

**USA**

**GUANTÁNAMO,  
IMPUNITY, AND GLOBAL  
ANTI-TORTURE DAY**

**AMNESTY  
INTERNATIONAL**



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## A CALL FOR INTERNATIONAL ACTION

In 1997, the UN General Assembly proclaimed 26 June as United Nations International Day in Support of Victims of Torture, with a view to the “total eradication of torture and the effective functioning of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (UNCAT), which had entered into force a decade earlier on 26 June 1987.<sup>1</sup> This year will mark the 20<sup>th</sup> International Day in Support of Victims of Torture and the 30<sup>th</sup> anniversary of UNCAT.

For the past 16 and a half years, the USA has been operating a detention regime at its naval base in Guantánamo Bay, Cuba that is entirely antithetical to its international law obligations, including those it undertook to abide by under UNCAT. Indeed, it is now more than a decade since the UN Committee Against Torture, the expert body established under UNCAT to monitor its implementation, told the USA in relation to this situation that indefinite detention without charge was *per se* a violation of the treaty.

These detentions have now gone on for so long that it has perhaps become all too easy for many to tolerate this semi-permanent fixture of the US incarceration landscape. But it is as crucial as ever that the world not accept this affront to human rights. To oppose it is to defend the human dignity of individuals and international law protections for all built up over decades.

On 26 June and beyond, it is important to remember that among the 41 people still held in this detention facility are some of those who were earlier subjected to torture and enforced disappearance authorized at high levels of the US government. Most remain held without charge or trial, as they have been for more than a decade. And while the USA intends to execute a number of those it has charged, if it manages to convict and obtain death sentences against them after unfair trials by military commission, the US perpetrators of crimes under international law committed against them and others continue to enjoy impunity.

The current US President, Donald Trump, has openly expressed his support for torture and espoused expansion of this detention regime. These are dangerous times for human rights. The international community must speak out.

- Governments must press the USA to end the Guantánamo detentions, close the facility there once and for all, and not conduct unlawful detentions anywhere else.
- No government should facilitate the detentions or participate or cooperate in any way in the transfer of more detainees to Guantánamo.
- No individual should be handed over to the US authorities if there is any risk that he or she could end up at Guantánamo, whether for unfair trial by military commission or indefinite detention without charge.
- Governments must continue to stress with their US counterparts the absolute prohibition of torture and other cruel, inhuman or degrading treatment, and of enforced disappearance and arbitrary detention, and to call on the USA to comply with all outstanding recommendations of UN treaty monitoring bodies, including in relation to truth, remedy and accountability for crimes under international law.
- All governments should point out to their US counterparts that executions after proceedings that do not meet international fair trials standards constitute arbitrary deprivation of life.<sup>2</sup> Governments that have abolished the death penalty should call on the USA to join them.

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<sup>1</sup> Resolution 52/149, 12 December 1997, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/52/149](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/52/149)

<sup>2</sup> See report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,

## PRESIDENTIAL WORDS AND DEEDS

The USA ratified UNCAT in 1994, but began marking International Day in Support of Victims of Torture only after it had embarked upon a major assault on the prohibition of torture as part of its response to the attacks of 11 September 2001 (9/11). The USA's first 26 June proclamation was issued by President George W. Bush in 2003. He said that despite UNCAT's prohibition, "torture continues to be practiced around the world by rogue regimes whose cruel methods match their determination to crush the human spirit...These despicable crimes cannot be tolerated by a world committed to justice." At that point, dozens of people were being subjected to enforced disappearance and other forms of torture or other cruel, inhuman or degrading treatment at "black sites" operated by the Central Intelligence Agency (CIA) under authority President Bush himself had granted.<sup>3</sup> The aim of "enhanced interrogations" in this programme was to induce "learned helplessness" in detainees held incommunicado and in solitary confinement and to break them down to a "baseline state". Methods included prolonged sleep deprivation, forced nudity, stress positions, various types of physical assault, exploitation of phobias, cramped confinement in boxes, and a form of mock execution by interrupted drowning known as "water-boarding".

This first June 26 proclamation and the two others President Bush issued during his time in office – in 2004 and 2005 – came during peak years of the CIA programme, a period which also saw US military torture at Abu Ghraib prison and other locations in Iraq, at Bagram airbase and elsewhere in Afghanistan, and at the US naval base in Guantánamo Bay in Cuba. In addition to the military detentions at Guantánamo, the CIA also operated a "black site" there – between President Bush's 2003 and 2004 statements trumpeting the USA as champion in the global struggle against torture.

The USA has still failed to draw anything like the requisite line under all this. For all the June 26 proclamations issued by President Barack Obama, he set accountability for torture and enforced disappearance to one side in the name of focussing on the future.<sup>4</sup> Those seeking remedy for victims of torture and other human rights violations faced a wall of secrecy or judicial deference to executive power. This persistent injustice matters not just because the USA is violating UNCAT obligations and denying individuals their rights. Impunity breeds contempt for the law and leaves the door to the torture chamber open for future occasions when some official or other deems it necessary or expedient.

