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# amnesty international

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## UNITED STATES OF AMERICA

### Five years on 'the dark side'

#### A look back at 'war on terror' detentions<sup>1</sup>

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*We understand that a world in which [values such as human dignity and the rule of law] are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism. This is the world we must build today.*

US Government, National Strategy for Combating Terrorism, 2003

*I'm in a cage like an animal*

*No-one's asked me am I human or not.*

Wazir Mohammed, Afghan taxi driver, Guantánamo detainee, 2003

On 25 September 2001, Amnesty International faxed a letter to President George W. Bush. The letter urged him to put respect for human rights and the rule of law at the heart of the USA's response to the crime against humanity that had been perpetrated two weeks earlier. There was reason to be nervous. President Bush was speaking of a global "war", of a "crusade", of a "monumental struggle between good and evil". On 16 September, Vice-President Dick Cheney echoed the President's "with us or with the terrorists" choice faced by all countries: "Are they going to stand with the United States and believe in freedom and democracy and civilization", he asked, "or are they going to stand with the terrorists and the barbarians?" The Vice-President added that he was "delighted" that Pakistan for one had decided to fall in behind the US. President Musharraf recently recalled that the choice the USA had presented Pakistan had been even starker: choose us or "be prepared to be bombed back to the Stone Age".

Three days after the attacks, with only one dissenting voice out of 519 legislators, Congress passed a resolution giving the President unprecedented authorization to use force against

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<sup>1</sup> A version of this text formed the keynote address given by Rob Freer (US Researcher, Amnesty International, International Secretariat) at *From Guantánamo to Petach Tikva: Torture Today in Israel and the World*. United Against Torture (UAT), 1<sup>st</sup> Annual Conference, with the Public Committee Against Torture in Israel (PCATI). Held at the Van Leer Institute, Jerusalem, Israel, 5 December 2006.

“nations, organizations and individuals” whom he determined were connected in any way with the attacks or with future acts of international terrorism. Two days later, although not publicly known at the time, the Director of the CIA sent a memorandum to his staff headed “We’re at war”, stating that “All the rules have changed”. In an NBC interview, Vice President Cheney said US intelligence agencies would have to operate on “the dark side” – the means, he suggested – including working with human rights violators – would justify the ends. The following day, 17 September 2001, President Bush is believed to have signed a memorandum giving the CIA exceptional authority to conduct covert operations.

States, including the USA, have too often responded to crime or threats to national security with human rights violations. With this in mind, Amnesty International’s letter to President Bush continued: “In the wake of a crime of such magnitude, principled leadership becomes crucial... We urge you to lead your government to take every necessary human rights precaution in the pursuit of justice”.

With the benefit of hindsight, perhaps we should also have urged that every human rights protection be ensured in the pursuit of *intelligence*. For justice – in the sense of due process and fair trials – appears to have been the last thing on the administration’s mind. It focused instead on intelligence-gathering. And its methods have jeopardized the prospect of justice for the victims of 9/11. For many people, the “war on terror” has amounted to an exercise in injustice.

Our appeal to President Bush fell on deaf ears. The past five years have seen the USA engage in systematic violations of international law. They include the following interlinked violations, part of a global detention web that the USA has spun in the “war on terror”:

- Secret detention, including enforced disappearance
- Secret detainee transfers, also known as rendition
- Indefinite detention without charge or trial
- Torture and other cruel, inhuman or degrading treatment

The US administration denies that it has operated on the wrong side of the law and continues to defend its policies and their lawfulness. In October, for example, John Bellinger, the State Department’s legal advisor, appealed to an audience in London to accept that “we have a solid legal basis for our views. We have not ignored the existing rules or made up new rules.”

This has been a consistent refrain. Last June, for example, President Bush said that his response to critics of the Guantánamo detention camp was that “we are a nation of laws and the rule of law”. In October, a week after President Bush signed into law the Military Commissions Act which strips the US courts of jurisdiction to hear *habeas corpus* appeals from any foreign detainee held anywhere in US custody as an “enemy combatant”, Attorney General Alberto Gonzales reassured an audience in Berlin of the USA’s commitment to preserving the rule of law in the “war on terror”.

