or human experimentation suffered by one or more Plaintiffs;[131]

Third, the defendant's participation in the design had a substantial effect on the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation suffered by one or more Plaintiffs;[132] and

Fourth, the defendant knew, or was aware of the substantial likelihood, that his acts would assist in the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation.[133]

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[130] *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, ¶ 494 (SCSL Sept. 26, 2013); *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-A, ¶ 688 (SCSL Oct. 29, 2009); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, ¶ 268 (ICTY Feb. 26, 2009).

[131] Ninth Circuit Jury Instructions Committee, *Manual of Model Criminal Jury Instructions*, Instruction 5.1 (Mar. 2017).

[132] *Taylor*, ¶ 494; *Milutinović,* ¶¶ 81-82.

[133] *Taylor,* ¶ 494*; Milutinović,* ¶ 268.

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Instruction 4.20
Planning – First Element
("the defendant participated in designing an act or omission")

To find that a defendant participated in designing an act or omission, you must find that the defendant took part in designing the course of action – that is, creating a plan. A "plan" is a method to achieve some objective, either by action or inaction.[134]

You do not need to find that the design was originally conceived of by the defendant, or that the defendant(s) acted alone in creating the design.[135] You also do not need to find a direct connection between the individual planning the crime and the perpetrator.[136]

The extent of participation you must find for a defendant is an amount sufficient to have a substantial effect on the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation suffered by one or more Plaintiffs, as discussed below.[137]

You may infer a defendant's participation in designing an act or omission from circumstantial evidence, and despite an absence of direct evidence. The type of circumstantial evidence that supports an inference of planning includes evidence related to the defendant's responsibilities relative to the context in which the ultimate violations occurred. In other words, if the defendant's role in relation to the torture, cruel, inhuman or degrading treatment, war crimes,; or human experimentation suggests it is more likely than not that defendant(s)

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[134] *See* Merriam-Webster online dictionary (defining "participate" as "to take part in," "design" as " to create, fashion, execute, or construct according to a plan," and "plan" as "a method for achieving an end").

[135] *Taylor*, § 494 ("[A]n accused need not design the conduct alone, and the accused need not be the originator of the design or plan.").

[136] *Kordic et al.*, Trial Judgement ¶ 386

[137] *Sesay*, ¶ 687.

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participated in the original design, then you may find that defendant(s) participated in designing the plan.[138]

A defendant does not have to directly or physically commit the crime planned to be found guilty of planning. The defendant does not even have to be at the crime scene, as long as it is established that the direct perpetrators were acting according to the defendant's plan.[139]

[138] *Dario Kordić & Mario Čerkez*, Case No. IT-95-14/2-T, Trial Judgment, 26 February 2001, ¶ 829 (finding planning liability on the basis of position and responsibilities of accused, noting that planning "fell within his sphere of authority").

[139] *Ljube Boškoski et al.*, Case No. IT-04-82-A, Appeal Judgement, 19 May 2010, ¶ 125.

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Instruction No. 4.21
Planning – Second Element
("the act or omission was committed by someone, resulting in the torture; cruel, inhuman or degrading treatment; war crimes; or human experimentation suffered by one or more Plaintiffs")

In order to find this element, you must find that someone committed torture, cruel, inhuman, or degrading treatment, war crimes or human experimentation, as defined above.[140] It is not necessary to identify by name the direct perpetrator(s) of the crime planned by the defendant(s).[141]

[140] *See* Ninth Circuit Criminal Instructions, Instruction 5.1.

[141] *Boškoski et al.*, AJ ¶ 75 (citing *Kordic et al.*, AJ ¶¶ 26, 29, 31).

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Instruction No. 4.22
Planning – Third Element
("the defendant's participation in the design had a substantial effect on the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation suffered by one or more Plaintiffs")

When I say that "the defendant's participation in the design had to have a substantial effect on the commission of the torture, cruel, inhuman or degrading treatment, war crimes or human experimentation," I mean that the violation most probably would not have occurred in the same way without someone participating in designing an act or omission in the way that the defendant did.[142]

As a result, the requirement that the planner had a "substantial effect" does not mean you must find that the planner actually carried out the violation or that the violation would not have happened if the defendant(s) had never participated in the planning process.[143] You may find a defendant liable even if the crimes could have been carried out through different means or without a defendant's participation in the planning.

It is not necessary to find that the defendant(s) planned any specific violation or crime that ultimately occurred. It is sufficient for planning liability if the defendant participated in creation of a design, and execution of that design entailed commission of a specific violation or crime.[144]

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[142] *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997).

