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USA: Blocked at every turn. The absence of effective remedy for counter-terrorism abuses

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Since the attacks of 11 September 2001, which Amnesty International condemned as a crime against humanity, the organization has been calling on the US government to ensure that the USA's counter-terrorism laws, policies and practices, including bringing to justice in fair trials those accused of involvement in those and other attacks, comply with international law and standards.

During the years of the administration of President George W. Bush, the USA manifestly failed in this regard, including by bypassing its international human rights obligations as it pursued a counter-terrorism strategy framed under a global "war" paradigm. Systematic human rights violations committed against detainees were the result, including the crimes under international law of torture and enforced disappearance. The USA pursued indefinite detention without charge of hundreds of detainees it labelled as "enemy combatants", and the unfair trial by military commission of those few "enemy combatants" it selected for trial.

The US administration under President Barack Obama has acted to end some, although not all, of the unlawful policies that were developed and carried out during the Bush administration. Amnesty International will continue to campaign for more change, in order that the USA comes into line with its international obligations in the counter-terrorism context. The USA has a legal obligation not only to prevent human rights violations in the first place, but to carry out full investigations into their prior occurrence, and to ensure full accountability for them and access to effective remedy for victims of such violations. As we approach the first anniversary of the Obama administration, this has still not happened.

Indeed, more than 10 months after President Obama took office, the lack of remedy for human rights violations committed against detainees held in US custody in the name of "countering terrorism" remains the rule rather than the exception. A combination of executive secrecy, judicial deference to the invocation of national security or war powers by the political branches, domestic party politics, and the USA's non-compliance with its international human rights obligations, continues to contribute to the absence of accountability.

A number of lawsuits brought by individuals held in US custody in the name of counter-terrorism are at various stages in the US federal courts. After outlining the right to remedy under international law, this paper offers a brief overview of some of these cases, to illustrate the range of claims raised and the obstacles faced.

THE RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

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.[1] 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.[2] 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.[3]

RASUL V. MYERS – 'QUALIFIED IMMUNITY' FOR HUMAN RIGHTS VIOLATORS?

In October 2004 four UK nationals, Shafiq Rasul, Asif Iqbal, Rhuhel Ahmed and Jamal al-Harith, who were held without charge or trial in the US Naval Base in Guantánamo Bay in Cuba for two years from 2002 to March 2004 after being transferred there from Afghanistan, filed a lawsuit in the US District Court for the District of Columbia (DC) seeking damages for their unlawful treatment. Their complaint asserted that they had been subjected to prolonged arbitrary detention, as well as torture and other cruel, inhuman or degrading treatment, in violation of the Geneva Conventions, customary international law, and the US Constitution, and had been discriminated against on the basis of their religious beliefs, in violation of US federal law.[4] Their mistreatment, the claim continued, "was not simply the product of isolated or rogue actions by individual military personnel", but the result of deliberate actions by US officials. Those named as defendants were the then Secretary of Defense Donald Rumsfeld; former Chairman of the Joint Chiefs of Staff General Richard Myers; former commander of the Guantánamo detentions, General Geoffrey Miller; and a number of other military officials.

Five years later, the *Rasul* lawsuit has come to nothing for the former detainees, who are now seeking the US Supreme Court's intervention. The Obama administration is urging the Supreme Court not to take the case, an outcome which would leave the detainees without remedy and further facilitate a lack of accountability.

In February 2006, the District Court found that the Authorization for Use of Military Force (AUMF), a broadly worded resolution passed by US Congress in the immediate wake of the 9/11 attacks, had authorized the military to carry out the detentions, and that torture, though "reprehensible", was a "foreseeable consequence of the military's detention of suspected enemy combatants". Judge Ricardo Urbina said that there was no evidence to lead him to believe that the alleged torture and other ill-treatment "had any motive divorced from the policy of the United States to quash terrorism around the world". He ruled that the individual officials named as defendants in the lawsuit had been acting, "at least in part, to further the interests of their employer, the United States". Under US law, once individual government officials are deemed to have been acting within the scope of their employment, the US government is substituted as the defendant in their place. Judge Urbina ruled that such a "substitution" in the *Rasul* case had the effect of granting the individual defendants absolute immunity from civil liability in US courts for violations of international law. Judge Urbina then granted the government's motion to dismiss the lawsuit for lack of jurisdiction on the grounds that the claimants had not exhausted administrative remedies as required in the cases of lawsuits brought against the government under the Federal Tort Claims Act.