Is this simply public relations? It is certainly tempting to accuse the US government of hypocrisy, particularly when it condemns the very same violations if committed by other countries. But we should reflect further on the question of lawfulness if we are to engage the US authorities in more than a shouting match.

It is true. The USA *is* a nation of laws. It is also sometimes said to be a nation of lawyers, some of whom are employed by the administration.

It is also true that the law is vulnerable to elastic interpretation, manipulation or selective application by the state. And, for better or worse, a government can use policy to drive the law rather than vice versa.

This is what has happened in the “war on terror” – for worse – causing *distress* to thousands of detainees and their families, *damage* to the international human rights framework, and ultimately *danger* to public security. Policy has come first. Law has come a distant second.

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Here it is necessary to pause to consider what we mean by the “rule of law”. President Bush has repeatedly asserted that the rule of law is one of the “non-negotiable demands of human dignity” to which the USA will adhere. The US National Security Strategy devotes an entire chapter to this promise, but without defining the rule of law. On the other side of the Atlantic, Lord Bingham, one of the most senior judges in the United Kingdom, recently attempted to do so. Drawing on the starting point suggested by John Locke in 1690 – “wherever law ends, tyranny begins”<sup>2</sup> – Lord Bingham suggests eight sub-rules to the rule of law:

- the law must be accessible and intelligible;
- disputes must be resolved by application of the law rather than exercise of discretion;
- the law must apply equally to all;
- it must protect fundamental human rights;
- disputes should be resolved without prohibitive cost or inordinate delay;
- public officials must use power reasonably and not exceed their powers;
- the system for resolving differences must be fair;
- a state must comply with its international law obligations.<sup>3</sup>

To measure the USA’s conduct in the “war on terror” against these rules is to find it wanting. The pursuit of unfettered discretionary executive power has been the order of the day. The law has not been accessible to so-called “enemy combatants”; it has not been applied equally; and it has not protected fundamental human rights, including the right to be free from

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<sup>2</sup> John Locke, *Second Treatise of Government*.

<sup>3</sup> *The Rule of Law*. The Rt. Hon Lord Bingham of Cornhill KG, House of Lords. The sixth Sir David Williams Lecture, Cambridge University Centre for Public Law, 16 November 2006.

arbitrary detention, enforced disappearance and torture or ill-treatment. The USA has failed to comply with its international legal obligations.

Perhaps all members of the US government should reflect upon the questions and answers for the new naturalization exam announced by the US Citizenship and Immigration Services on 30 November 2006. Under this exam, prospective US citizens would have to answer a number of questions selected from a set of 144. Question 73 is "What is the rule of law?" The answer provided is: "Everyone must obey the law. Leaders must obey the law. Government must obey the law."

Many people may consider that the USA's conduct over the past five years is the response of a *unique* administration to a *unique* event. It is not that simple. This administration's policies did not spring from nowhere. The policy of renditions, for example, builds on past practice and an executive order signed by President Clinton in 1995.<sup>4</sup> The choice of Guanánamo as a location for "war on terror" detentions built on existing US Supreme Court jurisprudence restricting the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals. Declassified CIA interrogation training manuals from the 1960s and 1980s describe "coercive techniques" that mirror the "stress and duress" techniques sanctioned in the "war on terror".<sup>5</sup> And, relevant to the last of Lord Bingham's rules – that a state must comply with its international legal obligations – the USA took a pick-and-choose approach to international law long before 11 September 2001. The administration's relationship to international law in the "war on terror", including its selective application of the Geneva Conventions, has been built on an existing US reluctance to apply the same rules to itself that it so often says it expects of others.

To take one example: The USA ratified the International Covenant on Civil and Political Rights in 1992 under the first President Bush and the Convention against Torture in 1994 under President Clinton. To each treaty, the US attached a number of conditions, including that it considered itself bound by the prohibition on cruel, inhuman or degrading treatment only to the extent that it matched existing US law. During at least the first four years of "war on terror" detentions, Justice Department lawyers took the position that because of these reservations the USA had no treaty obligation on cruel, inhuman or degrading treatment with respect to foreign nationals held in US custody overseas (including Guantánamo). Although Congress passed the Detainee Treatment Act in December 2005, prohibiting such treatment, the reservations remain in effect, drilling a loophole through the Act (which anyway restricts *habeas corpus* and entrenches impunity), and leaving detainees exposed to lesser standards of protection than required under international law.

