USA

SEE NO EVIL

GOVERNMENT TURNS THE OTHER WAY AS JUDGES MAKE FINDINGS ABOUT TORTURE AND OTHER ABUSE

AMNESTY INTERNATIONAL

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CONTENTS

Introduction 1

Judges point to human rights violations, executive turns away 4

Absence of judicial finding does not mean absence of abuse 18

Administration lawyers and prosecutors must act 22

Governments must ensure accountability and remedy; secrecy is no excuse 26

Conclusion 30

INTRODUCTION

The CIA, acting upon the highest authority, used coercive methods
US District Court Judge, New York, October 2010[1]

It has long been in the public domain that six days after the attacks of 11 September 2001, President George W. Bush signed a document authorizing the Central Intelligence Agency (CIA) "to set up terrorist detention facilities outside the United States".[2] In his 2007 autobiography, George Tenet, the former Director of the CIA who had requested this presidential authorization, recalled that formal congressional approval for this secret detention program had not been sought "as it was conducted under the president's unilateral authorities".[3]

Now the former President himself has added his own memoirs to the mix. While speculating that he "could have avoided some of the controversy and legal setbacks" if he had sought congressional legislation on the CIA's interrogation program at the outset, his admission that he personally approved the use of "enhanced interrogation techniques" against detainees held in secret custody is unapologetic.[4] "Damn right", he recalls as his response to CIA Director Tenet's request in 2003 for such authorization in the case of Khalid Sheikh Mohammed who was subsequently subjected, among other things, to more than 180 applications of "water-boarding", a torture technique that starts the process of drowning the detainee.[5] Like others held in the secret detention program, Khalid Sheikh Mohammed was also subjected – in his case for three and a half years – to enforced disappearance.

President Bush is similarly unapologetic about his executive order of 13 November 2001 authorizing military commission trials and indefinite detention without trial of selected foreign nationals, and about the detentions at the US Naval Base at Guantánamo Bay, without due process, of individuals taken into custody in a wide range of circumstances (many far removed from any armed conflict).[6] Holding "captured terrorists on American soil", the former President reasserts in his memoirs, "could [have] activate[d] constitutional protections they would not otherwise receive, such as the right to remain silent"; so the decision to hold the detainees at Guantánamo came after the US Department of Justice "advised me" that detainees held on "Cuban soil" had no right of access to the US criminal justice system.[7] In earlier memoirs, a former head of the Justice Department's Office of Legal Counsel put it that choosing Guantánamo had "seemed like a good bet to minimize judicial scrutiny".[8] A degree of substantive judicial scrutiny of the Guantánamo detentions only began after the US Supreme Court ruled in June 2008, in *Boumediene v. Bush*, that the detainees had the right to challenge the lawfulness of their detention in US District Court.

Torture and enforced disappearance are crimes under international law. Systematic or widespread use of either can amount to a crime against humanity. According to the CIA, some 98 so-called "high-value" detainees were held in the secret program between 2002 and 2007.[9] All faced conditions of transfer and detention and/or interrogation techniques that violated the international prohibition of torture or other cruel, inhuman or degrading treatment.[10] Many others were subjected by the USA to secret transfers and to periods of prolonged incommunicado detention, or to torture or other ill-treatment, outside the confines of this particular program, including in Afghanistan and at Guantánamo.

Many people were involved in the CIA programs of secret detention, interrogation and rendition. Those who authorized and carried out the human rights violations associated with these programs have not been brought to justice, or even (so far as is known) placed under serious criminal investigation. Those who were subjected to abuses continue to be denied

remedy. The right to an effective remedy is recognised in all major international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR).[11] Among other things, the ICCPR prohibits arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, unfair trial, and discrimination in the enjoyment of human rights including the right to equal protection of the law. Under international law, anyone who has been the victim of unlawful detention has the enforceable right to compensation.[12]

On 22 January 2009, at the same time as President Barack Obama ordered his administration to resolve the Guantánamo detentions and close the detention facility there within a year, he ordered the CIA to stop its use of long-term secret detention and "enhanced" interrogation techniques. This was a welcome first step towards accountability. In the more than two years since then, however, not only has the Guantánamo detention facility remained in operation with more than 170 detainees held there, the response of the US authorities to the ever growing evidence that crimes under international law were committed in the CIA's secret detention program has essentially been to turn away. Until they confront the issues of accountability and remedy head-on – with the necessary investigations, prosecutions, reparations, transparency and legislation – the USA will remain on the wrong side of its international human rights obligations and President Obama's 2009 executive order on the CIA's use of secret detention and "enhanced" interrogation may come to be seen as no more than a paper obstacle if and when any future US President decides that torture or enforced disappearance are once again expedient for national security.

All agencies of the executive branch of the US government were instructed by the administration in late 2009 that "the United States is bound under international law to implement all of its [human rights treaty] obligations… and takes these obligations very seriously".[13] In a memorandum to these agencies, the US State Department's Legal Adviser pointed, among other international instruments, to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which the USA ratified in 1994; the ICCPR, which it ratified in 1992; and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the USA ratified in 1994. Each has provisions requiring the state party to ensure accountability and remedy for breaches of the treaty in question.

The question remains, however, as to just how seriously the USA takes its international human rights obligations. Where is the investigation into the enforced disappearance, torture and other ill-treatment of detainees held in the CIA program that the US government is obliged under international law to undertake? Why is the administration continuing to block access to judicial remedy for detainees or former detainees who were subjected to human rights violations in the name of countering terrorism?[14]

Former President Bush's unapologetic defence of the indefensible – enforced disappearance, torture and other ill-treatment – continues a pattern set even before his administration left office. In January 2009, for example, former Vice-President Richard Cheney acknowledged his own involvement in the approval of "enhanced" interrogation techniques against detainees held in secret detention by the CIA. In January 2009, he said:

> "After 9/11, we badly needed to acquire good intelligence on the enemy. That's an important part of fighting a war. What we did with respect to al Qaeda high-value detainees, if I can put it in those terms, I think there were a total of about 33 who were subjected to enhanced interrogation; only three of those who were subjected to water-boarding… I signed off on it; others did, as well, too. I wasn't the ultimate authority, obviously. As the Vice President, I don't run anything. But I was in the loop. I thought that it was absolutely the right thing to do."[15]

In a subsequent interview, the former Vice President referred to the secret detention program

as a "presidential-level decision", that President Bush had "basically authorized it". The decision, he said, "went to the President" and "he signed off on it".[16]

On 2 June 2010, in response to a question at the Annual Dinner Meeting of The Economic Club of Grand Rapids in Michigan, former President Bush said "Yeah, we water-boarded Khalid Sheikh Mohammed… I'd do it again to save lives." [17] Asked in an interview with NBC five months later, on the eve of publication of his memoirs, the former President was asked whether he would make the same decision on the interrogations today. He responded, "Yeah, I would". In his memoirs he adds that "Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program for them as well."[18]

Repetition by former and current officials of the mantra that the USA's use of secret detention and torture "saved lives" has undoubtedly been effective in reducing domestic US public and political outrage and action, but whether or not their claims are true, such rationalizations for these crimes under international law have been expressly and formally rejected by the world community – including the United States of America. Whether in times of peace or time of war or threat of war, whether in normal conditions or under a state of emergency that threatens the life of the nation, violations of the prohibitions of enforced disappearance, torture and other ill-treatment are absolutely forbidden.[19] Whether torture or enforced disappearance are effective or not in obtaining useful information has expressly been made irrelevant to the question of whether they are lawful – they never are – or whether an individual responsible for these crimes is to be investigated or prosecuted.

'Whether torture or enforced disappearance are effective or not in obtaining useful information has expressly been made irrelevant to the question of whether they are lawful – they never are – or whether an individual responsible for these crimes is to be investigated or prosecuted.'

All branches of the US federal government – the executive, legislature and the judiciary – are required to act in accordance with the USA's international human rights obligations. The executive and legislature, the political branches of government responsible for ratifying and implementing international treaties, representing the government's position in court, and passing and signing domestic legislation into law, are particularly well-placed to ensure the USA complies with international standards. When the "third branch" of government, the federal judiciary, points to possible human rights violations but indicates that it considers that the question of accountability or remedy is not before it or is beyond its reach for reasons of domestic law, the political branches surely have an even greater responsibility to step in. Far from stepping in to ensure accountability, however, the administration has all too often invoked its powers of secrecy or other measures to block further examination of the issues. Congress, too, has failed to do the right thing.

As this report outlines, a number of federal judges, as well as at least two military judges and a former military appeals court judge, have pointed to human rights violations committed by the USA in the name of countering terrorism while, in their public rulings at least, declining to take the issue further. The findings have mostly come in the context of the post-*Boumediene* habeas corpus litigation being conducted in the US District Court for the District of Columbia (DC). Some cases implicate the CIA, others the military and Pentagon officials. Amnesty International believes that, if they have not already done so, the judges in these and other cases where allegations of human rights violations have been made should:

- wherever the evidence before them allows them to make formal findings of fact that the violations occurred, or it is within their power to order the government to produce further evidence to allow such a finding, do so; and

- if they conclude they lack jurisdiction under US law to undertake further inquiries

into the matters, expressly and formally refer all such allegations on to the appropriate US authorities with a view to their investigation and possible prosecution. Where relevant, such findings and investigations should include determination of whether the detainee in question was subjected to enforced disappearance at any time during his or her detention, in addition to whether he or she was subjected to torture or other cruel, inhuman or degrading treatment.

Meanwhile, the US administration lawyers representing the government's position in court have an obligation to ensure that this evidence of human rights violations is fully investigated and that anyone responsible for abuses is brought to justice. Under international standards,

> "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods..., and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".[20]

Amnesty International is calling on all such officials, and the US Attorney General as the country's chief law enforcement officer, to meet their obligations. Any collective failure by the judges, prosecutors, and other government lawyers involved in these cases to refer evidence of enforced disappearance, torture and other ill-treatment on to the appropriate authorities for investigation and possible prosecution would constitute independent violations by the USA of its obligations under international human rights law (and in some cases international humanitarian law as well).

JUDGES POINT TO HUMAN RIGHTS VIOLATIONS, EXECUTIVE TURNS AWAY

The "presidential directive" of 17 September 2001 which, among other things, authorized the CIA to use lethal force against terrorist suspects and to set up detention facilities outside the USA, remains classified Top Secret, on the grounds that publishing its contents could damage national security.[21] On 22 October 2010 litigation seeking its disclosure under the Freedom of Information Act (FOIA) was suspended by a federal judge on the District Court for the Southern District of New York.[22] It is already known, however, that multiple human rights violations, including torture and enforced disappearance, were committed against detainees held in the CIA's secret detention and interrogation program.

Another judge in New York's Southern District has effectively pointed his finger at former President George W. Bush in relation to the question of torture and enforced disappearance of detainees held in secret CIA custody. Immediately following the attacks of 11 September 2001, Judge Lewis Kaplan wrote in July 2010, "President Bush authorized new steps to combat international terrorism". In 2002, Judge Kaplan continued, the CIA established the Rendition, Detention, and Interrogation Program, "pursuant to which the CIA maintained clandestine facilities abroad at which suspected terrorists were detained, interrogated, and debriefed".[23] In a ruling in October 2010, Judge Kaplan wrote that in using "coercive methods" at secret detention sites, the CIA had been acting "upon the highest authority".[24]

The rulings came in the context of the trial in federal court in New York of Tanzanian national

Ahmed Khalfan Ghailani, the only detainee so far transferred from the detention facility at the US Naval Base in Guantánamo Bay, Cuba, to the US mainland for prosecution.[25] Ahmed Ghailani was taken into custody in Pakistan in late July 2004 and handed over to the USA the following month. In his ruling published on 13 October 2010, Judge Kaplan found that after Ghailani was "transferred to exclusive CIA custody", he was "imprisoned at a secret site and subjected to extremely harsh interrogation methods as part of the CIA's Rendition, Detention and Interrogation Program."

That sentence alone – even if there was nothing else known about what the USA got up to in its counterterrorism detentions – contains enough information to trigger the USA's obligation to investigate under the UN Convention against Torture and the International Covenant on Civil and Political Rights. Article 12 of UNCAT states:

> "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction".

Article 16 of UNCAT specifies that this obligation applies equally to other forms of cruel, inhuman or degrading treatment or punishment.

Under UNCAT, in every case where there is evidence against a person of their having committed or attempted to commit torture, or of having committed acts which constitute attempt, complicity or participation in torture, the case must be submitted to its competent authorities for the purpose of prosecution, if the individual is not extradited for prosecution.[26] The authorities must take their decision whether to prosecute in the same manner as in the case of any ordinary offence of a serious nature under the law of the state.[27] Failing to proceed with a prosecution on the basis that the accused held public office of any rank, or citing justifications based in "exceptional circumstances", whether states of war or other public emergencies, is not permitted by UNCAT.[28]

> "*Once Ghailani was transferred to US custody, he was put in the CIA Program. Ghailani was detained and interrogated by the CIA outside the United States for roughly two years. Many details of the CIA Program and its application to specific individuals remain classified… [S]ome of the methods it widely is thought to have used have been questioned and, to whatever extent they actually were used, might give rise to civil claims or even criminal charges*".
>
> US District Judge Lewis Kaplan[29]

The ICCPR, among other things, prohibits arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, unfair trial, and discrimination in the enjoyment of human rights including the right to equal protection of the law. Any act of enforced disappearance violates human rights, including as recognised under the ICCPR.[30] Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". The UN Human Rights Committee, the expert body established under the ICCPR to monitor implementation of the treaty, has referred to a general obligation under the ICCPR to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies, and in cases such as torture and similar ill-treatment or enforced disappearance, to ensure that those responsible are brought to justice.[31]

Where torture or other inhuman or degrading treatment or enforced disappearance take place in the context of armed conflicts, they constitute war crimes for which the Geneva Conventions and Customary International Humanitarian Law impose similar obligations on states to investigate and bring those responsible to justice.[32]

In Judge Kaplan's July 2010 pre-trial ruling in the Ghailani case, most of the description of

the CIA secret detention program, based on a classified CIA declaration dated 10 December 2009, has been redacted from the public record. While Judge Kaplan refers to Ahmed Ghailani's allegations that he was "tortured and mistreated" in the CIA program, all detail has been blacked out of the ruling. Judge Kaplan noted that this detail included how "Ghailani was subjected to some severe mistreatment, all or most of it pursuant to specific authorization from the CIA and the Department of Justice".[33] Judge Kaplan also pointed to the "discomfort and pain" that Ahmed Ghailani suffered as a result of this.

In his October 2010 ruling, Judge Kaplan said that he would not address the constitutionality of the methods used in the CIA secret detention program because that question was not before him. Five months earlier, he had denied a defence motion to have the indictment against Ahmed Ghailani dismissed on the grounds that he had been tortured in CIA custody before his transfer to Guantánamo in 2006, adding that "Any remedy for any such violation must be found outside the confines of this criminal case".[34] In July 2010, denying a defence motion to have the indictment dismissed on the grounds that the defendant's right to a speedy trial had been violated during the five years that he was held in CIA and then military custody, Judge Kaplan ruled that "this is not the time or the place to pass judgment on whether [the CIA] techniques, in and of themselves, were appropriate or legal." Having noted that the CIA's techniques included stripping, hooding, isolation, use of white noise, loud music, continuous light or darkness, sleep deprivation, shackling in stress positions, prolonged diapering, cramped confinement and water-boarding, he acknowledged that Ahmed Ghailani "is not alone in questioning the propriety of at least some of the techniques that the CIA was authorized to use on certain detainees", and added that some of the methods used by the CIA "might give rise to civil claims or even criminal charges".[35]

Judge Kaplan should, if he has not already, refer the evidence of enforced disappearance, torture and other ill-treatment in the Ghailani case on to the appropriate authorities for investigation and possible prosecution, and his reference to the possibility that those involved in the CIA's interrogation program could be criminally liable is in itself important for another reason. Elsewhere in the ruling, Judge Kaplan accepts the Obama administration's assertions that the USA's treatment of Ahmed Ghailani led to useful intelligence,[36] a finding which has been exploited by those who would defend the use of indefinite detention, "enhanced" interrogation, and military commission trials employing lower standards of admissibility of evidence than in the US federal courts.[37] However, as explained above, whether torture or enforced disappearance are effective or not in obtaining useful information is irrelevant to the question of whether an individual responsible for these crimes is to be investigated or prosecuted. Judge Kaplan appears to understand that. The US administration's failure to initiate the requisite investigations appears to suggest that it does not. As Amnesty International has pointed out, even now there is a continuing tendency among US officials to, in effect, justify human rights violations, committed in what the previous administration dubbed the "war on terror", on the basis of their historical context.[38]

The brief unredacted descriptions in Judge Kaplan's decisions of what happened to Ahmed Ghailani in CIA custody are not the only public references made by members of the federal judiciary to evidence of human rights violations committed by the CIA and other US personnel against detainees held in the counter-terrorism context. Such references have also cropped up in other judicial rulings, including in the context of the habeas corpus proceedings being pursued on behalf of Guantánamo detainees and in the context of military commission trials at Guantánamo. In a number of the cases, as in the Ghailani prosecution, the US administration has not sought to rebut the abuse claims, but merely to sidestep them while failing to address the accountability issue or blocking remedy.