At the time of Judge Urbina's consideration of the case, the question of what constitutional protections the Guantánamo detainees were entitled to was pending before the federal courts. Because of the "unsettled nature" of their rights in US courts at that time, Judge Urbina ruled, the officials "cannot be said to have been plainly incompetent or to have knowingly violated the law", and therefore, he ruled, "are entitled to qualified immunity" under US law.

Judge Urbina deferred on the question of whether the detainees' rights under the USA's Religious Freedom Restoration Act (RFRA) had been violated during their detention in Guantánamo, including through the use of forcible shaving, the alleged flushing of the Koran down the toilet, and harassment while practicing their religion. On 8 May 2006 he ruled that such conduct by officials – "blatant and shocking acts" allegedly perpetrated against individual detainees on account of their religion – would fall squarely within the conduct prohibited by the RFRA. He ruled that the RFRA applied to US government actions at Guantánamo Bay, and that the officials were not entitled to qualified immunity on this claim.

This decision was appealed to the US Court of Appeals for the DC Circuit. On 11 January 2008, a three-judge panel upheld Judge Urbina's rulings on the claims for violations of international law and constitutional rights, concluding that "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States". Even if they did have constitutional rights, the panel wrote, this was not clearly established at the time of their detention and the officials were entitled to qualified immunity under US law. On the claim of religious discrimination, the Court of Appeals noted that the RFRA prohibits the government from "substantially burden[ing] a *person's* exercise of religion" (emphasis in original). The Court took the view that because the claimants were foreign nationals who were held outside US sovereign territory at the time of the alleged conduct that led to the RFRA claim, Supreme Court precedent meant that they did not fall within the definition of "person" under the RFRA. Their RFRA claim, it ruled, should therefore be dismissed.

Following the Supreme Court's *Boumediene v. Bush* ruling in June 2008 finding that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in US court (reversing the DC Circuit Court of Appeals on this question), the Supreme Court remanded the *Rasul* lawsuit to the Court of Appeals to consider the effect of the *Boumediene* decision on it. There was then a change in US administrations following the November 2008 presidential election.

On 12 March 2009, the new administration filed its brief in the DC Circuit Court of Appeals. It argued that the Court of Appeals had been right to rule that Guantánamo detainees lack due process rights under the US Constitution. It also asserted that it would be "unfair" to subject government employees to financial damages when the constitutional rights being asserted, "which are still not established today, were not clearly established at the time of the alleged acts in question here". Finally, it argued that even if the RFRA did apply to foreign nationals held at Guantánamo, the *Rasul* petitioners' RFRA claim should be dismissed because the government defendants "are entitled to qualified immunity". At the time of the detentions in question, 2002 to 2004, the new administration argued, "a reasonable official could have doubted, at a minimum, that RFRA granted rights to suspected enemy combatants captured on foreign soil and held at a military facility abroad during a time of war".

In April 2009, the Court of Appeals decided in the government's favour, ruling that the *Boumediene* decision did not change the outcome of its own January 2008 decision in the *Rasul* lawsuit. The claims raised by the former detainees were not based on rights that were "clearly established" at the time they were held and "the doctrine of qualified immunity shields government officials from civil liability" under such circumstances, it ruled.