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<sup>4</sup> See *The temptation to circumvent extradition protections*, pages 16-24 of *USA: No return to execution: The US death penalty as a barrier to execution*, AMR 51/171/2001, November 2001. <http://web.amnesty.org/library/index/engamr511712001>.

<sup>5</sup> See pages 77-79 of *USA: Human dignity denied – Torture and accountability in the 'war on terror'* (AI Index: AMR 51/145/2004, October 2004, <http://web.amnesty.org/library/index/engamr511452004>).

In his discussion of the rule of law, Lord Bingham quotes the words of US Supreme Court Justice Brennan from the 1988 Israel Yearbook of Human Rights: *“There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along”*.

To look at it another way, in times of peace and low perceived threats to security, it is crucial to close all possible loopholes for human rights violations. Otherwise, when crises occur, the temptation for a government to resort to such violations in the name of “war” and national security is made all the more realizable.

## Human rights rejected by a war mentality

*War makes the world understandable, a black and white tableau of them and us. It suspends thought, especially self-critical thought. All bow before the supreme effort. We are one... But war is a god, and its worship demands human sacrifice.*

Chris Hedges, New York Times foreign correspondent, 2002

To return to the beginning, a core policy choice was to frame the response to the 11 September attacks in terms of a global “war” rather than as a criminal investigation and law enforcement effort. Unlike the “war on crime” or the “war on drugs” – this time it was more than rhetoric. The government maintains that its “war on terror” detention activities outside the USA (and some inside it) are exclusively regulated by the law of war, as the US itself interprets it. International human rights law has been demoted or rejected entirely. Yet human rights law applies in times of war and peace, and a country’s human rights treaty obligations apply to its conduct inside *and* outside its territory, as the UN Human Rights Committee and the Committee against Torture told the USA earlier this year.

The law would have to be rethought to fit the new paradigm ushered in by the terrorists, as President Bush characterized the situation in a detention policy document he signed early in the “war on terror”. This 7 February 2002 memorandum spoke of the need for “new thinking in the law of war” and an approach to detainees that was “consistent with” the Geneva Conventions, but only to the extent that “military necessity” allowed it. This memorandum is one of many that have leaked into the public domain over the past two years. These documents, mainly written by administration lawyers in 2001 and 2002, contained legal advice tailored to fit desired policy outcomes. Domestic and international precedents that suited the policy were emphasized; those that did not were ignored or downplayed. These memorandums represent the “new thinking” demanded by President Bush. The outcome has been old, familiar abuses.

An early indicator of how the USA's global war paradigm would determine its detention regime was revealed on 13 November 2001, when President Bush signed a Military Order authorizing the Pentagon to hold non-US citizens in indefinite military custody without charge or trial. The Military Order prohibited any detainee held under it from seeking any remedy in any proceeding in any US, foreign or international court. If any detainee were to be tried, the trial would be by military commission – an executive body not an independent or impartial court. Administration lawyers had been in action. The Order was signed a week after a memorandum was sent from the Justice Department to the White House entitled “*Legality of the use of military commissions to try terrorists*”.

Although these military commissions were struck down as unlawful by the US Supreme Court in June this year – once again exposing the hollowness of the policy-driven legal advice on which the administration was relying – the Military Order remains in force. The US government told the Committee against Torture in May that all those held in Guantánamo and Afghanistan were now held under the Order.

## Indefinite detention in Afghanistan and Guantánamo

*My country [Mauritania] turned me over, short-cutting all kinds of due process of law, like a candy bar to the United States. They sent me to Jordan for torture and later on to Bagram and then to this place... I have been kept out of the world for more than four years and I really don't know what is going on outside.*

Mohamedou Ould Slahi, Guantánamo detainee, December 2005

Two months after the Military Order was signed, the first detainees were transferred from Afghanistan to Guantánamo, hooded, shackled and tied down like cargo. They were the first of more than 750 detainees of some 45 nationalities who would be taken to the base. They have included children as young as 13, as well as the elderly. They have included people who were simply in the wrong place at the wrong time. They have included scores of individuals handed over to the USA by Pakistani or Afghan agents in return for bounties of thousands of dollars. In his recent memoirs, President Musharraf wrote that the CIA had paid millions of dollars in “bounties” and “prize money” for 369 suspects handed over by Pakistan to the United States.

