USA

HUMAN RIGHTS BETRAYED

20 YEARS AFTER US RATIFICATION OF ICCPR, HUMAN RIGHTS PRINCIPLES SIDELINED BY 'GLOBAL WAR' THEORY

AMNESTY INTERNATIONAL

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INTRODUCTION

The timeless principles enshrined in the Universal Declaration of Human Rights are a North Star guiding us toward the world we want to inhabit: a just world where, as President Obama has put it, peace rests on the 'inherent rights and dignity of every individual.' With the facts in hand, and the goals clear in our hearts and heads, we recommit ourselves to continue the hard work of making human rights a human reality

US Secretary of State Hillary Clinton, March 2010[1]

Launching the US Department of State's latest assessment of the human rights records of other countries, on 24 May 2012 Secretary of State Hillary Clinton emphasised to the media that the USA's message "to governments around the world" was: "We are watching and we are holding you accountable".[2]

Two years earlier, the State Department Legal Adviser Harold Koh had referred to an "emerging Obama/Clinton doctrine", one which had as a central pillar the USA's adherence to "universal standards, not double standards". The Legal Adviser recalled President Barack Obama's assertion in his 2009 Nobel lecture that "adhering to standards, international standards, strengthens those who do, and isolates those who don't" and Secretary Clinton's 2010 promise that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."[3]

By these measures, then, the purported Obama/Clinton doctrine has not yet emerged. Double standards still prevail, with the USA's ongoing failure both to adhere to international human rights standards in its counter-terrorism policies and to ensure accountability and remedy for past abuses in this context.

THE USA AND THE ICCPR

The 20th anniversary – on 8 June 2012 – of the USA's ratification of the International Covenant on Civil and Political Rights (ICCPR), one of the core international treaties codifying the rights articulated in the Universal Declaration of Human Rights (UDHR), is an opportune moment for the USA to re-visit its relationship to international human rights law and standards. The President and Secretary of State, along with other US government officials, should seize the moment to recognize that the USA's now decade-long counter-terrorism framework based on the premise of a "global war" with *al-Qa'ida*, and the failure to ensure accountability for human rights violations committed in the name of countering terrorism, continue the serious, sustained and damaging assault on human rights principles begun under the previous administration.

To produce its annual human rights assessments, the State Department uses the UDHR, the ICCPR, and other international instruments as its yardstick. To ensure credibility in the country entries, the US authorities look beyond what other governments say to what they actually do:

> "Many governments that profess to oppose human rights abuses in fact secretly order or tacitly condone them or simply lack the will or the ability to control those responsible for abuses. Consequently, in judging a government's policy, the reports look beyond statements of policy or intent and examine what a government actually has done to prevent human rights abuses, including the extent to which it investigates, brings to trial, and appropriately punishes those who commit abuses."[4]

Accountability and redress for human rights violations are themes that come up again and again in the country entries. On remedy, under the subsection "Civil Judicial Procedures and Remedies" of each entry, the USA notes whether there is "access to an independent and impartial court to seek damages for or cessation of an alleged human rights violation." On accountability, the report highlights the obligation of governments to end impunity – to investigate human rights violations and to bring perpetrators to justice. For example, *inter alia*, the State Department reported the following:

> **Afghanistan:** "Official impunity and lack of accountability were pervasive"
>
> **Belarus:** "the government often did not investigate reported abuses or hold perpetrators accountable."
>
> **Cuba**: "Members of the security forces acted with impunity in committing numerous, serious civil rights and human rights abuses."
>
> **Democratic Republic of the Congo**: "Impunity remained a severe problem, and several individuals in the [state security forces] continued to hold high positions despite credible evidence of their direct involvement in serious human rights abuses or failing to hold subordinates accountable for such abuses."
>
> **Kyrgyzstan**: "The central government's inability to hold human rights violators accountable allowed security forces to act arbitrarily and emboldened law enforcement to prey on vulnerable citizens."
>
> **Mauritania**: "The government rarely held security officials accountable or prosecuted them for abuses."
>
> **Myanmar:** "The government generally did not take action to prosecute or punish those responsible for human rights abuses, with a few isolated exceptions."
>
> **Pakistan**: "Lack of government accountability remained a pervasive problem. Abuses often went unpunished, fostering a culture of impunity".
>
> **Turkmenistan**: "The presidential commission created in 2007 to review citizens' complaints of abuse by law enforcement agencies did not conduct any known inquiries that resulted in members of the security forces being held accountable for abuses."
>
> **Zimbabwe**: "Security forces were rarely held accountable for abuses."

