

USA

ONE-WAY

ACCOUNTABILITY

**GUANTÁNAMO DETAINEE PLEADS GUILTY;
DETAILS OF GOVERNMENT CRIMES AGAINST
HIM REMAIN CLASSIFIED TOP SECRET**

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in July 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

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Index: AMR 51/063/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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INTRODUCTION

I'm making a leap of faith here, sir. That is all I can do
Majid Khan, Guantánamo Bay, 29 February 2012

At the US Naval Base at Guantánamo Bay in Cuba on 29 February 2012, Pakistani national Majid Shoukat Khan pleaded guilty to a range of charges under the US Military Commissions Act, including murder and attempted murder “in violation of the law of war”, before US Army Colonel James Pohl in his role as a military commission judge. Under the terms of a pre-trial plea agreement, Majid Khan is now convicted as charged and will be sentenced in February 2016 or earlier. In the interim, he is required under the agreement to cooperate “fully and truthfully” with the US government, including with military and civilian prosecutors, and law enforcement, military and intelligence authorities.

The factual allegations in relation to which Majid Khan admitted personal responsibility include conspiring with *al-Qa'ida* to assassinate a former President of Pakistan via a suicide bombing in 2002 and transferring funds for a group, *al-Qa'ida*, he knew to be engaged in terrorism, which were later used in the bombing of a hotel in Indonesia that occurred in August 2003 and in which 11 people were killed. Under the plea agreement, if he cooperates fully, he faces a prison sentence of up to 19 years, from the date of his guilty plea.¹ Once he has served any such sentence, the government reserves the right to return him to indefinite “law of war” detention.² Majid Khan’s “leap of faith” is that he will be released after serving whatever term of imprisonment he is given in or before February 2016.

At a press conference at Guantánamo after the plea hearing, the current Chief Prosecutor for the military commissions, Brigadier General Mark Martins, said that “Mr Khan has, importantly and commendably, accepted responsibility and expressed remorse for his actions.” General Martins noted that “no-one has alleged that he was a mastermind or a leader” and noted that Majid Khan had been convicted “on a rationale of indirect liability” whereby “you can be guilty of a substantive offence that you didn’t directly do but that was a natural and foreseeable consequences of an agreement that came into play and that you never withdrew from”. The facts taken together with Majid Khan’s acceptance of responsibility for his actions, the Chief Prosecutor asserted, rendered the plea arrangement “a very credible result that fits, that is justice, and that is an appropriate holding of accountability”.

At the press conference, Majid Khan’s lawyer explained that Khan had sought to plead guilty “quite a long time ago”, a matter of some years earlier, and that it had “taken a long time for us to get to today”. The lawyer recalled that defence counsel’s attempts to move the case forward had originally been met by “a tremendous bureaucratic paralysis” and “perhaps even intransigence” on the part of the authorities. Until the current Chief Prosecutor arrived in post in September 2011, the lawyer continued, “we couldn’t find anyone who would talk to us in the United States government”, He suggested that this state of affairs had flowed from a situation where President Barack Obama had essentially “surrendered” matters surrounding the Guantánamo detentions to “his political opponents.”

Majid Khan’s guilty plea was entered nine years after he was taken into custody in Pakistan in the first week of March 2003, secretly handed over to the USA and held at undisclosed locations. Prior to being transferred to military custody at Guantánamo on 4 September 2006, he was subjected to more than three years of enforced disappearance in the secret detention program then being operated by the Central Intelligence Agency (CIA) under the authorization of President George W. Bush. Majid Khan has also alleged that he was subjected to torture and other cruel, inhuman or degrading treatment while held in secret custody. The details of where he was held during this time, how he was interrogated and by

whom, and his conditions of confinement, remain classified at the highest levels of secrecy.

At the press conference on 29 February 2012 at Guantánamo, Majid Khan's lawyer reiterated that Majid Khan "was tortured and he was tortured very badly" in US custody prior to his arrival at Guantánamo. That is the limit of the detail he could or can disclose publicly on this issue. The lawyer emphasised that Majid Khan's treatment in secret custody had been "unlawful, and the United States government needs to – it must – acknowledge what happened to him and it must accept responsibility for what happened to him". He suggested that "the principle of transparency can't flow in only one direction.... There has to be disclosure of what happened to people like Majid Khan."

On the same question, the Chief Prosecutor said: "Accountability is important for everyone". He pointed to the fact that under the Military Commissions Act, as revised in 2009, statements obtained under torture or other cruel, inhuman or degrading treatment (as defined in US law) were no longer admissible before military commissions, and that Majid Khan would have the opportunity to raise allegations of ill-treatment at his sentencing in mitigation. The US government is bound under international law to prohibit the use of any statements obtained under torture or other ill-treatment.³ However, allowing Majid Khan to raise allegations of his ill-treatment in mitigation at his sentencing hearing in no way amounts to the access to the remedy that he is also entitled under international law. Moreover, while it is true that Majid Khan can raise his allegations of torture or other ill-treatment in CIA custody at his sentencing, as things currently stand, the public will not be able to hear them.

The Chief Prosecutor suggested that there was "significant investigation ongoing" into allegations of ill-treatment of detainees. Quite what he meant was unclear, because criminal investigations into the CIA secret detention program have all but been shut down by the US Department of Justice, and a yet to be released review of the CIA program by the Senate Select Committee on Intelligence apparently does not have accountability as its *raison d'être*.⁴ Yet in such a case, where there is a reasonable ground to believe that an act of torture has been committed, the US government is obliged to conduct a prompt and impartial investigation⁵, but despite such claims it is not apparent that any meaningful investigation is ongoing. "Trials have meaning", General Martins concluded, "They are very important, and they have consequences in holding people accountable". Yet while Majid Khan has now been convicted following his guilty plea, criminal trials for those who subjected Majid Khan and others to crimes under international law in the secret detention and rendition programmes remain notable by their absence.

Torture and enforced disappearance are crimes under international law. There has still been no explicit admission from the US government that crimes were committed against this and other detainees in the CIA secret detention program despite the wealth of information about these systematic human rights violations now in the public realm.

The US government has a duty to prevent acts of terrorism, protect those threatened by such attacks, and to bring those responsible to justice. To this end, the USA or other countries are clearly entitled to prosecute the conduct admitted to by Majid Khan in relation to such attacks as serious crimes (though their prosecution in a military court as "war crimes" under the USA's sweeping "global war" theory remains deeply flawed). However, Amnesty International is concerned that accountability and remedy for the human rights violations committed in the CIA program remain apparently as remote as ever, leaving the USA in serious breach of its international legal obligations. The US government is using secrecy to obscure victims' and society's collective and individual right under international law to the truth.

It is long past time for disclosure and accountability on the government side.

PLEADING GUILTY

This is your day at this Commission and therefore it is important that you understand completely everything that goes along
Military judge to Majid Khan, 29 February 2012

On 13 February 2012, the US government charged Majid Khan under the Military Commissions Act (MCA) of 2009 (legislation revising the 2006 law of the same name first passed three and a half years after he was taken into custody). The charges alleged that he had conspired with members of al-Qa'ida in 2002 and 2003 to commit a range of violent acts in the USA and elsewhere. Also on 13 February, the prosecution and defence signed a "stipulation of fact", under which they, with the "express consent" of Majid Khan, agreed that the facts contained in the stipulation were not disputed. On 15 February 2012, the charges were forwarded on for trial by the Convening Authority for the military commissions.

The stipulation of fact stated that Majid Khan, who lived in or near Baltimore, Maryland, USA, between 1998 and 2002, had become radicalized after the attacks of 11 September 2001. His subsequent activities in the USA, Pakistan and southeast Asia on behalf of al-Qa'ida and associated elements, the stipulation continued, "occurred during the period of an armed conflict between al Qaeda and the United States". These activities included a foiled attempt to assassinate the then President of Pakistan, Pervez Musharraf, in a suicide bombing in March 2002;⁶ the delivery of funds for a group the accused knew to be involved in terrorism, an al-Qa'ida affiliate in southeast Asia, which had then used at least part of the money to bomb a hotel in Indonesia in August 2003 which killed 11 people and injured at least 80 others; planning to blow up petrol stations in the USA; and collecting or attempting to collect by clandestine means information that could be used by al-Qa'ida or others to "injure the United States".

The stipulation of fact asserted that Majid Khan was guilty of the offences with which he was charged under the MCA, namely murder in violation of the law of war, attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.

At the hearing on 29 February 2012 at Guantánamo, the military commission judge, US Army Colonel James Pohl, asked Majid Khan if he understood what rights he would be waiving by pleading guilty, such as the right against self-incrimination, the right to a trial of the facts, and the right to confront the witnesses against him and to call witnesses on his behalf. Majid Khan responded that he understood and also assured Colonel Pohl that he had not been coerced into the agreement. The military judge then proceeded to take him through the various charges to ensure that the defendant understood what he was pleading to and the consequences.

The charges of "murder in violation of the law of war" and "attempted murder in violation of the law of war" related to the deaths and injuries that occurred as a result of the bombing of the J.W. Marriott Hotel in Jakarta, Indonesia, on 5 August 2003, which was funded using money which Majid Khan had delivered.⁷ Colonel Pohl took some time to examine whether Majid Khan understood that he could be criminally liable for actions carried out by co-conspirators even though the hotel bombing occurred five months after Majid Khan had been taken into custody in Karachi. During the dialogue with Colonel Pohl, Majid Khan said:

"Sure, I want to speak a little bit. I'm scared. I'm using common sense in a lot of sense, but I think during the stipulation of facts, if you read through, the fact of the matter is, even though I delivered the money, the fact of the matter is that I did not know where the money was going. But I voluntarily did that. I was not aware of any conspiracy that was going to happen".