The US authorities have branded the detainees as loosely-defined “enemy combatants” in a global conflict. That the world is seen as the “battlefield” is illustrated by the fact that those held in Guantánamo have included individuals picked up in Gambia, Bosnia, Mauritania, Egypt, Indonesia, Thailand, Zambia and United Arab Emirates, as well as Pakistan and Afghanistan.

According to the US, “enemy combatants” are both a potential source of intelligence and a potential threat to national security. Access to lawyers is perceived as detrimental to the interrogation process known as the “continuous intelligence cycle”. Access to the courts is

seen as disruptive of military operations. At every opportunity, the administration has thrown obstacles in the way of legal representation and judicial oversight.

Many questions about Guantánamo remain unanswered. For example, the CIA is known to have operated a separate interrogation facility there, but for how long and who was interrogated? Amnesty International has raised allegations that agents of other countries, including China and Libya, have been in Guantánamo and participated in ill-treatment there. We have received no substantive response to our inquiries.

Hopes for the beginnings of transparency and justice were raised in June 2004, when the US Supreme Court ruled in *Rasul v. Bush* that the US courts had jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad and held at Guantánamo, contrary to the legal advice that had been given to the Pentagon by Justice Department lawyers in a December 2001 memorandum. However, as Stalin said of the Pope, the Court has no army or police force to enforce its will.<sup>6</sup> Narrowly-framed judicial decisions interpreted narrowly and in self-serving fashion by the executive make for slow progress towards full respect for human rights.

The executive responded to the *Rasul* decision by arguing in the lower courts that the Guantánamo detainees had no grounds under constitutional, federal or international law on which to challenge the lawfulness of their detention. In other words, according to the administration's Kafkaesque vision for Guantánamo, the *Rasul* ruling should be interpreted as mandating no more than a purely paper right – the detainees could file *habeas corpus* petitions, but only in order to have them necessarily dismissed. More than two years after the *Rasul* ruling, not a single detainee currently held in Guantánamo has had the lawfulness of his detention judicially reviewed. And now, with the recent passage of the Military Commissions Act, the government is seeking to have all pending *habeas corpus* petitions thrown out of federal court. *Habeas corpus* is a fundamental safeguard against arbitrary detention, enforced disappearance and torture.

In its global war mode, the US administration has viewed *habeas corpus* as an abuse rather than as a protection against abuse. The version of the Military Commissions Act which President Bush sent to Congress on 6 September, stated that the legislation was necessary because “the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment...to the abuse of American legal processes”. This assertion seemed to put the US lawyers who had litigated on behalf of the Guantánamo detainees on the wrong side of President Bush's “with us or with the terrorists” divide. In this nation of laws, it seemed, you were either with the administration's lawyers or you were with the terrorists.

Five years on, more than 400 men are still held in Guantánamo. None has been tried. None has appeared in court. All, in Amnesty International's opinion, are unlawfully held. The

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<sup>6</sup> “The Pope? How many divisions has he got?” Quote attributed to Joseph Stalin by Winston Churchill (see, for example, <http://www.bartleby.com/66/30/55130.html>).

organization is concerned that many have been ill-treated, whether in Afghanistan or elsewhere prior to their transfer to Guantánamo, or during their transfer, or as part of the interrogation process in the base, or just through the harshness of the Guantánamo regime – isolating, indefinite and punitive. By association, their families too are subjected to the cruelty of this virtually incommunicado island incarceration. Amnesty International has spoken to many such relatives.

Another 600 people are held in US military custody in Bagram air base in Afghanistan. Even less is known about who is or has been held there than in the case of Guantánamo. Some are believed to have been held in Bagram for more than two years. None has access to lawyers or the courts. The government is resisting current *habeas corpus* challenges brought on behalf of Bagram detainees, not only on the basis of the Military Commissions Act's withdrawal of *habeas corpus*, but also on the grounds that Bagram is not US territory and foreign nationals held outside the USA cannot benefit from the US Constitution. Here the government is reprising the arguments it made in seeking to exempt Guantánamo from judicial scrutiny.