While there is no entry on the United States of America in the State Department report – self-scrutiny is not its purpose – the USA is included in an appended table listing which international treaties each country is party to. The table lists the USA as having ratified the ICCPR. This ratification occurred two decades ago on 8 June 1992.[5]

The Office of the UN High Commissioner for Human Rights considers the ICCPR to be one of nine core international human rights treaties.[6] The USA is party to only three of the nine.[7] Its ratification record, Amnesty International submits, does not square with the promise it has made to the international community:

> "*The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected. As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations.*"[8]

The ICCPR, among other things, prohibits arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, unfair trial, and discrimination in the enjoyment of human rights including the right to equal protection of the law. Any act of

enforced disappearance violates human rights, including as recognised under the ICCPR.[9] The right to an effective remedy is recognised in all major international and regional human rights treaties, including the ICCPR.[10] In addition, under the ICCPR, anyone who has been the victim of unlawful detention has the specific enforceable right to compensation.[11] The UN Human Rights Committee (HRC) – the expert body established under the ICCPR to oversee implementation of the treaty – has pointed to the general obligation under the ICCPR to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies, and in cases such as torture and similar ill-treatment or enforced disappearance, to ensure that those responsible are brought to justice.[12]

VIOLATIONS OF THE ICCPR UNDER THE BUSH ADMINISTRATION

In its review of the USA's state report in 2006, the HRC found that the USA had violated all of these provisions of the ICCPR, particularly in the context of its claimed "global war" with *al-Qa'ida* and in operations carried out in the name of countering terrorism. During this review, the ICCPR was described by a senior US official – leading the US delegation before the Human Rights Committee in Geneva – as "the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[13] To re-quote the words of the Department of State from its latest human rights report, "many governments that profess to oppose human rights abuses in fact secretly order or tacitly condone them".

Even as the Bush administration was proclaiming that it was leading the global struggle against torture, it was practising torture in secret detention facilities operated by the Central Intelligence Agency (CIA) under presidential authority.[14] Even as it was pointing the finger at other countries for employing "elaborate deceptions" to obscure human rights violations, it was subjecting dozens of detainees to enforced disappearance, again under presidential authority.[15]

During the Bush administration, US authorities sought to address the question of double standards, albeit in secret and to themselves. In a classified memorandum in 2005, the Office of Legal Counsel (OLC) at the US Department of Justice wrote in a memo to the CIA: "Each year, in the State Department's Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques… nudity, water dousing, sleep deprivation, and food deprivation… We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise".[16]

Another then-secret OLC memorandum to the CIA in 2007 said that the Department of State had "informed us" that its annual human rights assessments "are not meant to be legal conclusions, but instead they are public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests." The USA's public condemnation of torture and of the "coercion of confessions in ordinary criminal cases", it said, "is not inconsistent with the CIA's proposed interrogation practices". The CIA program, it continued "is designed to subject detainees to no more duress than is justified by the Government's paramount interest in protecting the United States and its interests from further terrorist attacks." As such, it concluded, the CIA's conduct "fundamentally differs from the conduct condemned in the State Department reports".[17]

'GLOBAL WAR'

Such executive agency wriggling to justify the unjustifiable would be laughable if it were not so serious. Hope for change across the range of counter-terrorism policies came with a new US administration in January 2009 which early on committed itself to unprecedented transparency in the name of accountability and an end to double standards. Such hopes have been dashed as accountability and remedy for crimes under international law committed in the CIA program have remained as remote as ever and as the "global war" paradigm has been adopted by the new administration with all the ramifications that follow for human rights.