Allegations and evidence of torture generally arise before judges on the US District Court overseeing the Guantánamo habeas corpus litigation in relation to attempts by the government to rely on statements made by detainees under interrogation.[39] Under rules

developed in late 2008 by the District Court for the Guantánamo litigation, the government must disclose information "about the circumstances in which such statements were made".[40] In numerous cases, the detainee has alleged that he was coerced into making statements.

The District Judge will conduct an assessment of the statements, with the burden on the party seeking to use the evidence to prove its reliability. During this process, the judge may decide to order the government to produce certain information. For example, in September 2009, District Judge Thomas Hogan ordered the government to produce the FBI's notes and reports of some 20 interrogations of **Suhail Abdu Anam**, a Yemeni national who was arrested in Pakistan and has been held in Guantánamo since 2002. These interrogations were conducted, "almost daily", while Suhail Anam was held in an isolation cell in Guantánamo from 10 April 2003 until at least 23 June 2003. Judge Hogan noted that the government did not dispute this, and further noted evidence that "such tactics would not be permissible for FBI agents to use in the United States". The government was seeking to rely upon statements made by Anam in at least 11 of the interrogation sessions. Judge Hogan ordered the government to produce "any reasonably available evidence of coercive techniques used" against the detainee during this period. At the same time, illustrating how these proceedings should not be viewed as fulfilling the USA's obligation to ensure accountability and remedy (see further below), Judge Hogan refused to order the government to disclose records authorizing the isolation.[41] The litigation in Suhail Anam's habeas corpus case is ongoing.

In January 2010, Judge Hogan found that statements made by Yemeni national **Musa'ab Omar al Madhwani** in US custody in Afghanistan were "the product of coercion".[42] However, the government was seeking to rely only upon statements made by this detainee after his transfer to Guantánamo, and it argued that those statements were reliable because the circumstances in which they were provided were distinct from the conditions Musa'ab al Madhwani had faced in US custody in Afghanistan. Judge Hogan found, however, that while "the maltreatment of [al Madhwani] does not automatically render his subsequent Guantánamo statements unreliable", the government had failed to establish that those statements were "untainted" by the earlier abuse to which he was subjected in Afghanistan. As outlined further below, Judge Hogan's opinion makes findings of fact to which the US authorities should respond with the necessary investigation. Amnesty International is unaware of the allegations having been investigated or of anyone having been brought to justice for the alleged enforced disappearance, torture and other ill-treatment of Musa'ab al Madhwani.

> "*The Government made no attempt to refute [Musa'ab al Madhwani's] descriptions of his confinement conditions in Pakistan and Afghanistan. To the contrary, the Government's records provide corroboration. [Al Madhwani] submitted uncontested government medical records describing his debilitating physical and mental condition during those approximately forty days in Pakistan and Afghanistan, thereby confirming his claims of harsh treatment.*"
>
> US District Court Judge Thomas Hogan[43]

Judge Hogan found "credible" Musa'ab al Madhwani's detailed allegations of torture and other ill-treatment. Musa'ab al Madhwani has alleged that he was whipped, beaten and threatened in Pakistani custody and his allegations indicate that US personnel were aware of this at the time.[44] After five days in Pakistani custody following his arrest on 11 September 2002 in an apartment in Karachi, Musa'ab al Madhwani was handed over to US custody and flown to Afghanistan. He says he was taken to the "Dark Prison", a secret CIA-operated facility in or near Kabul, where he was held for about a month. There "he suffered the worst period of torture and interrogation, treatment so terrible that it made him miss his time with the Pakistani forces".[45] He was allegedly held for 30-40 days "in darkness so complete that he could not see his hand in front of his face"; "not allowed to sleep for

more than a few minutes at a time"; "was fed only about every 2½ days, in very small portions"; and "twenty-four hours a day, obnoxious music blared at a deafening volume". For most of his detention at the Dark Prison, he was allegedly

> "suspended from a wall by one hand, feet shackled, in a stress position that allowed him neither to sit nor stand fully. Al-Madhwani was shackled in this way night and day, without relief except during interrogation sessions. During these sessions, Al-Madhwani's hands were shackled to the floor… On one occasion, two men took Al-Madhwani, hooded and shackled, stripped him naked, and attached electrical wires to his genitals. As the men discussed whether to turn on the electricity, Al-Madhwani began screaming with fear. The men laughed and then repeatedly drenched Al-Madhwani in water so cold that Al-Madhwani could not move his fingers or his mouth…
>
> Day after day, Al-Madhwani hung from the wall by his hand, in complete and total darkness, loud music blaring. Disoriented, he heard noises of mice and doors and thought they were ghosts. Thinking that he must be hallucinating, Al-Madhwani tried to calm himself by imagining mountains. Then he would hear a small noise, and as he turned toward it, five or more men would jump on him, remove his chains from the wall, and beat, kick, and throw him to the ground. Pointing a gun to Al-Madhwani's head, guards threatened him with the worst acts, including electrocution. For Al-Madhwani, these surprise attacks were the worst part of the Dark Prison, making him feel like his heart was tearing apart or his heart and brain were being extracted from his body."[46]

To reiterate, Judge Hogan wrote in his 2010 opinion that Musa'ab al-Madhwani had "provided extensive testimony describing the harsh treatment he endured before he was transferred to Guantánamo, which the Court finds to be credible". In a declaration signed in 2008, Musa'ab al-Madhwani had stated:

> "Raucous music blared continuously, except that screams of other prisoners could be heard when the tapes were changed. I was beaten, kicked, sprayed with cold water, deprived of food and sleep, and subjected to extreme cold, stress positions, and other forms of torture. I was partially suspended by the left hand for the entire time at the prison, so that I could not sit and was forced to rest all my weight on one leg. This resulted in permanent nerve damage to my leg… The Americans sprayed me with cold water and dumped water on my head until I got seizures and collapsed. The pain was so extreme that I would pass out repeatedly. Then I was freezing and sweating at the same time. An Arabic-speaking interrogator told me that I was in a place the bull flies cannot find. He said no one could find me in that place, not even the International Committee of the Red Cross [ICRC]…
>
> After a while I admitted to whatever the interrogators accused me of, just to stop the torture and abuse".

Musa'ab al Madhwani was then transferred to the US air base at Bagram where he was held for another five days. There he has alleged that:

> "I was forced to stand the entire time until my feet swelled and I was exhausted. I was dragged by the neck to interrogation, where dogs would bark in my face."

He was transferred to Guantánamo in late October 2002. There he was held in isolation and subjected to further interrogations. In his declaration, he added:

> "The interrogators at Guantánamo knew that I had been imprisoned and tortured at

> Bagram and the Dark Prison. They would ask me, 'So, how did you like it at Bagram? How did you like the Dark Prison?'
>
> An interrogator at Guantánamo showed me photographs of some of the same people I had been asked to identify [in photographs] at the Dark Prison. I told the interrogator I did not really know these people, and I had only said I did before because I was tortured. The interrogator became very angry, threw the file, grabbed a chair, and began screaming in my face. Because I feared that the torture would resume, and because the interrogator threatened to send me back to Bagram or the Dark Prison, I falsely admitted that I did know the people in the photographs".

In a habeas corpus hearing in US District Court on 14 December 2009 – more than seven years after Musa'ab Al Madhwani was taken to Guantánamo – Judge Hogan noted that the US government had "made no attempt" to refute Al Madhwani's torture allegations, and that there was "no evidence in the record" that they were inaccurate. To the contrary, Judge Hogan added, the allegations were corroborated by "uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions." Judge Hogan emphasised that as described in Musa'ab Al Madhwani's "classified testimony about his conditions of confinement, which I find to be credible, the United States was involved in the prisons where he was held, and believed to have orchestrated the interrogation techniques, the harsh ones to which he was subject".

Defending his detention before Judge Hogan, the US administration sought to rely not upon statements made by Al Madhwani during his custody in Afghanistan but upon 23 reports of interrogations of him conducted in Guantánamo between 3 March 2003 and 27 September 2004 and summaries of statements he made during these interrogations. The administration claimed that the detainee would by this time have recovered from any abuse he suffered in Afghanistan; that the conditions of detention at Guantánamo were not coercive; and that statements he made in the Naval Base were reliable. Judge Hogan, pointing out that Al Madhwani's post-traumatic stress disorder "seemingly exacerbated the taint from any harsh treatment", disagreed:

> "It should come as no surprise that during Petitioner's first Guantánamo interrogation, which was conducted on the day Petitioner arrived at Guantánamo, he was gripped by the same fear that infected his Afghanistan confessions. His Guantánamo interrogators did little to assuage that fear. According to the reliable evidence in the record, multiple Guantánamo interrogators on multiple occasions threatened Petitioner when he attempted to retract statements he now claims were false confessions…
>
> The Court is particularly concerned that the interrogators at Guantánamo relied on, or had access to, Petitioner's coerced confessions from Afghanistan. The logical inference from the record is that the initial interrogators reviewed Petitioner's coerced confessions from Afghanistan with him and asked him to make identical confessions. Far from being insulated from his coerced confessions, his Guantánamo confessions were thus derived from them…
>
> Petitioner's confinement at Guantánamo did not occur in a vacuum. Before Guantánamo, he had endured forty days of solitary confinement, severe physical and mental abuse, malnourishment, sensory deprivation, anxiety and insomnia. The Government fails to establish that months of less-coercive circumstances provide sufficient insulation from forty days of extreme coercive conditions…

> That the Government continued to drink from the same poisoned well does not thereby make the water clean".[47]

In the unclassified version of its brief to the Court of Appeals filed on 18 January 2011, the US administration notes that the District Court had "acknowledg[ed] Madhwani's claims of severe mistreatment in September and October 2002 prior to his transfer to Guantánamo".[48] In fact, Judge Hogan had done more than acknowledge these allegations; he had found them to be credible. As far as Amnesty International is aware, the US administration has not responded with the necessary investigative measures.

While Musa'ab Al Madhwani remains in Guantánamo, appealing Judge Hogan's ruling that the government could continue to hold him, **Fouad Mahmoud al Rabiah** was released to his native Kuwait on 9 December 2009 after seven years detained at the naval base and two months after District Court Judge Colleen Kollar-Kotelly ruled that his detention was unlawful and ordered his release. In her ruling of 17 September 2009, Judge Kollar-Kotelly found "substantial evidence in the record supporting Al Rabiah's claims" that he had made "confessions" under coercion and abuse. The judge continued:

> "The record contains evidence that Al Rabiah's interrogators became increasingly frustrated because his confessions contained numerous inconsistencies or implausibilities. As a result, Al Rabiah's interrogators began using abusive techniques that violated the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The first of these techniques included threats of rendition to places where Al Rabiah would either be tortured and/or would never be found".

> *"Al Rabiah's interrogators began using abusive techniques that violated the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. The first of these techniques included threats of rendition to places where Al Rabiah would either be tortured and/or would never be found"*
>
> US District Judge Colleen Kollar-Kotelly

The details of these threats have been redacted from the public version of Judge Kollar-Kotelly's ruling, but she notes that the threats had been "reinforced by placing Al Rabiah into the frequent flier program", a sleep deprivation/disruption technique that "as already noted, violated the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War."[49] The judge further noted that "underscoring the impropriety of these techniques is the fact that [redacted], Al Rabiah's lead interrogator, was disciplined for making similar threats during the same period toward a Guantánamo detainee who was also one of the alleged eyewitnesses against Al Rabiah".

The government had argued that the fact that Fouad al Rabiah had not told his "personal representative" (a US military officer assigned to assist in the administrative review of his case conducted by the Combatant Status Review Tribunal at Guantánamo in 2004) about the threats of rendition or his subjection to sleep deprivation was a reason to discount this issue. Judge Kollar-Kotelly responded that the evidence of the abuse she had reviewed was "drawn from the Government's own documents, primarily contemporaneous interrogation reports", and so "the fact that Al Rabiah omitted some allegations of abuse does not support the blanket inference that such abuse did not occur".[50] There is no information in the unclassified version of her ruling indicating that there had been any investigation into Fouad al Rabiah's allegations of torture or other ill-treatment.

Amnesty International is similarly unaware of anyone having been brought to justice for the torture or other ill-treatment to which **Mohammed Jawad** was subjected in US custody in Afghanistan and at Guantánamo. This Afghan national was taken into US military custody when he was under 18 years old. Like Fouad al Rabiah and numerous other detainees, Mohammed Jawad was subjected to the "frequent flyer" program in Guantánamo. In

September 2008, in the course of pre-trial military commission proceedings, a military judge found that this treatment of Mohammed Jawad constituted "abusive conduct and cruel and inhuman treatment" for which "those responsible should face appropriate disciplinary action".[51] The judge also found that at Guantánamo Mohammed Jawad had been subjected to "excessive heat, constant lighting, loud noise, linguistic isolation (separating the accused from other Pashto speakers), and, on at least two separate occasions, 30 days physical isolation".[52] In addition, in June 2008, the military judge wrote, Mohammed Jawad had been "beaten, kicked, and pepper sprayed for not complying with a guard's instructions".[53] In October 2008, the military judge found that the young detainee had been tortured in Afghan custody prior to being handed over to the USA in December 2002.[54] In July 2009, in the context of habeas corpus proceedings in US District Court, Mohammed Jawad's lawyers moved to have District Judge Ellen Segal Huvelle suppress all his in-custody statements. The Obama administration decided not to oppose the motion and on 17 July 2009, Judge Huvelle ruled to "suppress every statement made by [Jawad] since his arrest as a product of torture".[55] Mohammed Jawad was released from Guantánamo the following month.[56]

On 18 July 2008, US District Court Judge James Robertson allowed the military commission trial of Yemeni national **Salim Ahmed Hamdan** to proceed despite what Judge Robertson described as a "startling departure" from the standards that would be applied in federal criminal trials or US courts martial, in that the Military Commissions Act of 2006 (MCA 2006) allowed evidence obtained by "coercion" to be used against the defendant "so long as the military judge decides that its admission is in the interest of justice and that it has 'sufficient' probative value". [57] Two days later, the military judge overseeing Salim Hamdan's military commission trial at Guantánamo made a number of findings that should have been in themselves enough to trigger the USA into conducting specific criminal investigations pursuant to its obligations under international human rights and humanitarian law. [58]

The military judge acknowledged that "Hamdan was exposed to a variety of coercive influences over the past seven years"; nevertheless, applying the weak rules against coerced evidence under the MCA 2006, he excluded only some of the statements that had been extracted from Hamdan. Among those admitted into the proceedings, were some of the statements taken during and following a period of some 210 days after his capture during which he was held incommunicado (likely constituting an enforced disappearance). The military judge noted that "Hamdan was subjected to various types of coercive treatment, or treatment that seemed coercive to him, while at Guantánamo Bay." This included Hamdan being "placed in different camps and cells under different levels of security, some of which have some characteristics of solitary confinement". From December 2003 to October 2004, as the US authorities were preparing to bring him to trial – and apparently seeking to have him plead guilty – Salim Hamdan was put into solitary confinement in Camp Echo in a windowless cell that lacked natural light and fresh air. In addition, the military judge said, euphemistically, that Salim Hamdan was a "participant" in "Operation Sandman" from 10 June 2003 to 31 July 2003, a period of 50 days. This program involved sleep interruptions and frequent cell relocations, aimed at keeping detainees "mentally off balance, to isolate them linguistically or culturally, and to induce them to cooperate". [59]

> *"The interests of justice are not served by admitting these statements because of the highly coercive environments and conditions under which they were made".*
>
> US Navy Captain Keith Allred, military judge

However, even applying the weak standards of the MCA 2006, the military judge prohibited the prosecution from admitting into evidence statements made by Salim Hamdan in US custody in late 2001 in Panshir and Bagram in Afghanistan. The judge ruled that "the interests of justice are not served by admitting these statements because of the highly coercive environments and conditions under which they were made". In Panshir, for example, Hamdan had been interrogated, in what Hamdan described as "in the

manner of torturing". His feet and hands were tied, he had a bag put over his head, he was repeatedly knocked down by his interrogators, and was "duck walked" to and fro. In the US air base in Bagram, where he was taken on or around 1 December 2001, he was held in isolation in harsh and cold conditions. His hands and feet were tied 24 hours a day. During interrogations, he was sometimes surrounded by armed soldiers, and one with a knee in his back telling him to speak.