Under the Bagram lease, the Afghan government allows the USA “exclusive, peaceable, undisturbed and uninterrupted possession” and use of the base. This, the US argues, makes what goes on in Bagram even less subject to judicial oversight than what goes on in Guantánamo, where the USA exercises “complete jurisdiction and control” under the lease with Cuba. Under international human rights law, the detainees in both locations have the right to challenge the lawfulness of their detention in a court. Instead, however, the USA has operated a kind of lawlessness by lease.

Although the US authorities said in a recent legal brief that a “significant percentage” of the Afghan detainees at Bagram may be transferred to the custody of the Afghanistan government within a year, it also indicated that some Afghans and other nationals would be kept at Bagram or transferred to Guantánamo Bay beyond that timeframe. The USA said that it is helping the Afghan government refurbish the Afghan National Detention Facility to ensure that it has a “detention capability which meets international standards”. The double standard in this assertion is breathtaking, when one considers the USA's own detention practices in the past five years.

## **Torture and other cruel, inhuman or degrading treatment**

*Whatever the ultimate historical judgment, it is established fact that documents justifying and authorizing the abusive treatment of detainees during interrogation were approved and distributed. These authorizations rested on three beliefs: that no law prohibited the application of cruelty; that no law should be adopted that would do so; and that our government could choose to apply the cruelty – or not – as a matter of policy depending on the dictates of perceived military necessity.*

Alberto Mora, US Navy General Counsel, 2006



A familiar refrain throughout the “war on terror” has been the assertion by US officials that the USA leads the world in the struggle against torture; that all detainees in US custody are treated humanely; that there is full accountability on the rare occasions that this standard is not met; and that *al-Qa’ida* detainees are trained to lie as part of asymmetric warfare.

**(a) *The USA leads the world in the struggle against torture***

On 26 June 2003, three months after the invasion of Iraq, President Bush issued his annual statement on the USA’s commitment to the global struggle against torture. Here he broadened the “axis of evil” to include Burma, Cuba, and Zimbabwe as well as North Korea and Iran. He promised that unlike such “notorious human rights abusers” which had “long sought to shield their abuses from the eyes of the world by denying access to international human rights monitors”, the USA would lead by example.

By now, Amnesty International and other international human rights monitors had sought and been denied access to the USA’s “war on terror” detainees and had raised allegations of torture and ill-treatment by US forces in Afghanistan and Guantánamo, of deaths in custody, and of secret detentions and renditions. Such concerns were dismissed, to use Secretary Rumsfeld’s parlance, as the “shrill hyperventilation of a few people who didn’t know what they were talking about”.

Then the Abu Ghraib torture scandal broke. This time there were photographs, impossible to ignore. Still, this was spun by the administration as the exception that proved the rule – the rule being that the USA treats all detainees humanely. What happened at Abu Ghraib was the exception, a few low-ranking soldiers on the night shift displaying “un-American” values. And what they had done amounted to “abuse”, not torture.

One might reasonably hypothesize that members of an administration that had discussed how to push the boundaries of acceptable interrogation techniques and of how agents could avoid criminal liability for torture might display a particular reticence to call torture by its name. Certainly, such an administration could not be described as leading the struggle against torture.

Asked whether the revelations from Iraq undercut the assertion that the USA did not torture, Secretary Rumsfeld responded that while he was “not a lawyer”, it was his “impression” that what had happened at Abu Ghraib was “abuse, which I believe technically is different from torture...Therefore, I’m not going to address the torture word”.

Secretary Rumsfeld’s comment about not being a lawyer suggests that only a lawyer can say what torture is or is not. And the administration lawyers had already spoken. It was revealed that in a memorandum dated 1 August 2002, drawing on past cases from Northern Ireland and Israel, citing judicial or other decisions that supported his thesis and ignoring those that did not, an Assistant Attorney General in the Justice Department had advised the White House that the President could override the prohibition on torture; that interrogators could cause a great deal of pain before crossing the threshold to torture; and that there were a wide range of acts that might amount to cruel, inhuman or degrading treatment but which would not amount

to torture. Agents who used them, the memorandum argued, would not be prosecutable under the USA's extraterritorial anti-torture law. Even if their interrogation methods did constitute torture, "necessity or self-defence could provide justifications that would eliminate any criminal liability".