President Trump has voiced his support for torture and, as a candidate, made a pre-election pledge not only to keep the Guantánamo detention facility open but to "load it up with some bad dudes." Such language is reminiscent of the early months of this ill-judged and unlawful detention experiment, when torture and other abuses were being developed and implemented.<sup>5</sup>

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to the 67th Session of the General Assembly, UN doc. A/67/275, 9 August 2012, para.25.

<sup>3</sup> 2003 was "the most active period of the CIA's Detention and Interrogation Program", according to the Senate Select Committee on Intelligence. See page 97 of USA: Crimes and impunity, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/>

<sup>4</sup> USA: 'We tortured some folks', 2 September 2014, <https://www.amnesty.org/en/documents/amr51/046/2014/en/>. While President Bush's June 26 proclamations dried up after 2005, President Obama issued such statements in 2009, 2010, 2011, 2012, 2014, 2015 and 2016.

<sup>5</sup> For example, on 27 January 2002, Secretary of Defence Donald Rumsfeld referred to those held at Guantánamo Bay as "among the most dangerous, best-trained, vicious killers on the face of the earth". President Bush made similar statements. On 17 July 2003, for example, he told the world's press that "the only thing I know for certain is that these are bad people".

Throughout history, torture has occurred against those considered as the “other”.<sup>6</sup>

At its peak in 2003, there were more than 650 detainees held at Guantánamo.<sup>7</sup> Today there are 41. There is a worrying amount of cell space available, then, if President Trump should decide to return to his campaign promise. There were indications in the first month of his presidency that he was about to issue an executive order giving the go-ahead for new detentions at Guantánamo (an earlier draft order even proposed revisiting the CIA detention and interrogation programme), but so far no such order has been signed and no new detainee has been brought to the base. This lack of activity should not lull anyone into a sense of complacency.

Even without new detentions, there are 41 too many cases festering now.<sup>8</sup> Thirty of the 41 detainees still at Guantánamo are in indefinite detention without charge or trial. All have been held there for more than a decade, some for more than 15 years. Eleven are facing or have faced prosecution before military commissions that violate international fair trial standards binding on the USA. Six of the 11, possibly seven, face the possibility of the death penalty after such trials.<sup>9</sup> More than half of the detainees currently held at Guantánamo were held in the CIA secret detention programme before their transfer to the naval base. They were subjected to torture or enforced disappearance or both. Others of the 41 were subjected to torture or other ill-treatment in military custody.

“From this moment on”, said President Trump in his inaugural speech in January 2017, “it’s going to be America First”. It has seemed all too often that the other side of this coin is “human rights last”. And as long as the Guantánamo detention facility remains open, it carries with it not only its past and present unlawfulness and corrosive effects on the rule of law, but also facilitates a future in which the categories of persons liable to end up in indefinite detention could be expanded.

## CHALLENGING ‘AMERICA FIRST’ EXCEPTIONALISM

As noted above, 26 June was designated as global anti-torture day to help bolster UNCAT. The USA’s actions have undermined such efforts.

The Guantánamo detentions – and the CIA interrogation programme – were conceived from late 2001 out of a familiar US conditionality towards human rights – a pick and choose approach to treaty law and a reluctance to apply the same principles to its own conduct that it says it expects of others. The reservations, understandings and declarations, including in relation to torture and other cruel, inhuman or degrading treatment, which the USA filed with its ratifications of UNCAT and other human rights treaties long before 9/11, came home to roost after that date. When considering the question of how the USA reached this point, and how to stop the rot, part of the answer lies in the thread of “America first” exceptionalism that runs down the decades in relation to the USA’s approach to its international human rights obligations and persists to this day. This is the thread that needs to be cut.

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<sup>6</sup> USA: Human dignity denied. Torture and accountability in the ‘war on terror’, 26 October 2004, <https://www.amnesty.org/en/documents/amr51/145/2004/en/>

<sup>7</sup> The first detainees were brought to the base on 11 January 2002 and the most recent arrival was on 14 March 2008.

<sup>8</sup> For a list of the 41 detainees, see USA: Guantánamo detentions, 15 years and counting. 27 January 2017, <https://www.amnesty.org/en/documents/amr51/5280/2017/en/>

<sup>9</sup> As noted below, Hambali had charges sworn against him on 20 June 2017. They are potentially capital, but whether the charges are referred on for trial and whether the prosecution will be authorized to pursue the death penalty will depend on the Convening Authority.

Sixteen and a half years after the first detainees arrived at the Guantánamo facility, the USA has yet to address the detentions as being governed by international human rights law. Instead it continues to apply a flawed war paradigm, underpinned by a congressional resolution – the Authorization for Use of Military Force (AUMF) – passed with little substantive debate in the immediate wake of the 11 September 2001 attacks.<sup>10</sup> The three branches of US government – executive, legislative and judicial – have come to agree that the USA can engage in indefinite detentions in what they characterize as an armed conflict, one essentially without geographical or temporal limits. The gap between this exceptionalism-fuelled US position and the international law analysis of the various UN treaty monitoring bodies which have called for closure of the Guantánamo detention facility is stark.