In an opinion released in January 2010, US District Court Judge Ricardo Urbina ruled on the habeas corpus petition of **Saeed Mohammed Saleh Hatim**, a Yemeni national taken into custody by Pakistani police in October or November 2001, and held for several weeks in various different prisons in Pakistan before being handed over to US custody. He was taken to Kandahar air base in Afghanistan, where he was held for about six months before being flown to Guantánamo in June 2002. Judge Urbina noted that Saeed Hatim had provided "specific, unrefuted evidence…that he was tortured at Kandahar". The federal judge pointed to Saeed Hatim's assertions that:

> "after he was captured in Pakistan, he was held for six months at a [US] military base in Kandahar, Afghanistan, where he was severely mistreated, including being beaten repeatedly, being kicked in the knees and having duct tape used to hold blindfolds on his head. To this day he cannot raise his left arm without feeling pain. [Saeed Hatim] also alleges that he was threatened with rape if he did not confess to being a member of the Taliban or al-Qaida."

In a declaration signed in January 2009, Saeed Hatim had said:

> "At Kandahar I was interrogated approximately forty times. As badly as I have been treated in Guantánamo Bay, the treatment I suffered in Kandahar was a thousand times worse… In my first three years at Guantánamo I was interrogated at least fifty times… I also told the interrogators in Cuba that may earlier statements in Kandahar were made only in response to threats of rape and violence."

Judge Urbina noted that the US government had sought to refute neither Saeed Hatim's allegation that he had been coerced into making incriminating statements nor "the widespread allegations of torture of other detainees prior to their arrival at GTMO".[60] Having noted that "the government faces a steep uphill climb in attempting to persuade the court that [Saeed Hatim's] detention is justified based on the allegation that he trained at al-Farouq [al Qa'ida training camp in Afghanistan], given that the sole evidence offered in support of that allegation is tainted by torture", Judge Urbina granted the habeas corpus petition and ordered the detainee's release. The government appealed, however, and as of 31 January 2011, Saeed Hatim remained at Guantánamo, with a decision from the Court of Appeals for the DC Circuit still pending (oral arguments were held on 9 November 2010).

> "*The petitioner [Saeed Hatim] has offered specific, unrefuted evidence, however, that he was tortured at Kandahar… [His] unrefuted allegations of torture undermine the reliability of the statements made subsequent to his detention at Kandahar.*"
>
> US District Court Judge Ricardo Urbina

In an April 2010 brief to the Court of Appeals, the US administration asserted that statements attributed to Saeed Hatim which the government had submitted in District Court, and was also seeking to rely upon for the appeal, "were all made either while Hatim was in foreign government custody prior to his transfer to Kandahar, or during his later detention by US officials at Guantánamo".[61] In this way, the US authorities continued to seek to sidestep Saeed Hatim's allegations of ill-treatment in Kandahar, arguing instead that none of the alleged ill-treatment there had undermined statements he later made at Guantánamo. The government acknowledged that it "did not attempt in the habeas proceedings to specifically prove a negative, i.e., that Hatim had not

been mistreated at Kandahar some seven years earlier", adding that "Hatim never claimed to have been physically mistreated in Guantánamo, and his only complaint about his treatment at Guantánamo is an assertion that he was once moved to solitary confinement at Guantánamo after he declined to spy on other detainees". It also added that "Hatim has never claimed that he was mistreated while he was in Pakistani custody" (Saeed Hatim's US lawyers have filed information rebutting this claim).[62] The government makes no reference to any investigation into the allegations of abuse at Kandahar (at least not in the unredacted text), either ordered under the current US administration or its predecessor (the government's brief notes that Saeed Hatim had complained to interrogators at Guantánamo in as early as October 2002 that he had been ill-treated in US custody in Kandahar).

Statements made under alleged torture by detainees other than the person whose habeas corpus petition is before the court has been an issue in a number of cases. For example, in May 2009, US District Court Judge Kessler noted that the government was not seeking to rely "on any incriminating statements" made by Yemeni national Alla Ali Bin Ali Ahmed in arguing that his detention was lawful, but chiefly on statements made by four current or former Guantánamo detainees. In relation to one of these detainees, Judge Kessler noted evidence that he "underwent torture, which may well have affected the accuracy of the information he supplied to interrogators". The detainee in question had "spent time at Bagram and the Dark Prison, and alleges that he has been tortured". Judge Kessler pointed out that "the Government has presented no evidence to dispute the allegations of torture at Bagram or the Dark Prison", adding later in the ruling that there had been "widespread, credible reports of torture and detainee abuse at Bagram". She also noted that the government had presented no evidence that the detainee in question "claimed to be unaffected by past mistreatment", and yet had argued that the judge should assume that any past ill-treatment had been "effectively erased from his memory" and that the "residual fear" of torture had been overcome at the time (June 2004) that he made an incriminating statement against Alla Ali Ahmed. Judge Kessler also dismissed the government's argument that the detainee's statements against Alla Ali Ahmed were reliable because they were made during the same interrogation session in which he had made incriminating statements about himself. Judge Kessler responded that "any effort to peer into the mind of a detainee at Bagram, who admitted to fearing torture at a facility known to engage in such abusive treatment, simply does not serve to rehabilitate [him as] a witness".[63]

In the habeas corpus case of Guantánamo detainee Farhi Saeed bin Mohammed, Judge Kessler in late 2009 outlined the evidence that had been presented to her of human rights violations committed against another detainee, Ethiopian national **Binyam Mohamed**, who had been released from Guantánamo to the United Kingdom in February 2009. Binyam Mohamed was taken into custody in Pakistan in April 2002, subjected to rendition to Morocco where he was held for 18 months, transferred to the CIA-run "Dark Prison" in Kabul in Afghanistan, before being held in Bagram air base and then transferred to Guantánamo. He has claimed that he was subjected to torture and other ill-treatment in Pakistan, Morocco and the Dark Prison.

Judge Kessler noted that the US government "does not challenge or deny the accuracy of Binyam Mohamed's story of brutal treatment". She also concluded that his allegations bear "several indicia of reliability", including its detail, its consistency, and the fact that Binyam Mohamed "has vigorously and very publicly pursued his claims in British courts subsequent to his release from Guantánamo Bay". His persistence in telling his story", Judge Kessler continued, "demonstrates his willingness to test the truth of his version of events in both the courts of law as well as the court of public opinion". She went on:

> "Binyam Mohamed's lengthy and brutal experience in detention weighs heavily with the Court… Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was

> deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculpate himself and others in various plots to imperil Americans. The Government does not dispute this evidence"
>
> "[E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to Special Agent [redacted], there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay…"[64]

"Binyam Mohamed's lengthy and brutal experience in detention weighs heavily with the Court… Binyam Mohamed's trauma lasted for two long years. During that time, he was physically and psychologically tortured…[E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to Special Agent [redacted], there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States."

US District Court Judge Gladys Kessler

The political branches of the US government refuse to ensure accountability for such human rights violations, even in the face of such judicial comment, and the executive continues to actively block remedy. Binyam Mohamed was one of the five plaintiffs in a lawsuit brought in US federal court who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment at the hands of US personnel and agents of other governments as part of the CIA's rendition program. On 8 September 2010 a federal appeals court upheld, by six votes to five, the Obama administration's invocation of the "state secrets privilege" and agreed to dismiss a lawsuit, possibly ending the pursuit of judicial remedy in the USA for these men.[65] The five dissenting judges, noting that "abuse of the Nation's information classification system is not unheard of", warned that the state secrets doctrine "is so dangerous as a means of hiding governmental misbehaviour under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets". They accused the six judges in the majority of "gratuitously attaching 'allegedly' to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations."[66] The dissenting judges published an appendix summarizing some 1,800 pages of public materials submitted in support of the plaintiffs' claims.

This follows the case of German national **Khaled el-Masri**, whose 2005 lawsuit against former CIA Director George Tenet and named private companies in relation to El-Masri's alleged rendition in 2004 from Macedonia to arbitrary detention and ill-treatment in secret US custody in the CIA-run "Salt Pit" detention facility in Kabul in Afghanistan was dismissed by a federal District Court judge in May 2006.[67] Judge Thomas Ellis upheld the Bush administration's invocation of the state secrets doctrine in dismissing the lawsuit. He also added the following before concluding his order:

> "It is worth noting that putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it

> is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch".

> "*…[Khaled] El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy*"
>
> US District Court Judge Thomas Ellis

Under the Bush administration at least, the executive actively opposed any domestic judicial remedy for Khaled el-Masri. It seems it also lobbied against accountability being pursued outside the USA.[68] In February 2007, according to a US State Department cable published by WikiLeaks, the Deputy Chief of Mission (DCM) at the US embassy in Berlin told the German authorities of the USA's "strong concerns about the possible issuance of international arrest warrants in the al-Masri case" and that issuance of such warrants "would have a negative impact on our bilateral relationship." The cable continued: "The DCM pointed out that our intention was not to threaten Germany, but rather to urge that the German Government weigh carefully at every step of the way the implications for relations with the US."[69]

In March 2007, the US Court of Appeals for the Fourth Circuit affirmed Judge Ellis's order in the el-Masri case. The Court of Appeals asserted that the federal courts in the USA were assigned a "modest role" under the Constitution: "we simply decide cases and controversies". The federal courts, the Fourth Circuit continued, did not possess "a roving writ to ferret out and strike down executive excess". The court therefore declined "to rule that the state secrets doctrine can be brushed aside on the ground that the President's foreign policy has gotten out of line".[70] The US Supreme Court declined to review the Fourth Circuit's ruling and so Khaled el-Masri was left – in the absence of action by the political branches of government – without access to an effective remedy in the USA, in violation of international law.

Another individual who has been denied remedy in the USA is **Maher Arar**, a dual Canadian/Syrian national who was held for nearly two weeks in US custody in 2002 before being transferred from the USA via Jordan to detention and torture in Syria.[71] In 2006, US District Court Judge David Trager dismissed his claims against former Attorney General John Ashcroft and other US officials or former officials.[72] In November 2009, the US Court of Appeals for the Second Circuit upheld Judge Trager's ruling, by seven votes to four. The majority stated that "it is for the executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation".[73] It is worth recalling the strength of the dissent by the four judges in the minority. One of the judges, for example, accused the majority of engaging in a "hyperbolic and speculative assessment of the national security implications" of allowing Maher Arar to pursue judicial remedy, and of underestimating "the institutional competence of the judiciary". Maher Arar, she wrote, should have access to judicial remedy "to reinforce our system of checks and balances, to provide a deterrent, and to redress conduct that shocks the conscience".[74] Another accused the majority of "utter subservience to the executive branch" and wrote that "regardless of the propriety of such renditions, an issue on which I won't hide my strong feelings, mistakes *will* be made in its operation… [A] civilized polity, when it errs, admits it and seeks to give redress".[75] Another of the dissenting judges wrote:

> "My point of departure from the majority is the text of the Convention Against Torture, which provides that 'no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'. Because the majority has neglected this basic commitment and a good deal more, I respectfully dissent.
>
> Maher credibly alleges that United States officials conspired to ship him from American

> soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest. He also credibly alleges that, to accomplish this unlawful objective, agents of our government actively obstructed his access to this very Court and the protections established by Congress…
>
> The majority would immunize official misconduct by invoking the separation of powers and the executive's responsibility for foreign affairs and national security. Its approach distorts the system of checks and balances essential to the rule of law, and it trivializes the judiciary's role in these arenas…
>
> At the end of the day, it is not the role of the judiciary to serve as a help-mate to the executive branch, and it is not its role to avoid difficult decisions for fear of complicating life for federal officials. Always mindful of the fact that in times of national stress and turmoil the rule of law is everything, our role is to defend the Constitution. We do this by affording redress when government officials violate the law, even when national security is invoked as the justification."[76]

On 14 June 2010, the US Supreme Court announced, without explanation, that it was refusing to consider the case, leaving the lower court's ruling intact and Maher Arar without judicial remedy in the USA. Amnesty International continues to call on the US executive and legislative branches to ensure that the USA complies with its international obligations on remedy and accountability in Maher Arar's case.[77]

"*Maher [Arar] credibly alleges that United States officials conspired to ship him from American soil, where the Constitution and our laws apply, to Syria, where they do not, so that Syrian agents could torture him at federal officials' direction and behest.*"

US Circuit Judge Barrington Parker

Mauritanian national **Mohamedou Ould Slahi** also remains without a remedy, and in US military custody, more than nine years after he was first arrested in Mauritania in November 2001 "at the request of the United States".[78] Those responsible for the multiple human rights abuses committed against him since then have not been brought to justice. Today he remains in Guantánamo.

After a week in detention in Mauritania in November 2001, Mohamedou Slahi was subjected to rendition to Jordan, "at the direction of the US" according to his lawyers.[79] For the next year and a half his family could only guess where he was. As his brother put it in a declaration filed in US District Court in 2005, "Mohamedou disappeared and we did not know his whereabouts from time of his arrest [in November 2001] until the beginning of March 2003". By that time, after eight months in Jordan, he had been transferred from Amman to Kabul in Afghanistan, possibly aboard a CIA-leased jet that made that journey on 19 July 2002, taken to the US detention centre in Bagram and thereafter transferred to Guantánamo on 4 August 2002. In addition to being subjected to enforced disappearance, Mohamedou Slahi was allegedly subjected to torture or other cruel, inhuman or degrading treatment in Jordan, in Bagram, and in Guantánamo, as well as during his transfers.[80] In Guantánamo, during 2003, he was allegedly deprived of sleep for some 70 days straight, subjected to strobe lighting and continuous loud heavy metal music, threats against him and his family, intimidation by dog, cold temperatures, dousing with cold water, physical assaults, and food deprivation.

In April 2010, nearly five years after a habeas corpus petition was first filed on Mohamedou Slahi's behalf in US federal court, a District Court judge ordered his release, on the grounds that his detention was unlawful.[81] In his ruling, Judge James Robertson noted that "there is ample evidence in this record that Salahi was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003". This was the period that

Mohamedou Slahi had been labelled by his US military captors as having "Special Projects Status" and subjected to a 90-day "special interrogation plan" requested by the Defense Intelligence Agency (DIA) and approved by the commander of the Guantánamo detentions, General Geoffrey Miller on 1 July 2003, by Deputy Secretary of Defense Paul Wolfowitz on 28 July 2003, and by Secretary of Defense Donald Rumsfeld on 13 August 2003.[82] The plan stated that it would "not be implemented until approved by higher authority".[83] Whether this referred to President Bush is not clear.

"*There is ample evidence in this record that Salahi was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003*".

US District Court Judge James Robertson

The original interrogation plan approved by Secretary Rumsfeld had, among other things, Mohamedou Slahi being hooded and put aboard a helicopter and flown off Guantánamo for one or two hours to convince him that he was being rendered to a location where "the rules have changed". In practice, this fake rendition was amended and a boat was used instead of a helicopter. Three weeks after being told to "use his imagination to think up the worst possible scenario he could end up in", that "beatings and physical pain are not the worst thing in the world", and that unless he cooperated he would "disappear down a dark hole", Mohamedou Slahi was taken from his cell, fitted with blacked out goggles, dragged into a truck, and taken to a boat with individuals purporting to be Egyptian and Jordanian interrogators who argued within the hearing of Mohamedou Slahi about who would get to interrogate him. He was held for three and a half hours on the boat, during which time he says he was beaten. He was eventually taken to a cell on land, apparently at Camp Echo.[84] According to an appeal brief filed in the US Court of Appeals in June 2010,

> "Salahi was the only prisoner in the new building in which he was kept. Consistent with the 'special interrogation plan', his cell was 'modified in such a way as to reduce as much outside stimuli as possible. The doors will be sealed to a point that allows no light to enter the room'. The guards assigned to him wore face masks. It was not until a year later – in July 2004 – that Salahi was allowed out during sunlight hours...It was not until June or July 2004 that the guards assigned to Salahi's cell removed their masks. In addition, on July 30, 2004, Salahi was finally told that he had not been 'disappeared' to a new country but was still in Guantánamo..."[85]

In his April 2010 ruling, US District Court Judge James Robertson concluded:

> "the government's problem is that its proof that Salahi gave material support to terrorists is so attenuated, or so tainted by coercion and mistreatment, or so classified, that it cannot support a successful criminal prosecution. Nevertheless, the government wants to hold Salahi indefinitely, because of its concern that he might renew his oath to al-Qa'ida and become a terrorist upon his release... But a habeas court may not permit a man to held indefinitely upon suspicion, or because of the government's prediction that he may do unlawful acts in the future..."