The Obama administration has continued to promote the USA as a champion of human rights, and indeed the USA's engagement on international human rights issues on the global stage has been positive in many regards. Reference to human rights remains largely absent from the US domestic political discourse, however, particularly when it comes to national security. In a landmark national security speech on 21 May 2009, for example, while President Obama littered his address with references to US values, he did not once expressly mention human rights.[18]

In similar vein, a key speech on national security and justice issues given by US Attorney General Eric Holder on 5 March 2012 did not once mention human rights. He provided an outline of the USA's governing principles on the use of lethal force in the counterterrorism context (and the use of military commission trials), but nowhere did he refer to the universal right to life, let alone analysing US actions and policies in relation to the right of every human being not to be arbitrarily deprived of his or her life.[19]

Their respective addresses may have been three years apart but the President and his Attorney General were on the same page when they pointed to the proposition that the USA is engaged in a "global war" against *al-Qa'ida* and associated groups. This assertion by US officials has become familiar over the course of the decade since members of *al-Qa'ida* perpetrated attacks in the USA on 11 September 2001. Under this "global war" framework, the USA has engaged in counter-terrorism detention policies clearly contrary to principles contained in the ICCPR and other international instruments.

Seventeen years ago, in its observations on the USA's initial report after ratification of the ICCPR, the UN Human Rights Committee noted with regret the extent of the USA's "reservations, declarations and understandings to the Covenant" and expressed the belief that "taken together, they intended to ensure that the United States has accepted only what is already the law of the United States."[20] The Committee expressed particular concern at the USA's reservations attached to article 6.5 on the death penalty (which essentially asserted that the USA could execute anyone the US Supreme Court said it could) and article 7 prohibiting cruel, inhuman or degrading treatment or punishment (a reservation which, again, took the position that the USA was only agreeing to be bound by constitutional prohibitions). The Committee said that the reservations were "incompatible with the object and purpose of the Covenant", that is, unlawful under international law.[21] Two decades on from ratification, the USA has still made no effort to withdraw the reservations.

The reservation to article 7 of the ICCPR, or at least the identical reservation lodged by the USA to its 1994 ratification of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, was exploited by the Department of Justice after 11 September 2001 in its flawed legal arguments to give the green light to acts constituting torture and other ill-treatment by the CIA against detainees in secret detention. It is the authorizers and perpetrators of such violations who continue to enjoy impunity, with the USA

ignoring calls for accountability from, among others, the UN Human Rights Committee.[22]

A reluctance to acknowledge the equal application of international human rights standards to the USA has been described as a form of "American exceptionalism". Such exceptionalism may be based in part on an assumption that universal human rights rules or values are somehow inferior to or less worthy than the constitutional and other laws and values of the USA. The grave dangers of reliance on any such assumption has been starkly demonstrated over the past decade when the invocation of "American values" as an apparently overriding point of reference by public officials – under the Bush and Obama administrations – has become a familiar refrain even as the USA has adopted counter-terrorism detention policies clearly contradicting basic rules of international human rights and humanitarian law.

Under the Obama administration, the list of violations has been amended from how the list read under its predecessor – for example, the CIA's use of "enhanced" interrogation techniques authorized under the Bush administration and the agency's operation of "black sites" for long-term secret detention were prohibited by presidential order in 2009. The "global war" framework has been adopted lock, stock and most of the barrel, however. Thus, for example, although the US administration blames Congress for the failure to close the detention facility at the US Naval Base in Guantánamo Bay in Cuba, and Congress has indeed tried to place a variety of obstacles in the way of closure – there is a near-consensus between these two branches of government that the USA is engaged in a self-defined "global war", and that in many cases, human rights obligations are simply inapplicable to the key US policies and practices in that "war".[23]

A seemingly permanent system of indefinite military detention without charge or trial is just one of the many purposes for which the USA has used this doctrine of global and open-ended war, and Guantánamo is just one place where such a regime is applied. Indeed, the current US administration has said that, no matter what happens to the other men currently held at the naval base, it intends to hold more than 40 of them without trial for the foreseeable future under the "law of war". In other words, without a fundamental shift in approach, even if the administration were to close the Guantánamo detention facility tomorrow, the Guantánamo-style system of detentions, and many of the detainees themselves, would simply be moved elsewhere. Closing the Guantánamo facility will represent real improvement in respect for human rights only if it is accompanied by an end to the related practices it has come to symbolize.