US Attorney General Jeff Sessions, displaying a disturbing lack of respect for the presumption of innocence, has said that Guantánamo is “just a very fine place for holding these kind of dangerous criminals”, and “I don’t think we’re better off bringing these people to federal court... where they get discovery rights to find out our intelligence, and get court-appointed lawyers and things of that nature.” As for the prospect of new detainees arriving at the base, Attorney General Sessions said in this 9 March 2017 radio interview, “there’s plenty of space... It’s a perfect place for it... I see no legal problem whatsoever with doing that.”<sup>11</sup>

Congress placed obstacles in the way of the Obama administration’s efforts to end the Guantánamo detentions and close the camp. Three weeks into the new administration, on 9 February 2017, 11 Senators wrote to President Trump to express their support for “maintaining and expanding the utilization of the detention facility... by detaining current and future enemy combatants”.<sup>12</sup> Other members of Congress should refuse to accept continuation of the Guantánamo prison camp, and must reject the false and toxic promise that security lies in violating human rights and undermining the rule of law.

• Having scrutinized the USA’s obligations under the **International Covenant on Civil and Political Rights** (US ratification, 1992), the **UN Human Rights Committee** calls for the Guantánamo detainees’ “trial or their immediate release and the closure of the Guantánamo Bay facility.” The USA “should end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo ... are dealt with through the criminal justice system rather than military commissions...”

• The **UN Committee Against Torture** has repeatedly told the USA that detaining people without charge is per se a violation of the **UN Convention Against and Other Cruel, Inhuman or Degrading Treatment or Punishment** (US ratification, 1994). It has called on the US authorities to “cease to detain any person at Guantánamo Bay and close this detention facility”, and to “ensure that detainees held at Guantánamo Bay who are designated for potential prosecution are charged and tried in ordinary federal civilian courts. Any other detainees who are not to be charged or tried should be immediately released.”

• The **UN Committee on the Elimination of Racial Discrimination**, after assessing the USA’s record under the **International Convention on the Elimination of All Forms of Racial Discrimination** (US ratification, 1994) calls upon the USA to “end the system of administrative detention without charge or trial and ensure the closure of the Guantánamo Bay facility without further delay.”

<sup>10</sup> See USA: Doctrine of pervasive ‘war’ continues to undermine human rights, 15 September 2010, <https://www.amnesty.org/en/documents/amr51/085/2010/en/>

<sup>11</sup> See, for example, Jeff Sessions: Guantanamo Bay is ‘a very fine place’ for holding terror suspects, <http://abcnews.go.com/Politics/jeff-sessions-guantanamo-bay-nice-place-holding-terror/story?id=46035561>

<sup>12</sup> Sen. Moran Leads Senate Colleagues in Encouraging the President to Strengthen Mission at GITMO, Safeguard Americans, 13 February 2017, <https://www.moran.senate.gov/public/index.cfm/news-releases?ID=A399DF82-C4E6-4EB4-93BB-7CF4578C7581> (including link to letter, signed by Senators Jerry Moran, Roy Blunt, Tom Cotton, Jim Inhofe, John Boozman, Tim Scott, Thom Tillis, Cory Gardner, Pat Roberts, Steve Daines and Orrin Hatch).



In truth, however, it is likely that any decision by the President to kick-start new detentions at Guantánamo will meet with less than stiff domestic political resistance. Even a return to CIA “enhanced interrogations” would not be without support in the body politic in the USA, and could grow in the event that public fears are stoked for any reason. And the impunity that continues to persist in relation to the past occurrence of crimes under international law can only embolden those who advocate some sort of rerun.

This leaves international pressure as an important component of any effort to seek to persuade the USA to meet its international human rights obligations. While the USA is hardly alone in having compromised respect for human rights in the name of fighting terrorism, there is still a solidity in the international opposition to the detention regime practiced at Guantánamo. Governments around the world must press the USA to end the Guantánamo detentions and close the facility there once and for all. But they must go further and make it clear that they will not engage in any collusion. No government should facilitate the detentions or participate or cooperate in any way in the transfer of more detainees to Guantánamo. No individual should be handed over to the US authorities if there is any risk that he or she could end up at Guantánamo, whether for unfair trial by military commission or indefinite detention without charge.

Too many governments made the fateful decision to collude with the USA when they assisted in unlawful detention and interrogation practices after 9/11. Indeed, some individuals who were victims of this complicity in crimes under international law are still at Guantánamo. All governments should maintain a firm and principled line against any sort of repetition.