[143] *Taylor*, ¶ 494; *Milutinović*, ¶ 268.

[144] *Taylor*, ¶ 492 ("'[T]he legitimate character of an operation does not exclude an accused's criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation' if the goal is to be achieved by the commission of crimes.") (citation omitted); *Milutinović*, ¶ 81 n.84 ("The accused need only design an 'act or omission'—and not necessarily a crime or underlying offence per se[.]").

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Instruction No. 4.23
Planning – Fourth Element
("the defendant knew, or was aware of the substantial likelihood, that his acts would assist in the commission of torture, cruel, inhuman or degrading treatment, war crimes, or human experimentation")

A defendant need not have the same intent to commit the wrongful acts as the individual who in fact commits them.[145] The law requires only that a defendant know, or be aware of the substantial likelihood, that the design that he participates in planning will result in torture, cruel, inhuman or degrading treatment, war crimes or human experimentation.[146]

[145] *Taylor*, ¶ 446; *Prosecutor v. Kayishema*, ICTR-95-1-T, Trial Judgment, ¶ 205 (ICTR May 21, 1999) ("[T]he accused need not necessarily have the same *mens rea* as the principal offender.").

[146] *Taylor*, ¶ 494, *Milutinović*, ¶ 268.

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SECTION 5 – DAMAGES

Instruction No. 5.1
Damages-Proof

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the Plaintiffs, you must determine their damages. Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the Plaintiffs for any injury you find was caused by the Defendants. You should consider the following:

A. Compensatory Damages
B. Punitive and Exemplary Damages; and
C. Reasonable Attorneys' Fees and Costs of Suit.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.[147]

[147] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 5.1 (March 2017).

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Instruction No. 5.2
Measures Of Types Of Damages

In determining the measure of damages, you should consider:

The nature and extent of the injuries;

The disability, disfigurement, loss of enjoyment of life experienced and that with reasonable probability will be experienced in the future;

The mental, physical, emotional pain and suffering experienced and that with reasonable probability will be experienced in the future;

The reasonable value of necessary medical care, treatment, and services received to the present time;

The reasonable value of necessary medical care, treatment, and services that with reasonable probability will be required in the future;

The reasonable value of earnings or earning capacity lost up to the present time;

The reasonable value of earnings or earning capacity that with reasonable probability will be lost in the future;

The reasonable value of necessary services other than medical and expenses required up to the present time; and

The reasonable value of necessary services other than medical and expenses that with reasonable probability will be required in the future.[148]

[148] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 5.2 (March 2017).

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Instruction No. 5.3
Damages Arising In The Future—Discount To Present Cash Value

Any award for future economic damages must be for the present cash value of those damages.

Noneconomic damages such as pain and suffering, disability, disfigurement and mental trauma are not reduced to present cash value.

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages would have been received.

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. You should also consider decreases in the value of money that may be caused by future inflation.[149]

[149] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 5.4 (March 2017) (citing *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 339-42 (1988)); *see also Passantino v. Johnson & Johnson Consumer Prods., Inc.,*212 F.3d 493, 508-09 (9th Cir. 2000) (for proposition that there must be evidence to support this instruction).

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Instruction No. 5.4
Punitive Damages

If you find for Plaintiffs, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish Defendants and to deter similar acts in the future. Punitive damages may not be awarded to compensate Plaintiffs.

Plaintiffs have the burden of proving by a preponderance of the evidence that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the Defendants' conduct that harmed the Plaintiffs was malicious, oppressive or in reckless disregard of the Plaintiffs' rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring Plaintiffs. Conduct is in reckless disregard of the Plaintiffs' rights if, under the circumstances, it reflects complete indifference to the Plaintiffs' safety or rights, or if the Defendants acts in the face of a perceived risk that its actions will violate the Plaintiffs' rights under federal law. An act or omission is oppressive if the Defendants injure or damage or otherwise violate the rights of the Plaintiffs with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the Plaintiffs.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the Defendants' conduct, including whether the conduct that harmed the plaintiff was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages in order to punish the Defendants for harm to anyone other than the Plaintiffs in this case.

In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the Plaintiffs.

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You may impose punitive damages against one or more of the Defendants and not others, and may award different amounts against different Defendants.] Punitive damages may be awarded even if you award Plaintiffs only nominal, and not compensatory, damages.[150]

[150] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 5.5 (March 2017).