The "global war" doctrine has also been used by the current US administration to revive military commissions for trials of some Guantánamo detainees. Despite amendments under the 2009 Military Commissions Act, these tribunals still fall short of international fair trial standards for such criminal proceedings. The Act specifies that only non-citizens can be subject to their flawed lesser procedural protections, so equality before the law is violated by discrimination on grounds of national origin. Their military character also renders them inherently inappropriate for trials of civilians - particularly when the ordinary civilian courts stand readily available. The Obama administration has so far announced it will seek the death penalty against six detainees it has slated for trials by military commissions. Amnesty International categorically opposes any use of the death penalty as inconsistent with full respect of the right to life. Even those who do not share Amnesty International's position must recognise that any imposition of the death penalty after unfair trials before such military commissions would be arbitrary and so violate the right to life, including under the ICCPR.[24]

The "global war" theory has also been used to justify the use of lethal force by the USA around the world in a variety of contexts. International law allows for the use of lethal force in

factual circumstances where it would normally be prohibited, in situations that meet the international legal definition of an armed conflict. The USA has, over the past decade, participated in a number of specific armed conflicts, both of an international and non-international character, on the territory of several states, some of which continue today. However there is no reasonable basis in international humanitarian and human rights law for the invocation by one state of its view that it is engaged in a global and pervasive armed conflict against a diffuse network of non-state actors, in the way the USA has done, as the basis for purported permission under international law to kill and detain individuals anywhere in the world at any time, whenever that state deems, based on secret information, such actions to be appropriate. To accept such a theory would twist international human rights and humanitarian law and other basic rules of public international law to their breaking points. It would also fundamentally undermine crucial protections for the human rights of civilians and others that have been painstakingly developed over more than a century of international law-making.

ACCOUNTABILITY

The failure to ensure proper investigations, accountability, and access to remedy for the human rights abuses evidenced in the cases of those secretly detained, tortured and subsequently transferred to military detention at Guantánamo Bay is another manifestation of the far-reaching effects of the USA's "global war" theory. Despite the initial assertions of transparency, three and a half years after President Obama took office, secrecy, by design or effect, is still obscuring past violations in CIA secret detention and facilitating the impunity instigated under the previous administration. No-one has been brought to trial for the crimes under international law committed in the CIA secret detention, rendition and interrogation programmes. This failure is an affront to international human rights law, including the ICCPR. Such a failure, if committed by any other government, would surely feature in the US Department of State reports.

Three years ago, in the speech on national security noted above, President Obama stated his opposition to an independent commission of inquiry into human rights violations committed during the previous administration on the grounds that "our existing democratic institutions are strong enough to deliver accountability". Despite the existence of such institutions, indeed perhaps because of the willingness of each branch of government to defer to another or to pass the buck between each other, and as the detainees at Guantánamo have been placed, for all practical purposes, outside the reaches of the ordinary justice system, however, accountability and remedy have remained largely absent. Although detainees are now able to challenge the lawfulness of their detention (in habeas corpus proceedings) in the US courts, it can be years before a Guantánamo detainee even gets a hearing on the merits of his habeas corpus challenge, let alone a decision, and even then, they are unlikely to be successful. The court responsible for hearing the appeals for these cases from the US District Court in Washington, DC – the US Court of Appeals for the DC Circuit – has ruled on 19 cases to date, ruling against the detainee in all 19 cases.[25] Even if a judge finds that the detention is unlawful, this can still mean indefinite detention, possibly for years, if the government says it is unable to find any country willing to take the detainee. This is because the USA continues to refuse to allow any Guantánamo detainee to be released into the USA and the Courts have held that in Guantánamo cases they have no power actually to compel the government actually to release the person (including into the USA if necessary) so long as officials say they are still trying to find another country willing to take the detainee.[26]

Furthermore, the US federal courts, for example, have systematically refused to hear the merits of lawsuits seeking redress for human rights violations committed in this context. The

courts have done so at the urging of administration lawyers, citing national security secrecy and various forms of immunity under US law. Meanwhile, Congress has generally failed to act in any way to ensure accountability – indeed facilitating impunity through various pieces of legislation.[27]

A single case example can here suffice to show the apparent unwillingness or inability of the USA's institutions "to deliver accountability", the damage wrought by the "global war" framework, and the appalling example it sets to the rest of the world.