The USA’s “war on terror”, begun in response to the 9/11 attacks and still with us in all but name, quickly descended into an assault on human rights, incorporating abductions, illegal detainee transfers, the use of torture under the euphemism of “enhanced interrogation”, and enforced disappearance in secret prisons. The Guantánamo detention hub was just one of the manifestations.<sup>13</sup> It should have been closed years ago.

## **ENDING UNFAIR TRIALS, ENDING PURSUIT OF EXECUTION**

The 41 people still held in Guantánamo are all victims of human rights violations at the hands of the USA. Among the 41 are survivors of US torture and enforced disappearance. Accountability and redress for these crimes under international law has been blocked by the authorities. In a move about as far from the remedy obligation as can be imagined, the USA plans to get to a point where it can execute some of the detainees after proceedings that do not meet international fair trials standards.

The first charging of a Guantánamo detainee under the Trump administration came on 20 June 2017 when Indonesian national Riduan bin Isomuddin, also known as Hambali, had charges sworn against him under the Military Commissions Act (MCA) of 2009.<sup>14</sup> The charges, relating to bomb attacks in Indonesia in 2002 and 2003, came almost 14 years after he was taken into custody in Thailand by the Special Branch of the Thai police on 11 August 2003. Hambali has said he was in Thailand, in US custody, for four to five days, before being taken to secret CIA detention in Afghanistan for two months, where he was held naked for most of the time and subject to “enhanced” interrogation. He was held in CIA custody for nearly three years –

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<sup>13</sup> Guantánamo: A decade of damage to human rights, and 10 anti-human rights messages Guantánamo still sends, 16 December 2011, <https://www.amnesty.org/en/documents/amr51/103/2011/en/>

<sup>14</sup> The charges are “murder in violation of the law of war”; attempted murder in violation of the law of war; intentionally causing serious bodily injury; terrorism; attacking of civilians; attacking civilian objects; destruction of property in violation of the law of war. The charge sheet states that the detainee was informed of the charges the following day on 21 June.

subject to enforced disappearance – until his transfer to Guantánamo in early September 2006.<sup>15</sup> The task force established under President Obama’s 2009 executive order for closing the Guantánamo detention facility by January 2010 gave Hambali’s “final disposition” as of 22 January 2010 as “referred for prosecution”. It is only now, seven and a half years later, that charges have been sworn against him – and for trial before a military commission, not an ordinary civilian court. Whether the charges will be referred on for trial, and whether they will be referred on as capital, will depend on a Pentagon official known as the Convening Authority.

On or around 16 September 2003, a CIA interrogator told Hambali that he would never be taken to a court because “we can never let the world know what I have done to you”.<sup>16</sup> As things currently stand, if brought to trial, this will proceed before a military commission. If the use of coercive interrogations conducted out of sight of independent judicial scrutiny, legal counsel and other fundamental safeguards for detainees was at the heart of the USA’s detention experiment conducted at Guantánamo and beyond, trials by military commission were conceived as part of the experiment. A forum for trials was developed that was vulnerable to political interference and could minimize independent external scrutiny of detainee treatment.

One of the five Guantánamo detainees currently facing capital charges relating to their alleged involvement in the 9/11 attacks is Ammar al Baluchi. He and his four co-defendants were first charged in 2008 under the MCA of 2006. The MCA was passed by Congress at the request of President Bush, who exploited the cases of 14 men, including Ammar al Baluchi, whom he revealed had been held in secret CIA detention for up to four and a half years but had a few days earlier been taken to Guantánamo. There, the President said on 6 September 2006, “as soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.” The President noted that it was now almost five years since the 9/11 attacks, and “the families of those murdered that day have waited patiently for justice... They should have to wait no longer.” More than a decade has passed since Congress passed the MCA and still no trial date has been set.

The 2008 charges were dismissed after the Obama administration announced in 2009 that it would transfer the men to New York for trial in civilian federal court. However the politics of fear got the better of the situation and, in 2011 the Attorney General announced a U-turn. Ammar al Baluchi and the four other men were charged with crimes under the revised MCA of 2009, including conspiracy, attacking civilians, murder in violation of the law of war, and terrorism and would be tried by military commission. As of mid-2017 a trial date has yet to be set.

Taken into custody in Pakistan in April 2003, Ammar al Baluchi was subjected to enforced disappearance in secret CIA custody until he was transferred to Guantánamo in early September 2006. During his three and a half years in CIA custody he was held in a number of locations, the identity of which remain classified Top Secret. The countries in which “black sites” operated by the CIA were located during the time that Ammar al Baluchi was in CIA custody are believed to have included Afghanistan, Poland, Romania, Cuba (Guantánamo), Morocco, and Lithuania. Ammar al Baluchi has alleged that in secret CIA custody he was subjected to torture and other ill-treatment, including beating, “walling” (being smashed against walls), prolonged standing, forced nudity, food deprivation, shackling, blindfolding,