The US administration disagreed and appealed Judge Robertson's decision. Under a framework of a "global war against al-Qa'ida and associates" virtually identical to that developed by its predecessor, the Obama administration argues that Mohamedou Slahi's detention is lawful under the Authorization for Use of Military Force (AUMF), the broadly worded (and much abused) resolution passed by Congress in the immediate wake of the 9/11 attacks.[86] Under the AUMF, the administration argued, "there is no requirement that Salahi have personally engaged in combat" and "it is also of no moment that Salahi may have been transferred to US custody in a location other than Afghanistan". The President's detention authority under the AUMF, it continues, "is not limited to persons captured on a 'battlefield' in Afghanistan" and to argue otherwise would "cripple the President's capability to effectively

combat al-Qa'ida".[87]

It was under the USA's global war paradigm that Mohamedou Slahi – who went voluntarily to the Mauritanian authorities at their request in November 2001 – was transferred to custody in Jordan, then to Afghanistan, and then to Guantánamo. It was under a distorted notion of "military necessity" under this war framework that the ICRC was denied access to him during a period that he was subjected to torture and other ill-treatment.[88] It is under this global war framework that he remains held without charge or trial in military custody. It is under this global war framework that accountability and remedy are missing.

In its most recent appeal brief, the US administration states that it has "recognized" the allegations of Mohamedou Slahi's ill-treatment. Specifically, it wrote:

> "Recognizing Salahi's claims of mistreatment 'at Guantánamo from mid-June 2003 to September 2003', some of which were corroborated by government investigations, the government declined to rely on statements Salahi made from this period".[89]

A decision to forego use of any statements against this detainee which were obtained under torture or other ill-treatment is not only a crucial element of any effective remedy for Mohamedou Slahi, however, it is and was in any event a specific international legal obligation by which the US government was bound.[90] And whereas it was obliged to decline to rely on any such statements against Slahi, it cannot legitimately decline to ensure less than full investigations into, and accountability (criminal and otherwise) and full remedy (which includes reparation allowing for rehabilitation) for, the human rights violations to which he has been subjected since November 2001.

It seems that Mohamedou Slahi will remain at Guantánamo for the foreseeable future. On 5 November 2010, the US Court of Appeals for the DC Circuit vacated Judge Robertson's ruling and sent the case back to the District Court for further proceedings on the question of whether Mohammedou Salahi was "a part of" *al-Qa'ida* at the time he was taken into custody despite his claim to have by then severed all ties to the group.[91] The Court of Appeals noted the government's acknowledgement that Mohammedou Salahi had been "mistreated" by interrogators from June to September 2003 and cited the District Court's finding of the "extensive and severe mistreatment" to which he had been subjected. The Court of Appeals reiterated that the government is not pursuing a criminal indictment against Salahi, including possibly because of its "problem" that its case against him is "so tainted by coercion and mistreatment".

ABSENCE OF JUDICIAL FINDING DOES NOT MEAN ABSENCE OF ABUSE

The absence in any particular case of reference to torture or other ill-treatment made by judges overseeing the Guantánamo detainee habeas corpus petitions does not necessarily mean an absence of allegations of such treatment.[92] In some cases the detainee has been transferred out of Guantánamo before a ruling has been made on his habeas corpus petition. In others, a ruling may have been handed down, but without reference to allegations of abuse (in some cases the judge may have made a finding on abuse earlier in the proceedings and this may not be reflected in the final decision on the habeas corpus petition). And in yet other cases, the detainee still awaits a ruling on the challenge to his detention. The government must investigate all allegations of torture or other human rights violations.

In a large number of cases where habeas corpus petitions have been filed, the detainee has

been released from Guantánamo before the US District Court has ruled on the question of the lawfulness of his detention. An example of such a case is that of Saudi Arabian national **Ahmed Zaid Salem Zuhair**.

According to his habeas corpus petition filed in US District Court in May 2008, and supporting materials filed subsequently, Ahmed Zuhair was seized at a market in Lahore in Pakistan "by a dozen men in civilian clothes who blindfolded him and took him to an unmarked house" where he was subjected to torture and other ill-treatment. In early January 2002, he was transferred to an underground military facility in Rawalpindi where he was held incommunicado for another two and a half months. During this period he was allegedly taken to an office in Islamabad and interrogated by "two Americans in civilian clothes" who "identified themselves as FBI agents". In mid-March 2002, he was taken to a military facility in Peshawar, and thence to an airport in Peshawar where he was handed over to US personnel. He was flown to Afghanistan and taken to Bagram, where he has said he was subjected to daily interrogations, and to torture or other ill-treatment, including beatings, being stripped naked, and being threatened with rendition to a country where he would be raped. After about two months in Bagram, he was transferred to the US airbase in Kandahar, and two weeks after that, to Guantánamo. There he has alleged he was subjected to further ill-treatment, including prolonged isolation and being left in an interrogation room for eight hours a day for a period of 20 days, "handcuffed and chained to the floor, with neither food nor water".[93]

Ahmed Zuhair's habeas corpus petition alleged that the US government had built much of its case against Zuhair on statements extracted under torture and other ill-treatment. Among other things, lawyers for Ahmed Zuhair claimed that statements implicating Zuhair had been obtained from another detainee under highly coercive conditions. That detainee – by then released -- signed a declaration which was filed in Ahmed Zuhair's habeas corpus case in US District Court in December 2008. The former detainee was Pakistani national **Sa'd Iqbal Madani**. His allegations of his own rendition, enforced disappearance and torture should have been referred on by the District Court to the appropriate authorities for investigation.

In his declaration, Sa'd Madani stated that he had been arrested in Jakarta, Indonesia, on 9 January 2002, and transferred to Egypt. There he said he was held in a "tiny, tomb-like cell that was less than four feet by six feet" in an underground facility, for a period of 92 days, during which time "I never saw the sun, never saw the sky, and never saw the earth". He said that his interrogators in Egypt told him that he had been sent there "at the request of US authorities". He alleged that, among other things, he was subjected to electric shock torture. He claimed that "there were American interrogators working with the Egyptian ones. Americans, both in civilian clothes and uniforms, would sit in on my interrogations. They never spoke but would write questions on pieces of paper and pass them to the Egyptians".

> 'Amnesty International reminds the US government that whatever the outcome of this litigation in the federal courts, it has an ongoing obligation under international law to ensure that any victims of human rights violations, including enforced disappearance, unlawful detention and torture or other cruel, inhuman or degrading treatment have effective access to remedy, and to ensure full investigation of, and accountability for, any such abuses.'

Sa'd Madani said that on 13 April 2002 he was transferred to Bagram, where he was held in a large communal cell with other detainees, including Ahmed Zuhair. Among the interrogators in Bagram, according to Sa'd Madani, was one that he had encountered during his detention in Egypt. He alleged that he was threatened with being sent back to Egypt if he did not cooperate and with the threat that his Indonesian stepmother would be kidnapped. Sa'd Madani recalled that this same interrogator had threatened Ahmed Zuhair. Ahmed Zuhair's own declaration alleges that it was an interrogator with an Egyptian accent who had

threatened to have him sent to another country where he would be raped.

Sa'd Madani was transferred from Bagram to Guantánamo in April 2003 and held there for five years before being released without charge or trial in September 2008. Among other things, he alleges that he was subjected to the "frequent flyer" program for six months, during which time he says he was "shackled and moved to another cell every two hours to prevent me from ever sleeping properly".[94]

Ahmed Zuhair was transferred to his native Saudi Arabia on 12 June 2009, after more than seven years in US custody and two weeks before the US District Court was due to hear his case and then rule on the lawfulness of his detention. Whether Judge Emmett Sullivan would have made any findings on the torture issue in his ruling on Ahmed Zuhair's case is therefore unknown.

In April 2010, with 105 cases of detainees transferred out of Guantánamo consolidated before him, including the cases of Ahmed Zuhair, Judge Thomas Hogan ruled on the question of whether the District Court had continuing jurisdiction over the habeas corpus petitions of detainees after they had left Guantánamo. Under US Supreme Court precedent, a habeas corpus petition filed by a convicted prisoner is not necessarily rendered moot upon release of the individual in question if as a consequence of his imprisonment he continued to suffer "disabilities or burdens".[95]

Among the collateral consequences faced by their clients, lawyers for the former detainees argued, was their continued detention or other restrictions in their home country and reputational damage from the stigma of having been held in Guantánamo. In addition, they argued, their prior detention at Guantánamo and an absence of a judicial ruling that they were unlawfully held would preclude them from bringing lawsuits in the USA. For under the Military Commissions Act,

> "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, transfer, treatment, trial, 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."

However, Judge Hogan dismissed the 105 petitions as moot, writing:

> "the Court is not unsympathetic to potential collateral consequences of Petitioners' prior detention at Guantánamo. Detention for any length of time can be injurious. And certainly associations with Guantánamo tend to be negative. But the collateral consequences doctrine does not protect a habeas petitioner from any consequence of his prior detention. Rather, the harm must be concrete and redressable by a court. On this score, Petitioners' fail to carry their burden. The alleged injuries are either speculative or beyond the Court's authority to redress, and therefore do not save the petitions from being moot".[96]

The decision is being appealed to the US Court of Appeals. Amnesty International reminds the US government that whatever the outcome of this litigation in the federal courts, it has an ongoing obligation under international law to ensure that any victims of human rights violations, including enforced disappearance, unlawful detention and torture or other cruel, inhuman or degrading treatment have effective access to remedy, and to ensure full investigation of, and accountability for, any such abuses. Provisions of the Military Commissions Act inconsistent with that obligation must be repealed.

Where there has been a ruling on a habeas corpus petition, the absence of any reference in the ruling to allegations of torture or other ill-treatment by US forces against the detainee in question does not necessarily mean that such claims have not been raised.

On 14 January 2009, US District Court Judge Richard Leon ordered the release from Guantánamo of Chadian national **Mohammed el Gharani**, who had been held there since he was as young as 14 years old.[97] The boy had been taken into custody by Pakistani forces in late 2001, handed over to the USA and taken to Kandahar air base in Afghanistan before being transferred to Guantánamo in January 2002. Although Judge Leon pointed to the paucity of the government's case for holding Mohammed el Gharani, and said that "the credibility and reliability of the detainees being relied upon by the Government has either been directly called into question by Government personnel or has been characterized by Government personnel as undetermined", he did not expressly refer to the allegations of torture or other ill-treatment that had been made in the case.

Some details of Mohammed el-Gharani's treatment in Guantánamo had been revealed in May 2008 in a report by the Inspector General at the US Department of Justice.[98] FBI agents described how during an interrogation period in September 2003, when still only 16 years old, Mohammed el Gharani was "short-chained", whereby a chain was placed around his waist and bolted to the floor, preventing him from being able to stand up straight. He was left like this for several hours. Another FBI agent stated that a military interrogator had ordered guards to place Mohammed el Gharani in a "stress position", described as being "shackled on the hands and feet and then chained to the floor to force him to sit on the floor or crouch without a chair". Left like this for several hours, Mohammed el Gharani was forced to urinate on himself. Mohammed el Gharani himself told investigators of another occasion when military guards chained him overnight for 12 to 16 hours. The report also revealed that the teenager had been subjected to the "frequent flyer program". Mohammed el Gharani has alleged that during interrogations in 2003, he was subjected to racist abuse, physical assaults, loud music, and doused with cold water. Amnesty International is not aware of anyone having been brought to account for such abuses, as required under international law.

In June 2009, Judge Leon ordered the release of **Abdul Rahim Abdul Razak al Ginco** (Abdul Rahim al Janko), a Syrian national of Kurdish origin who had been held in US military custody without charge or trial for nearly seven and a half years.[99] While Judge Leon noted the evidence that Abdul al Janko had been tortured in detention in 2000 and 2001 by Taleban and al-Qa'ida personnel, his ruling did not make reference to the detainee's allegations that he had been subjected to torture or other ill-treatment in early 2002 by US military forces in Kandahar air base.[100]

On 5 October 2010, a little under a year after he was released from Guantánamo, Abdul al Janko filed a lawsuit in US District Court in Washington, DC, seeking "justice and redress" for the human rights violations he says he was subjected to in US custody.[101] Numerous former officials are named in the lawsuit. As had been raised during the habeas corpus proceedings before Judge Leon, the lawsuit alleges that in Kandahar, he was subjected to abusive techniques including sleep deprivation, exposure to very cold temperatures, stress positions, exercise to exhaustion through sit-ups, press-ups, and running in shackles, and use of dogs.

The lawsuit also alleges that at Guantánamo, Abdul al Janko was subjected to, among other things, prolonged isolation, sleep deprivation, exposure to extreme temperatures, severe beatings, threats against him and his family, deprivation of adequate medical and psychological care and "continuous humiliation and harassment". The lawsuit states that Abdul al Janko attempted to commit suicide 17 times, the last of which caused him "to fracture a vertebra and lose control of his bodily functions". The lawsuit further alleges that in 2007, he was beaten by a cell extraction squad during which his knee was broken. Abdul al Janko's lawsuit has been assigned to Judge Richard Leon.

Meanwhile, in many cases – two and a half years after the US Supreme Court ruled that the Guantánamo detainees had the right to a "prompt hearing" to challenge the lawfulness of their detention, many detainees still await such a hearing.[102] None of the 14 detainees who

were transferred to Guantánamo in early September 2006 from the CIA's secret detention program, for example, have had rulings on the merits of habeas corpus challenges. They include **Zayn al Abidin Muhammad Husayn**, more commonly known as **Abu Zubaydah**, a Palestinian man born in Saudi Arabia who was subjected, among other things, to more than 80 applications of "water boarding" in August 2002. In his newly published memoirs, former President Bush highlights the case of Abu Zubaydah and asserts that "I approved the use of the interrogation techniques", including water-boarding.[103] Abu Zubaydah was subjected to four and a half years of enforced disappearance in the secret program operated under presidential authorization. No one has been held accountable for these crimes under international law.

"*We tortured Qahtani. His treatment met the legal definition of torture.*"

Former US military appeals court judge

Nor has anyone been brought to justice for the alleged torture and other ill-treatment of Saudi Arabian national **Mohamed al-Qahtani** who remains in Guantánamo nine years after first being transferred there from Afghanistan in February 2002. There is compelling evidence – including has revealed by US officials and official materials – that during interrogations in 2002 and 2003 he was subjected to techniques that included prolonged sleep deprivation, prolonged isolation, religious and sexual humiliation, threats of rendition to torture, threats against his family, forced nudity, stress positions, threats and attacks by dogs, beatings, prolonged exposure to loud music, prolonged exposure to cold temperatures, and prolonged and cruel use of restraints.

It is now more than two years since a former US military appeals court judge went on the public record as stating that Mohamed al-Qahtani was tortured in US custody. The official who spoke out was Susan Crawford, convening authority for the military commissions at Guantánamo. In May 2008, this former chief judge of the US Court of Appeals of the Armed Forces had dismissed charges against Mohamed al-Qahtani, then facing a death penalty trial by military commission at Guantánamo. At the time there was no official explanation for her decision. Then in January 2009, she told the *Washington Post*: "We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case".[104] Mohamed al-Qahtani remains in indefinite military detention without criminal trial and has yet to have a ruling on the merits of his habeas corpus petition, first filed in October 2005. That petition presented evidence that Mohamed al-Qahtani had been subjected to interrogation techniques that violated the international prohibition of torture and other ill-treatment, including techniques authorized by then Secretary of Defense Donald Rumsfeld.[105]

ADMINISTRATION LAWYERS AND PROSECUTORS MUST ACT

As noted above, it is generally in relation to the question of coerced statements that US District Court judges overseeing the Guantánamo habeas corpus litigation have been confronted with the issue of torture and other abuses. Their scrutiny of this issue has been carried out within the relatively narrow confines of whether a statement was reliable or not. While this has in a number of cases led to findings supporting the credibility of the allegations, these judicial assessments and orders should not be taken as completely fulfilling the government's obligation under international law to ensure full investigations, accountability and remedy for human rights violations.[106]

A case where there has been a degree of investigation, and even a court-martial of a US

military interrogator, in relation to allegations of detainee abuse is that of Saudi Arabian national **Ahmed Mohammed al Darbi** who has been in US custody for more than eight years, and remains in military detention in Guantánamo today. In the course of habeas corpus proceedings that are yet to be resolved more than five years after a habeas corpus petition was filed in District Court, the judge has ordered the government to disclose information on the treatment of Ahmed al Darbi.