Today, Zayn al Abidin Muhammad Husayn, more commonly known as Abu Zubaydah, appears to be one of the 48 Guantánamo detainees whom the administration said in 2010 it intended to hold indefinitely without criminal trial. However, this has not been confirmed, and even Abu Zubaydah's lawyers – who have top secret security clearance – have not been told whether their client is one of the four dozen. No date has been set for a hearing on the merits of his challenge to the lawfulness of his detention, and numerous motions brought by his lawyers since 2008 remain unadjudicated. Abu Zubaydah's habeas corpus petition was filed over three years ago and it is now more than a decade since he was taken into US custody and subjected to systematic human rights violations, including the crimes under international law of torture and enforced disappearance, for which no one has been held to account.

Abu Zubaydah was one of 14 detainees transferred from secret CIA custody to military detention in Guantánamo in September 2006. He had been held in secret detention for the longest of any of them – four and a half years, after being taken into custody in Pakistan in late March 2002. In a leaked report based on their interviews of the 14 men at Guantánamo in late 2006, the International Committee of the Red Cross (ICRC) listed a number of interrogation techniques used by the CIA against detainees subjected to enforced disappearance in secret custody at undisclosed locations.[28] Interrogation techniques listed in the ICRC report included prolonged "stress standing" position with arms extended and chained above the head, physical assaults, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, threats of ill-treatment, deprivation or restriction of solid food, and "water-boarding". According to the ICRC, not all of the methods it listed in the report had been used on all of the detainees – except for one of them, Abu Zubaydah.

In December 2007, to pre-empt a report that was about to be published in the media, General Michael Hayden, then Director of the CIA, confirmed that videotapes of interrogations during 2002 had been destroyed by the CIA in 2005. In the course of litigation in federal court in 2009, the CIA revealed that 92 videotapes of interrogations of Abu Zubaydah (90) and 'Abd al-Nashiri (2) recorded between April and December 2002 had been destroyed. Twelve of the tapes depicted use of "enhanced interrogation techniques", including "water-boarding". Indeed, a CIA Office of Inspector General review of the tapes in 2003 had revealed that Abu Zubaydah was subjected to "eighty-three applications of the waterboard", a detail not made public until 2009.[29]

Those who destroyed the tapes were, it would seem, thereby also destroying evidence of torture and enforced disappearance, crimes under international law. Wilfully concealing or destroying evidence of a crime can constitute complicity in the crime. Articles 4, 6 and 7 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires that not only the direct perpetrators of torture, but also those complicit in it, be brought to justice. The official responsible for destroying the tapes, former head of the National Clandestine Service of the CIA José Rodriguez, is unapologetic in his recently published memoirs, as was former President George W. Bush in his 2011 memoirs when he asserted that it had been he who had authorized the use of "water-boarding" and other "enhanced" techniques against detainees held by the CIA, including Abu Zubaydah.[30]

The interrogation tapes were destroyed on 9 November 2005, more than a year *after* a federal judge ordered the government to produce or identify materials responsive to a request filed in 2003 by the American Civil Liberties Union (ACLU) and other US non-governmental organizations under the Freedom of Information Act (FOIA) seeking information on the treatment of detainees in US custody in the counter-terrorism context. In December 2007, following the CIA Director's revelation about the destruction of the tapes, the ACLU filed a motion to have the CIA found in contempt of court. It argued for such a finding, "not as a punishment, but to provide a concrete remedy for the CIA's premeditated and contumacious actions in destroying the tapes and failing to respect the lawful orders of a co-equal branch of government".[31] For its part, the CIA argued that such a finding would be "nothing but punitive" and should be rejected.[32]

In an opinion issued in October 2011, US District Court Judge Alvin Hellerstein denied the ACLU's motion. He ruled that the plaintiffs had "achieved nearly complete remedial relief" as a result of the disclosure of documents relating to the tapes, including that it had been the CIA's then Deputy Director of Operations and subsequent head of its National Clandestine Service, José Rodriguez, who had approved their destruction in 2005. The judge said that "the public gains an additional benefit" by the CIA's adoption in August 2011 of new protocols to avoid the improper destruction of documents in the future.[33] A contempt finding at this point, Judge Hellerstein ruled, "would serve no beneficial purpose".