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<sup>15</sup> For details and sources see USA: Crimes and impunity, April 2015, <https://www.amnesty.org/en/documents/amr51/1432/2015/en/> See also Amnesty International Urgent Action, 19 August 2003, USA: Incommunicado detention/Fear of ill-treatment: Riduan Isamuddin aka Hambali, <http://www.amnesty.org/en/library/info/AMR51/119/2003/en>

<sup>16</sup> Crimes and impunity, *op.cit.*

suspension from ceiling, subjection to bright and constant lights, use of hallucinogenic or disorienting drugs, threats, loud music, and sleep deprivation.<sup>17</sup>

Another violation of international law remains on the cards in relation to the Guantánamo detentions – execution after unfair trial by military commission. The UN Human Rights Committee has emphasised that any trial not meeting international fair trial standards that results in a death sentence would constitute a violation of the right to life under the International Covenant on Civil and Political Rights (ICCPR). Military commissions do not meet these standards. No amount of improvement can rid the military commissions of their fundamental flaw – that they are not independent courts, but exceptional tribunals the creation of which was entirely unnecessary given the existence of fully functioning court system resourced and available to deal with the same prosecutions.<sup>18</sup> The Human Rights Committee has stated in its authoritative General Comment interpreting the right to a fair trial under the ICCPR that the trial of civilians by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”. Clearly that is not the case here.

Amnesty International categorically rejects the trial of civilians by military courts, including civilians who are alleged to have engaged in the kind of conduct at issue in the US cases. Even applying the criteria set out by the Human Rights Committee, however, the military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice. By their very nature, their application in cases such as these violates the right to fair trial. Moreover, the fact that this violation of fair trial rights is being reserved for foreign nationals renders the system discriminatory, again in violation of international law. In addition, the USA considers that the detainees acquitted at military commission trial can be returned to indefinite detention under the ‘law of war’.

For much of the world, the death penalty is incompatible with fundamental notions of justice. Today, 141 countries are abolitionist in law or practice. While it is true that international human rights law, including article 6 of the ICCPR, recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. The UN Human Rights Committee has said that article 6 “refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life”.<sup>19</sup> Dozens of countries have abolished the death penalty since this General Comment was issued in 1982. The USA is way behind the times on this fundamental human rights issue. Its pursuit of the death penalty after unfair trials at Guantánamo indicates that, far from working towards abolition as human rights law expects of it, the USA is willing to open a new chapter in the country’s ugly history of judicial killing.

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<sup>17</sup> See more on this case and on the case of ‘Abd al-Nashiri, also facing capital trial, in USA: Broken promises: Failure to close Guantánamo is part of a deeper human rights deficit, 10 January 2017, <https://www.amnesty.org/en/documents/amr51/5433/2017/en/>

<sup>18</sup> The UN Basic Principles on the Independence of the Judiciary state: “everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.

<sup>19</sup> CCPR General Comment No. 6, The right to life (Article 6), 1982.

## GREASING THE SLIPPERY SLOPE OF TORTURE

In a television interview on 25 January 2017, almost three decades after UNCAT came into force, President Trump endorsed torture, while stating that he would “rely” upon Secretary of Defense James Mattis, CIA Director Mike Pompeo, and others in deciding whether the USA should use it. He said he was “a little surprised” when General Mattis told him “he’s not a believer in torture”, but added that he had “spoken to others in intelligence. And they are big believers in, as an example, waterboarding” (a form of torture).

President Obama terminated the CIA programme in 2009, but his administration blocked accountability, remedy and truth in relation to the human rights violations committed in it. The findings of a Senate Select Committee on Intelligence review of the programme, contained in a 6,700 page report, remains classified top secret. Such secrecy serves to block accountability and remedy, and also contradicts the USA’s obligations to ensure the full truth about human rights violations.

The full report was provided to the White House, the CIA, the Department of Justice, the Department of Defense, the Department of State, and the Office of the Director of National Intelligence. The Senate Intelligence Committee’s outgoing Chair, Senator Dianne Feinstein, expressed the hope in her foreword to the published summary that distributing the report to these various departments would “prevent future coercive interrogation practices and inform the management of other covert action programmes”. In contrast, her replacement, Senator Richard Burr, called on the various departmental recipients of the report to return the copies. Senator Burr was one of the Committee members to sign the minority (dissenting) report, which argued that the review amounted to an attack on “the CIA’s integrity and credibility in developing and implementing the Program”, and created “the false impression that the CIA was actively misleading policy makers” during the programme’s lifetime.

## ERASING HISTORY?

A lawsuit was brought in federal court by the American Civil Liberties Union seeking to compel disclosure of the full report under the Freedom of Information Act (FOIA). In May 2015, however, the District Court judge ruled that the report was exempt from disclosure under FOIA on the grounds that it remained a “congressional document” over which Congress rather than the executive branches retained control. The judge said that the court was being asked “to interject itself into a high-profile conversation that has been carried out in a thoughtful and careful way by the other two branches of government... To be sure, Plaintiff – and the public – may well ultimately gain access to the document it seeks. But it is not for the Court to expedite that process.”<sup>20</sup> Senator Burr released a statement welcoming the decision, claiming that “Further release of this highly classified document will compromise the national security of the United States and needlessly put Americans lives at risk.”<sup>21</sup> In particular, Volume 3 of the report contains details of the scores of individuals who were held in the CIA programme and against whom crimes under international law and other human rights violations were committed.