Ahmed al Darbi was arrested by civilian authorities at the airport in Baku, Azerbaijan, on 4 June 2002, and held in Azerbaijani custody for about two months. In August 2002, he was handed over to US agents. In a declaration signed in 2009, Ahmed al Darbi recalls how these agents,

> "blindfolded me, wrapped their arms around my neck in a way that strangled me, and cursed at me. [Redacted], and somebody else kept saying 'fuck you' in my ear. I was terrified and feared for my life, because I did not know who had seized me, which government's custody I was in, or where they were taking me. They did not tell me where we were going. I was eventually taken to a place that I now know was Bagram Air Force Base in Afghanistan. I was imprisoned at Bagram for about eight months… In late March 2003, I was transferred to Guantánamo."

Ahmed al Darbi was charged for trial by military commission in December 2007. These charges were referred on for trial in February 2008, but were withdrawn and dismissed on 25 November 2009. Prior to this, during the military commission proceedings, his defence counsel had asserted that:

> "the Government's case rests entirely on 119 statements Mr Al Darbi allegedly gave while in US custody in Bagram and Guantánamo; all those reported statements – to the extent they were actually given by Mr Al Darbi – are the direct result of torture and coercion".[107]

A brief filed in District Court in February 2009 in the context of Ahmed al Darbi's habeas corpus case alleges:

> "According to written records and corroborated testimony obtained by Mr Al Darbi's military defense counsel, Mr Al Darbi has been a victim of torture and coercion during his more than six years in United States custody. Mr Al Darbi has been beaten, suspended by his arms and placed in other excruciating positions for extended periods of time, sexually assaulted, threatened with further sexual assault and rape, sexually humiliated, forced to perform hard labor, exposed to loud music and bright lights, kept in isolation for extended periods of time, and deprived of sleep for extended periods of time. To this day, Mr Al Darbi continues to suffer mental and physical harm as a result of his torture, reporting headaches, mood swings, recurring nightmares involving his interrogators, night terrors, incontinence and, until recently, back pain."[108]

> "*Petitioner's [Ahmed al Darbi's] military commission case produced many documents, both unclassified and classified, showing that petitioner was subject to abuse. Petitioner's counsel… has received documents from petitioner's counsel in that case which show that petitioner was subject to abuse or torture.*"
>
> US District Court Chief Judge Royce Lamberth

In December 2009, US District Court Chief Judge Royce Lamberth ordered the government to produce "all reasonably available evidence" showing that Ahmed al Darbi was subjected to "abuse, torture, coercion, or duress prior to or contemporaneous with the time he made statements" that were included in the government's case for continuing to detain him. Until that point, the government had produced only one document, but Judge Lamberth pointed to evidence of the existence of other relevant documents. This included the fact that a named US army interrogator had been tried by court

martial in 2006 for certain alleged abuses, including against Ahmed al Darbi, and al Darbi's allegations made to military investigators were used at the trial. In addition, Judge Lamberth noted that three reports issued by army investigators contained "detailed accounts" of Ahmed al Darbi's allegations of "physical and psychological abuse at Bagram". Moreover, continued Judge Lamberth, the military commission proceedings against Ahmed al Darbi "produced many documents, both unclassified and classified, showing that petitioner was subject to abuse".[109] As of the end of January 2011, the habeas corpus litigation was continuing without as yet any findings by Judge Lamberth on the torture issue.

At the time that Ahmed al Darbi was held in Bagram, detainees in US custody in Afghanistan were being subjected to stripping, prolonged isolation, "stress positions", sleep and light deprivation, and the use of dogs to instil fear, as the US military has itself acknowledged.[110] FBI agents in Afghanistan reported personally observing military interrogators employing stripping of detainees, sleep deprivation, threats of death or pain, threats against the detainee's family members, prolonged use of shackles, stress positions, hooding and blindfolding other than for transportation, use of loud music, use of strobe lights or darkness, extended isolation, forced cell extractions, use of and threats of use of dogs to induce fear, forcible shaving for the purposes of humiliating detainees, holding unregistered detainees, sending detainees to other countries for "more aggressive" interrogation and threatening to do this.[111] Documents made public in June 2008 by the Chairman of the US Senate Armed Services Committee revealed that at a meeting of US military personnel on 2 October 2002 to discuss interrogation techniques for use in Guantánamo, one of the participants noted that "we have had many reports from Bagram about sleep deprivation being used", to which another participant replied "true, but officially it is not happening".[112]

Ahmed al Darbi was held for eight months in Bagram in 2002 and 2003, during which time two Afghan detainees died in custody as a result of torture or other ill-treatment. For the investigation that eventually took place into those December 2002 deaths – some 18 months after they occurred – a number of detainees who had been in Bagram at the time of the deaths, and who were still in US custody in 2004, were interviewed by military investigators.[113] One of them was Ahmed al Darbi, who told an investigator in June 2004 that he had been subjected to torture and other ill-treatment in Bagram, and identified US Army Private Damien Corsetti of Company A, 519th Military Intelligence Battalion, as the lead perpetrator. Ahmed al Darbi's deposition, taken at Guantánamo in March 2006, was used at the court martial later that year of Private Corsetti. The defendant was acquitted.

During the court-martial proceedings, the US government itself agreed to a number of facts, including that sleep deprivation and "physical training" were authorized for use against detainees held at Bagram and that Ahmed al Darbi was subjected to both of these techniques in September 2002. It also agreed that another detainee, Kuwaiti national **Omar al-Faruq**, who Private Corsetti was also charged with ill-treating, had been subjected to these techniques.[114] During the investigation, another military interrogator stated that Omar al-Faruq had been held as a "ghost detainee" in Bagram, in other words kept incommunicado in secret detention, in circumstances amounting to the crime under international law of enforced disappearance for which no one has been held to account.[115] The government stated that at some point Ahmed al-Darbi was allowed to meet with the International Committee of the Red Cross at Bagram, but it is not clear when. In his 2009 declaration, he states that he was kept in "complete isolation" for his first two weeks in Bagram.

Regardless of the outcome of the habeas corpus proceedings in Ahmed al Darbi's case, the government has an ongoing obligation to ensure full investigation of his allegations of torture or other ill-treatment, and to ensure accountability and remedy for any substantiated claims. The investigation to date does not end the matter.

In some cases, District Court judges overseeing the Guantánamo habeas corpus cases have decided not to examine certain allegations of abuse on the grounds that it is not necessary

for the purposes of reaching a conclusion on the lawfulness of the detention. For example, in July 2010, Judge Reggie Walton ruled on the habeas corpus petition of **Abdulrahman Abdou Abou Al Ghaith Suleiman**, a Yemeni national taken into custody by Pakistani authorities in December 2001, handed over to US custody and transferred to Guantánamo in February 2002. Judge Walton noted that Abdulrahman Suleiman "does assert that he was subjected to abuse" in US custody, but that even if he had been subjected to "physical abuse, difficult living conditions, and coercive interview techniques" in US custody, "the Court need not consider the impact that treatment had on the reliability of his statements", as it was unnecessary for the purpose of answering the question of the lawfulness of his detention.[116] In similar vein, in August 2010, Judge Ellen Huvelle decided that it was "unnecessary" for her to determine whether Yemeni national **Sabry Mohammad Ebrahim al-Qurashi** "was in fact mistreated in Kandahar or Guantánamo" as he had alleged, after concluding that the US government had met a burden to show that statements he made when in Pakistani custody prior to transfer to Kandahar and thence to Guantánamo had been made voluntarily and were therefore admissible.[117] Judge Huvelle ruled that the question of whether similar statements he made in US custody had been coerced was therefore "irrelevant" to the question before her.[118] This does not give the executive an excuse not to investigate any such allegations.

Nor should the government consider that its obligations are fulfilled by declining to rely upon statements obtained under torture. It must also ensure full investigations, accountability and remedy. The Department of Justice has told the District Court that, in line with Article 15 of the UN Convention against Torture, "the government does not and will not rely upon statements it concludes were procured through torture" in the context of the Guantánamo habeas corpus litigation.[119] The government must go further.

In the case of Ahmed Ghailani, who has just faced the civilian trial that no other Guantánamo detainee has been provided, Judge Lewis Kaplan's October 2010 ruling related to a witness who the prosecution had wanted to present against the defendant. Judge Kaplan prohibited the government from introducing the witness – Hussein Abebe – because it had only identified him as a result of the CIA's torture or other ill-treatment of Ahmed Ghailani in secret custody. Ahmed Ghailani, Judge Kaplan wrote, had been held in secret CIA custody and subjected to "so-called enhanced interrogation methods and other allegedly abusive treatment", and "over time, Ghailani gave the CIA the information that led the government directly to Hussein Abebe". Judge Kaplan wrote that "the link between the CIA's coercion of Ghailani and Abebe's testimony is direct and close… [T]he government would not have identified or located Abebe absent Ghailani's coerced statements… Abebe was arrested and interrogated solely as a result of statements coerced from Ghailani… [T]he connection between Abebe's proposed testimony [against Ghailani] and statements coerced from Ghailani could not be closer".

With Judge Kaplan's repeated references to secret detention and coercion in mind, the prosecutors in Ahmed Ghailani's case were obliged not only to drop their proposed use of Hussein Abebe as a witness, but also to do all in their power and influence to ensure accountability for any human rights violations to which Ahmed Ghailani was subjected.[120] This is made clear in the UN Guidelines on the Role of Prosecutors:

> "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods…, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".[121]

US Justice Department lawyers working on the Guantánamo habeas corpus litigation are under the same obligation.[122] Not only must they not use any information against any

detainee obtained in violation of the international prohibition of torture and other ill-treatment or other abuses of human rights, once they come into possession of such information they must take all necessary steps to ensure that those responsible for such violations of human rights are brought to justice. As officials overseeing these government lawyers involved in the habeas corpus litigation, the Assistant Attorney General at the Civil Division of the US Department of Justice and the US Attorney General have senior responsibility within the Department to ensure this happens.[123]

GOVERNMENTS MUST ENSURE ACCOUNTABILITY AND REMEDY; SECRECY IS NO EXCUSE

The government's use of secrecy, by design or effect, continues to obscure human rights violations committed by the USA in what the previous administration called the "war on terror". The deference generally paid by US federal courts to the use of secrecy by the executive in this context is a part of this problem and is illustrated by the judiciary's upholding of the invocation by both the Bush and Obama administrations of the state secrets doctrine, as outlined above in the cases of Khaled el-Masri and Binyam Mohamed.

On 18 January 2011, the US Court of Appeals for the DC Circuit dealt another blow to transparency and accountability when it 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 transferred from CIA custody to military detention at Guantánamo Bay in September 2006. The 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 Combatant Status Review Tribunals (CSRTs), the military panels set up by the Bush administration to review the "enemy combatant" status attached to detainees at Guantánamo. In the versions of the CSRT transcripts published by the Pentagon, descriptions by the detainees of how they were treated in CIA custody 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 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 that discussed the legality of "enhanced interrogation techniques" by the CIA.[124] In addition, in late April 2009, a February 2007 ICRC report of its interviews with the 14 detainees after their transfer to Guantánamo had been leaked into the public domain, providing new evidence of torture and enforced disappearances of these men in CIA custody.[125] Despite these developments, in October 2009, Judge Lamberth again ruled against disclosure of the CSRT records, deferring to the declaration filed by the CIA that to publish the information about the detainees would harm national security. Judge Lamberth declined even to conduct an in camera review of the withheld information.

The case was appealed to the Court of Appeals for the DC Circuit. The Obama administration urged it to uphold the District Court's ruling. Among other things, in its March 2010 brief to the Court of Appeals, the Department of Justice noted that in the cases of **'Abd al Nashiri**, **Abu Zubaydah**, **Khaled Sheikh Mohammed**, **Hambali** and **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". In its brief, the Justice Department 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."[126] As Amnesty International has previously pointed out, if these detainees have knowledge about detention conditions or interrogation techniques that violate the prohibition 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 preserve the impunity of the perpetrators, is fundamentally inconsistent with international law.[127]

The Court of Appeals upheld the District Court's ruling and added that Judge Lamberth had acted within his "broad discretion" when he declined to conduct an in camera review of the withheld documents. Among other things, the administration had 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. Clearly the USA's use of secret rendition and detention could not have operated without the cooperation of other countries. Indeed among the reasons given by the CIA – under both the Bush and the Obama administrations – for keeping secret the contents of the presidential directive of 17 September 2001 and other documents relating to the secret program is a claim that disclosure of such information would reveal the location of secret CIA facilities and the identities of countries that cooperated with the USA in this regard.[129]

At 'Abd al-Nashiri's CSRT hearing in Guantánamo on 14 March 2007, all detail of the torture to which he says he was subjected has been redacted from the published transcript.

'Abd al-Nashiri [through interpreter]: From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way, and another time they tortured me in a different way.

CSRT President: Please describe the methods that were used.

'Abd al-Nashiri [through interpreter]: [Redacted]. What else do I want to say? [Redacted] Many things happened. There [sic] were doing so many things. What else did they did [sic]? [Redacted]. They do so many things. So so many things. What else did they did [sic]? [Redacted]. After that another method of torture began [Redacted]. Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body. Swollen too. They used to ask me questions and the investigator after that used to laugh. And, I used to answer the answer that I knew. And, if I didn't reply what I heard, he used to [redacted]. That thing did not stop until here. So many things happened. I don't in summary [sic], that's basically what happened"[128]

Numerous countries have been implicated in the USA's secret detention and rendition programs. Just some of the cases cited above point to the possible involvement of Afghanistan, Azerbaijan, Egypt, Indonesia, Jordan, Macedonia, Mauritania, Morocco, Syria, and Pakistan. In other words, while an unknown number of US officials were involved in the crimes under international law of torture and enforced disappearance committed in the

context of the USA's secret detention and rendition programs, officials in other countries may also be implicated. The use of secrecy to protect foreign relations at the expense of accountability is unacceptable and flies in the face of the requirement on governments to cooperate in bringing torturers to justice and to ensure victims receive effective remedies.

Under Article 9 of the UNCAT, State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought against anyone accused of involvement in torture. In addition, any State Party to UNCAT in whose territory a person believed to have been involved in torture is present is required take the necessary investigative, prosecutorial or extradition measures against that person.[130]

Far from cooperation, the use of secrecy and national security arguments by the USA and other governments has undermined accountability. The Italian and US government's efforts to undermine rather than ensure accountability in the context of the prosecution of Italian and CIA agents charged in relation to the abduction in Italy and rendition to alleged torture in Egypt of Usama Mostafa Hassan Nasr (better known as Abu Omar) is a case in point.[131]

The US authorities continue to use secrecy in ways that not only keep from public scrutiny the details of what went on in the unlawful CIA programs, but also that obscure the role of other countries in cases of detainees who ended up in US custody and who were allegedly subjected to torture.

In 2010, a ruling in a Guantánamo habeas corpus case by US District Court Judge Henry Kennedy was mistakenly released prior to redaction.[132] This version was subsequently withdrawn and replaced by another which appears to seek to sanitize or obscure the role of other countries. The replacement version of the opinion opens: "Uthman Abdul Rahim Mohammed Uthman (ISN 27), a Yemeni citizen, has been held by the United States at the naval base detention facility in Guantánamo Bay, Cuba, since January 2002." The earlier version had opened with "Uthman Abdul Rahim Mohammed Uthman (ISN 27), a Yemeni citizen, was seized by Pakistani authorities in October 2001 and has been held by the United States at the naval base detention facility in Guantánamo Bay, Cuba since January 2002".

The earlier unredacted version stated that Guantánamo detainee **Sanad Yislam Ali al Kazimi** had been "held in the United Arab Emirates" prior to being transferred to the "Dark Prison" run by the CIA in Afghanistan. In the UAE, "his interrogators beat him; held him naked and shackled in a dark, cold cell; dropped him into cold water while his hands and legs were bound; and sexually abused him." In the replacement version, this particular passage stated not that the detainee had been held in the UAE, but that he had been "detained outside the United States".[133]

"*Without a reason to doubt the veracity of the declarations [about torture], the Court cannot ignore them*".

US District Court Judge Henry Kennedy

This approach does not seem to be consistently applied, however. Judge Kennedy's ruling also cites the case of another Guantánamo detainee, **Sharqwi Abdu Ali Al-Hajj**. In both versions – the withdrawn unredacted version and the later edited version – it is stated that he was held in Jordan, where he was "regularly beaten and threatened with electrocution and molestation", prior to being transferred to the CIA-run Dark Prison in Afghanistan. Yet in the case of Mohamedou Ould Slahi (above), references to Jordan in recent briefs in the case to the Court of Appeals in mid-2010 have been redacted despite it being public knowledge that he was transferred to Jordan from Mauritania.

