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USA: Secrecy blocks accountability, again

Federal court dismisses 'rendition' lawsuit; points to avenues for non-judicial remedy

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[T]hat the judicial branch may have deferred to the executive branch's claim of privilege in the interest of national security does not preclude the government from honouring the fundamental principles of justice
US Court of Appeals for the Ninth Circuit, 8 September 2010

It is a fundamental principle of international law that any person whose human rights have been violated shall have access to an effective remedy. It is also a fundamental principle that those responsible for crimes under international law be brought to justice.

A federal court ruling on 8 September 2010 upholding the US administration's invocation of the "state secrets privilege" and agreeing to dismiss a lawsuit brought by five men 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 USA's "rendition" program operated under the auspices of the Central Intelligence Agency (CIA), may end their pursuit of judicial remedy in the USA. [1]

The six judges in the majority pointed to the possibility that "non-judicial relief" might be open to the plaintiffs, and that action to this end could be taken by the executive or Congress. Whether or not the court was wrong to shunt the matter to other branches of government, as the five dissenting judges suggested, Amnesty International once again urges the USA to meet its international obligation to ensure remedy and full accountability for the human rights violations, including the crimes under international law of torture and enforced disappearance, committed as part of the CIA's rendition, detention and interrogation operations.

The US government has failed even to acknowledge that these crimes were committed in the CIA program, let alone to bring those responsible to justice and provide remedy to those subjected to these human rights violations. Yet only last month, the US administration told the United Nations High Commissioner for Human Rights that the USA "takes vigilant action… to hold those who commit acts of official cruelty accountable for their wrongful acts". In this August 2010 report filed as part of the forthcoming scrutiny of the USA's human rights record under the UN Universal Periodic Review (UPR) process, the US administration concluded that "delivering on human rights has never been easy, but it is work we will continue to undertake with determination, for human rights will always undergird our national identity and define our national aspirations".[2]

Today the USA is widely seen as having systematically violated human rights in the name of national security after the attacks of 11 September 2001 and to have done so undergirded by measures to facilitate impunity. Despite the fact that under President Barack Obama it has acted to end some, although not all, of the unlawful policies developed and carried out during the previous administration, it has utterly failed to address the issue of accountability and remedy in any meaningful way.

It should pursue with determination its obligation to uphold "fundamental principles of justice" and to end the accountability and remedy gap.

THE *MOHAMED V. JEPPESEN* LAWSUIT AND THE COURT OF APPEALS RULING

The lawsuit in question was filed in US District Court in 2007 by UK resident Binyam Mohamed, Italian national Abou Elkassim Britel, Egyptian national Ahmed Agiza, Yemeni national Muhammad Faraj Ahmed Bashmilah, and Bisher al-Rawi an Iraqi national and UK permanent resident. Between them they allege that they were "rendered" to secret detention in Morocco, Egypt and Afghanistan and subjected to various forms of torture or other ill-treatment.

The lawsuit alleges that Jeppesen Dataplan, Inc. (Jeppesen), a subsidiary of the Boeing Company, had provided "direct and substantial services" to the CIA for the rendition program. In so doing, the lawsuit continued, "Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine".

The administration of President George W. Bush moved to intervene in the case, to assert "state secrets privilege" on behalf of itself and Jeppesen, and to have the case dismissed on that basis. Under US law, the government may assert state secrets privilege when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged". Under US law, the invocation of the state secrets privilege has been found to be a categorical bar to a lawsuit in cases where the very subject matter of the lawsuit was considered a state secret. The Bush administration asserted that the subject matter of this lawsuit was. In support of this assertion, the then Director of the CIA, General Michael Hayden, filed declarations in the District Court asserting that proceeding with the case would cause "exponentially grave damage" to national security by revealing CIA methods and sources and "extremely grave damage" to the USA's foreign relations and activities by revealing which governments the CIA had cooperated with.