In August 2009, lawyers for the four UK nationals petitioned the US Supreme Court to take the case, arguing that the Court was faced with fundamental questions about whether the detainees at Guantánamo had the right to be free from torture, free from abuse in the practice of their religion, and whether officials could escape accountability for the violation of these rights by claiming qualified immunity. The lawyers argued:

> "Equally important to the condemnation of government-inflicted torture wherever it occurs is the repudiation of the use of qualified immunity to insulate misconduct that [the government officials in question] knew was legally wrong and morally reprehensible on the pretext that they did not know it was also unconstitutional. At its core, qualified immunity must rest on a genuine good faith belief that the conduct being challenged was not wrongful. This case presents the Court with the opportunity to make clear that qualified immunity cannot be used as a stratagem to enable government officials to create a lawless enclave where they can knowingly engage in despicable practices with impunity".

In November 2009, the administration filed its response, urging the Supreme Court not to take the case, arguing that the post-*Boumediene* decision by the Court of Appeals was correct and should be allowed to stand. Under Supreme Court precedent, the Solicitor General's brief asserted, "government officials performing discretionary functions are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". It was "not clearly established at the time petitioners were detained at Guantánamo Bay that they had the constitutional rights they claim were violated", she wrote. The Supreme Court's decision as to whether to take the case was pending at the time of writing.

In his February 2006 ruling on the *Rasul* lawsuit, Judge Ricardo Urbina had noted that it was undisputed that the officials named in it had "initially acted" pursuant to a memorandum on interrogation techniques signed by Secretary of Defense Rumsfeld on 2 December 2002.[5] The US Senate Armed Services Committee has since concluded that Secretary Rumsfeld's December 2002 authorization "was a direct cause of abuse" at Guantánamo, and had also contributed to abuse of detainees in US custody in Afghanistan and Iraq. In the memo, Secretary Rumsfeld had authorized interrogation techniques such as stripping, hooding, prolonged isolation, stress positions, forced shaving, and exploitation of individual phobias including the fear of dogs, for use against detainees held at Guantánamo.

Secretary Rumsfeld had subsequently rescinded the December 2002 memo, but the *Rasul* lawsuit maintained that the ill-treatment had continued after that. Indeed, the Senate Armed Services Committee's 2008 report noted that despite the rescission, Secretary Rumsfeld's initial approval "continued to influence interrogation policies". In addition, in early 2009, the Convening Authority for the military commissions at Guantánamo revealed that she had dismissed charges against detainee Mohamed al Qahtani in 2008 because he had been tortured in military custody. She added that the interrogation techniques had been authorized. The techniques used against al Qahtani included those of the sort authorized by Secretary Rumsfeld.[6] Despite the official confirmation that Mohamed al Qahtani was tortured, no criminal investigation has been opened into the case, as far as Amnesty International is aware.[7]

The administration's November 2009 brief in the *Rasul* lawsuit asserts that "torture is illegal under federal law, and the United States government repudiates it". The fact is, however, that interrogation techniques and detention conditions that violated the international prohibition of torture and other cruel, inhuman and degrading treatment were authorized and used under the previous administration. The US government does not just have a moral duty to "repudiate it", but a clear legal obligation to investigate and bring to justice those responsible for it and to ensure that those who were subjected to torture and other human rights violations have access to effective remedy. The Obama administration has yet to act to meet its international obligations in this regard. Its stance against the *Rasul* lawsuit is part of its failure to comply with its international obligations.

KIYEMBA V. OBAMA – POWER OF COURTS TO PROVIDE REMEDY FOR UNLAWFUL DETENTION

As the Obama administration has moved slowly towards closing the detention facility at Guantánamo and its stated aim of resolving the cases of those still detained there, the question of remedy for unlawful detention remains a central one.[8] This is not least because the US authorities have continued to refuse to allow the release of any Guantánamo detainee who cannot be returned to his home country or a third

country, even where a court has specifically concluded that release into the USA is the only available remedy to bring an unlawful detention to an immediate end.