During a hearing in January 2011, Judge Hellerstein had been expressly critical of the CIA. He said that the destruction of the tapes had "flouted" his order of September 2004, and that the individuals who destroyed the tapes "did something that was really wrong".[34] However, in a ruling from the bench in August 2011, he made clear that he would not "hold an entire agency in contempt for the mistakes of some of its officials". However, he also declined to hold José Rodriguez in civil contempt for authorizing the tapes' destruction. Judge Hellerstein indicated that he considered that such a finding would be more akin to criminal contempt, and "that's not my job".[35]

By the time Judge Hellerstein issued his written ruling, the prosecutor who had been assigned by the US Attorney General the job of looking into the matter had already declined to initiate any criminal proceedings against anyone in relation to the destruction of the interrogation tapes. On 9 November 2010, the Department of Justice had announced, without further explanation, that no one would face criminal charges in relation to this issue.[36]

Then in June 2011, Attorney General Holder announced that, except for criminal investigations into two deaths in custody allegedly involving the CIA – one in Afghanistan in 2002 and one in Iraq in 2003 – all other investigations relating to the CIA secret detention and interrogation program would be closed.[37]

The administration's efforts to keep from public disclosure details relating to the treatment in secret detention of Abu Zubaydah and others have continued, with success, in the courts. On 21 May 2012, for example, the US Court of Appeals for the Second Circuit ruled that the CIA did not have to release cables describing its use of "water-boarding" against Abu Zubaydah or others, or a photograph of Abu Zubaydah dated 11 October 2002, taken a matter of months after he was subjected to this torture technique and when he was still in the first year of what would become four and a half years of enforced disappearance. The three-judge panel of the Second Circuit agreed with the CIA's and administration's arguments that the information on "water-boarding" was exempt from disclosure under FOIA as it related to "intelligence methods."

The ACLU had argued that the information should not be so exempt because "water-boarding" is torture, as President Obama and Attorney General Holder have acknowledged, and therefore cannot be a legitimate intelligence method. The Second Circuit stated that "Even if we assumed that a President can render an intelligence method 'illegal' through the mere issuance of public statements, or, more formally, through adoption of an executive order… we would be left with the difficult task of determining what retroactive effect, if any, to assign that designation". It declined the task. Thus torture is left un-remedied, unpunished, and information about its use undisclosed.

To add insult to injury, the Second Circuit also held that the photograph of Abu Zubaydah – taken at a time not long after he had been tortured and while he was still being subjected to enforced disappearance – could remain withheld from public disclosure. The Court of Appeals said that "we observe that a photograph depicting a person in CIA custody discloses far more information than the person's identity." The administration's justification for withholding the photograph – that it "relates to" an "intelligence source or method" because it recorded Abu Zubaydah's condition during the period he was being interrogated – was "logical and plausible", said the court.[38]

Today, Abu Zubaydah remains in detention without charge or trial for whatever wrongdoing the government might allege against him or remedy and accountability for the crimes under international law committed by US personnel against him. His lawyers have recently taken the unusual step of asking the government to charge him rather than have him disappear into oblivion. In mid-May 2012, one of his US lawyers wrote:

> "Last week, my colleagues and I did something defense attorneys rarely do: We asked the government to file charges against our client. And because it seems unlikely the case will ever make it to an American courtroom, we have asked that it be heard in the nation's flawed military commission system… No one should misunderstand what we have done. We don't believe the military commission system is fair. In fact, we think its proceedings bear only a glancing resemblance to a real trial. But Abu Zubaydah has been in custody for more than 10 years without being able to answer his accusers, or even know what he is accused of. We've come to the conclusion that a prosecution in a flawed system is better than nothing."[39]

Abu Zubaydah's case stands as an indictment of the USA's failure to live up to its international human rights obligations and commitments when it comes to countering terrorism. The protections of the ICCPR against unlawful detention, enforced disappearance, torture and other ill-treatment were systematically ignored and sidestepped by the USA in his case, as in others, as have been the requirements on remedy and accountability under international law, including the ICCPR.