The stipulation of fact asserts that “at no time” from Majid Khan being taken into custody on or around 5 March 2003 through to 5 August 2003 – the first five months of his enforced disappearance – did he “ever seek to voluntarily withdraw from the conspiracy”. Colonel Pohl pressed Majid Khan on this point:

Pohl: *Now, the bombing in Jakarta occurred in August of '03.*

Khan: *Yes, sir.*

Pohl: *In August of '03, were you still part of the conspiracy? Were you still part of this group to do this? Even though you couldn't do anything, I got that.*

Khan: *Exactly, I was captured. You know what happened to us.*

Pohl: *I got that part, but I'm saying were you still part of the conspiracy so you are still criminally liable for the bombing in August even though, obviously, you were not there you may not have even known about it. Do you understand?*

Khan: *Yes, sir.*

Pohl: *So were you still part of the conspiracy in August of '03?*

Khan: *Yes, sir.*

Pohl: *Do you understand – physically I understand you weren't there anymore, you were somewhere else.*

Khan: *I mean –*

Pohl: *I got that part, but under the law you are still part of the conspiracy.*

Khan: *Even if a person wants to withdraw, he cannot possibly withdraw from the conspiracy because he is illegally kidnapped even if he wants to change his mind. Not that I'm saying I did change my mind.*

Pohl: *Let's not talk about what didn't happen, it will be confusing enough as we talk about what did happen. I'm saying in August of '03 you believe you were still part of the conspiracy?*

Khan: *Yes, sir. Because during – after August – March '03 when I was captured, you know, they asked me information ---*

Pohl: *Don't go down – I want to be careful we don't slide into some classified areas. It is a simple question. In August of '03 do you believe and admit you were still part of the conspiracy?*

Khan: *Yes, sir.*

According to the stipulation of fact, Majid Khan was, and had been “at all times relevant to these proceedings”, an “alien unprivileged enemy belligerent” under the MCA of 2009. This was important because under this legislation he could not be subjected to trial by military commission unless he was an “alien unprivileged enemy belligerent” within the meaning of the MCA. Colonel Pohl explained to Majid Khan that this applied to each of the offences with which he had been charged. He asked the defendant if he agreed that he met the definition of an “alien unprivileged enemy belligerent”, to which Khan replied:

Khan: *Meaning I'm not part of armed forces or something.*

Pohl: *No, but it is more complicated than that.*

Khan: *Yes, I understand that, sir.*

Pohl: *Good. Okay.*

By asking Majid Khan to agree that he was an “alien unprivileged enemy belligerent”, Colonel Pohl was in effect getting Khan to accept the USA’s view that it is engaged in a ‘global war’ against al-Qa’ida and that the acts for which he was charged took place “in the context of and were associated with hostilities”, whether they took place in Pakistan, Thailand, Indonesia, or the USA. Here “hostilities”, Colonel Pohl explained to Majid Khan, “means any conflict subject to the laws of war”.

The USA’s sweeping “global war” legal theory in fact is not recognised in international law – indeed, the theory’s development and invocation by the USA appears to have been calculated from the start precisely to avoid established rules of international human rights and humanitarian law, as well as human rights protections under ordinary US domestic law. The “global war” theory has had devastating effects on the US human rights record over the past decade. The fact that Majid Khan’s conviction comes through the deeply flawed and widely discredited military commission system, rather than in the well-established ordinary civilian US criminal justice system, is but one manifestation of the “global war” theory;⁸ the failure to ensure proper investigations, accountability, and access to remedy for the human rights violations evidenced in his and other cases is another.

With access to experienced lawyers, Majid Khan apparently determined that it was in his “best interest” to plead as he did.⁹ It is a route taken by a majority of those Guantánamo detainees so far convicted by military commission (see box). It is difficult to estimate the degree to which such decisions are influenced by the fact that the US government takes the position that even if a detainee chooses to defend himself in a trial before the unfair military commissions and is actually acquitted, he may still be detained indefinitely at the discretion of the US government.

The fact is, however, that no US citizen would currently face this dilemma – the MCA applies only to foreign nationals. No US citizen, even if accused of precisely the same conduct with which Majid Khan was charged, would have faced the decision as to whether to go to trial before these military commissions. Prosecution of any such individual who was not a member of the US armed forces would have taken place within the civilian justice system and been brought in an ordinary federal court, where a defendant would receive higher fair trial protections than provided for at the military commissions. The decision on how to plead faced by any such US defendant would not have been taken on a remote US military base in Cuba, after years of harsh detention there, that period itself coming after years of incommunicado detention in solitary confinement at undisclosed locations by the USA.¹⁰

US citizens could be assured that if they turned down a plea bargain and successfully defended themselves in a criminal trial, they would almost certainly be legally entitled to be released, not risking being kept in prison indefinitely. To discriminate in the quality of criminal justice in this manner is a clear breach of the USA’s human rights obligations. Article 2 of the International Covenant on Civil and Political Rights (ICCPR), to which the USA is party, requires states to respect and to ensure “the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, *national* or social *origin*, property, birth or other status” [emphasis added]; article 26 further provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law”, including on grounds of national origin. In addition, among the rights provided for in the ICCPR, in article 14, are the right to “be equal before the courts and tribunals”, the “right to a fair and public hearing by a competent, independent and impartial tribunal established by law” and to various “minimum [fair trial] guarantees, in full equality”, which are all to be provided free from discrimination in accordance with Article 2.

Regardless of what the future holds for Majid Khan following his guilty plea, that plea was made under a system that discriminates in the level of fair-trial protections on the basis of nationality, lacks structural independence from the political branches of government responsible for systematic human rights violations, and is not consistent with the right to a fair trial as provided for in Article 14 of the ICCPR.

The UN Human Rights Committee has stated, on the right to a fair trial under article 14 of the ICCPR, that the trial of civilians (anyone who is not a member of a state's armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is "necessary and justified by objective and serious reasons", and where "with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".¹¹

Amnesty International categorically rejects the trial of civilians by military courts, including civilians who are alleged to have engaged in the kind of conduct at issue in this case. Even applying the criteria set out by the Human Rights Committee, however, the military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice. By their very nature, then, their application in cases such as these violates the right to fair trial. The US administration's retention of military commissions appears to be part of a continuing approach under which decisions made on detainees are taken according to which avenue is deemed most likely to achieve government "success", or minimize domestic political fallout, rather than adhering to principles of equality, due process and

17 September 2001 – President Bush authorizes CIA to conduct detentions outside the USA
13 November 2001 – President Bush signs military order authorizing detention without trial of foreign nationals and trials by military commission
11 January 2002 – First detainees transferred to US Naval Base at Guantánamo Bay in Cuba
5 March 2003 – Pakistani national Majid Khan arrested in Karachi, handed over to US custody, taken to secret detention reportedly in Afghanistan and later on to one or more other undisclosed locations
29 June 2006 – In *Hamdan v. Rumsfeld*, US Supreme Court voids the Bush military commissions, and rules that article 3 common to the four Geneva Conventions applies to al-Qa'ida detainees
4 September 2006 – in response to *Hamdan*, US administration transfers 14 men, including Majid Khan, from secret CIA custody to Guantánamo
6 September 2006 – President Bush publicly confirms for the first time that the CIA has been operating a secret detention program and seeks congressional approval for the Military Commissions Act (MCA)
17 October 2006 – President Bush signs MCA into law
30 March 2007 – Under a pre-trial arrangement, David Hicks pleads guilty under the MCA and is sentenced to seven years in prison, all but nine months suspended which is to be served in his native Australia
12 June 2008 – US Supreme Court rules in *Boumediene v. Bush* that the Guantánamo detainees have the right to habeas corpus, despite the MCA
7 August 2008 – Charged and tried under the MCA, Yemeni national Salim Ahmed Hamdan is sentenced to 66 months in prison, all but five of which are suspended. He is transferred from Guantánamo to Yemen in late 2008
3 November 2008 – At a military commission in Guantánamo, Yemeni national Ali Hamza al Bahlul sentenced to life imprisonment under the MCA
22 January 2009 – President Obama commits his administration to close the Guantánamo detention facility by 22 January 2010 and orders the CIA to end its use of long-term secret detention. Military commissions suspended
9 April 2009 – CIA Director says CIA no longer using "enhanced interrogation techniques" authorized by Department of Justice between 2002 and 2009, and "no longer operates detention facilities or black sites." He adds: the "CIA retains the authority to detain individuals on a short-term transitory basis"
29 October 2009 – President Obama signs Military Commissions Act of 2009 into law, with provisions for revised military commissions
11 August 2010 – Sudanese national Ibrahim al Qosi sentenced to 14 years under MCA 2009. In exchange for his guilty plea entered in July, all but two years of his sentence suspended. He is transferred from Guantánamo to Sudan in July 2012 on completion of these two years
31 October 2010 – Details of pre-trial arrangement for Canadian national Omar Khadr released. He is sentenced to 40 years in prison, limited to eight years under a plea agreement, and possible return to Canada after a year. He was 15 when taken into custody in Afghanistan in 2002. He remains in Guantánamo in July 2012.
18 February 2011 – Sudanese detainee Noor Uthman Muhammed sentenced to 14 years in prison under the MCA 2009, all but 34 months suspended under the terms of a guilty plea and promise to cooperate in future proceedings
29 February 2012 – Majid Khan pleads guilty at a hearing in Guantánamo. Under the terms of a pre-trial agreement he will be sentenced in four years time after having co-operated with the government in the interim
July 2012 – Two and a half years after the passing of the presidential deadline for closure of the Guantánamo detention facility, more than 160 men still held there, with pre-trial military commission proceedings continuing against some of them.

human rights.¹²

Further, the military commissions cannot be divorced from the unlawful detention and interrogation regime for which they were developed. This is not least because of the continuing failure of the USA to meet its obligations on independent investigation, accountability and effective remedy for the now well-documented allegations of torture and other ill-treatment, enforced disappearance, and other human rights violations against the individuals selected for trial in front of these tribunals.