As a result of this stance, an issue now pending before the US Supreme Court is effectively a follow-on from its ruling in June 2008 in *Boumediene v. Bush*. In that decision, which came some six and a half years after detentions at Guantánamo began, the Court found that the detainees held there as "enemy combatants" had the constitutional right to a "prompt" hearing in federal court to challenge the lawfulness of their detention. While the requirement for promptness has far from been met, the question for the Supreme Court now is whether the federal District Courts have any real power to order an effective remedy in the event they find a detainee unlawfully held, which they have in fact found in a majority of cases in which decisions have been made.

After coming into office, the new administration pursued the appeal initiated by its predecessor against the October 2008 order by a District Court judge for the immediate release into the USA of 17 Uighur men held without charge at Guantánamo since 2002 who could not be returned to China because of the serious risk that they would face torture and execution there. Judge Ricardo Urbina had ruled that the detention of the Uighurs was unlawful as "the Constitution prohibits indefinite detention without just cause". Noting that the USA's "extensive diplomatic efforts" to find a third country solution had come to nothing, that the government was unable to point to any security risk posed by the Uighurs, and that there were individuals and organizations in the USA ready and willing to provide the Uighurs the support they would need after their release, Judge Urbina ordered that they be freed into the USA.

On 18 February 2009, with the Uighur detainees still detained, the US Court of Appeals overturned the lower court ruling. It noted that Judge Urbina had invoked the principle "where there is a right, there is a remedy". However, the Court of Appeals asserted that "we do not believe the maxim reflects federal statutory or constitutional law. Not every violation of a right yields a remedy, even when the right is constitutional". The Court of Appeals said that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien". In the case of the 17 Uighurs, it continued, "the Executive Branch has determined not to allow them to enter the United States".

Arbitrary detention is absolutely prohibited under international human rights law.[9] Detainee access to a court to challenge the lawfulness of detention and to be ordered released if that detention is deemed unlawful is a basic requirement of this law.[10] A court's power to obtain the immediate release of an unlawfully held individual must be real and effective and not merely formal, advisory, or declaratory.[11] In addition to these specific rights and obligations there is the general requirement, as noted above, that no-one may be denied effective remedy for violations of their human rights. The ruling of the Court of Appeals leaves US law fundamentally inconsistent, then, with a range of specific obligations the USA has assumed under international law.

Lawyers for the Uighur detainees appealed to the US Supreme Court to intervene. In a petition dated 3 April 2009, they argued that, if allowed to stand, the Court of Appeals' *Kiyemba* decision would "eviscerate" the *Boumediene* ruling. In *Kiyemba*, the Court of Appeals had stated that the government had "represented that it is continuing diplomatic attempts to find an appropriate country willing to admit [the Uighurs], and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more". The petition to the Supreme Court argued that:

> "The *Kiyemba* majority's taxidermy would hang *Boumediene* as a trophy in the law library, impressive but lifeless. For *Kiyemba*'s practical result is that while every Guantánamo prisoner enjoys the privilege of habeas corpus, none can obtain a judicial remedy… [W]ithout the fallback of judicial power to order release, even imprisonments that the Executive concedes have no legal justification will continue at the discretion of the Executive, while the habeas court will be reduced to powerless irrelevance…

> The question presented here is whether the Third Branch [the judiciary] may check the Second [the executive] at all. If habeas review may be shelved because one President may some day undo what his predecessor did, then the law is whatever the sitting President says it is, and the judiciary is the handmaiden of the political branches. Habeas and the separation of powers cannot wait for politics. Without the [Supreme] Court's intervention now..., all relief would hereafter be diplomatic, and located entirely and completely within the discretion of the jailer himself."

The petition to the Supreme Court pointed out that recent government briefs had indicated that the Justice Department aimed to extend its use of the *Kiyemba* ruling beyond the Uighur cases, to other Guantánamo detainees. At stake, the petition argued, is whether *Boumediene* will remain as a landmark ruling or end up as "a curiosity".[12]

The Obama administration urged the Supreme Court not to take the case. However, on 20 October 2009, the Court agreed to hear it, most likely in early 2010.