Judge Kennedy granted Uthman Mohammed Uthman's habeas corpus petition after discounting, as products of torture, incriminating statements about Uthman made by the two other detainees. In the cases of Sanad al Kazimi and Sharqwi al-Hajj, Judge Kennedy noted "unrebutted evidence in the record" that the two had been tortured prior to their arrival in Guantánamo. This included evidence of their time in the CIA Dark Prison in Afghanistan,

where Sanad al Kazimi had allegedly been held in perpetual darkness and where he was "hooded, given injections, beaten, hit with electric cables, suspended from above, made to be naked, and subjected to continuous loud music". In the case of Sharqwi Abdu Ali Al-Hajj Judge Kennedy noted that "after transfer to a secret CIA-run prison in Kabul, Afghanistan, Hajj was reportedly kept 'in complete darkness and was subject to continuous loud music'." This evidence was filed in the District Court in the form of declarations by lawyers for the two men. Judge Kennedy wrote that "without a reason to doubt the veracity of the declarations, the Court cannot ignore them". So far, as far as Amnesty International is aware, the US government has ignored its obligation to ensure impartial and independent investigations into these allegations and accountability for any that are substantiated. Meanwhile, the administration has appealed Judge Kennedy's ruling that Uthman is unlawfully held to the US Court of Appeals and the detainee remains in military custody in Guantánamo.

After their time under CIA interrogators in the Dark Prison in Kabul, Sanad al Kazimi and Sharqwi al-Hajj were both transferred during 2004 to the US air base in Bagram in Afghanistan. Bagram is currently the subject of FOIA litigation in the US District Court for the Southern District of New York brought by the American Civil Liberties Union (ACLU). Part of the information that has been requested is that relating to information about the CIA's involvement in detentions in Bagram and renditions to and from the base over the years since detentions began there in late 2001.

The CIA responded to the FOIA request by stating that it could "neither confirm nor deny the existence or non-existence" of records responsive to the request.[134] Litigation ensued, with the CIA declaring that it could "neither confirm nor deny" that it had records pertaining to renditions and/or transfers of individuals captured outside Afghanistan to Bagram, and that it had no option but to "deny the existence or non-existence" of records relating to detainees held at Bagram.[135] To do otherwise, the CIA stated among other purported justification for non-disclosure, would "reveal classified information concerning intelligence activities, intelligence sources and methods, foreign government information, and US foreign relations", disclosure of which could cause "serious damage to national security". Besides, asserted the CIA, "no authorized United States Executive Branch official has officially acknowledged CIA's involvement with individuals detained at Bagram".[136]

District Court Judge Barbara Jones ruled that the CIA was justified under US law in deciding neither to confirm nor deny the existence or non-existence of records relating to the rendition or transfer of detainees to Bagram and the interrogation and treatment of detainees there. She ruled that while the ACLU had identified official statements indicating that "the CIA is involved in US activities in Afghanistan, none of the statements specifically disclose the existence or non-existence of records pertaining to the rendition or transfer of detainees to Bagram or the interrogation and treatment of detainees at Bagram."[137]

So the situation is now that the US administration is not seeking to rebut allegations such as those raised by Binyam Mohamed, Sanad al Kazimi and Sharqwi al-Hajj, that they were tortured in CIA custody in Afghanistan and then transferred to Bagram, while at the same time seeking to keep from making public any information which would officially confirm that the CIA has been involved in any transfers of detainees to or from Bagram or the cases of detainees held there.

The UN Human Rights Council has referred 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,"[138] The UN General Assembly has recognised the obligation of states to provide victims with "verification of the facts and full and public disclosure of the truth" as part of an effective remedy.[139] Far from providing those whose human rights it has violated, let alone society as a whole, with the truth, the

USA has done all in its power to keep the details about violations secret and to block the access of victims to any form of effective remedy.[140]

A supplement to District Court Judge Lewis Kaplan's July 2010 opinion denying Ahmed Ghailani's motion that his right to a speedy trial had been denied during his time in secret CIA custody contains information relating to the "historical development and operation of the CIA's Rendition, Detention and Interrogation (RDI) Program", and "Ghailani's personal experience in that program", including "certain conditions of his confinement and the specific interrogation techniques used on the defendant". Precisely what information is included in the supplement is unknown, however, as it has been redacted from the public version of the supplement.[141] As Judge Kaplan noted in the accompanying opinion, "many details of the CIA Program and its application to specific individuals remain classified".[142]

An affidavit signed by Ahmed Ghailani in 2010 states that "while detained at the Black Site, personnel whom I believed were part of the CIA interrogated me and subjected me to the following enhanced interrogation techniques:".[143] The remaining four pages of the affidavit have been redacted from the public version, as the details of Ahmed Ghailani's treatment remains classified Top Secret. In its briefs to the District Court, the Obama administration conceded that "some of" the conditions of detention to which Ahmed Ghailani had been subjected were "undoubtedly aggressive". All detail is redacted from the public record.[144]

The US administration further stated: "What happened to the defendant during his detention by the CIA...may be relevant to other legal arguments in this case; in theory, the defendant could also seek civil remedies against those involved".[145] However, unless the US administration puts an end to its approach, including via its invocation of the state secrets doctrine, of seeking to block judicial remedy for those subjected to human rights violations in what the USA used to call the "war on terror", access to such remedy is likely to remain theoretical only.

Ahmed Ghailani was subjected to the crime under international law of enforced disappearance. He additionally alleges that he was subjected to torture under "enhanced" interrogation while held in secret custody. The US administration has said that his "allegations should be taken seriously",[146] but as in other cases has failed to initiate the investigation it is required under international law to undertake.

CONCLUSION

America's moral example must always shine for all who yearn for freedom and justice and dignity

President Barack Obama, 25 January 2011[147]

The USA has a former President who has unabashedly admitted in his memoirs and on television to authorizing acts that clearly constitute torture, and a current President who acknowledges that such acts amount to torture.[148] The current Attorney General has also acknowledged that "water-boarding", one of the "enhanced interrogation techniques" the former President says he personally authorized, is torture.

Former President George W. Bush's admission is enough to trigger the USA's obligations under international law to investigate his admissions and if substantiated, to prosecute him. Failure to investigate and prosecute in circumstances where the requisite criteria are met is itself a violation of international law.[149]

The administration of President Obama has committed the USA to "meeting its UN treaty obligations". [150] Yet accountability and remedy for the crimes under international law committed in the CIA's secret detention program remain set at zero.

In his memoirs, former President Bush says: "I knew that an interrogation program this sensitive and controversial would one day become public. When it did, we would open ourselves up to criticism that America had compromised our moral values". His response to such criticism has been unapologetic, part of an apparent strategy that seems to have put the current administration and members of Congress on the back foot and left them reluctant to respond with an equally energetic defence of human rights. As such the USA remains on the wrong side of its international obligations with regard to accountability and remedy for crimes under international law and other human rights violations.

A number of federal and military judges have now made findings in relation to torture or other ill-treatment in the context of habeas corpus or military commission cases of former or current Guantánamo detainees. Any collective failure by the judges, prosecutors, and other government lawyers involved in these cases to refer any evidence of enforced disappearance, torture and other ill-treatment on to the appropriate authorities for investigation and possible prosecution would constitute independent violations by the USA of its obligations under international human rights law (and in some cases international humanitarian law as well). Amnesty International has not so far seen any evidence that officials are following up such findings with thorough and impartial investigations directed towards prosecutorial action.

The international community must redouble its efforts to persuade the US authorities to meet their obligations on accountability and remedy. In the absence of the USA conducting the criminal investigations it is obliged to undertake into the torture and enforced disappearance committed in the CIA program or otherwise in the name of countering terrorism, other states should step in and carry out such investigations themselves.

Indeed, should former President George W. Bush or any other US official similarly accused of responsibility for torture, including complicity or participation in torture, travel to any one of the 146 other states that are party to the UN Convention against Torture, that country would be legally obliged to arrest or otherwise secure his or her presence, to launch a criminal investigation and, if there is evidence of criminal wrongdoing, to either submit the case for prosecution or extradite the suspect to a state willing to do so.

On 17 December 2009, the memorandum from the State Department's Legal Adviser on US human rights obligations, cited in the introduction, was transmitted to all executive agencies of the US government. Eleven months later, on 9 November 2010, at the UN Human Rights Council in Geneva, the Legal Adviser responded to recommendations made by other governments relating to the USA's human rights record. On the question of accountability for US human rights violations in the context of counterterrorism and armed conflict, Harold Koh said: "Allegations of past abuse of detainees by US forces in Afghanistan, Iraq and Guantánamo have been investigated and appropriate corrective action taken."[151] This brief comment glosses over the degree of impunity and leniency that has been the hallmark of the USA's response to abuses in these locations. What was even more notable was the complete absence of any reference by the US delegation to the question of accountability for the crimes under international law committed in the CIA secret detention program.

To date, the US Attorney General's actions in this regard have been minimal. On 2 January 2008, Attorney General Michael Mukasey appointed federal prosecutor John Durham to supervise a criminal investigation into the CIA's destruction of videotapes made in 2002 of interrogations conducted against two detainees held in the secret program. On 9 November 2010, the Justice Department announced that no criminal charges would be pursued in relation to the destruction of the tapes.[152] However, Assistant US Attorney Durham's mandate had been expanded in August 2009 by Attorney General Eric Holder to include a "preliminary review" into some aspects of some interrogations of some detainees held in the secret detention program. That review is ongoing.

There is currently little cause to believe that the "preliminary review" will lead to much. It has been narrowly framed and has been set against a promise of immunity from prosecution for anyone who acted in "good faith" on official legal advice in conducting interrogations. This falls far short of the scope of investigations and prosecutions required by binding legal obligations to which the USA is subject under international law, including under the explicit provisions of treaties the USA has entered into such as the Geneva Conventions and UNCAT.

When it comes to other countries, US officials seem to recognize the importance of accountability. For example, a January 2010 diplomatic cable from the US Embassy in Colombo, Sri Lanka, concerning alleged war crimes committed by Sri Lankan government "troops and officials", published by WikiLeaks, states: "Accountability is clearly an issue of importance for the ultimate political and moral health of Sri Lankan society."[153] And as Amnesty International has previously pointed out, President Barack Obama himself said in March 2010 in relation to past human rights violations in Indonesia that "We have to acknowledge that those past human rights abuses existed. And so we can't go forward without looking backwards..."[154]

When the USA assumed its seat on the UN Human Rights Council in 2009, it said: "Make no mistake; the United States will not look the other way in the face of serious human rights abuses. The truth must be told, the facts brought to light and the consequences faced".[155] It continues to turn away, even as its federal judges make findings about allegations of abuse against detainees held by the USA in the counter-terrorism context.

At the opening of the Human Rights Council session on the USA on 5 November 2010, the US delegation said that "advancement and enforcement of human rights must be pursued persistently over time, with accountability, follow through, continuing effort, and constant improvement".[156]

If the USA continues to fail to apply the necessary persistence and effort to the question of its own accountability for crimes under international law committed by US personnel in the name of countering terrorism, international responses must be found.

SELECTED AMNESTY INTERNATIONAL DOCUMENTS FOR FURTHER INFORMATION

Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention, 15 November 2010, http://www.amnesty.org/en/library/info/EUR01/023/2010/en

USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes, 10 November 2010, http://www.amnesty.org/en/library/info/AMR51/104/2010/en

USA: Former President's defence of torture highlights need for criminal investigations, 9 November 2010, http://www.amnesty.org/en/library/info/AMR51/103/2010/en

USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 30 September 2010, http://www.amnesty.org/en/library/info/AMR51/094/2010/en

USA: Secrecy blocks accountability, again: Federal court dismisses 'rendition' lawsuit; points to avenues for non-judicial remedy, 8 September 2010, http://www.amnesty.org/en/library/info/AMR51/081/2010/en

USA: Normalizing delay, perpetuating injustice, undermining the 'rules of the road', 22 June 2010, http://www.amnesty.org/en/library/info/AMR51/053/2010/en

USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, http://www.amnesty.org/en/library/info/AMR51/008/2010/en

USA: Missing from the US 'human rights agenda': Accountability and remedy for 'war on terror' abuses, 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/005/2010/en

USA: Still failing human rights in the name of global 'war', 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/006/2010/en

USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en

USA: Attorney General orders 'preliminary review' into CIA detention cases – full investigation long overdue, 25 August 2009, http://www.amnesty.org/en/library/info/AMR51/094/2009/en

USA: Trials in error: Third go at misconceived military commission experiment, 15 July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en

USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en

USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 16 April 2009, http://www.amnesty.org/en/library/info/AMR51/055/2009/en

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

USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en

USA: Vice President seeks to justify torture, secret detention and Guantánamo, 23 December 2008, http://www.amnesty.org/en/library/info/AMR51/157/2008/en

USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en

USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 19 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en

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

USA: Impunity and injustice in the 'war on terror': From torture in secret detention to execution after unfair trial? 12 February 2008, http://www.amnesty.org/en/library/info/AMR51/012/2008/en

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

USA: Law and executive disorder: President gives green light to secret detention program, 16 August 2007, http://www.amnesty.org/en/library/info/AMR51/135/2007/en

USA: Off the Record. US responsibility for enforced disappearances in the 'war on terror', June 2007,

http://www.amnesty.org/en/library/info/AMR51/093/2007/en

USA: All allegations of torture must be investigated, 15 March 2007, http://www.amnesty.org/en/library/info/AMR51/045/2007/en

USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi, 20 September 2006, http://www.amnesty.org/en/library/info/AMR51/149/2006/en

USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 21 June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en

USA: Below the radar: Secret flights to torture and 'disappearance', April 2006, http://www.amnesty.org/en/library/info/AMR51/051/2006/en

USA: Secret detention in CIA 'black sites', November 2005, http://www.amnesty.org/en/library/info/AMR51/177/2005/en

USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en

USA: Human dignity denied: Torture and accountability in the 'war on terror', 25 October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en

USA: The threat of a bad example: Undermining international standards as "war on terror" detentions continue, August 2003, http://www.amnesty.org/en/library/info/AMR51/114/2003/en

Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002, http://www.amnesty.org/en/library/info/AMR51/053/2002/en

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ENDNOTES

[1] *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 6 October 2010. Redacted version released on 13 October 2010.

[2] *ACLU et al v. Department of Defense et al*. Ninth Declaration of Marilyn A. Dorn, Information Review Officer, Central Intelligence Agency, US District Court, Southern District of New York, 7 June 2007.

[3] George Tenet, At the Center of the Storm, Harper Books 2007, page 366. Publicly confirming the existence of the secret detention program for the first time in September 2006, President Bush said that "A small number of key leaders from both political parties on Capitol Hill were briefed about this program." The current Director of the CIA, Leon Panetta, said in April 2009 that "over the life of" the secret detention program, the operations were "briefed to the Congressional leadership".

[4] George W. Bush, Decision points, Virgin Books, 2010, pages 168-180.

[5] *Ibid*.

[6] Military Order – Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001. See Decision Points, *op. cit.*, page 166-167.

[7] See also: Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, Office

of Legal Counsel, 28 December 2001.

[8] Jack Goldsmith, The Terror Presidency: Law and Judgment inside the Bush Administration, W.W. Norton Books, 2007, page 108.

[9] Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

[10] A background paper provided to the Office of Legal Counsel at the US Department of Justice by the CIA in December 2004 described the CIA's typical transfer process: "The HVD [High Value Detainee] 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… The HVD's head and face are shaved. A series of photographs are taken of the HVD while nude….Detention conditions are not interrogation techniques, but they have an impact on the detainee…The HVD is typically reduced to a baseline, dependent state using the… specific conditioning interrogation techniques [of nudity, sleep deprivation and dietary manipulation]." A leaked report sent to the US authorities by the ICRC of its interviews with the 14 men transferred from secret CIA custody to Guantánamo in September 2006 adds 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… 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 hand 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". ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007, page 6.

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

[12] See Article 9.5, International Covenant on Civil and Political Rights.

[13] Memorandum for executive branch agencies, re: US human rights treaty reports. From Harold Hongju Koh, Legal Adviser, US Department of State, transmitted 17 December 2009, available at http://www.state.gov/documents/organization/137293.pdf

[14] USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en

[15] Interview with the *Washington Times,* 17 December 2008.

[16] Interview with Bob Schieffer, Face the Nation, CBS News, 10 May 2009.

[17] See 'I'd do it again' former President Bush tells Grand Rapids crowd about waterboarding terrorists, 2 June 2010, http://www.mlive.com/news/grand-

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rapids/index.ssf/2010/06/id_do_it_again_former_presiden.html

[18] George W. Bush, Decision points, Virgin Books, 2010, page 171.

[19] See also, for example, UN Human Rights Committee General Comment 20 (1992) on article 7 of the International Covenant on Civil and Political Rights which prohibits the use of torture or other cruel, inhuman or degrading treatment or punishment (para 3: "The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.")