Techniques cited in the memorandum emerged in the USA's "war on terror" as the euphemistically termed "stress and duress" techniques. They included forced standing and crouching, sleep deprivation, subjection to noise, and hooding. Some techniques, such as the use of dogs, forced nudity, forcible shaving, sexual humiliation by female interrogators, and removal of religious items, have had discriminatory undertones.

Although the administration distanced itself from the 2002 memorandum after it was leaked two years later in the wake of Abu Ghraib, much of it lived on in a 2003 Pentagon interrogation report. Moreover, Alberto Gonzales said during his nomination hearings in 2005 that the memorandum had represented the position of the administration and that he, as White House Counsel, had accepted it. He got the job of Attorney General, the highest law enforcement officer in the country. In the context of the "war on terror", there have been no prosecutions of US personnel under the extraterritorial anti-torture law.<sup>7</sup>

***(b) All detainees are treated humanely; there is accountability when this standard is not met***

As White House Counsel, Alberto Gonzales had drafted advice in a memorandum to the President in January 2002, advice that was echoed in a document from Attorney General John Ashcroft on 1 February 2002, suggesting that a benefit of not applying the Geneva Conventions to detainees picked up in the Afghanistan conflict would be that prosecutions of US personnel under the USA's War Crimes Act would be more difficult. On 7 February 2002, President Bush signed a memorandum confirming that no Taliban or *al-Qa'ida* detainees would qualify as prisoners of war, and that Article 3 common to the Geneva Conventions would not apply to them either.

Common Article 3 guarantees minimum standards of fair trial. It also prohibits torture, cruel treatment, "outrages upon personal dignity, in particular humiliating and degrading treatment". At the time, the War Crimes Act criminalized violations of common Article 3 as war crimes that could be prosecuted in the USA.

Almost five years later, there have been no prosecutions under the Act. Yet, at a Senate hearing last July, six former and current military lawyers all agreed that some of the interrogation techniques authorized in the "war on terror" had violated common Article 3. Indeed in 2004 a military investigation confirmed that at least from 2002, US interrogators in

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<sup>7</sup> On 6 December 2006, Roy Belfast Jr., aka Charles McArthur Emmanuel, a US citizen who is the son of the former Liberian President Charles Taylor, became the first person to be charged with torture under 18 U.S.C. § 2340, the extraterritorial anti-torture statute. US Department of Justice news release, <http://miami.fbi.gov/dojpressrel/pressrel06/mm20061206.htm>.

Afghanistan were stripping detainees, isolating them for long periods, using stress positions, exploiting fear of dogs and using sleep and light deprivation.

After the Supreme Court's *Hamdan v. Rumsfeld* ruling in June this year found that common Article 3 was applicable, the administration was clearly concerned. At a press conference on 15 September 2006, as his White House Counsel had done nearly five years earlier, President Bush complained that "Common Article 3 says that there will be no outrages upon human dignity. It's very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation." Again we hear echoes from the past. In 2000, the US government told the Committee against Torture that it had been necessary to "limit" the USA's "undertakings" under Article 16 of the Convention against Torture "primarily because the term 'degrading treatment' is at best vague and ambiguous". That treaty reservation has been exploited against "war on terror" detainees.

In September 2006, the administration came up with the Military Commissions Act, a minimally revised version of which was passed by Congress at the end of that month. The Act narrows the War Crimes Act to exclude as war crimes unfair trials or "outrages upon personal dignity, in particular humiliating and degrading treatment", and backdates this to before the beginning of the "war on terror". Impunity has been further entrenched.