In the particular case of Majid Khan, he may well have considered it to be in his best interest to make the decision he did given his circumstances. He might well have made a similar plea bargain (or been convicted after a not guilty plea) in the ordinary justice system and his guilt might thereby have been established in a system that enjoys precisely the kind of legitimacy that the military commissions so badly lack. The US government's insistence on continuing to rely on the "global war" theory in his and other cases means we will likely never know. The one thing that remains crystal clear is that, in the Guantánamo detention and military commission scheme as a whole, the government's thumb remains firmly on its side of the scales of justice, tainting all the outcomes the scheme produces.

SENTENCING DEFERRED

*Mr Majid Shoukat Khan, in accordance with your pleas of guilty, the Commission finds you:
of all charges and specifications: Guilty
Military judge, Guantánamo, 29 February 2012*

Each of the five charges Majid Khan faced, on the basis of his guilty plea alone – without a pre-trial agreement – carried a maximum punishment of life imprisonment. The hearing on 29 February 2009 then moved on to the question of sentencing under the pre-trial agreement.

Firstly, under the agreement the sentencing is deferred until 29 February 2016, four years after acceptance by the military judge of the guilty plea, or before if the government moves to have it conducted earlier.¹³ This deferral is to allow time for Majid Khan to cooperate with the government under the terms of the agreement. This cooperation includes, "but is not limited to", Majid Khan providing "complete and accurate information in interviews, depositions, and testimony wherever and whenever requested by prosecutors from the Office of Military Commissions, the United States Department of Justice, United States law enforcement, military or intelligence authorities". He has agreed that the government may conduct interviews of him without the presence of his lawyers. He can withdraw his guilty plea at any time prior to sentencing.

Under the pre-trial agreement, the Convening Authority of the military commissions will not approve a sentence above 25 years. In addition, if the Convening Authority determines that Majid Khan has provided "full and truthful cooperation amounting to substantial assistance" to the US government, he or she will approve a sentence of no more than 19 years. Under the agreement, the Convening Authority has the discretion to approve any sentence between zero and 19 years.

When the time for sentencing comes, a military commission "panel" will be convened. Its members – US military personnel – will not know about the pre-trial agreement and will be able to recommend a sentence of anywhere between 25 and 40 years. By virtue of the guilty plea, the military judge will pass a sentence of no more than 25 years. The plea agreement, however, is actually with the Convening Authority. If Majid Khan is deemed to have fully cooperated under the terms of the agreement, the Convening Authority will approve a sentence of no more than 19 years (and whatever time Majid Khan has spent incarcerated

between acceptance of the plea agreement on 29 February 2012 and the date of the sentencing will be taken off this total).

To that extent, the panel sentencing hearing would appear to be pointless, except that the testimony and other evidence presented at the hearing will form part of the record which will then be handed on to the Convening Authority for his or her approval of sentence.¹⁴ Assuming Majid Khan's cooperation with the government is deemed to have met his obligation under the pre-trial agreement, and depending on the relative weight he or she gives to mitigating and aggravating evidence presented at the sentencing hearing, the Convening Authority would approve a prison sentence of somewhere between zero and 19 years.

Under the pre-trial agreement, Majid Khan has waived his right to appeal against any prison sentence that is handed down against him, unless it were to violate the terms of the agreement. This includes waiving any post-conviction challenge based on a claim that the commission did not have jurisdiction over his prosecution.

In spite of all of this, Majid Khan may still not be guaranteed release even after he has served whatever sentence he is given, although he will have the right to petition for release via habeas corpus in the federal courts (see below). The USA currently maintains that the "global war" theory allows it to impose "law of war" detention on convicted prisoners once they have served their sentence (or if acquitted at trial), as discussed further in the next section, until the sweepingly-defined "war" is over: for all practical purposes, indefinite detention, perhaps for life, can be the result whatever the outcome of any criminal trial or sentencing.

SERVING THE SENTENCE, AND BEYOND

When that sentence runs, whether it's 19 years, 25 years, whatever it is, you will no longer be serving a post-conviction sentence... But you may still be a detainee... So after the sentence is run, it may look very similar to you, that you are in a very similar type of confinement facility

Military judge to Majid Khan, Guantánamo, 29 February 2012

While he awaits sentencing, Majid Khan remains in Guantánamo and presumably will remain at that location until the administration meets its commitment – now some two and a half years past its deadline – to close the detention facility. In the event of closure being achieved, it remains to be seen where detainees whom the USA says it cannot prosecute or release, or those serving sentences imposed by military commissions, would be held.

Presuming that Majid Khan's plea agreement holds, and he is deemed to have met the requirement to cooperate with the US authorities, the period he remains in detention between now and his eventual sentencing will be considered as time served and taken off whatever prison sentence he is eventually given.¹⁵ Under the agreement, he has waived his right to assert a claim "for any day-to-day credit" for the nine years he spent in custody prior to 29 February 2012.

Pursuant to the agreement, Majid Khan has recognized that the Convening Authority has "no power to control the location or conditions of my detention or confinement". However, under the military commission rules, the Convening Authority can make recommendations to the detaining authorities in relation to conditions of detention for a detainee entering a pre-trial agreement. In Majid Khan's case, the Convening Authority has agreed to recommend that, as long as Majid Khan is cooperating with the government, he should not be detained at Camp 7, where he had been held from September 2006 until around the time of his plea hearing. Instead, he "should be detained at a facility consistent with the detention conditions appropriate for law of war detainees and no more austere than [his] detention conditions at

Camp 7". Failure by the Guantánamo authorities to implement this recommendation would not render the pre-trial agreement void and would not constitute grounds for Majid Khan to withdraw from it.

At the time of writing, it was not clear where Majid Khan was being held at Guantánamo, although he was not with the other Camp 7 detainees, who are believed to number 14. They include those named as co-conspirators under the charges to which he has pleaded guilty and presumably against whom he will be expected to testify if they are brought to trial by the USA.¹⁶

It would be an understatement to say that Majid Khan was subjected to harsh conditions of confinement prior to making his guilty plea. Before being brought to Guantánamo, Majid Khan was held for three and a half years at undisclosed locations, incommunicado and in solitary confinement (see further below). For the more than five years he spent at Guantánamo between September 2006 and around the time of his plea deal, he was held in Camp 7. This is where he and the other former CIA detainees – labelled as “high-value” by the US authorities – were put after their arrival at the prison camp. The location of Camp 7 remains classified.

A review of conditions in Guantánamo ordered by President Obama after he took office in January 2009 revealed that conditions in Camp 7 were the most isolating at the detention facility. Detainees there were held in cells that permitted no communication with adjacent cells. They were allowed up to four hours a day in an outdoor recreation area, with a “recreation partner” in an adjacent area (the partner was always the same fellow detainee). Detainees had no opportunity for phone calls, their mail took longer to clear than in other Guantánamo camps, and they had less opportunity for intellectual stimulation. The final report of the review published in February 2009 “vigorously” urged that steps be taken to “increase detainee-to-detainee contact” in Camp 7, including opportunity for group prayer and communal recreation.¹⁷ The current conditions of detention in Camp 7 are classified.

HABEAS CORPUS

[Y]ou know how habeas corpus has helped me so far
Majid Khan, Guantánamo, 29 February 2012

Another notable aspect of Majid Khan’s detention that foreshadowed his guilty plea was the fact that more than five years after a habeas corpus petition was filed on his behalf in US federal court, there had been no ruling on its merits. As recognised by article 9(4) of the ICCPR, “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” Habeas corpus is the procedure under US law by which people normally exercise this right. Under the pre-trial agreement, Majid Khan agreed to withdraw the habeas corpus petition, first filed on his behalf in US District Court for the District of Columbia (DC) on 29 September 2006, challenging the lawfulness of his detention.

In the more than four years since the US Supreme Court’s *Boumediene v. Bush* ruling in June 2008 that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in US courts, none of the 16 detainees transferred to Guantánamo from secret CIA custody on or after 4 September 2006 who have filed such petitions have had rulings on the merits of their challenges.

On 16 April 2012 a Joint Status Report was filed in the US District Court for DC by the government and Majid Khan’s habeas counsel, informing the court that both parties expected Majid Khan to withdraw his habeas corpus petition without prejudice within 60 days.¹⁸

Withdrawing the petition “without prejudice” would mean that he would be able re-file such a petition or seek “other available remedies” after he has served any prison sentence he is eventually given. Normally, a prisoner would not turn to habeas corpus to challenge the lawfulness of their detention after they have completed their prison sentence as, absent further charges, they would generally be released by the authorities without any need for further court proceedings. Not so under the distorting effects of the USA’s “global war” paradigm, as Colonel Pohl reminded Majid Khan:

Pohl: ...remember I talked earlier about once you serve confinement you still may be detained?

Khan: Yes, sir.

Pohl: Again, that continued detention, or lack thereof, is not controlled by the Convening Authority, it is controlled by somebody else. Do you understand that?

Khan: Would you be more specific? The somebody else would be?

Pohl: The best I can say is initially the Executive Branch of the United States Government.

Khan: I get the idea.