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SECTION 6: INSTRUCTIONS CONCERNING DELIBERATIONS

Instruction No. 6.1
Duty of Jury

Members of the Jury: Now that you have heard all of the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case. Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations. It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so. Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.[151]

[151] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 1.4 (March 2017).

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Instruction No. 6.2
Duty To Deliberate

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.[152]

[152] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.1 (March 2017), cmt.: A jury verdict in a federal civil case must be unanimous, unless the parties stipulate otherwise. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995) (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-70 n.5 (1972)); *see also* Fed. R. Civ. P. 48(b). A federal civil jury must also unanimously reject any affirmative defenses before it may find a defendant liable and proceed to determine damages. *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 985 (9th Cir. 2002).

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Instruction No. 6.3
Consideration Of Evidence—Conduct Of The Jury

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.
>
> Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any

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information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.[153]

[153] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.2 (March 2017)

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Instruction No. 6.4
Communication With Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the clerk, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.[154]

[154] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.3 (March 2017); *see also* Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 5.1A (2013) (for guidance on the general procedures regarding jury questions during deliberations).

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Instruction No. 6.5
Readback Or Playback

Because a request has been made for a [readback][playback] of the testimony of [witness's name] it is being provided to you, but you are cautioned that all [readbacks] [playbacks] run the risk of distorting the trial because of overemphasis of one portion of the testimony. [Therefore, you will be required to hear all the witness's testimony on direct and cross-examination, to avoid the risk that you might miss a portion bearing on your judgment of what testimony to accept as credible.][Because of the length of the testimony of this witness, excerpts will be [read] [played].] The [readback] [playback] could contain errors. The [readback] [playback] cannot reflect matters of demeanor [, tone of voice,] and other aspects of the live testimony. Your recollection and understanding of the testimony controls. Finally, in your exercise of judgment, the testimony [read] [played] cannot be considered in isolation, but must be considered in the context of all the evidence presented.[155]

[155] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.4 (March 2017) (citing *United States v. Newhoff*, 627 F.3d 1163, 1167 (9th Cir. 2010); *see also* Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 5.1.C (2013)) and noting that: "Absent the parties' stipulation to a different procedure, the jury should be required to hear the readback in open court, with counsel for both sides present, and after giving the admonition set out above."

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Instruction No. 6.6
Return Of Verdict

A verdict form has been prepared for you. [Explain verdict form as needed.] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the clerk that you are ready to return to the courtroom.[156]

[156] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.5 (March 2017).

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Instruction No. 6.7
Additional Instructions Of Law

At this point I will give you an additional instruction. By giving an additional instruction at this time, I do not mean to emphasize this instruction over any other instruction.

You are not to attach undue importance to the fact that this instruction was read separately to you. You must consider this instruction together with all of the other instructions that were given to you.

[Insert applicable Instruction from Sections 3 & 4]

You will now retire to the jury room and continue your deliberations.[157]

[157] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.6 (March 2017); *see also* Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures,* § 5.1.B (2013).

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Instruction No. 6.8
Deadlocked Jury

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with the other jurors. During your deliberations, you should not be unwilling to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of the other jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now return to the jury room and continue your deliberations.[158]

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[158] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.7 (March 2017), cmt.: Before giving any supplemental jury instruction to a deadlocked jury, the Committee recommends the court review Jury Instructions Committee of the Ninth Circuit, *A Manual on Jury Trial Procedures* § 5.5 (2013); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (finding no error in standard Allen charge issued to deadlocked jury).

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Instruction No. 6.9
Continuing Deliberations After Juror Is Discharged

[One] [some] of your fellow jurors [has] [have] been excused from service and will not participate further in your deliberations. You should not speculate about the reason the [juror is] [jurors are] no longer present. You should continue your deliberations with the remaining jurors. Do not consider the opinions of the excused [juror] [jurors] as you continue deliberating. All the previous instructions given to you still apply, including the requirement that all the remaining jurors unanimously agree on a verdict.[159]

[159] Ninth Circuit Jury Instructions Committee, *Manual of Model Civil Jury Instructions*, Instruction No. 3.8 (March 2017) (citing Fed. R. Civ. P. 48 for proposition that a court may not seat a jury of fewer than six nor more than twelve jurors and citing Advisory Committee Note, Fed. R. Civ. P. 47(b)(1991) for proposition that the selection of alternate jurors in civil trials has been discontinued).

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DATED: August 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2017, I caused to be electronically filed and served the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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