MOHAMED V. JEPPESEN – ADMINISTRATION SAYS 'NO CHOICE' BUT TO INVOKE SECRECY

The Obama administration continues to invoke the "state secrets privilege" to seek dismissal of a lawsuit brought in 2007 by five non-US nationals 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). The five are 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 alleged that they were "rendered" to secret detention in Morocco, Egypt and Afghanistan and subjected to various forms of torture or other ill-treatment.[13]

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 Bush administration 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 constitutional 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 a declaration in the District Court 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. The judge said that a review of the CIA Director's public and classified declaration raised concern that "any further proceedings in this case would elicit facts which might tend to confirm or refute as of yet undisclosed state secrets". He noted that at the core of the case against Jeppesen were "allegations" of covert US operations outside the USA against foreign nationals which he said was "clearly a subject matter which is a state secret". He dismissed the case.

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 the new 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 the administration's 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", adding that arbitrary detention and torture "under any circumstance" represent a "gross and notorious… act of despotism".

On 13 November 2009, the Obama administration appealed for a rehearing in front of the full Ninth Circuit court with a view to obtaining reversal of the panel's decision. 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's brief argues, "that no further litigation can proceed without an undue risk of disclosing information relating to national security". For the lawsuit to succeed, the brief continues, 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 asserts, could not be disclosed "without jeopardizing the national security of the United States".

The government brief asserted that the Justice Department had considered "all possible alternatives" to continued invocation of the state secrets privilege and added that the Department's revised policy on assertions of this privilege, announced in September 2009, did not apply retroactively. At the same time, the administration stated that it "recognizes the harsh consequences" of dismissal of the lawsuit for the plaintiffs, but maintained that "there is no other choice".

This expression of sympathy for the detainees rings hollow in the face of the US government's continuing failure to investigate the human rights violations – including the crimes under international law of torture and enforced disappearance – committed during what the Bush administration called the "war on terror". The stated purpose of the new administration's revised policy governing invocation of the state secrets privilege was "to strengthen public confidence" that the doctrine was being used only as absolutely necessary.[14] As occurred under President Bush, however, assertions by the Obama administration that it is not invoking secrecy to conceal violations of law or to prevent government embarrassment are likely to be met with cynicism, in the absence of evidence that the authorities are serious about ensuring accountability for these past human rights violations.

PADILLA V. YOO – ROLE OF LAWYERS WHEN LAW IS SUBORDINATED TO POLICY

Among the measures the USA took in the name of "countering terrorism" after the 9/11 attacks, were arbitrary detention, secret detention, enforced disappearance, unlawful detainee transfers, torture and other cruel, inhuman and degrading treatment, and unfair trials. It carried out such policies under broad notions of executive power and a "global war" paradigm. According to President Obama in a national security speech on 21 May 2009, under the Bush administration the US authorities had frequently "made decisions based on fear rather than foresight" and had "trimmed facts and evidence to fit ideological predispositions". Law was subordinated to policy. Legal opinion from Justice Department lawyers was used by the administration effectively to rubber stamp its policy preferences. This does not mean that government lawyers providing a green light to torture and other human rights violations cannot be held accountable, however.

In June 2009, a US District Court judge in California denied former Justice Department lawyer John Yoo's motion to dismiss a lawsuit against him brought by Jose Padilla, a US national who had been held in military detention without charge in South Carolina for three years and eight months from 2002. The lawsuit alleged that John Yoo, then a Deputy Assistant Attorney General, was involved in Padilla's designation as an "enemy combatant" in June 2002 and the use of abusive interrogation techniques and detention conditions against him – including denial of access to counsel and the courts, extreme and prolonged isolation, death threats, threats of transfer to torture, cruel use of shackles, stress positions, and deprivation of natural light. John Yoo was the signatory on a number of controversial legal opinions on interrogations, detentions and executive power emanating from the Justice Department's Office of Legal Counsel (OLC) after 9/11 and is believed to have co-authored a number of opinions signed by others.[15]

Denying Yoo's motion to dismiss the case, Judge Jeffrey White wrote that "this lawsuit poses the question addressed by our founding fathers about how to strike the proper balance of fighting a war *against* terror, at home and abroad, and fighting a war *using* tactics of terror".