In his pre-trial agreement, Majid Khan recognized that the Convening Authority lacks the power “to compel the United States to release me from my detention as an alien unprivileged enemy belligerent”. Both the Bush and the Obama administrations have reserved the right to continue to hold a Guantánamo detainee even if he were to be acquitted at a military commission (or after a sentence has been served by a detainee convicted by such tribunals). The current administration asserts the right to return the detainee to indefinite detention under the “law of war”, including even after an acquittal in federal District Court in the USA.¹⁹

Neither has habeas corpus survived the corrosive and distorting effects on ordinary principles of justice wrought by the USA’s “global war” paradigm. The essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate that a clear legal basis exists for their detention. Normally, if the government is unable to do so promptly, the court is to order the individual released.²⁰ A court’s power to obtain the immediate release of an unlawfully held individual must be real and effective and not merely formal, advisory, or declaratory.²¹ This is the bedrock guarantee against arbitrary detention (reflected in article 9(4) of the ICCPR, for example). If it is not fully respected by the government and courts in every case, the right to liberty and the rule of law are more generally undermined.

As mentioned, under the ICCPR detainees have the right to a decision from the court “without delay”. In practice, it can be years before a Guantánamo detainee even gets a hearing on the merits of his habeas corpus challenge, let alone a decision.²² Once he does receive a hearing, he will find that domestic law – under a global war paradigm largely accepted by the federal judiciary – has placed substantial obstacles in the way of him winning a court ruling that his detention is unlawful. Even if he meets that obstacle in the District Court, the government may turn to the Court of Appeals for the DC Circuit, which will not only mean the detention will continue while that court is briefed and its decision awaited, but also likely result in government victory (whether by an overturning of a District Court decision favourable to the detainee, or by a remand to the District Court for further litigation and therefore further detention) if the record so far is any guide.²³ If a District Court finds that the detention is unlawful, and this is upheld or not appealed by the government, this can still mean indefinite detention, possibly for years, if the detainee cannot be returned to his

home country and the US government says it is unable to find any country willing to take him. 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 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.²⁴

As Majid Khan noted with apparent irony at his guilty plea hearing on 29 February 2012, once he has served his sentence, if he is not released, “I can always go to habeas, you know how habeas corpus has helped me so far.”

TIME FOR GOVERNMENT DISCLOSURE

I agree that I will not disclose, in any form, in any manner, or by any means,... any information regarding my capture, detention, confinement, locations of my confinement or detention

Majid Khan, pre-trial agreement, February 2012

Majid Khan clearly signed away much when agreeing to plead guilty, including the right to have the government prove the charges against him beyond a reasonable doubt, to confront the prosecution’s witnesses and present his own (he will be able to present witnesses at his sentencing and confront witnesses against him), and to appeal his conviction and sentence outside of very limited grounds. He has waived any “speedy trial” concerns relating to the delayed sentencing (which further delays what for Majid Khan has already lasted more than nine years) and agreed that the government could dispose of “any physical evidence” once any appellate processes are completed, and he waived any future request to have scientific testing of any such evidence in the government’s possession.

He has also agreed not to sue the USA or any of its agencies for anything that happened to him between being taken into custody in March 2003 and his guilty plea on 29 February 2012:

“Once my guilty plea is accepted, I will not initiate any legal claims against the United States Government, any United States Government Agency or official, or any civilian or civilian agency regarding my capture, detention, or confinement conditions prior to my plea. I further agree to withdraw or dismiss without prejudice any pending litigation regarding my capture, detention, confinement conditions, or alien unlawful enemy combatant or alien unlawful enemy belligerent status...”

At the hearing in Guantánamo on 29 February 2012, an official from the Counterterrorism Section of the US Department of Justice clarified that while the USA considered that the pre-trial agreement prevented Majid Khan from suing “officials or agencies of the United States Government”, it “does not bind him in any respect with respect to foreign governments”. Undoubtedly, the US administration has here obtained an agreement meshing with its broad litigation and political strategy generally to block accountability and access to remedy in the USA for human rights violations committed by US personnel in the counter-terrorism context.²⁵

Under Majid Khan’s plea deal, the Convening Authority of the military commissions has agreed to consider any evidence Majid Khan and his lawyers may make in mitigation for sentencing, including “the nature of [his] capture, detention and confinement”. However, any classified evidence presented during the sentencing procedures would be kept from public disclosure. As things stand today, this would include anything relating to his time in secret detention, for everything Majid Khan knows, says or writes about his time in CIA

custody is presumptively classified Top Secret/Special Compartmentalized Information (TS/SCI). Neither his US lawyers (who have TS/SCI security clearance), nor anyone in the government may reveal it without exposing themselves to criminal liability under US law. His pre-trial agreement addresses this aspect of his case too:

“Once this Offer is accepted, and as a continuing obligation after the Military Judge has accepted my guilty plea, I agree that I will not disclose, in any form, in any manner, or by any means, any classified United States Government information, except to my cleared defense counsel during the course of my representation or to the Military Commission as information in mitigation at sentencing... Such classified information includes any information regarding my capture, detention, confinement, locations of my confinement or detention, or identifying information concerning any Government employee, law enforcement officer, or intelligence officer, including any physical description or any other information from which identity could be inferred or otherwise determined. Such classified information also includes any information regarding the capture, detention, confinement, locations of detention or confinement of other detainees currently held at the United States Naval Base at Guantánamo, Bay Cuba, or such information regarding other detainees that I may have learned since my capture...”

During the proceedings at Guantánamo on 29 February 2012, the military commission judge dutifully steered Majid Khan away from any reference to his past treatment in US custody and the defendant's words were silenced from the ears of observers present if he strayed towards this topic. At one point, Majid Khan alluded to the fact that under the agreement, he would not be able to sue the government:

“Going back to the paragraph, you know, just to be on the record, I can't sue the United States Government, CIA, whatever, but I can always have the right to sue--”

At this point, the “security classification button” was pressed to cut off transmission so that observers behind the glass wall dividing the commission room from the public observation area, and anyone observing from remote locations, could not hear what was said. The military commission judge, Colonel Pohl, warned Majid Khan not to “discuss any individual agencies of government” – Majid Khan had made the mistake of mentioning the CIA, the US agency in whose custody he was subjected to enforced disappearance and to torture or other cruel, inhuman or degrading treatment. Under the rules of the military commissions, not even the name of the CIA is permitted to be pronounced in this regard during commission proceedings.

Majid Khan continued, “Sir, talking about public record, talking about public record” – presumably stressing that he was only referring to what was already in the public domain. Nevertheless, Colonel Pohl interrupted by saying “no, no” and the transmission to the observation areas was again cut. When it resumed Colonel Pohl said, “Okay. Just – so we are sliding away from that area”.

Amnesty International does not seek to address whether agreeing to waive his right to sue for redress was the right course of action for Majid Khan to take in his personal circumstances. As will be described later, Majid Khan has not been provided with any access to an effective remedy for the human rights violations to which he is publicly known to have been subjected, and those he might further allege. Obliging him in his plea

“These reports, which the United States Government has published for nearly four decades, make clear to governments around the world: We are watching and we are holding you accountable.”

US Secretary of State Hillary Clinton, 24 May 2012, releasing latest US assessment of human rights in other countries²⁶

bargain to keep secret and give up any right to a remedy for such abuses itself violates the USA's explicit obligation under international human rights law to provide access to effective remedies to *anyone* who alleges he has been subjected to such human rights violations.²⁷

Further, regardless of this or any other similar plea agreements, the US government is not absolved of its obligation under international law to ensure accountability for the crimes committed against this and other detainees and its duty to respect and fulfil the individual and collective right to truth about such violations. The United Nations, among others, has formally recognised “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”, referring in part to

“the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred”.²⁸

The right to the truth has clearly been a casualty of the USA's “global war” against al-Qa'ida and associated groups. The Obama administration has maintained that “with limited exceptions, the specific details of the capture, detention, and interrogation of particular enemy combatants remains highly classified”.²⁹ This use of secrecy, by effect if not design, continues particularly to obscure human rights violations committed in the CIA's secret detention program, including against those like Majid Khan who were held in that program and remain today in Guantánamo. The implementation of such secrecy coupled with a determination to “look forward, not back” when it comes to torture by US agents, is also in clear breach of the USA's obligations under international law to investigate, prosecute and punish those responsible for the enforced disappearance and alleged torture or other cruel, inhuman or degrading treatment of many of the detainees held at Guantánamo, including Majid Khan.

The following section outlines some of what is in the public record about “that area” referred to and cut off from public transmission by the military commission authorities at the plea hearing, and how the government's use of secrecy seeks to keep what is public to a minimum and officially unconfirmed, thereby blocking truth and accountability.

SECRECY BLOCKING TRUTH AND ACCOUNTABILITY

As chairman of the Select Committee on Intelligence, I can say that we are nearing the completion of a comprehensive review of the CIA's former interrogation and detention program, and I can assure the Senate and the Nation that coercive and abusive treatment of detainees in US custody went beyond a few isolated incidents at Abu Ghraib. Moreover, the abuse stemmed not from the isolated acts of a few bad apples but from fact that the line was blurred between what is permissible and impermissible conduct, putting US personnel in an untenable position with their superiors and the law.

US Senator Dianne Feinstein, December 2011³⁰

So under the plea bargain it seems Majid Khan cannot publicly disclose any human rights violations that happened to him from the day he was taken into custody in March 2003 to after he was transferred to Guantánamo three and a half years later. Nor can his lawyers. If the latter were to publicly disclose classified information or even confirm or deny allegations relating to information that is classified, they could be subjected to criminal prosecution and held in contempt of court. As a practical matter, in his current circumstances, Majid Khan has no opportunity to disclose classified information into the public realm, but if he could, presumably the government could take any such disclosure as a material breach of the pre-trial agreement and as a basis to terminate the agreement.