In May 2016, the Court of Appeals affirmed the District Court ruling, and on 24 April 2017 the US Supreme Court announced it would not review the case. The Obama administration had left the matter to the courts, and as this timing shows, had left office by the time the litigation ended. On 2 June 2017, the New York Times reported that the Trump administration had

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<sup>20</sup> *American Civil Liberties Union v. Central Intelligence Agency*, Memorandum Opinion, US District Court for the District of Columbia, 20 May 2015.

<sup>21</sup> Burr Statement on Court’s Interrogation Report Ruling, 21 May 2015, <https://www.burr.senate.gov/press/releases/burr-statement-on-courts-interrogation-report-ruling->

begun returning copies of the full report to Congress, as Senator Burr had demanded. Senator Feinstein expressed disappointment at Senator Burr's move, adding: "No senator – chairman or not – has the authority to erase history. I believe that is the intent of the chairman in this case." She expressed regret that CIA Director Mike Pompeo had approved this action, adding that during his confirmation hearing he had "clearly stated his opposition to torture and made a commitment to read the full classified report. I very much doubt that he has had an opportunity to fulfil that commitment. The report is an important tool to help educate our intelligence agencies about a dark chapter of our nation's history. Without copies of it, the lessons we've learned will be forgotten." Senator Feinstein said she had so far confirmed that the CIA, the CIA Inspector General, and the Director of National Intelligence had "complied with the chairman's demand".<sup>22</sup>

Meanwhile, the level of impunity that exists in the USA with regard to the crimes under international law committed in the CIA programme is such that a number of former officials have felt confident enough to publish memoirs in which they assert leading involvement in the programme.<sup>23</sup> Alleged involvement in crimes under international law also seems to be no bar to career progression, either, and taken as no cause for human rights vetting of such officials by the Trump administration.

### **FROM 'BLACK SITE' TO DEPUTY DIRECTOR OF CIA?**

On 2 February 2017, CIA Director Pompeo announced that President Trump had selected Gina Haspel to be the new Deputy Director of CIA. Gina Haspel's previous positions at the CIA during a time that crimes under international law are known to have been committed raise serious questions.

The CIA's alleged "black site" in Thailand operated from April to December 2002. The first detainee to be taken there was Zayn al Abidin Muhammad Husayn, also known as Abu Zubaydah. He was subjected to torture and other ill-treatment at the facility, as well as to enforced disappearance. A second detainee, 'Abd Al-Rahim Hussein Muhammed al-Nashiri, was taken to the site in November. Both were transferred out of the site in December 2002 to what would be another nearly four years of enforced disappearance at other black sites. Both men are still in US custody, at Guantánamo, where they have been since early September 2006. A medical expert who has examined 'Abd al-Nashiri has concluded that he "suffers from complex posttraumatic stress disorder as a result of extreme physical, psychological, and sexual torture inflicted upon him by the United States. Indeed, in my many years of experience treating torture victims from around the world, Mr Al-Nashiri presents as one of the most severely traumatized individuals I have ever seen".<sup>24</sup> It is believed that Gina Haspel was CIA Chief of Staff in Thailand in 2002 and that she oversaw the "black site" there at the time these two men were held and tortured there in 2002.

Gina Haspel also served as Chief of Staff for the Director of the National Clandestine Service and Chief of Staff to the Director of the Counterterrorist Center. From late 2005, José Rodríguez became head of the CIA's newly-established National Clandestine Service and before that, from spring 2002, he was director of the Counterterrorist Center, the branch of the CIA delegated by its then Director George Tenet to run the detention program. In his 2012 memoirs,

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<sup>22</sup> Feinstein Statement on Intelligence Chairman Demanding Return of Torture Report Copies, 2 June 2017, <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=20EB2630-B4C2-478B-9980-703BF7956662>

<sup>23</sup> See 'Thanks for the memoirs, now for truth and justice', in USA: Time for truth and justice, 23 June 2014, <http://www.amnesty.org/en/library/info/AMR51/035/2014/en>

<sup>24</sup> USA: Broken promises: Failure to close Guantánamo is part of a deeper human rights deficit, January 2017, <https://www.amnesty.org/en/documents/amr51/5433/2017/en/>

José Rodríguez asserts that “I was responsible for helping develop and implement the Agency’s techniques for capturing the world’s most dangerous terrorists and collecting intelligence from them, including the use of highly controversial ‘enhanced interrogation techniques’.”<sup>25</sup> He also referenced “Jane”:

“Another superstar whom I recruited was ‘Jane’, who had served extensive time overseas and was working in an Agency organization that provided surveillance support. I stole her away and had her head one of our earliest ‘black sites’, where terrorists were interrogated. Later she became my right arm as chief of staff when I led the clandestine service.”