[20] UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, article 16.

[21] In his memoirs, former President Bush confirms that George Tenet requested that the CIA be granted the authority "to kill or capture al Qaeda operatives without asking for my sign-off each time. I decided to grant the request". Decision points, *op. cit.*, page 186. See also, for example, Amnesty International news release, 8 November 2002, Yemen/USA: government must not sanction extra-judicial executions, http://www.amnesty.org/en/library/info/AMR51/168/2002

[22] *ACLU et al v. Department of Defense et al*, Order, US District Court, Southern District of New York, 22 October 2010.

[23] *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

[24] *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 6 October 2010. Unclassified version released on 13 October 2010. In a document filed in the District Court in the FOIA litigation, the CIA has said that the presidential directive of 17 September 2001 "did not outline interrogation methods that may be used against detainees" held in the CIA program. Ninth Declaration of Marilyn A. Dorn, *op. cit.*

[25] Ahmed Ghailani was charged with complicity in the 1998 bombings of two US embassies in east Africa in which 224 people were killed and many more injured. On 17 November 2010 a jury found him guilty of one conspiracy charge and acquitted him on all the other charges he had faced. On 25 January 2011, Ahmed Ghailani was sentenced to life imprisonment. See Ghailani verdict underlines need for fair trials for all Guantánamo detainees, 18 November 2010, http://tinyurl.com/33g5pav, and also USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 1 October 2010, http://www.amnesty.org/en/library/info/AMR51/094/2010/en

[26] UNCAT articles 4, 6, and 7.

[27] UNCAT article 7(2).

[28] UNCAT article 2. Torture is also defined as a grave breach of the 1949 Geneva Conventions, meaning investigation and submission for prosecution of all cases of torture in situations of international armed conflict is an express obligation under those treaties.

[29] *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

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

[31] Human Rights Committee General Comment 31, The Nature of the General Legal Obligation Imposed

on States Parties to the Covenant (2004), paras 15 and 18.

[32] See, e.g., 1949 Geneva Convention IV, articles 146-147; ICRC Study of Customary International Humanitarian Law, Volume I: Rules (2005), pp 315-319 (Rule 90), 340-343(Rule 98), pp 574-575,590 (Rule 156), pp 607-611 (Rule 158.

[33] The CIA Declaration provided to Judge Kaplan asserts that "in the program's early years", use of "enhanced interrogation techniques" on specific detainees "required authorization by the Director of the CIA Counter Terrorism Center", whereas "later this authorization had to come from the Director of the CIA". *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

[34] *USA v. Ghailani*, Memorandum Opinion, District Court, Southern District of New York, 10 May 2010.

[35] *USA v. Ghailani*. Opinion, US District Court for the Southern District of New York, 12 July 2010 (see footnotes 31 and 32). At the sentencing of Ahmed Ghailani on 25 January 2011, Judge Kaplan said "This trial has been divorced from any questionable practice that may have been engaged in by anybody other than the defendant. This should not be taken as condoning whatever may have been done to Mr Ghailani by our government. But that is a matter for another time and another place". Ghailani judge: civililan trials work, CBS News, 30 January 2011. See also Ex-detainee gets life sentence in embassy blasts. New York Times, 25 January 2011.

[36] For example, *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010 ("Ghailani has pointed to nothing that casts doubt on the government's conclusion, which the Court credits, that he provided useful information throughout the entire two years" that he was held in secret CIA custody).

[37] See, for example, Marc Thiessen, The enduring appeal of trying terrorists by military commission, Washington Post, 24 November 2010. More generally, see John Yoo, The Ghailani verdict and the war on terror, Wall Street Journal, 20 November 2010. US Senator Lindsey Graham, 'The verdict in the trial of Ahmed Ghailani', Senator Graham press release, 17 November 2010. US Congressman Pete King, 'King statement on Ghailani verdict', Office of Congressman King, 18 November 2010. John B. Bellinger III, 'A counterterrorism law in need of updating', Washington Post, 26 November 2010.

[38] See USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, http://www.amnesty.org/en/library/info/AMR51/008/2010/en

[39] As discussed below, international law prohibits the use of information obtained by torture or other cruel, inhuman or degrading treatment, in court or other forms of proceedings; if a plausible allegation of torture is raised, the burden lies on the state to establish that the statement was not obtained by such means. See Report of UN Special Rapporteur on Torture, UN Doc A/61/259, paras 44-65.

[40] See In re: Guantánamo Bay detainee litigation. Case Management Order, US District Court for DC, 6 November 2008, as amended by Order of 16 December 2008 (Judge Hogan).

[41] *Anam v. Obama*, Order, US District Court for DC, 9 September 2009.

[42] *Anam v. Obama*, Memorandum opinion, US District Court for DC, 6 January 2010. For further information see USA: Still failing human rights in the name of global 'war', 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/006/2010/en

[43] *Anam v. Obama*, Memorandum Opinion, US District Court for DC, 6 January 2010.

[44] According to an appeal brief, after allegedly being subjected to torture and other ill-treatment by Pakistani authorities, "Al-Madhwani was eventually brought into an office full of Americans. When his blindfold and hood were removed, the Americans could see that he was bleeding all over. The Americans took Al-Madhwani's photograph and fingerprints. Americans then interrogated Al Madhwani, who agreed

to whatever they asked. Al-Madhwani was returned to the Pakistanis. Later the Americans took Al-Madhwani for a long interrogation session… Under the coercion of the Pakistanis, Al-Madhwani admitted everything the Americans wanted him to admit." After five days in Pakistani custody, Al-Madwhani was taken by bus to an airport and "he and others were handed over to Americans… Al-Madhwani was sent to the 'Dark Prison', where he was received by Americans." *Al-Madhwani v. Obama*, Brief for petitioner-appellant Musa'ab Al-Madhwani, In the US Court of Appeals for the DC Circuit, 15 November 2010.

[45]*Al-Madhwani v. Obama*, Brief for petitioner-appellant Musa'ab Al-Madhwani, In the US Court of Appeals for the DC Circuit, 15 November 2010.

[46] *Ibid*.

[47] Judge Hogan decided that incriminating statements Al Madhwani had given at his Combatant Status Review Tribunal (CSRT) in September 2004 and to his Administrative Review Board (ARB) in December 2005 were "reliable", and were "not infected" by the earlier "coercive conditions". Al Madhwani has since signed a statement maintaining that the CSRT and ARB sessions appeared to him to have been part of the interrogations process. For example, he recalls that he was "once transferred directly from an interrogation interview to a CSRT interview. Thus, I felt that the procedure was nothing more than a continuation of the interrogation interviews". He recalled that a particular interrogator of whom he was "very scared" and "who had already tortured a large number of detainees, including myself", had said that he would be watching the CSRT hearing, and Al Madhwani said that this appeared to be a threat of punishment if he were to retract what he had said during interrogations. Musa'ab Al Madhwani further noted that during interviews with his "personal representative", the US military officer assigned to help the detainee for his CSRT and ARB hearings, "my feet were shackled to the floor, which reminded me of the interrogation interviews". During the CSRT and ARB hearings themselves, Al Madhwani continues, "I was surrounded with individuals in military uniforms. There were officers, military officials, as well as other soldiers. It was frightening and terrifying for me; especially after the torture I had previously been subjected to under the hands of some US officials and others who worked in the administration in both the Dark Prison of Bagram and in Guantánamo". *Anam v. Obama*, Petitioner Musa'ab Omar Al Madhwani's supplement to his rule 59(e) motion and supporting memorandum to reconsider this Court's January 6, 2010 memorandum opinion and order. In the District Court for DC, 8 March 2010.

[48] *Al Madhwani v. Obama*, Brief for respondents-appellees, In the US Court of Appeals for the DC Circuit, December 2010.

[49] For more on the 'frequent flyer program', see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en

[50] *Al Rabiah v. United States*, Memorandum opinion, US District Court for DC, 17 September 2009.

[51] *USA v. Jawad*, D-008 ruling on defense motion to dismiss – torture of the detainee. US Army Colonel Stephen R. Henley, Military Judge (military commission), 24 September 2008.

[52] *Ibid*.

[53] *Ibid*.

[54] *USA v. Jawad*, D-022, ruling on defense motion to suppress out-of-court statements of the accused to Afghan authorities, 28 October 2008.

[55] *Bacha (Jawad) v. Obama*, Order, US District Court for DC, 17 July 2009.

[56] For more information see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en; USA: Military judge hears allegations of ill-treatment of teenager at Bagram and Guantánamo, 14 August 2008, http://www.amnesty.org/en/library/info/AMR51/094/2008/en; USA: Remedy and accountability

still absent: Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds, 30 September 2008, http://www.amnesty.org/en/library/info/AMR51/109/2008/en; USA: Sounding a note of urgency: Judge loses patience over Guantánamo case; detention and interrogation policy Task Forces delay reports, 20 July 2009, http://www.amnesty.org/en/library/info/AMR51/084/2009/en; USA: Moving the goalposts, prolonging the detention: Mohammed Jawad no longer detained under AUMF, but still held, 26 July 2009, http://www.amnesty.org/en/library/info/AMR51/087/2009/en; USA: Judge orders Mohammed Jawad's release from Guantánamo; administration still mulling trial, 30 July 2009, http://www.amnesty.org/en/library/info/AMR51/088/2009/en.

[57] *Hamdan v. Gates*, Memorandum order, US District Court for DC, 18 July 2008.

[58] *USA v. Hamdan*, D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008. US Navy Captain Keith Allred, Military Judge.

[59] See USA: Trial and error - a reflection on the first week of the first military commission trial at Guantánamo. 30 July 2008, http://www.amnesty.org/en/library/info/AMR51/084/2008/en

[60] *Hatim v. Obama*, Memorandum opinion, US District Court for DC, 15 December 2009.

[61] *Hatim v. Obama*, Brief for respondents-appellants, In the US Court of Appeals for the DC Circuit, 12 April 2010.

[62] It is alleged that "Hatim was threatened and beaten by his Pakistani jailers, who withheld food and water from him; that his experience was a 'nightmare'; and that on one occasion while still in Pakistani custody, he endured a 'tough' interrogation by an American agent who shouted at him, yelled at him, and insulted him. He was very scared during this interrogation". From unredacted section of footnote 19, *Hatim v. Obama*, Brief for petitioner-appellee, US Court of Appeals for DC Circuit, 12 May 2010. The government's brief states that during his time in Pakistani custody, Hatim was "interrogated by a group of Pakistani and US intelligence officers". Brief for respondents-appellants, 12 April 2010, *op. cit.*

[63] *Ahmed v. Obama*, Memorandum opinion, US District Court for DC, 11 May 2009. Judge Kessler granted the habeas petition and ordered the government to release Alla Ali bin Ali Ahmed. He was released to Yemen on 25 September 2009.

[64] *Farhi Saeed bin Mohammed et al v. Barack H. Obama et al*, Memorandum opinion, US District Court for DC, 19 November 2009.

[65] On 7 December 2010, lawyers for the plaintiffs filed a petition in the US Supreme Court asking it to take the case. *Mohamed et al v. USA, Jeppesen Dataplan*, Petition for a writ of certiorari, in the US Supreme Court, 7 December 2010.

[66] USA: Secrecy blocks accountability, again, 9 September 2010, http://www.amnesty.org/en/library/info/AMR51/081/2010/en. See also UK urged to establish the truth about rights violations, 16 November 2010, http://www.amnesty.org/en/node/19552

[67] *El Masri v. Tenet*, Order. US District Court for the Eastern District of Virginia, 12 May 2006.

[68] In cables sent from the US Embassy in Madrid since the current US administration came to office, published by WikiLeaks, moves by judges in Spain to invoke universal jurisdiction against former US officials in relation to allegations of human rights violations against detainees held at Guantánamo is described as an "irritant to bilateral relations" (see 'Scenesetter for June 23-25 Washington visit by Spain's Interior Minister', 9 June 2009, http://213.251.145.96/cable/2009/06/09MADRID614.html and 'Scenesetter for DHS Sec Napolitano's July 1 meetings in Madrid', 26 June 2009, http://213.251.145.96/cable/2009/06/09MADRID551.html). According to an earlier cable, in a meeting on 15 April 2009 with Spain's acting Minister of Foreign Affairs in Madrid, then US Senator Mel Martinez and the US Embassy's Chargé d'Afffaires "underscored that the prosecutions would not be

understood or accepted in the US and would have an enormous impact on the bilateral relationship" between Spain and the USA. The cable notes that the announcement on 16 April 2009 by the Attorney General of Spain that prosecutors would not support prosecution of the case filed against six former US officials (Former Attorney General Alberto Gonzales; David Addington, former Chief of Staff to Vice President Cheney; former Pentagon General Counsel William Haynes; former Under Secretary of Defense for policy, Douglas Feith; former Assistant Attorney General Jay Bybee, and former deputy assistant Attorney General John Yoo) had followed "intensive outreach" by the US government (see 'Spain Attorney General recommends court not pursue GTMO criminal case vs. former USG officials, 17 April 2009, http://213.251.145.96/cable/2009/04/09MADRID392.html). Another cable reports that Spain's Chief Prosecutor had noted that "Spain would not be able to claim jurisdiction in the case if the USG [US Government] opened its own investigation, which he much preferred as the best way forward and described as 'the only way out' for the USG" (see 'Spain: Prosecutor weighs GTMO criminal case vs. former USG officials, 1 April 2009, http://213.251.145.96/cable/2009/04/09MADRID347.html). The 17 April cable adds that "We intend to further explore this option with him informally (asking about format, timing, how much information he would need, etc.) while making it clear that the USG has not made a decision to follow this course of action" (see http://213.251.145.96/cable/2009/04/09MADRID392.html). See also Supplemental Filing to 26 April 2010 Joint Expert Opinion, 11 December 2010, Center for Constitutional Rights and European Center for Constitutional and Human Rights, http://www.ccrjustice.org/files/Spain%20Supplemental%20Final_English%20-%20EXHIBITS.pdf

[69] Al-Masri case – Chancellery aware of USG concerns. 6 February 2007, http://213.251.145.96/cable/2007/02/07BERLIN242.html

[70] *El-Masri v. USA*, US Court of Appeals for the Fourth Circuit, 2 March 2007.

[71] Maher Arar was released from detention in Syria and returned to Canada on 5/6 October 2003. A declassified US diplomatic cable from the US Embassy in Damascus to the US Secretary of State in Washington, DC, dated 9 October 2003 and released by the US authorities under the Freedom of Information Act in 2009, states that the Maher Arar case was discussed at a meeting on 8 October 2003 between officials from the US embassy and the Syrian Ministry of Foreign Affairs in Damascus. "Poloff [policy officer] asked [redacted] the reasons for Arar's October 5, 2003 release. [Redacted] responded that the SARG [Syrian government] had completed its investigation of Arar and found 'nothing there'. [Redacted] asked, not rhetorically, if Poloff thought the SARG's handling of the case would improve Syria's human rights reputation." (According to the cable, the US embassy had requested the meeting with the Syrian authorities "to solicit SARG's input on the 2003 Human Rights Report", the annual assessment of the human rights records of other countries issued by the US Department of State). For cable, see 'Syria: Human rights reform not possible in current environment' http://www.state.gov/documents/organization/133224.pdf

[72] *Arar v. Ashcroft et al.* Memorandum and order, US District Court for the Eastern District of New York, 16 February 2006.

[73] *Arar v. Ashcroft*, *En banc* rehearing, US Court of Appeals for the Second Circuit, 2 November 2009.

[74] *Ibid.* Circuit Judge Pooler, joined by Judges Calabresi, Sack and Parker, dissenting.

[75] *Ibid.* Circuit Judge Calabresi, joined by Judges Pooler, Sack and Parker, dissenting.

[76] *Ibid.*, Circuit Judge Barrington D. Parker, joined by Judges Calbresi, Pooler and Sack, dissenting.

[77] The failure to ensure accountability and redress in Maher Arar's case in the USA stands in stark contrast to what has transpired in Canada. In January 2004, the Canadian government announced the establishment of a public Commission of Inquiry to examine the role played by Canadian officials in his case. The Commission, headed by a Canadian judge, issued its report in September 2006, identifying

numerous ways that Canadian negligence and wrongdoing had contributed to violations of Maher Arar's rights. Four years later, the Canadian government has failed to implement many of the proposed institutional and policy changes recommended by the Commission. However, four months after the Commission issued its report the Canadian government issued an official apology to Maher Arar and his family and provided him with CDN$10.5 million in compensation.

[78] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan and Iraq, US Department of Justice, Office of Inspector General, October 2009 (revised) (hereinafter FBI Inspector General Report). As a transliteration, both Mohammedou Salahi and Mohamedou Slahi have been used for this detainee in court and other documents in English.