The government can choose to declassify and disclose this information, however, and to the extent that it describes any human rights violations under international law it should do so now. It should also allow Majid Khan, at his sentencing if not before, to reveal publicly what happened to him in secret US detention.

As far as is known, Pakistani security agents seized Majid Khan from his brother's house in Karachi, Pakistan, in the first week of March 2003.³¹ There was no official news of his fate or whereabouts until President Bush announced on 6 September 2006 that Majid Khan and 13 others had been transferred from secret CIA custody to Guantánamo. According to government documents leaked into the public domain since, the 14 had arrived at Guantánamo two days earlier on 4 September 2006.

In his speech, President Bush said that the 14 men were being transferred to Guantánamo to be brought to justice, but the Bush administration never brought any of them to trial. It did exploit the 14 cases to obtain congressional approval of the 2006 version of the MCA, legislation incompatible with international law. This incompatibility stemmed not least from the MCA's attempt to deny habeas corpus for those held as "enemy combatants", its resuscitation of military commissions, in the Bush administration's interpretation of the MCA as allowing the USA to continue its program of secret detentions, and in its expansion of a special legal defence, created in 2005, for US officials who had engaged in criminal abuses of detainees since 2001.³² It would not be until June 2008 that the US Supreme Court ruled, in *Boumediene v. Bush*, that the denial of habeas corpus to the Guantánamo detainees under the MCA 2006 was unconstitutional. To this day, the MCA's stripping of jurisdiction of the US courts to hear other actions against US personnel for "any aspect" of the detention, treatment or conditions of confinement used against such foreign national detainees in US custody treatment remains one of the obstacles to remedy for human rights violations in the USA.³³

After Majid Khan and the 13 other so-called "high value detainees" were transferred to Guantánamo, the International Committee of the Red Cross (ICRC) was informed of their detention and was allowed access to them, things the organization had been denied while the men were held in secret custody. In February 2007, the ICRC sent the US authorities a copy of its findings based on interviews with the 14 detainees conducted in late 2006. In 2009, this confidential report was leaked into the public domain.³⁴ Among other things, the ICRC concluded that US agents were responsible for enforced disappearance, torture and other cruel, inhuman or degrading treatment and called on the US authorities to bring the perpetrators of the abuses to justice. Five years later, this has still not happened. Indeed, US investigations have been all but shut down and secrecy continues to be used by the government, by design or effect, to block remedy and accountability.

The ICRC report provided a snapshot of the allegations made to the organization by the detainees and revealed, for example, that Majid Khan had alleged that he was subjected to prolonged stress standing, a technique which consisted of the detainee having his wrists shackled to a bar or hook in the ceiling above his head. In Majid Khan's case, this was apparently done to him for three days in Afghanistan, his alleged second place of detention after his original arrest and detention in Pakistan, and seven days in his third, unknown, place of detention. In Afghanistan and during this latter period he was allegedly kept naked. He also alleged that he was denied solid food for seven days in US custody in Afghanistan.

There's a detention facility outside the city [of Kabul] that we use to question terrorists

Former FBI agent, reporting conversation with head of CIA high value target (HVT) unit, Kabul, September 2002³⁵

Exactly when Majid Khan was transferred from Pakistani custody to US custody, or from Pakistan to Afghanistan, or from Afghanistan to his third country of detention and onward, or

where he was held in any of these countries, has not been made public. A former detainee has said that Majid Khan was in the same secret CIA facility in Afghanistan as he was in 2004. Yemeni national Ahmed al-Maqtari told Amnesty International that Majid Khan was brought to the facility about six to eight weeks after he, Ahmed al-Maqtari, arrived.³⁶ This would mean that Majid Khan was brought to this facility in or around March 2004, about a year after Khan was first taken into custody in Pakistan. In this facility, Majid Khan told another detainee that he “had been here before, was transferred to another prison in Kabul and then was returned to this prison”. At the prison in Kabul, Majid Khan had said, there had been both Arab and Afghan prisoners, who were able to communicate more freely with one another, although their general conditions of detention were worse.³⁷

Ahmed al-Maqtari thought the place in which he was being held in 2004 with Majid Khan was Bagram – where the CIA operated a secret facility – but this remains unconfirmed and it could have been another location in or near Kabul, either the ‘dark prison’ or the ‘salt pit’, operated by or for the CIA at that time.

The sort of treatment Majid Khan alleged to the ICRC about his treatment in Afghanistan was similar to that alleged to Amnesty International by Ahmed al-Maqtari, who said that in the first two weeks after his transfer to this facility in Afghanistan he had been held in a small cell kept dark for the first four or five days, and loud sounds were played over a speaker inside the cell. He was kept handcuffed and shackled. After two weeks he was moved to a larger one; in both cells he was under 24-hour camera surveillance. Whenever he was taken for interrogation, he was masked and hooded.

Since then, more has emerged about the CIA’s detention program, including further confirmation from former President Bush himself, that the program was conducted under his authority given to the CIA Director in a memorandum signed on 17 September 2001 and that he had subsequently and expressly authorized the use of “enhanced” interrogation techniques used against detainees in the program, techniques that violated the international prohibition of torture and other cruel, inhuman or degrading treatment or punishment.³⁸

In a background paper faxed from the CIA to the US Department of Justice on the morning of 30 December 2004, classified Top Secret but released in redacted form in August 2009, the CIA provided a “generic description” of the interrogation process employed in its secret detention program:

“The purpose of interrogation is to persuade High-Value Detainees (HVD) to provide threat information and terrorist intelligence in a timely manner, to allow the US Government to identify and disrupt terrorist plots [redacted] and to collect critical intelligence on al-Qa’ida [redacted]... Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence HVD behaviour, to overcome a detainee’s resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence....”³⁹

The manner in which the CIA transferred detainees between different locations itself violated the international prohibition against torture and other cruel, inhuman or degrading treatment. The agency’s background paper cited above described the CIA’s typical rendition in the secret program:

“The HVD is flown to a Black Site... During the flight, the detainee is securely shackled, and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods... Upon arrival at the destination airfield, the HVD is moved to the Black Site under the same conditions...The HVD finds himself in the complete control of Americans... [T]he rendition and reception process generally creates significant apprehension in the HVD because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of US

custody... The HVD's head and face are shaved. A series of photographs are taken of the HVD while nude."⁴⁰

The ICRC's report of its interviews with the 14 men transferred to Guantánamo in September 2006 added some human reality to the picture painted by the CIA:

"The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and effect of such suppositories was unknown by the detainees), was also administered at that moment. The detainee would be made to wear a diaper and dressed in a track suit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied....The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort".⁴¹

Majid Khan would have been subjected to numerous transfers between various secret facilities in various countries between the time of his arrest and his eventual transfer from his final undisclosed location to Guantánamo in early September 2006.

The ICRC report highlighted a number of methods of torture or other ill-treatment alleged by the 14 detainees, techniques which the ICRC emphasised had been applied in combination, and some of which were specifically alleged by Majid Khan as detailed above. The techniques 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.

The ICRC further stressed that even the two (unidentified) men who had not alleged use of these particular methods against them had nevertheless, like all the detainees in the CIA program, been subjected to conditions of detention that violated the prohibition against torture and other ill-treatment – in the form of months and years of continuous solitary confinement and incommunicado detention. A 2006 US Department of Justice memorandum noted that "the covert facilities in which the CIA houses these detainees were not designed as ordinary prisons", and that this purportedly justified the use of certain conditions of detention, including blindfolding, white noise, 24-hour lighting, shackling, and forced shaving, as security measures in addition to the incommunicado and solitary confinement of those held and the interrogation techniques to which they were subjected.

The question of detention conditions in the CIA program has been somewhat overlooked with the focus instead on interrogation techniques authorized and used in the program. Conditions of detention, including during transfers, and not only interrogation techniques, can violate the international prohibition of torture and other cruel, inhuman or degrading treatment. As the ICRC has noted, the conditions of detention – from solitary confinement, and incommunicado detention to "deprivation of access to the open air; deprivation of exercise; deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation; and restricted access to the Koran linked with interrogation – must be understood as forming

part of the whole picture. As such, they also form part of the ill-treatment to which the fourteen were subjected”.⁴²

Beyond the limited disclosures on the use of “water-boarding” – that it was used against three detainees in 2002 and 2003 (not including Majid Khan) – and the disclosure of legal Department of Justice memorandums discussing specific “enhanced” interrogation techniques *in theory* – both the Bush and Obama administrations have refused to disclose how interrogation techniques were used *in practice*. However, the CIA’s background paper faxed to the Office of Legal Counsel (OLC) at the US Department of Justice on 30 December 2004 provided what it said was “a look at a prototypical interrogation”.⁴³ Given what has been alleged about the reality in the CIA program – in the ICRC report and elsewhere – the reality of what actually happened could reasonably be assumed to be more severe than what the CIA told the Department of Justice when seeking the green light for its activities from the OLC.

In the “prototypical interrogation”, then, the first session would begin with the detainee stripped naked, shackled and hooded, with the “walling collar” around his neck. The detainee is told that the interrogators “will do what it takes to get important information”. With any signs of failure to cooperate, the interrogators would immediately resort to slapping the detainee and then to “walling” him, that is, slamming him against the plywood walls. Multiple “iterations” of this sequence might follow. The session would last for 30 minutes to several hours at the end of which the detainee would be put in a position for “standing sleep deprivation” (that is, hands handcuffed and chained to ceiling, feet shackled to a floor bolt), put on dietary manipulation through the use of a liquid diet, and kept “naked (except for a diaper)”. The gap between sessions could be as short as an hour or as long as 24 hours.