In November, John Yoo filed an appeal in the US Court of Appeals for the Ninth Circuit against Judge White's decision to allow the lawsuit to go ahead. The brief argued that Judge White had erred by "implying a damages remedy against a government lawyer who allegedly provided legal advice to the President regarding the designation, detention, and treatment of enemy combatants." The appeal argued that "habeas corpus is the proper vehicle for citizens detained as enemy combatants to challenge their detention", an ironic position considering John Yoo's role in an administration that had sought for years to deny habeas corpus review to Jose Padilla and others. The appeal argued that holding John Yoo personally liable "would chill executive branch attorneys from offering candid legal advice to the President on issues of national security and foreign policy", and moreover John Yoo "is entitled to qualified immunity" as he was "not personally responsible for any of the alleged constitutional or statutory violations" against Padilla. "To the contrary", Yoo's appeal adds, the lawsuit against him "claims repeatedly that Yoo provided *ex post* legal justification for policy decisions that had already been made by other officials".

Under international law, arbitrary detention, torture and other cruel, inhuman or degrading treatment are never legal. No lawyer's opinion can render them lawful; no politician, legislator, judge, soldier, police officer, prison guard, or interrogator can override this prohibition. Violations of these human rights must result in investigation, accountability and remedy.

It appears that the Obama administration is to assert a role in John Yoo's appeal. In a motion filed on 13 November 2009, the administration said that Judge White's decision to allow the lawsuit to proceed "raises numerous legal questions of potential interest and concern to the United States" and the US Solicitor General was considering whether to authorize the Justice Department to file an *amicus curiae* (friend of the court) brief in the case. If she does so, the administration will file such a brief by 3 December 2009.

ARAR V. ASHCROFT – A JUDICIAL DECISION RISKING UNFETTERED EXECUTIVE POWER

On 2 November 2009, the Court of Appeals for the Second Circuit dismissed a lawsuit brought by Maher Arar, a dual Canadian/Syrian citizen who was arrested at New York airport in September 2002 while travelling on a Canadian passport en route home to Canada from vacation in Tunisia. After 12 days held incommunicado by the US authorities, he was sent, via Jordan, to Syria, where he was held for a year, including 10 months in a small underground cell. A Canadian judicial commission later concluded that he was subjected to torture during that time. The lawsuit claims that the US officials conspired to send him to Syria for the purpose of interrogation under torture, and provided Syria with information and questions for the interrogation.

The Second Circuit majority opinion took an approach deferential to the other branches of government and detrimental to the plaintiff. It stated that "a suit seeking a damages remedy against senior officials who implement an extraordinary rendition policy would enmesh the courts ineluctably in an assessment of the validity and rationale of that policy and its implementation in this particular case, matters that directly affect significant diplomatic and national security concerns". Absent "clear congressional authorization", the Second Circuit continued, "the judicial review of extraordinary rendition would offend the separation of powers and inhibit this country's foreign policy". This policy of rendition, it noted, "involves exchanges among the ministries and agencies of foreign countries on diplomatic, security, and intelligence issues".

The court 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".

Four of the 11 judges dissented. Judge Parker, joined by three of his colleagues, said he was writing in order to "underscore the miscarriage of justice that leaves Arar without a remedy in the courts." The dissent argued that the majority opinion "would immunize official conduct 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." While deference to the other branches of government has its place, the dissent continued, there was "an enormous difference between being deferential and being supine in the face of government misconduct." The majority ruling "risks a government that can interpret the law to suit its own ends, without scrutiny."

In contrast to the complete lack of remedy and accountability in the USA on this case, the Government of Canada established the above-mentioned commission of inquiry into the involvement of Canadian officials in Maher Arar's case, which produced its report in 2006. This was followed by an apology to Maher Arar from the Prime Minister of Canada in 2007 for his "terrible ordeal" and financial compensation for his and his family's suffering.