In February 2008, the District Court ruled in favour of the government and dismissed the lawsuit. The decision was appealed to the US Court of Appeals for the Ninth Circuit. At a hearing in February 2009, the Justice Department revealed that, under President Obama, the administration would be adopting the same position on the case as its predecessor. On 28 April 2009, the three-judge panel issued its unanimous opinion, rejecting this position. The subject matter of the lawsuit "is not a state secret", they wrote, "and the case should not have been dismissed at the outset". It took issue with the administration's position, saying that if accepted it would "effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law." It added that "separation-of-powers concerns take on an especially important role in the context of secret Executive conduct".

The Obama administration appealed for a rehearing in front of the full Ninth Circuit court. In its November 2009 brief, it urged the judges to "examine the declarations of the Director of the CIA, with due regard to the deference owed to the national security judgments of the Executive Branch". State secrets "are so central to this case", the Justice Department argued, "that no further litigation can proceed without an undue risk of disclosing information relating to national security". For the lawsuit to succeed, the brief continued, it would require "establishing the existence of the very thing – a secret intelligence relationship between Jeppesen and the CIA – that can neither be confirmed nor denied". Similarly, establishing liability on the basis of the detainees' claims "would also require plaintiffs to prove that agents of the United States and certain foreign governments arrested and detained them at various locations abroad and subjected them to specific interrogation techniques". Such information, the administration asserted, could not be disclosed "without jeopardizing the national security of the United States".

By six votes to five, the Ninth Circuit voted in favour of the government and affirmed the original District Court ruling. The majority stated that the case has required the court to address "the difficult balance the state secrets doctrine strikes between fundamental principles of our liberty, including justice, transparency, accountability and national security". This was "one of those rare cases", it said, where the

demands of national security meant that the lawsuit "must be dismissed" at the outset. The majority explained that:

> "We have thoroughly and critically reviewed the government's public and classified declarations and are convinced that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets... The government's classified disclosures to the court are persuasive that compelled or inadvertent disclosure of such information in the course of litigation would seriously harm legitimate national security interests... We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect."

They further concluded that there was "no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets". Despite the fact that some information about the CIA's rendition program was in the public realm, "Jeppesen's alleged role and its attendant liability cannot be isolated from aspects that are secret and protected... Whether or not Jeppesen provided logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations [emphasis in original]".

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 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, including that Jeppesen knew what was going on when it arranged flights described by one of its officials as 'torture flights'."

The dissent argued that the matter should have been sent back to the District Court for the judge to decide whether any part of the lawsuit should go forward. Rather than throwing out the lawsuit wholesale at the outset, it would be "far better" for the government to have to make its claims of state secrets "with regard to specific items of evidence or groups of such items as their use is sought in the lawsuit".

The majority said that the ruling was "not intended to foreclose – or to prejudge – possible *non-judicial* relief, should it be warranted for any of the plaintiffs". It recognized that dismissal of the lawsuit deprived the plaintiffs of "the opportunity to prove their alleged mistreatment and obtain damages", and eliminated "one important check on allege abuse by government officials and putative contractors".

The majority pointed to a number of possible non-judicial avenues for remedy. As the branch of government that has access to the information that is being kept secret, it said, the executive "can determine whether plaintiffs' claims have merit and whether misjudgement or mistakes were made that violated plaintiffs' human rights. Should that be the case, the government may be able to find ways to remedy such alleged harms while still maintaining the secrecy national security demands". Congress could "investigate alleged wrongdoing and restrain excesses by the executive branch", the majority continued, and it could also enact compensation schemes or legislate to authorize "appropriate causes of action and procedures to address claims like those presented here".

The five dissenting judges took issue with the majority's suggestions, arguing that "not only are these remedies insufficient, but their suggestion understates the severity of the consequences to Plaintiffs from the denial of judicial relief"; "Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive Plaintiffs of a fair assessment of their claims by a neutral arbiter." They added:

> "Arbitrary imprisonment and torture under any circumstance is a gross and notorious act of despotism. But confinement and abuse of the person, by secretly hurrying him to prison, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government" [internal punctuation omitted].

The majority had noted that the administration adopted new policies on the state secrets privilege which came into effect on 1 October 2009.[3] Under these policies, the US Department of Justice will not defend the state secrets doctrine in certain circumstances, including where it is being invoked in order to "conceal violations of the law" or to "prevent embarrassment to a person, organization, or agency of the United States government". The Ninth Circuit majority concluded that the government was "not invoking the privilege to avoid embarrassment or to escape scrutiny of its recent controversial transfer and interrogation policies".