USA AND ICCPR AT 20: A GULF BETWEEN WORDS AND DEEDS

Thus the framework that the USA uses to produce its annual assessments of the human rights record of other countries – the Universal Declaration of Human Rights and the international legal instruments that have come into force since the UDHR was adopted in 1948 – is precisely the framework that is not being applied to the USA's own conduct, particularly in the counter-terrorism context.

The USA's continuing failures in the specific area of counter-terrorism are not only undermining its impact as a serious and potentially powerful advocate for human rights, a role it seeks to bolster through its annual Department of State human rights assessments. It

also provides other governments with political cover for gross human rights violations they perpetrate in the name of countering terrorism. These side effects of the USA's failures to engage with the human rights dimensions of its counter-terrorism measures are doing significant damage to respect for human rights more generally.

The government should use the 20th anniversary of the USA's ratification of the ICCPR, and beyond that date, to firmly and expressly embrace the universality of human rights and recognise international human rights law as not only *applicable* to all counter-terrorism measures and all detainees, but also (as the nations of the world agreed in the UN Global Counter-Terrorism Strategy) as *a key component* of any effective plan for countering the threat posed by groups such as *al-Qa'ida* and others like it.

For the rest of us, including other governments – to paraphrase the US Department of State in its latest human rights report – "in judging the US government's policy, we must look beyond its statements of policy or intent and examine what it actually has done to prevent human rights abuses, including the extent to which it has investigated, brought to trial, and appropriately punished those who have committed abuses."

Today there remains a gulf between the USA's words on human rights and its anti-human rights deeds and omissions under its "global war" framework.

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USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en

ENDNOTES

[1] Preface, 2009 Country Reports on Human Rights Practices, US Department of State, published, 11 March 2010, http://www.state.gov/j/drl/rls/hrrpt/2009/frontmatter/135934.htm

[2] Release of the 2011 Human Rights Report. Remarks, Hillary Rodham Clinton, Secretary of State, Washington, DC, USA, 24 May 2012, http://www.state.gov/secretary/rm/2012/05/190826.htm

[3] 'The Obama Administration and International Law'. Harold Hongju Koh, Legal Adviser, US Department of State, Annual Meeting of the American Society of International Law, Washington, DC, USA, 25 March 2010, http://www.state.gov/s/l/releases/remarks/139119.htm

[4] Appendix A: Notes on preparation of report, http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper

[5] The USA signed the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 5 October 1977, the same day as it signed the ICCPR. It has not yet ratified the ICESCR, a treaty to which 160 other countries are party. There are 167 states party to the ICCPR, including the USA.

[6] International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); International Convention for the Protection of All Persons from Enforced Disappearance (CPED); and Convention on the Rights of Persons with Disabilities (CRPD).

[7] ICCPR, CERD and UNCAT.

[8] US Human Rights Commitments and Pledges. April 2009, http://www.state.gov/j/drl/rls/fs/2009/121764.htm

[9] UN General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance, res 47/133 of 18 December 1992, article 1; Human Rights Committee, *El Hassy v Libya* (2007) UN Doc CCPR/C/91/D/1422/2005, para 6.6.

[10] Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity".

[11] See Article 9.5, ICCPR.

[12] Human Rights Committee General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), paras 15 and 18. Where torture or other inhuman or degrading treatment or enforced disappearance take place in the context of armed conflicts, they constitute war crimes for which the Geneva Conventions and Customary International Humanitarian Law impose similar obligations on states to investigate and bring those responsible to justice. See, e.g., 1949 Geneva Convention IV, articles 146-147; ICRC Study of Customary International Humanitarian Law, Volume I: Rules (2005), pp 315-319 (Rule 90), 340-343(Rule 98), pp 574-575,590 (Rule 156), pp 607-611 (Rule 158.

[13] Opening statement to the UN Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of the US Delegation, Geneva, Switzerland, 17 July 2006.

[14] "The United States is committed to the worldwide elimination of torture, and we are leading this fight by example." President George W. Bush, Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2003. "America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture… Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere." President George W. Bush, Statement on United Nations International Day in Support of Victims of Torture, 26 June 2004.