In his memoirs, Rodríguez confirmed what had already been revealed during FOIA litigation, namely that it was he who approved the destruction in November 2005 of videotapes of CIA interrogations of Abu Zubaydah and ‘Abd al Nashiri at the “black site”, including recordings of “water-boarding”.<sup>26</sup> The destruction of the tapes may have concealed crimes by state agents. Concealing evidence of a crime may constitute criminal complicity. Complicity in torture is expressly recognised as a crime under international law.<sup>27</sup> Amnesty International considers that Rodríguez’s own admissions of his role in a program in which detainees were subjected to enforced disappearance and interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment, and his admission that he ordered the destruction of the interrogation tapes, warrant the opening by the US authorities of a criminal investigation into his involvement.

On 2 February 2017, Senator Ron Wyden and Senator Martin Heinrich, both of whom are members of the Senate Select Committee on Intelligence, wrote to President Trump:

“We write to express our concern at the announcement today that Ms. Gina Haspel has been named as the Deputy Director of the CIA. Her background makes her unsuitable for the position. We are sending separately a classified letter explaining our position and urge that the information in that letter be immediately declassified.”<sup>28</sup>

Senators Wyden and Heinrich wrote to the CIA Director on 23 February 2017 noting that since their earlier letter to President Trump, at least two former senior CIA officials had made public statements about Gina Haspel’s background, including that she “drafted a cable directing that CIA interrogation videos be destroyed”. They called on the CIA Director to declassify information on Gina Haspel’s background, concluding that “it is a basic hallmark of our democracy that the public know who its leaders are”.<sup>29</sup>

## **PROVISION OF ‘LEGAL PRETEXTS FOR MANIFESTLY ILLEGAL BEHAVIOUR’**

The USA has failed to comply with repeated calls from UN treaty monitoring bodies to

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<sup>25</sup> José A. Rodríguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012). Preface

<sup>26</sup> *Ibid.*, especially pages 183-196.

<sup>27</sup> 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>

<sup>28</sup> Wyden, Heinrich Express Concern on Selection of Gina Haspel to be Deputy Director of the CIA, 2 February 2017, <https://www.wyden.senate.gov/news/press-releases/wyden-heinrich-express-concern-on-selection-of-gina-haspel-to-be-deputy-director-of-the-cia>

<sup>29</sup> Heinrich, Wyden Urge CIA to Declassify Information About Deputy Director Haspel’s Background, 23 February 2017, <https://www.heinrich.senate.gov/press-releases/heinrich-wyden-urge-cia-to-declassify-information-about-deputy-director-haspels-background>

investigate and prosecute those involved in torture and other human rights violations against detainees. In August 2016, the UN Human Rights Committee wrote to the USA expressing regret that it had received no further information on “investigations, prosecutions or convictions of US government personnel in positions of command for crimes committed during international operations or as part of the US detention and interrogation programmes”. In October 2015, and again in August 2016, the Committee to ask what measures had been taken “to establish responsibility for those who provided legal pretexts for manifestly illegal behaviour”.<sup>30</sup>

On 5 June 2017, President Trump announced his intent to nominate Steven Bradbury to the position of General Counsel of the Department of Transportation. The announcement noted that “from 2005 to 2009, Mr Bradbury headed the Office of Legal Counsel [OLC] at the US Department of Justice, where he advised the executive branch on a wide range of constitutional and statutory questions”.<sup>31</sup> It did not elaborate.

Steven Bradbury was first “read into” the CIA secret detention programme in August 2004, when he was Principal Deputy Assistant Attorney General at the OLC. He thereafter became the signatory on a number of secret memorandums provided to the CIA on the subject of interrogations and conditions of detention in the CIA programme.

For example, one dated 30 May 2005 advised the CIA that Article 16 of UNCAT (the ban on cruel, inhuman or degrading treatment) was inapplicable to the agency’s interrogation programme because the programme was not being operated inside the USA or against US nationals. Even if Article 16 were to apply, the OLC continued, because of the reservation the USA attached to its ratification of UNCAT, the relevant measure as to whether US conduct was unlawful would be the “shocks the conscience” test, a US constitutional standard. The OLC advised that while the use of the sort of interrogation techniques being used by the CIA “might well” shock the conscience if used in “ordinary criminal investigations”, it would not do so in the context of a CIA detention programme where the techniques were being used in the context of national security.