[79] *Salahi v. Obama*. Brief for appellee, In the US Court of Appeals for the DC Circuit, 9 June 2010. The US government has never publicly admitted that it rendered Mohamedou Ould Slahi to Jordan.

[80] *Ibid.*, also see USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi, 20 September 2006, http://www.amnesty.org/en/library/info/AMR51/149/2006/en.

[81] *Salahi v. Obama*, Memorandum Order, US District Court for DC, 9 April 2010.

[82] See Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate (hereinafter SASC Report), 20 November 2008, pages 135-141. See also FBI Inspector General Report, *op. cit*.

[83] SASC Report, *op. cit.*, page 138. The techniques in the special interrogation plan were apparently already in use against Slahi at least a month before Secretary Rumsfeld's written approval of them.

[84] SASC Report, *op. cit.*, page 137.

[85] *Salahi v. Obama*, Brief for appellee, In the US Court of Appeals for DC Circuit, June 2010.

[86] See, e.g., USA: Doctrine of pervasive 'war' continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, http://www.amnesty.org/en/library/info/AMR51/085/2010/en

[87] *Salahi v. Obama*, Reply brief for respondents-appellants, In the US Court of Appeals for DC Circuit, June 2010.

[88] See USA: Rendition – torture – trial? *Op. cit*.

[89] *Salahi v Obama*, Corrected brief for appellants. In the US Court of Appeals for DC Circuit, May 2010.

[90] UN Convention against Torture, 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.

[91] *Salahi v. Obama*, US Court of Appeals for the DC Circuit, 5 November 2010. At the time of writing a "status conference" was scheduled to occur on 8 December 2010 in front of Judge Emmet Sullivan.

[92] Moreover, the examples given in this paper are not an exhaustive account of judicial comments on allegations of torture or other ill-treatment alleged by Guantánamo detainees. In a ruling issued in another Guantánamo case in April 2010, for example, US District Court Judge Henry Kennedy noted allegations of torture and other ill-treatment made by Yemeni national Yasein Mohammad Esmail who has been held in Guantánamo without charge or trial since May 2002. While considering that some of his later claims of abuse were "exaggerated", Judge Kennedy said that he was "crediting evidence that Esmail was mistreated" in US custody in Afghanistan. Judge Kennedy noted that lawyers for Yasein Esmail had "submitted documents from a variety of sources that corroborate the general practice of torture at the US detention facilities at Bagram and Kandahar" and that "Esmail's allegations and this

additional evidence are sufficient for the Court to credit the proposition that at some point during his time in US custody, Esmail was mistreated". *Abdah et al v. Obama et al.*, Memorandum opinion, US District Court for DC, 8 April 2010.

[93] *Zuhair v. Bush*, Petition for writ of habeas corpus and complaint for declaratory and injunctive relief, 19 May 2008; Traverse in support of Ahmed Zuhair's petition for writ of habeas corpus, 31 December 2008; Declaration of Ahmed Zaid Salem Zuhair, filed 22 May 2009. US District Court for DC.

[94] *Zuhair v. Bush*, Declaration of Sa'd Iqbal Madani, filed 31 December 2008. US District Court for DC. Records indicate that he was subjected to the frequent flyer program from 22 December 2003 to 8 May 2004. See USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en Appendix 2: Detainees subjected to 'frequent flyer program'.

[95] *Carafas v. Lavallee*, 391 U.S. 234 (1968).

[96] *In re: Petitioners seeking habeas corpus relief in relation to prior detentions at Guantánamo Bay*. Memorandum opinion, 1 April 2010.

[97] According to his lawyers, he was born in July 1987. The Pentagon has previously given his year of birth as 1986. Judge Leon's ruling indicates that Mohammed el Gharani left Saudi Arabia, where he was brought up, sometime "in or around 2001" when he was 14.

[98] FBI Inspector General report, *op. cit.*

[99] *Al Ginco v. Obama*, Memorandum order, US District Court for DC, 22 June 2009.

[100] See USA: Judge orders Guantánamo detainee released after seven and a half years in detention without charge, 24 June 2009, http://www.amnesty.org/en/library/info/AMR51/080/2009/en

[101] *Al Janko v. Gates et al*, Complaint for damages; jury trial demanded, US District Court for DC, 5 October 2010.

[102] US District Court Judge Gladys Kessler, for example, said nearly two years ago, "The detainees at Guantánamo Bay have waited many long years (some have waited more than seven years) to have their cases heard by a judge so that the legality of their detention could be adjudicated in a court of law. During that time they, like all prisoners, have remained at the mercy of their captors. From all accounts -- those presented in classified information the Court has had access to, in affidavits of counsel, and in reports from journalists and human rights groups -- their living conditions at Guantánamo Bay have been harsh. There have been several episodes of widespread protests by the detainees, and many of them have engaged in hunger strikes of both short-term and very long term (5 years and more) duration. Many detainees have complained of brutal treatment, lack of medical care, and long placements in solitary confinement. To this Court's knowledge, none of these allegations, or the Government's denials, have been fully tested and subjected to the rigors of cross-examination in open court. They may never be." *Al-Adahi v. Obama*, Memorandum opinion, 10 February 2009. See generally, USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after Boumediene, 9 April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en

[103] Decision points, *op. cit.*, pages 168-169.

[104] Detainee tortured, says US official. Bob Woodward, Washington Post, 14 January 2009. See also USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en. USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 19 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en

[105] *Al-Qahtani v. Bush*, Petition for writ of habeas corpus, In the US District Court for DC, 5 October 2005. See also 'A case to answer: The torture of Mohamed al-Qahtani', in USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, 21 June 2006, http://www.amnesty.org/en/library/info/AMR51/093/2006/en

[106] See, for example, in addition to the relevant provisions of the UN Convention against Torture and the ICCPR, as well as the UN Basic Principles on the Right to a Remedy, the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ("The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment include the following: (a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families; (b) Identification of measures needed to prevent recurrence; (c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation."

[107] Military commission, *USA v. Al Darbi*, P-012, Defense response to motion for appropriate relief (120-day continuance), 30 January 2009.

[108] In re Guantánamo Bay detainee litigation. *Al Darbi v. Obama*, Petitioner al Darbi's opposition to respondents' motion to dismiss habeas petition without prejudice or, alternatively, to hold petition in abeyance pending completion of military commission proceedings. In the US District Court for DC, 18 February 2009.

[109] *Al Darbi v. Obama*. Memorandum opinion and order, US District Court for DC, 22 December 2009.

[110] "[F]rom December 2002, interrogators in Afghanistan were removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation." AR 15-6 investigation of intelligence activities at Abu Ghraib, 2004, page 29. Amnesty International believes that detainees in US custody in Afghanistan were being subjected to torture or other ill-treatment before December 2002 (as the comment about sleep deprivation made in the 2 October 2002 meeting referred in the text above indicates).

[111] FBI Inspector General report, *op. cit.* In his 2009 declaration, Al Darbi states that at Bagram, he was threatened by "US agents" with being sent to "Israeli, Egyptian, or Afghan jails for torture and rape".

[112] Counter resistance strategy meeting minutes, 2 October 2002. Quotes are paraphrases.

[113] In his July 2009 declaration, Ahmed al Darbi states: "When I was in the communal holding pen [in Bagram], an Afghan prisoner by the name of Dilawar was shackled in a hanging position in the cage adjacent to my pen. I remember that this was the same cage where I had been suspended. I recall that Dilawar had been hanging hooded for about two days and was screaming and moaning… Then the next shift of guards came on. They ordered Dilawar to stop screaming. They then brought a shorter chain and used it to suspend him wholly off the floor by his wrists. Dilawar moved his body only slightly and that is when the guards began beating him. At first two guards were beating Dilawar, kneeing him in the legs and punching him in the chest as he was suspended in the cage. They then moved him to the walkway area, outside the cage, and several guards beat him. By this point, Dilawar had stopped moving or crying. I witnessed the entire event. Dilawar was then moved somewhere out of my sight. Days later, I heard Dilawar had died. This made me fearful that I would meet the same fate".

[114] *US v. Corsetti*, Stipulation of Fact, In a general court-martial of the United States, US Army Trial Judiciary, Third Judicial Circuit, 30 May 2006.

[115] A: "We did an interrogation of a 'ghost detainee' once"… Q: Who was Omar al-Faruq? A: He was the ghost detainee I referenced above". Sworn statement of Selena Marie Salcedo, 525th Military Intelligence Brigade, 15 September 2005. Omar al-Faruq is reported to have been taken into detention by Indonesian authorities in Indonesia in June 2002, handed over to the USA and subjected to CIA rendition to, and secret CIA custody in, Bagram air base. See, Questioning terror suspects in a dark and surreal world. New York Times, 9 March 2003, quoting a "Western intelligence official" as describing the treatment in Bagram of Omar al-Faruq as "not quite torture, but about as close as you can get". The official reported that over a three-month period, al-Faruq was "fed very little, while being subjected to

sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees [38 degrees centigrade] to 10 degrees [minus 12 degrees centigrade]". Classified documents filed with the military judge overseeing Private Corsetti's court martial relate "to the circumstances surrounding [Omar] al Faruq's escape from United States custody". *US v. Corsetti*. Essential findings of fact, conclusions of law and ruling defense motion to abate, 11 May 2006. Omar al Faruq's alleged escape from Bagram was reported to have taken place in July 2005. In the Corsetti case, the government agreed that Omar al Faruq had been detained at Bagram "until 20 September 2002" and "never returned" to the detention facility "at any time pertinent to this case" US v. Corsetti, Stipulation of Fact, 30 May 2006, *op. cit.*

[116] *Sulayman v. Obama*, Memorandum opinion, US District Court for DC, 20 July 2010.

[117] Sabry al-Qurashi has alleged that in US custody in Kandahar he was, among other things, threatened with dogs, stripped naked and left out in the cold, and had a gun put to his head while being threatened that he would be shot if he did not "confess to being an important part of al-Qaeda". He further alleged that in Guantánamo, he was subjected to extremes of cold (via the use of water and air conditioning) while held in isolation.

[118] *Al-Qurashi v. Obama*, Memorandum opinion and order, US District Court for DC, 3 August 2010.

[119] *Farhi Saeed bin Mohammed v. Barack Obama*, Respondents' brief in response to the Court's order of September 4, 2009, In the US District Court for DC, 28 September 2009.

[120] The prosecution of Ahmed Ghailani was being conducted by prosecutors in the Office of the US Attorney for the Southern District of New York. The current US Attorney for the SDNY is Preet Bharara.

[121] UN Guidelines on the Role of Prosecutors, article 16*, op. cit.*

[122] See also Principle 7 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by General Assembly resolution 43/173 of 9 December 1988 ("Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers").

[123] The office in the Department of Justice tasked with representing the government's position in the Guantánamo habeas corpus litigation is the Civil Division. The current head of the Civil Division is Assistant Attorney General Tony West, nominated to the post by President Obama on 22 January 2009, and confirmed by the US Senate on 20 April 2009.

[124] 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; USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 16 April 2009, http://www.amnesty.org/en/library/info/AMR51/055/2009/en

[125] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007, page 6. This leaked report is available at http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

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

[127] See 'A little knowledge is a dangerous thing', In appendix 1 of USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, http://www.amnesty.org/en/library/info/AMR51/050/2009/en

[128] Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10015, held at Guantánamo on 14 March 2007, as declassified on 12 June 2009.

[129] 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").

[130] UNCAT articles 6 and 7.

[131] See Amnesty International, Convictions in Abu Omar rendition case a step towards accountability, 5 November 2009, http://tinyurl.com/yaublud. Also, Amnesty International, Italy prevents trial of intelligence agents over Abu Omar rendition, 16 December 2010, http://tinyurl.com/2vgtoto

[132] *Abdah et al. v. Obama et al*, US District Court for the District of Columbia, 24 February 2010.

[133] The UAE has been implicated in the CIA's secret detention program elsewhere. In October 2002, Abdelrahim Hussein Abdul Nashiri was arrested in Dubai. He was held and interrogated for a number of weeks by Dubai authorities before being handed over to US custody on 15 November 2002 and taken to a secret CIA facility at an unconfirmed location. After nearly four years in secret CIA custody, during which time he was tortured, 'Abd al-Nashiri was transferred to Guantánamo, where he remains today.

[134] Letter to Melissa Goodman, Staff Attorney, National Security Project, American Civil Liberties Union, from Delores Nelson, Information and Privacy Coordinator, Central Intelligence Agency, 13 May 2009.

[135] *ACLU et al v. US Department of Defense et al*, Declaration of Wendy M. Hilton, Information Review Officer, Central Intelligence Agency, In the US District Court for the Southern District of New York, 29 January 2010, and Supplemental Declaration of Wendy M. Hilton, 8 April 2010.

[136] *Ibid.*

[137] *ACLU v. Department of Defense et al.* Memorandum and order. US District Court, Southern District of New York, 22 October 2010.

[138] Human Rights Council, Resolution 9/11 Right to the Truth (18 September 2008).

[139] UN General Assembly, 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, article 22(b) ("UN Basic Principles on the Right to a Remedy").

[140] Under a new policy issued by Attorney General Holder in September 2009, "if the Attorney General concludes that it would be proper to defend invocation of the [state secrets] privilege in a case, and that invocation of the privilege would preclude adjudication of particular claims, but that the case raises credible allegations of government wrongdoing, the Department [of Justice] will refer those allegations to the Inspector General of the appropriate department or agency for further investigation, and will provide prompt notice of the referral to the head of the appropriate department or agency". Memorandum for Heads of Executive Departments and Agencies. Policies and procedures governing invocation of the state secrets privilege, 23 September 2009, §4.C, http://www.justice.gov/opa/documents/state-secret-privileges.pdf. Amnesty International knows of no such referrals having been made in cases of Khaled el-Masri or the Jeppesen lawsuit (see above) in which there is evidence of the USA having committed crimes under international law.

[141] *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

[142] *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 12 July 2010.

[143] *USA v. Ghailani*. Affidavit of Ahmed Khalfan Ghailani, New York, 27 April 2010.

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[144] See *USA v. Ghailani*, Memorandum of law in opposition to defendant Ahmed Khalfan Ghailani's motion to dismiss the indictment due to the denial of his constitutional right to a speedy trial, In the US District Court for the Southern District of New York, December 2009.

[145] *Ibid*.

[146] *USA v. Ghailani*, Government's memorandum of law in response to defendant Ahmed Khalfan Ghailani's motion to dismiss the indictment on the grounds of outrageous government conduct, In the US District Court for the Southern District of New York, 23 April 2010.

[147] President Barack Obama, State of the Union address, 25 January 2011, http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address

[148] In his memoirs, former President George W. Bush asserts that "I had asked the most senior legal officers in the US government to review the interrogation methods, and they had assured me they did not constitute torture". Decision Points, *op. cit*. page 171. See also Jack Goldsmith, The Terror Presidency, *op. cit*., page 146 ("The administration's aim was to go right to the edge of what the [US] torture law prohibited, to exploit every conceivable loophole…").

[149] See, for example, UN Human Rights Committee General Comment 31 (2004), on the nature of the legal obligations imposed on States Parties to the International Covenant on Civil and Political Rights ("As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6)… Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.") The Human Rights Committee has also stressed that everyone who violates article 7 of the ICCPR "whether by encouraging, ordering, tolerating or perpetrating prohibited acts" must be held responsible: General Comment 20 (1992), para 13.

[150] US human rights commitments and pledges, Bureau of International Organization Affairs, US Department of State, 27 April 2009, http://www.state.gov/documents/organization/121976.pdf

[151] Response of the United States of America to Recommendations of the United Nations Human Rights Council, Harold Hongju Koh, Legal Advisor U.S. Department of State, Geneva, Switzerland, 9 November 2010, http://www.state.gov/s/l/releases/remarks/150677.htm

[152] See USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes, 10 November 2010, http://www.amnesty.org/en/library/info/AMR51/104/2010/en

[153] Sri Lanka war crimes accountability, the Tamil perspective. Cable dated, 15 January 2010, http://213.251.145.96/cable/2010/01/10COLOMBO32.html

[154] See Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention, 15 November 2010, http://www.amnesty.org/en/library/info/EUR01/023/2010/en

[155] Remarks before the high-level session of the Human Rights Council, Esther Brimmer, Assistant Secretary, Bureau of International Organization Affairs, US Department of State, 14 September 2009.

[156] Interactive dialogue on the US Universal Periodic Review: Opening statement by the US delegation. Esther Brimmer, Assistant Secretary, Bureau of International Organization Affairs, US Department of State, 5 November 2010, http://www.state.gov/p/io/rm/2010/150485.htm

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