It is long overdue for the USA to account for the human rights violations committed as part of the USA's unlawful rendition program, including the crimes under international law of torture and enforced disappearance. [16]

ACLU V. DEPARTMENT OF DEFENSE – SECRECY BLOCKING ACCOUNTABILITY AND REMEDY

Other litigation that implicates remedy and accountability is that brought under the Freedom of Information Act (FOIA) by non-governmental organizations, particularly the American Civil Liberties Union (ACLU). This litigation, initiated in 2003, seeks disclosure of written and other material relating to detention and interrogation policies pursued by the US government in the context of counter-terrorism since 11 September 2001.

President Obama has committed his administration to ensuring transparency in government in the name of accountability.

Having earlier agreed to their release under FOIA litigation, in a policy U-turn in May 2009, the new administration moved to block publication of a number of photographs depicting abuse of detainees in US military custody in Afghanistan and Iraq. President Obama maintained that releasing the photos would "inflame anti-American opinion" and endanger US forces. In October he signed legislation granting the Pentagon the authority to suppress photographs deemed harmful to national security. On 13 November, the Secretary of Defense exercised this authority in relation to the detainee photographs in question. On the same day, the administration petitioned the Supreme Court to vacate a September 2008 order by the Second Circuit Court of Appeals for the government to disclose the photographs.

Also in May 2009, in the ongoing FOIA litigation relating to the CIA's secret detention program developed and operated from 2001 to 2009, a federal judge ordered the US administration to compile a list of documents relating to the content of 92 videotapes of CIA interrogations conducted between April and December 2002 and destroyed in 2005. The CIA identified 580 documents. A sample of 65 documents was selected for review for potential release.

The following month, CIA Director Leon Panetta signed a declaration that the 65 documents must be withheld from public disclosure in their entirety, on the grounds that to release them would cause exceptionally grave damage to national security. He said that the documents were "TOP SECRET communications to the CIA Headquarters from a covert overseas CIA facility where interrogations are being conducted", and "consist primarily of sensitive intelligence and operational information concerning interrogations of Abu Zubaydah", a detainee who was subjected at least 80 times to the torture technique of "water-boarding", or simulated drowning, in August 2002. Sixty-two of the 65 documents, the CIA Director said, contain names or identifying information of CIA personnel or employees and disclosure of such "would constitute a clearly unwarranted invasion of personal privacy". The documents also "disclose the locations of covert CIA facilities and the identities of countries cooperating with the CIA in counterterrorism operations", and descriptions of "enhanced interrogation techniques (EITs) "being applied during specific overseas interrogations". The fact that the Justice Department memorandums on these same interrogation techniques have been made public by the new administration, the CIA Director continued, did not mean that these "operational" details should be disclosed. These descriptions, he said, "are of EITs *as applied* in actual operations, and are of a qualitatively different nature than the EIT descriptions *in the abstract* contained in the OLC memoranda."

In September 2009, CIA Director Panetta signed another declaration in support of the agency's withholding from public disclosure of information relating to the secret detention program, including "details about the conditions of confinement" and the "locations of detention facilities". Disclosure of such information would damage national security, he asserted. He added that "operational details regarding the CIA's former interrogation program – that is, information regarding how the program was actually implemented – also remains classified, as do descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used (excepting such general information that has been released to date on these topics)".

Many victims of torture and other ill-treatment at the hands of the USA, as well as other similarly grave human rights violations, remain without remedy. Many of those responsible for these abuses, and especially those at higher levels of authority, have not been brought to justice. To the extent that continued concealment of documentary evidence of these violations perpetuates that situation, it would be inconsistent with the USA's obligations under international human rights law. Further, the right of society as a whole to know the full truth of gross and systemic violations, as a prerequisite to public accountability and as a measure against recurrence, is also undermined by continued suppression of evidence of the abuses.