Here the majority was straying into understatement. Those polices were not just controversial, but unlawful. In the CIA program, detainees were subjected to the crimes under international law of enforced disappearance and torture. This much is known from information that the government itself has disclosed, even though it continues to resist further disclosures of information it has classified Top Secret.

Whether or not the state secrets privilege has been invoked *in order to* conceal violations of the law, that has been *the effect* of the invocation and the judiciary's upholding of it.

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), ratified by the USA in 1992. 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". 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.

The UN Human Rights Committee, established under the ICCPR to oversee its implementation, has affirmed that the right to an effective remedy can never be derogated from, even during times of national emergency. International law requires that remedies not only be available in law, but accessible and effective in practice. Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Other treaties dealing with specific human rights contain additional provisions regarding accountability and remedy. For instance, the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which the USA ratified in 1994, does not permit the granting to individuals of immunity from criminal responsibility for torture on the basis of official status, and also precludes justifications such as "exceptional circumstances" or superior orders. It also requires that each State Party "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible", a right the UN Committee against Torture has said applies equally to other forms of cruel, inhuman or degrading treatment or punishment.

Amnesty International reiterates that as well as facilitating remedy and accountability through an approach to litigation that respects international human rights, the US administration should ensure that an independent commission of inquiry is set up to investigate all aspects of the USA's detention and interrogation policies and practices since 11 September 2001. If and when the inquiry concludes that particular conduct may have amounted to crimes under national or international law not known to be already under investigation, the information gathered should be referred to the appropriate federal authorities with a view to possible prosecution of the individual or individuals concerned. The establishment and operation of the commission, however, must not be used to block or delay the prosecution of any individuals against whom there is already sufficient evidence of wrongdoing.

In this regard, every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution. Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who either knew or

consciously disregarded information that indicated that subordinates were committing violations, yet failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or participated in the acts, including by knowingly providing assistance. Prosecutions should not be limited to members of the US forces, but also should include private contractors and foreign agents where evidence of criminal wrongdoing by such individuals is revealed.

In August 2009 Attorney General Eric Holder ordered a "preliminary review" into some aspects of some interrogations of some detainees held in the CIA's secret detention program. However this review has been narrowly framed and has been set against a promise of immunity from prosecution for anyone who acted in good faith on 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 the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Rejecting impunity is crucial not only for dealing with past human rights violations, but also for preventing recurrences. The US administration must ensure that investigations and prosecutions in individual cases are initiated while simultaneously working to remove legal or practical or political obstacles to criminal responsibility. And access to remedy for the victims of human rights violations must no longer be blocked.

In its August 2010 report to the UN for the UPR process, the USA spoke of its "commitment to help build a world in which universal rights give strength and direction to the nations, partnerships, and institutions that can usher us towards a more perfect world, a world characterized by, as President Obama has said, 'a just peace based on the inherent rights and dignity of every individual'."

The example being set by the USA's failure to meet its obligations on remedy and accountability for human rights violations in the counter-terrorism context flies in the face of such assertions.

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See also:

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

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

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

[1] Although the decision may be appealed to the US Supreme Court, it has to be considered quite possible that the Court would not take the case. In 2007, the Court of Appeals for the Fourth Circuit dismissed a lawsuit brought by German national Khaled el-Masri against employees of the CIA and named private companies in relation to his rendition from Macedonia to Afghanistan followed by arbitrary detention and ill-treatment in US custody. The US Supreme Court declined to intervene and so El-Masri was left without access to an effective remedy, in violation of international law.

[2] Report of the United States of America submitted to the UN High Commissioner for Human Rights in conjunction with the Universal Periodic Review. August 2010.

[3] See Policies and procedures governing invocation of the state secrets privilege. Memorandum for Heads of Executive Departments and Agencies; from US Attorney General Eric Holder, 23 September 2009, available at http://www.justice.gov/opa/documents/state-secret-privileges.pdf
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