[15] "Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors." President George W. Bush, Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2003.

[16] Re: Application of United States obligations under Article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005, including note 30.

[17] Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value

al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007, page 39.

[18] Remarks by the President on National Security, at the National Archives, Washington, DC, USA, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[19] Attorney General Eric Holder Speaks at Northwestern University School of Law, Chicago, USA, 5 March 2012, http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html

[20] U.N. Doc. CCPR/C/79/Add.50, A/50/40 (1995).

[21] Under article 19 of the Vienna Convention on the Law of Treaties, a state may not make a reservation to a treaty if that reservation is prohibited in the treaty itself or if the reservation is incompatible with the object and purpose of the treaty. The USA signed the VCLT in April 1970, but by June 2012 had still not ratified it. However, the USA considers many of the VCLT's provisions "to constitute customary international law on the law of treaties". See US Department of State, at http://www.state.gov/s/l/treaty/faqs/70139.htm

[22] UN Doc.: CCPR/C/USA/CO/3/Rev.1, 18 December 2006

[23] Recent statements tweak the official explanation but appear to leave its basic conclusions in place: Fourth ICCPR Report of the USA (30/12/2011), paras 506-507, http://www.state.gov/j/drl/rls/179781.htm.

[24] Report on USA visit by Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc A/HRC/11/2/Add.5 (28/05/2009), paras 38-41; Human Rights Committee, General Comment No 32 (UN Doc CCPR/C/GC/32, 23/08/2007), para 59.

[25] Currently, seven of the detainees have petitioned the US Supreme Court to review the decision of the DC Circuit Court of Appeals in their cases. It is anticipated that the Supreme Court will announce on 11 June 2012 which if any of the petitions it will review. If it does take any of the cases, under the current timeline, a decision on the merits would not be expected until the spring of 2013.

[26] See *Kiyemba v Obama*, No. 08-5424 (28 May 2010), US Court of Appeals for the DC Circuit. The US Supreme Court refused to review the decision on 18 April 2011.

[27] Section 1004 of the Detainee Treatment Act of 2005 (further amended by section 8 of the Military Commissions Act of 2006) purports to create a sort of special "ignorance of the law" defence for any US personnel against whom civil or criminal proceedings are brought in relation to their activities in the detention and interrogation of foreign nationals suspected of involvement or association with "international terrorist activity".

[28] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007.

[29] *ACLU et al v. Department of Defense, et al*. Opinion and order denying motion to hold defendant CIA in civil contempt. US District Court, Southern District of New York, 5 October 2011.

[30] Jose A. Rodriguez, Jr., Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives. Threshold Editions, New York (2012). George W. Bush, Decision Points. Virgin Books (2011).

[31] *ACLU et al, v. Department of Defense et al*. Supplemental memorandum of law in support of plaintiffs' motion for contempt and sanctions. In the US District Court for the Southern District of New York, 15 February 2011.

[32] *ACLU et al, v. Department of Defense et al*. Defendant Central Intelligence Agency's memorandum of law in opposition to plaintiffs' motion for contempt and sanctions. In the US District Court for the Southern District of New York, 14 April 2011.

[33] *ACLU et al v. Department of Defense, et al*. Opinion and order denying motion to hold defendant Central Intelligence Agency in civil contempt. US District Court for the Southern District of New York, 5 October 2011. Appended to the order is a "summary of CIA policies regarding document preservation".

[34] *ACLU, et al v. Department of Defense, et al*. Transcript of hearing before District Judge Alvin Hellerstein, US District Court for the Southern District of New York, 14 January 2011.

[35] ACLU et al v. Department of Defense et al. Transcript of hearing before District Judge Alvin Hellerstein, US District Court for the Southern District of New York, 1 August 2011.

[36] Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9 November 2010, http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html

[37] Statement of the Attorney General regarding investigation into the interrogation of certain detainees, US Department of Justice, 30 June 2011, http://www.justice.gov/opa/pr/2011/June/11-ag-861.html

[38] *ACLU et al v. Department of Justice et al*. US Court of Appeals for the Second Circuit, 21 May 2012.

[39] 'Abu Zubaydah, the man justice has forgotten.' By Joseph Margulies, Los Angeles Times, 16 May 2012.