At the start of the second session, the detainee would be released from the standing sleep deprivation position, hooded and placed against the “walling” wall. The attention grasp would be used while the detainee was hooded. The hood would then be removed. Answers from the detainee deemed inappropriate would be met with insult slaps or abdominal slaps, and could be followed by walling if the detainee was deemed still to be resistant. Again the sequence could be repeated multiple times depending on the detainee’s “resistance posture”. The interrogators would then resort to dousing the detainee with water from a hose. They would stop and start this as they continued the interrogation. The session would again end with the detainee being put in the standing sleep deprivation position, on a liquid diet, and naked except for a diaper. Again, the session could have lasted up to several hours.

A third interrogation session would begin like the second, with walling and water dousing employed against the detainee when deemed resistant. Insult slap, abdominal slap, facial hold, attention grasp might all be used depending on the detainee’s responses. Stress positions and wall standing would be integrated into the session, along with multiple applications of “walling”, with interrogators using “one technique to support another”. At the end of the session, standing sleep deprivation, dietary manipulation and nudity would again be maintained. In later sessions, “while continuing the use of sleep deprivation, nudity and dietary manipulation” the interrogators might add “cramped confinement”. The series of sessions would extend over a period of up to 30 days and might be extended with approval from CIA Headquarters in Langley, Virginia.

Throughout Majid Khan’s ordeal, and to date, past and current operational details of the CIA secret detention program remained classified. His attempts to secure some accountability for his treatment at the hands of the CIA and US government foundered on the system of secrecy and classification. In 2008, his US lawyers wrote in a legal brief filed in federal court:

“In a transparent attempt to avoid criminal indictments of US officials and the national embarrassment that would unquestionably follow from public disclosure of Khan’s ordeal, the government has improperly classified every detail of his experience in the CIA

Torture Program. The government has essentially sought to maintain complete secrecy concerning Khan by holding him indefinitely in military custody at Guantánamo, and by withholding from public scrutiny any description of his torture or its impact on him and the conduct of his Combatant Status Review Tribunal at Guantánamo. The government has classified Majid Khan almost in his entirety, as if he never existed to the outside world after his abduction...⁴⁴

The Combatant Status Review Tribunals (CSRTs) were the military panels set up by the Bush administration in 2004 in an attempt to keep judicial scrutiny of the detentions to a minimum following the Supreme Court's *Rasul v. Bush* ruling in June 2004 finding that the US federal courts had jurisdiction to consider habeas corpus petitions filed on behalf of the Guantánamo detainees. The CSRTs were tasked with affirming or rejecting the "enemy combatant" status attached to detainees at Guantánamo. They lacked any semblance of independence from the executive.⁴⁵

Nearly a year after Majid Khan's transfer to Guantánamo, a CSRT affirmed him as an "enemy combatant". He was denied access to a lawyer until two months after that, in mid-October 2007, four and a half years after he was first taken into custody. This access was granted for the purpose of representing him for the narrow judicial review by the US Court of Appeals for the DC Circuit to which Majid Khan was then entitled under the Detainee Treatment Act (DTA), namely to challenge the CSRT's "enemy combatant" finding against him.⁴⁶

More than a year of litigation in Majid Khan's case in the Court of Appeals came to nothing. In November 2007, his lawyers filed a motion to preserve evidence of his torture. In December 2007, they filed a motion to declare that his treatment in CIA custody had constituted torture. In May 2008, they filed a motion seeking an order that would allow Khan to make public his allegations of torture on the grounds that he had a constitutional right to freedom of speech, and that his statements were not properly classified. When these motions were never ruled upon by the Court of Appeals, Khan's lawyers filed a motion on the motions, seeking a response from the Court. None was forthcoming.

Declarations filed by Majid Khan's lawyers at the Court of Appeals described what he had told them about his three and a half years in secret US custody. Most of what they have filed was censored from the public record. The declaration of one of the lawyers stated:

"[D]uring our meetings with Khan we learned that he was subjected to an aggressive CIA detention and interrogation program notable for its elaborate planning and ruthless application of torture... Khan's torture was decidedly not a mistake, an isolated occurrence, or even the work of 'rogue' CIA officials or government contractors operating outside their authority or chain of command. To the contrary, as described below, Khan encountered several other prisoners who were similarly abducted, imprisoned and tortured by US personnel at CIA 'black sites' around the world. The collective experiences of these men, who were forcibly disappeared by our government and became 'ghost' prisoners, reveal a sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law".⁴⁷

Almost all of the remaining 40 pages of this declaration detailing Majid's Khan's alleged treatment were redacted, page after page entirely blacked out by US officials. Far from ensuring the truth came out about human rights violations, the CIA and the US administration were clearly intent on keeping the public in the dark about what went on in the CIA's "black sites".

An end to the secret detention program as operated under the Bush administration was initiated by President Barack Obama under an executive order he signed on 22 January 2009, his second full day in office. At the same time, President Obama also ordered an end to the use by the CIA of "enhanced" interrogation techniques, and prohibited the reliance by

any US officer, agent or employee upon “any interpretation of the law governing interrogation... issued by the Department of Justice between September 11, 2001, and January 20, 2009”.⁴⁸ The largely un-redacted publication in April 2009 by the new US administration of four previously secret memorandums written in the Office of Legal Counsel at the US Department of Justice in 2002 and 2005 on the CIA’s use of “enhanced” interrogation techniques against detainees deemed to have “high value” intelligence, was a welcome act of transparency. However, the failure by both the Bush and Obama administrations to ensure accountability leaves the USA in violation of its international obligations to investigate, prosecute and punish those responsible for the human rights violations committed against Majid Khan and others. In addition, the USA is obliged under international law to provide effective remedy and redress to the victims (including Majid Khan) for the harm they have suffered and to guarantee the right to truth regarding what happened in the CIA secret detention programme, both for the individual victims and to society collectively.

The Obama administration has attempted to draw a line under the CIA program. It told the UN Human Rights Council in March 2011 that “The President has closed all CIA detention facilities and has prohibited CIA operation of such facilities... We investigate allegations of torture, and prosecute where appropriate.”⁴⁹ Three months later, the US Attorney General 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 would be closed.⁵⁰

With investigations into the CIA program all but closed down, the US administration continues to use secrecy to argue against judicially ordered disclosure of what happened in the program.

On 18 January 2011, the US Court of Appeals for the DC Circuit upheld the CIA’s invocation of Freedom of Information Act (FOIA) exemptions to withhold details of the locations and treatment in secret detention of the 14 detainees, including Majid Khan, transferred from CIA custody to Guantánamo on 4 September 2006.⁵¹ The American Civil Liberties Union (ACLU) had filed a FOIA request with the CIA and Pentagon in 2007 seeking unredacted records relating to the hearings of the 14 detainees before CSRTs. In the versions of the CSRT transcripts published by the Pentagon, allegations by the detainees of how they were treated in CIA custody and where they were held were blacked out.

In October 2008, Chief Judge Royce Lamberth on the District Court for DC ruled against the ACLU in a summary judgment, concluding that the CIA had provided adequate explanation for its invocation of the FOIA exemptions. The case was subsequently sent back to the District Court to review the case in light of President Obama’s three executive orders of 22 January 2009, which had included the order on the CIA to stop its use of long-term secret detention and “enhanced” interrogation, and the release on 16 April 2009 of four Justice Department memorandums from 2002 and 2005 that discussed the legality of “enhanced interrogation techniques” by the CIA.⁵² In October 2009, Judge Lamberth again ruled against disclosure of the CSRT records, simply deferring to the declaration filed by the CIA that to publish the information about the detainees would harm national security.

The case was appealed to the DC Circuit Court of Appeals. The Obama administration urged it to uphold the District Court’s ruling. Far from being critical of the CIA detention program, the administration’s brief reiterated President Bush’s words that the CIA’s “terrorist detention and interrogation program” had “provided the US Government with one of the most useful tools in combating terrorist threats to the national security” and had “played a vital role in the capture and questioning of additional senior al Qaeda operatives” and in thereby assisting the USA in learning about *al-Qa’ida*. The brief noted that in the cases of particular detainees, including Majid Khan, the withheld information included details about their detention conditions in CIA custody, where they were held, and in each case “the

interrogation methods that he claims to have experienced”. The administration argued that “the potential for harm from the disclosure of these interrogation methods is not lessened by the fact that the documents contain detainees’ descriptions of their own interrogations. These detainees are in a position to provide accurate and detailed information about some aspects of the CIA’s former detention and interrogation program, which remains classified.” Among other things, the administration stated that “the present prohibition against using these interrogation methods does not render their past use illegal”.⁵³

If these detainees have knowledge about detention conditions or interrogation techniques that violate the prohibitions against enforced disappearance and of torture and other cruel, inhuman or degrading treatment or punishment, it is only because the US government itself forced that knowledge on them in the course of carrying out such violations of their rights. Allowing a government to, in effect, indefinitely and unilaterally keep secret the details of allegations of such human rights violations – indeed it has gone so far as to physically censor the voices of those who claim to have suffered the violations – in a manner that by purpose or effect deprives the person of access to an effective remedy and preserves the impunity of the perpetrators, is fundamentally inconsistent with international law.