CONCLUSION

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.

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.

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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: Attorney General orders 'preliminary review' into CIA detention cases – full investigation long overdue, 26 August 2009, http://www.amnesty.org/en/library/info/AMR51/094/2009/en

USA: Transparency and accountability dealt another blow: Administration reversal on release of detainee abuse photos, 14 May 2009, http://www.amnesty.org/en/library/info/AMR51/067/2009/en

USA: Federal court rejects government's invocation of 'state secrets privilege' in CIA 'rendition' cases, 29 April 2009, http://www.amnesty.org/en/library/info/AMR51/058/2009/en

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

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

USA: Urgent need for transparency on Bagram detentions, 6 March 2009, http://www.amnesty.org/en/library/info/AMR51/031/2009/en

USA: Right to an effective remedy – Administration should release Guantánamo Uighurs into the USA now, 19 February 2009, http://www.amnesty.org/en/library/info/AMR51/023/2009/en

USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, February 2009, http://www.amnesty.org/en/library/info/AMR51/021/2009/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.
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[1] 999 UNTS 171.
[2] See UN Convention against Torture, 1465 UNTS 85, articles 1, 2, 4 and 7(1). Committee against Torture, General Comment no 2, UN Doc CAT/C/GC/2 (24 January 2008), paras 5-6 and 26.
[3] UNCAT, article 14; Committee against Torture, General Comment no 2, para 3.
[4] Their allegations of torture and other ill-treatment include: repeated beatings; prolonged solitary confinement; threats of attacks by dogs; forced nudity; repeated body cavity searches; denial of food and water; sleep deprivation and disruption; and shackling in painful stress positions for extended periods.
[5] See USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en.
[6] As the Senate Armed Services Committee noted in its October 2008 report, "published accounts indicate that military working dogs had been used against Khatani. He had also been deprived of adequate sleep for weeks on end, stripped naked, subjected to loud music, and made to wear a leash and perform dog tricks."
[7] Mohamed al Qahtani remains in indefinite military detention without charge or trial in Guantánamo. See USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en and USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en
[8] See USA: Future of Guantánamo detainees must be resolved, 18 November 2009, http://www.amnesty.org/en/for-media/press-releases/future-guant%C3%A1namo-detainees-must-be-resolved-20091118.
[9] See, e.g., article 9(1) of the ICCPR and Human Rights Committee General Comment no 29 on states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001), para 11.
[10] Article 9(4) of the ICCPR and General Comment no 29, para 16.
[11] See e.g. Human Rights Committee, *A v Australia,* Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), para 9.5
[12] On 11 June 2009, four of the Uighur detainees were transferred to Bermuda, and on 31 October another six were released in Palau. Seven Uighur detainees remain in Guantánamo.
[13] 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.
[14] See Policies and procedures governing invocation of the state secrets privilege. Memorandum from the Attorney General, 23 September 2009, http://www.justice.gov/opa/documents/state-secret-privilieges.pdf
[15] See, e.g., Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, signed by John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003. Also: Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, signed by Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.
[16] On 4 November 2009 in Milan, Italy, 22 US agents or officials of the CIA and one military officer were convicted of crimes for their involvement in the abduction of Usama Mostafa Nasr (Abu Omar), who was abducted in Milan and transferred to alleged torture in Egypt. The US officials were tried *in absentia* because the Italian government had refused to forward requests for their extradition to the USA. The US government had taken the position that even if it received the requests for the extraditions of the charged officials, it would not comply with them. Although Italian law allows for trials *in absentia*, international law requires that a person be present at his trial to hear the full prosecution case, put forward a defence, challenge the evidence and examine witnesses. If they are apprehended in future, the US nationals convicted *in absentia*, are entitled to a new trial before a different court and to the presumption of innocence in that new trial. See 'Convictions in Abu Omar rendition case a step toward accountability', 5 November 2009, http://www.amnesty.org/en/news-and-updates/news/convictions-abu-omar-rendition-case-step-toward-accountability-20091105