Another memo signed by Steven Bradbury, dated 31 August 2006, responded to the CIA’s request as to whether particular “standard conditions of detention” at CIA detention facilities were lawful. The CIA had asked the OLC to consider “standard” conditions of confinement, namely blindfolding, forced shaving, white noise, 24-hour-a-day cell lighting, and shackling. Also, it was asked to consider incommunicado detention and solitary confinement. The OLC knew that a number of detainees had been so held “for a few years” (by this time, Abu Zubaydah has been held incommunicado in solitary confinement for more than four years). The Bradbury memo noted that US law defined the term “cruel, inhuman, or degrading treatment or punishment” in line with the USA’s reservation to its ratification of UNCAT, which means that only domestic constitutional limitations applied. It concluded that “the security rationale alone is sufficient to justify each of the conditions of confinement in question”, and they may be applied even to detainees who no longer have “significant intelligence value”. The Bradbury memo considered that the conditions were legal in and of themselves, and in any combination.

In yet another memo signed by Steven Bradbury, dated 20 July 2007, the OLC provided the CIA with legal advice on the application of “enhanced interrogation techniques” against “high

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<sup>30</sup> Letter to USA from Deputy Special Rapporteur for Follow-up to Concluding Observations of the Human Rights Committee, 16 August 2016  
[http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT\\_CCPR\\_FUL\\_USA\\_24978\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_FUL_USA_24978_E.pdf)

<sup>31</sup> <https://www.whitehouse.gov/the-press-office/2017/06/05/president-donald-j-trump-announces-intent-nominate-personnel-key>

value” detainees, including dietary manipulation, extended sleep deprivation (with the detainee kept awake by the use of “physical restraints”, that is, by being shackled in a position that will prevent him from falling asleep). Sleep deprivation will frequently be combined with “diapering”: that is, the detainee is made to wear a diaper: “because releasing a detainee from the shackles to utilize toilet facilities would... interfere with the effectiveness of the technique, a detainee undergoing extended sleep deprivation frequently wears a disposable undergarment designed for adults with incontinence or enuresis.”<sup>32</sup> Other techniques include a variety of physical assaults (Facial hold; Attention grasp; Abdominal slap; Insult (or facial) slap). The CIA had informed Steven Bradbury that the agency particularly favoured the use of sleep deprivation, as it is used to bring the detainee to a “baseline state”. The Bradbury memo concluded that the CIA’s use of the six techniques, singly or in combination, was lawful.

In 2014, the Committee Against Torture wrote to the USA expressing its dismay that the US reservation to article 16 of UNCAT featured in the various OLC memorandums “as part of deeply flawed legal arguments used to advise that interrogation techniques, which amounted to torture, could be authorized and used lawfully.”<sup>33</sup> The Committee remained concerned that the USA “has not yet withdrawn its reservation to article 16 which could permit interpretations incompatible with the absolute prohibition of torture and ill-treatment.”<sup>34</sup>

## CONCLUSION

Since 2011, Amnesty International has been calling for former President George W. Bush to be subject to criminal investigation for his alleged involvement in and responsibility for crimes under international law, including torture.<sup>35</sup> Any current or future President or any other official authorizing torture or enforced disappearance would similarly be exposing themselves to criminal liability.

Whatever President Trump believes about torture, torture is a crime under international law. In promoting, endorsing or otherwise justifying torture, he promotes, endorses or otherwise justifies a crime. Torture and other cruel, inhuman or degrading treatment are always unlawful and can never be justified. No one can render them lawful; no president, politician, legislator, judge, soldier, police officer, prison guard, intelligence operative, medical professional, interrogator or lawyer can override this absolute prohibition. No matter the security threat, including terrorism-related threats, security threats during states of emergency which threaten the life of the nation, or in times of war or threat of war, there is and can be no exemption from this absolute prohibition. The same is true of enforced disappearance, another crime under international law.

Three weeks before President Trump was promoting torture on primetime television, the USA assumed a three-year seat on the UN Human Rights Council, the principal human rights body of the United Nations. In seeking election to that seat, the USA committed itself to championing the Universal Declaration of Human Rights (with the conviction that

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<sup>32</sup> 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.

<sup>33</sup> UN Doc.: CAT/C/USA/CO/3-5. Concluding observations on the combined third to fifth periodic reports of the United States of America.

<sup>34</sup> *Ibid.*

<sup>35</sup> USA: Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, 30 November 2011, <https://www.amnesty.org/en/documents/AMR51/097/2011/en/>



“international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected”),<sup>36</sup> abiding by US treaty obligations, and engaging in meaningful dialogue with the UN treaty monitoring bodies.

In his preface to the latest US Department of State’s Country Reports on Human Rights Practices, which the administration confirmed “he did approve personally”, Secretary of State Rex Tillerson asserts that “standing up for human rights” is “not just a moral imperative but is in the best interests of the United States in making the world more stable and secure”. He expressed the hope that the country reports will facilitate reflection “on the situation of human rights” in those countries and the promotion of “accountability for violations and abuses”.<sup>37</sup>

The world should challenge the USA on why it has not yet closed the Guantánamo detention facility and why it continues to fail to ensure truth, accountability and remedy for crimes under international law.

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<sup>36</sup> US human rights commitments and pledges, published 2016.

<sup>37</sup> <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>