The Obama administration had also argued to the Court of Appeals that to disclose, for example, “whether a particular foreign country assisted the United States in detaining or interrogating a terrorism suspect, or allowed the United States to detain people on its soil” would harm the CIA’s relations with such governments. The CIA has also argued that disclosure of information related to the programme of secret detention would reveal the location of secret CIA facilities and the identities of countries that cooperated with the USA in this regard, and should thus be kept secret.⁵⁴

Majid Khan has said: “They had no choice but to make me Top Secret because of what they did to me”.⁵⁵ Whatever its purported justifications might be, the US government does not just have a choice, it has an obligation. That obligation is to ensure accountability for crimes committed by US personnel under international law. In Majid Khan’s case it should begin by declassifying and disclosing what happened to him in secret CIA custody, where he was held and how he was treated.

CONCLUSION

My Administration is committed to creating an unprecedented level of openness in Government... Transparency promotes accountability
Memorandum, President Barack Obama, January 2009⁵⁶

At the hearing in Guantánamo on 29 February 2012, Majid Khan summed up what he understood as his situation:

“[Y]ou are saying I can’t sue the CIA or any other government agency about what happened to me in the past, I can’t talk about [it]. Second is, even though I do my time, the government can still consider me enemy combatant and they can keep me for the rest of my life... I can always go to habeas, you know how habeas corpus has helped me so far. Basically I do my time. There is no guarantee. This agreement does not guarantee me I will ever get free even though I do my time”.

To which the military judge, US Army Colonel James Pohl, replied: “Exactly”. Majid Khan responded that he was taking “a leap of faith” that it was in his best interests to enter his guilty plea.

It has sometimes seemed over the past decade since the attacks of 11 September 2001 that

the US authorities have lost faith in the ordinary criminal justice system in the counter-terrorism context. The politics of fear and the framework and language of “global war” have conspired to undermine human rights principles and militarize aspects of US justice and detentions.

When President Obama took office, he held out the promise of a change in approach, but that promise has remained unfulfilled in a number of important ways:⁵⁷ The predominant framework has remained one of “global war” to the virtual exclusion of respect for human rights or the guarantees of the ordinary criminal justice system, the Guantánamo detention facility remains in operation with scores of detainees still held there in indefinite military custody, unfair military commission proceedings have resumed, and the prospect of accountability and remedy for, and the truth about, human rights violations committed over the past decade, particularly in the context of secret detentions, interrogations and renditions, remains apparently as remote as ever.

The one-way nature of the accountability issues in this case is stark in its imbalance and surely offends basic notions of fairness. Majid Khan has admitted his involvement in acts for which he now faces the possibility of up to almost another two decades in US custody, following the nine years he spent in custody prior to his guilty plea and subsequent conviction under the MCA. The US government should for its part disclose, investigate and ensure accountability for any human rights violations, including the crimes under international law of torture and enforced disappearance, carried out against Majid Khan in US custody.

From what Amnesty International can glean about Majid Khan’s decision to plead guilty – he is a detainee to whom the organization has had no access and whose treatment and conditions in US custody his lawyers cannot publicly disclose – it would appear that he determined it to be the best course of action available to him. It is difficult to assess the impact of the treatment he was subjected to at the hands of the US government before, and the potential for indefinite detention in the future, on his decision making in this regard.

While Majid Khan has decided to plead guilty and assume responsibility for the acts alleged against him, official accountability remains notable by its absence when it comes to the human rights violations associated with the CIA secret detention and rendition programmes. It is important not just that the military commission, military judge and Convening Authority know – in full detail – how Majid Khan was treated in US custody, in addition to the wrongdoing to which he has pleaded guilty, but that this information is publicly disclosed, that the perpetrators of any human rights violations against him are held accountable and adequate redress provided to Majid Khan.

The USA must disclose what happened to Majid Khan after his arrest in March 2003 and to begin the process of accounting for the human rights violations that were committed against this and other detainees held in secret CIA custody.

ENDNOTES

¹ That is, the time he spends in prison between 29 February 2012 and his sentencing, but not the time previously spent detained, will be taken off the eventual sentence.

² The administration has not said that it intends to do so in any particular case, but maintains the position as a general one covering all such detainees.

³ UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(UNCAT), article 15; Human Rights Committee, General Comment no. 20 (1992), para. 12, finding the same obligation to arise under article 7 of the International Covenant on Civil and Political Rights. See USA: Judge refuses to dismiss charges against former secret detainee, says remedy for torture or other abuses must be sought elsewhere, 13 May 2010, <http://www.amnesty.org/en/library/info/AMR51/040/2010/en>.

⁴ See 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>. On Senate Select Committee on Intelligence see note 30 *infra*.

⁵ UNCAT, article 12.

⁶ At the hearing on 29 February 2012, Majid Khan admitted that on 8 March 2002 he had donned a live suicide vest with the intent to detonate at a mosque in Karachi that President Musharraf was expected to visit, but that in the event the intended victim had not arrived.

⁷ The attempted murder charge also covered the alleged plan to detonate a suicide bomb with the intent to kill the then President of Pakistan in March 2002.

⁸ USA: Trials in error: Third go at misconceived military commission experiment, 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>

⁹ *United States v. Majid Shoukhat Khan*, Offer for pre-trial agreement, 13 February 2012.

¹⁰ The CIA secret interrogation program was only used against non-US citizens, and no US nationals have knowingly been held at the Guantánamo detention facility. Yaser Hamdi, who was initially sent to Guantánamo, was immediately transferred to the mainland USA when his possible dual US/Saudi citizenship was discovered. He, Jose Padilla, and Ali al-Marri were the three US citizens or legal residents subjected to indefinite military detention as “enemy combatants” under the Bush administration. Hamdi was eventually released to Saudi Arabia, giving up his US citizenship, while Jose Padilla were charged for trial in civilian courts and are currently serving prison sentences.

¹¹ UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc CCPR/C/GG/32, 23 August 2007, para. 22.

¹² See for example, USA: Guantánamo – A decade of damage to human rights. And 10 anti-human rights messages Guantánamo still sends, 16 December 2011, <http://www.amnesty.org/en/library/info/AMR51/103/2011/en>

¹³ His sentencing can be brought forward by the military judge, as long as the defence is given 90 days notice of an earlier date for the sentencing.

¹⁴ Under the pre-trial agreement, Majid Khan has agreed not to offer any “live testimony of any detainee held at United States Naval Station Guantánamo Bay”.

¹⁵ It is not clear what would happen if the eventual sentence is less than the time that will have passed between 29 February 2012 and the date of sentencing.

¹⁶ Those named as co-conspirators in the charges referred against Majid Khan, and who were also transferred to Guantánamo on 4 September 2006 after being held in secret CIA custody and are believed to remain in Camp 7, are Pakistani nationals Khalid Sheikh Mohammed and ‘Ali ‘Abd al-‘Aziz, Indonesian national Encep Nurjaman (a.k.a. Hambali), and Malaysian nationals Mohd Farik bin Amin (a.k.a. Zubair) and Mohammed Nazir bin Lep (a.k.a. Lillie).

¹⁷ Review of Department compliance with President’s executive order on detainee conditions of confinement, February 2009.

¹⁸ *Khan v. Obama*, Joint Status Report, In the US District Court for DC, 16 April 2012.

¹⁹ At the military commission arraignment at Guantánamo on 9 November 2011, the following dialogue occurred between the military judge and a prosecutor from the US Department of Justice, Assistant US Attorney Anthony Mattivi. Military Judge, Colonel Pohl: “If the accused were acquitted today, there is no legal prohibition from the government to take him under the Authorization for Use of Military Force straight back to the cell he came from? Today.” US Attorney Mattivi: “Today, just as if the same thing had happened to Mr [Ahmed Khalfan] Ghailani in the Southern District in the Article III case, that’s absolutely correct”. Ahmed Ghailani is the only Guantánamo detainee to have been transferred to the US mainland for prosecution. He was convicted in 2010 and sentenced to life imprisonment in 2011.

²⁰ General Comment no 8, para 2 (1982) (...“delays must not exceed a few days”).

²¹ See e.g. Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), para 9.5

²² See, for example, ‘Abu Zubaydah, the man justice has forgotten.’ By Joseph Margulies, Los Angeles Times, 16 May 2012 (“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.”) A habeas corpus petition was first filed for Abu Zubaydah in 2008. There is yet to be a ruling on the merits of his challenge. Abu Zubaydah was subjected to enforced disappearance for four and a half years in secret US custody, and to torture and other cruel, inhuman or degrading treatment. See also, USA: Human rights betrayed: 20 years after US ratification of ICCPR, human rights principles sidelined by ‘global war’ theory, 7 June 2012, <http://www.amnesty.org/en/library/info/AMR51/041/2012/en>

²³ For a discussion on the record in the habeas corpus cases, see Benjamin Wittes, ‘The real DC Circuit habeas record’, 18 June 2012, at <http://www.lawfareblog.com/2012/06/the-real-d-c-circue-wit-habeas-record/>; and Benjamin Wittes, ‘David Remes responds to my habeas numbers’, 23 June 2012, at <http://www.lawfareblog.com/2012/06/david-remes-responds-to-my-habeas-numbers/>. On 11 June 2012, the US Supreme Court announced that it would review none of the cases of seven Guantánamo detainees who had petitioned it to review the decision of the DC Circuit Court of Appeals in their cases. For the time being at least, the DC Circuit Court of Appeals appears effectively to be the court of final review for the detainees in their habeas corpus challenges.

²⁴ 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.

²⁵ See, for example, USA: ‘Congress has made no such decision’: Three branches of government, zero remedy for counter-terrorism abuses, 6 February 2012, <http://www.amnesty.org/en/library/info/AMR51/008/2012/en>

²⁶ Release of the 2011 Human Rights Report. Remarks of Hillary Rodham Clinton, Secretary of State, Washington, DC, USA, 24 May 2012, <http://www.state.gov/secretary/rm/2012/05/190826.htm>. See USA: Human rights betrayed. 20 years after US ratification of ICCPR, human rights principles sidelined by ‘global war’ theory, 7 June 2012, <http://www.amnesty.org/en/library/info/AMR51/041/2012/en>

²⁷ See ICCPR Article 2(3): “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the

legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.” See also UN Convention against Torture articles 12-14 and 16, referring to among other things the obligation to ensure “a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed”, “the right” of alleged victims “to complain to, and to have his case promptly and impartially examined by, ... competent authorities” and the obligation to “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. See also the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

²⁸ UN Human Rights Council, res. 9/11 ‘Right to the truth’, A/HRC/RES/9/11, 24 September 2008, para. 1 and preamble; see also Human Rights Commission, res. 2005/66 ‘Right to the truth’, E/EN.4/RES/2005/66, 20 April 2005.

²⁹ *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

³⁰ Senator Dianne Feinstein. S8130, Congressional Record – Senate, 1 December 2011. Senators Dianne Feinstein and Kit Bond, Chair and Vice Chair of the Senate Select Committee on Intelligence, announced on 5 March 2009 that the Committee would “review the CIA’s detention and interrogation program”, and that the review would include “how the CIA created, operated, and maintained its detention and interrogation program” and “whether the CIA implemented the program in compliance with official guidance, including covert action findings, Office of Legal Counsel opinions, and CIA policy”. Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009. The then CIA Director Leon Panetta subsequently stated that Senators Feinstein and Bond had assured him that the goal of their review was to inform “future policy decisions”, rather than “to punish those who followed guidance from the Department of Justice.” Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Senate Review of CIA's Interrogation Program, 5 March 2009, <https://www.cia.gov/news-information/press-releases-statements/senate-review-of-cia-interrogation-program.html>; Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the New Review Group on Rendition, Detention, and Interrogation, 16 March 2009, <https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html>. Originally, it had been projected that the review would take about a year. No report has yet been released, and it is not currently known if or when any such report will be, and if it is how much will be redacted from the public record during classification review.

³¹ According to the transcript of his guilty plea hearing on 29 February 2012, Majid Khan gave the date of his original arrest as 1 March 2003. Amnesty International does not know whether this was an error in the transcript, or by Majid Khan, or if 1 March 2003 is in fact the correct arrest date. The organization notes that the memoirs of the former Director of the CIA, George Tenet, asserts that Majid Khan was taken into custody on the same day that Khalid Sheikh Mohammed was arrested, which occurred on 1 March 2003. However, the declassified but heavily redacted 2004 report of the CIA Inspector General's review of the CIA's secret detention program noted that it was the interrogation of Khalid Sheikh Mohammed that led to the arrest of Majid Khan. Previously declassified materials filed by Majid Khan's habeas corpus lawyers gave 5 March 2003 as Khan's arrest date, as did a leaked February 2007 ICRC report (see below), and a leaked secret document produced by the Guantánamo authorities in 2008, which stated “There are few details of detainee's actual capture. Detainee was arrested in Karachi, PK on 5 March 2003, likely as a result of his connections to KU-10024 [Khalid Sheikh Mohammed]”. JTF-GTMO Detainee Assessment”, 30 June 2008, <http://wikileaks.org/gitmo/pdf/pk/us9pk-010020dp.pdf>

³² Signing the MCA into law on 17 October 2006, President Bush emphasized that it would “allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders”. Remarks on signing the Military Commissions Act of 2006, President G.W. Bush, 17 October 2006. See USA: Rubber stamping violations in the “war on terror”: Congress fails human rights, 28 September 2006, <http://www.amnesty.org/en/library/info/AMR51/155/2006/en>; USA: Military Commissions Act of 2006 - Turning bad policy into bad law, 29 September 2006, <http://www.amnesty.org/en/library/info/AMR51/154/2006/en>

³³ See, for example, *al Janko v. Gates et al*, Memorandum Opinion, US District Court for the District of Columbia, 11 December 2011 (Granting of government’s motion to dismiss action brought by former Guantánamo detainee, released from the base after a successful habeas corpus challenge, but seeking damages for physical and psychological injuries allegedly suffered as a result of abuse in US custody. Abdul Rahim Abdul Razak al Janko, a Syrian national, alleges among other things that when in US custody in Afghanistan he was subjected to “abusive interrogation techniques”, including “striking his forehead; threatening to remove his fingernails; sleep deprivation; exposure to very cold temperatures; humiliation; and rough treatment” and in Guantánamo that he was tied, shackled, force-fed, had his Koran desecrated, was subjected to “extreme sleep deprivation” in solitary confinement, and to “severe beatings and threats against himself and his family”. He alleges that as a result of the abuse, he attempted suicide 17 times. The District Court granted the government’s motion to dismiss, citing section 7 of the MCA which states “No court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention,... treatment,... or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”. At the time of writing, the District Court decision was being appealed to the US Court of Appeals for the DC Circuit.)

³⁴ ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, February 2007. The ICRC has said, generally, that it “deplores the fact that confidential information conveyed to the US authorities has been published by the media on a number of occasions in recent years. The ICRC has never given its consent to the publication of such information.” US detention related to the fight against terrorism – the role of the ICRC. ICRC Operational update, March 2009.

³⁵ Ali Soufan, *Black Banners: The inside story of 9/11 and the war against al-Qaeda*. W.W. Norton (2011), page 448, quoting “Samantha”, head of the HVT unit in a conversation with Ali Soufan in Kabul in September 2002. Ali Soufan is a former FBI interrogator who was involved in interrogating a number of detainees held in secret CIA custody.

³⁶ USA: A case to answer. From Abu Ghraib to secret CIA custody: The case of Khaled al-Maqtari, March 2008, <http://www.amnesty.org/en/library/info/AMR51/013/2008/en>

³⁷ *Ibid.*

³⁸ See for example, Amnesty International memorandum to the Canadian authorities. Visit to Canada of former US President George W. Bush and Canadian obligations under international law. 12 October 2011, <http://www.amnesty.org/en/library/info/AMR51/080/2011/en>

³⁹ Background paper on CIA’s combined use of interrogation techniques. Sent by fax from Central Intelligence Agency to Daniel Levin, Acting Assistant Attorney General, Office of General Counsel, 30 December 2004. The fax cover sheet includes the comment from the unidentified sender at the CIA “Dan, a generic description of the process. Thank you”.

⁴⁰ Background paper on CIA’s combined use of interrogation techniques, <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf>

⁴¹ ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, International Committee of the Red Cross, February 2007, page 6.

⁴² ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody. February 2007, *op. cit.*

⁴³ See Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005.

⁴⁴ *Khan v. Gates*, Motion to unseal petitioner’s torture motions. In the US Court of Appeals for the DC Circuit, 9 May 2008. Unclassified version.

⁴⁵ See USA: No substitute for *habeas corpus*. Six years without judicial review in Guantánamo, November 2007, <http://www.amnesty.org/en/library/info/AMR51/163/2007/en>

⁴⁶ In its *Boumediene* ruling the Supreme Court held that the only law that it was finding unconstitutional was Section 7 of the MCA. The Court said that “both the DTA and the CSRT process remain intact”. The government sought in the Court of Appeals to have review under the DTA narrowed. When it failed to achieve the degree of narrowness it sought, it litigated to end this review scheme altogether, a goal it achieved in January 2009. The Court of Appeals dismissed the DTA petitions before it. *Bismullah v Gates*. US Court of Appeals for the DC Circuit, 9 January 2009.

⁴⁷ *Khan v. Gates*. In the US Court of Appeals for the District of Columbia Circuit, Declaration of J. Wells Dixon, 6 December 2007. Unclassified version.

⁴⁸ Executive Order. Ensuring lawful interrogations. The White House, 22 January 2009. In April 2009, the new Director of the CIA, Leon Panetta (now Secretary of Defense), said that the CIA was not using “any of the enhanced interrogation techniques that were authorized by the Department of Justice from 2002 to 2009”; that “no CIA contractors will conduct interrogations”; and that the “CIA no longer operates detention facilities or black sites”. Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the CIA’s Interrogation Policy and Contracts, 9 April 2009, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>

⁴⁹ Report of the Working Group on the Universal Periodic Review. United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review. UN Doc.: A/HRC/16/11/Add.1, 8 March 2011.

⁵⁰ Statement of the Attorney General regarding investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 June 2011, <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>

⁵¹ *ALCU v. Department of Defense and Central Intelligence Agency*, US Court of Appeals for the DC Circuit, 18 January 2011.

⁵² See USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 17 April 2009, <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>

⁵³ *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

⁵⁴ See, e.g., *ACLU et al v. Department of Defense et al*. Sixth Declaration of Marilyn A. Dorn, Information Review Officer, CIA, US District Court, Southern District of New York, 5 January 2007 (disclosure of the information “could be expected to impair the foreign relations and foreign activities of the United States by undermining the cooperative relationships that the United States has developed with its critical partners in the global war on terrorism”), and Declaration of Leon A. Panetta, CIA Director, 8 June 2009

(disclosure of the information “would disclose the locations of covert CIA facilities and the identities of foreign countries cooperating with the CIA in counterterrorism operations”).

⁵⁵ Majid Khan, quoted in *Khan v. Gates*, Motion to unseal petitioner’s torture motions, In the US Court of Appeals for the District of Columbia Circuit, 9 May 2008. Unclassified version.

⁵⁶ Transparency and Open Government. Memorandum for the Heads of Executive Departments and Agencies, <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>

⁵⁷ See USA: The promise of real change. President Obama’s executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>, and USA: Guantánamo – A decade of damage to human rights, *op. cit.*