In his 2004 annual statement against torture, made a matter of weeks after the Abu Ghraib revelations, President Bush said that "the abuse" – again, no resort to the torture word – the "abuse" of detainees at Abu Ghraib was "inconsistent with our policies." This implied that humane treatment is a policy choice not a legal obligation, and echoed in President Bush's 7 February 2002 memorandum, which has not been withdrawn or amended. This states that "as a matter of policy" detainees would be treated humanely, "including those who are not legally entitled to such treatment". There are no such detainees. All detainees, everywhere, have the right to be free from torture or other ill-treatment. This is not a policy choice. It is a legal obligation on all governments.

Even now, two and a half years after Abu Ghraib, the USA adheres to a less than absolute ban on torture and other cruel, inhuman or degrading treatment.

As already noted, the USA's treaty reservations mean that it considers itself bound by the prohibition on cruel, inhuman or degrading treatment only to the extent that it matches existing US law. Under Supreme Court jurisprudence, conduct is banned that "shocks the conscience". Justice Department lawyers reportedly view this as allowing consideration of the context in which ill-treatment of detainees occurs. One such context is the scenario in which a detainee is thought to have vital information, which together with the defence of "necessity" the Supreme Court of Israel gave a green light to in 1999, but which the Committee against Torture and the Human Rights Committee have firmly rejected. Some of the memorandums drafted by US administration lawyers picked up on the Israeli example. The August 2002 memorandum advised that US agents accused of torture might evade criminal liability by arguing the defence of "necessity".

In addition, the concept of “military necessity” has been used by the US authorities to justify prolonged incommunicado detention during which torture or ill-treatment has been used. For example, the International Committee of the Red Cross (ICRC) was denied access to a Syrian detainee in Abu Ghraib for four months in 2004, during which time he was abused and threatened with dogs and subjected to solitary confinement in a tiny dark cell without windows, toilet or bedding (this was one of the torture techniques used in Iraq under Saddam Hussein and cited by the USA in its build-up to the invasion of Iraq). Mauritanian detainee Mohamedou Ould Slahi, who prior to being taken to Guantánamo had been “rendered” to Jordan for eight months where he has said he was tortured, was kept from the ICRC at the US Naval Base for more than a year, also on the grounds of “military necessity”. During this time his treatment included being subjected to extremes of temperature, to threats against his family (he was told that his mother was now in US custody and only his cooperation could help her), and being taken off the base in a boat and threatened with death or disappearance. Although a military investigation recommended that the chief interrogator be disciplined, the Commander of US Southern Command rejected this on the grounds that further inquiry could reveal extenuating evidence to help the interrogator’s case. There can be no extenuating circumstances for torture.

“Military necessity” was also used to justify the “special interrogation plan” authorized by Secretary of Defence Rumsfeld for use on another detainee, Mohamed al-Qahtani (Guantánamo detainee 063), considered to have high intelligence value but to be resistant to standard US army interrogation techniques.

***In September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).***

FBI memorandum, 14 July 2004

Mohamed al-Qahtani was subjected to intense isolation for three months in late 2002 and early 2003. Similar to what would soon occur in Abu Ghraib, he was forced to wear a woman’s bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number of dog tricks; was forced to dance with a male interrogator while made to wear a towel on his head “like a burka”; was subjected to forced standing, forcible shaving of his head and beard during interrogation, stripping and strip-searching in the presence of women, sexual humiliation, culturally inappropriate use of female interrogators, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of “swimsuit models” hung round his neck; was subjected to hooding, loud music, white noise, sleep deprivation, and to extremes of heat and cold. Other forms of humiliation included being forced to urinate in his clothing when interrogators

refused to allow him to go to the toilet. Mohamed al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days. During the period of his interrogation, al-Qahtani was allegedly subjected to a fake rendition, during which he was injected with tranquilizers, made to wear blackened goggles, and taken out of Guantánamo in a plane.

A military investigation concluded that Mohamed al-Qahtani's treatment, while cumulatively "degrading and abusive", "did not rise to the level of prohibited inhumane treatment". We should bear this in mind every time an official says that detainees in US custody are treated humanely. Clearly their concept of humane treatment does not match international standards.

**(c) *Al-Qa'ida detainees are trained to lie as part of asymmetric warfare***

The administration has sought to dispel allegations of torture and ill-treatment made by detainees by pointing to the "Manchester document", an alleged *al-Qa'ida* training manual found in the UK which instructs members to claim that they were tortured or ill-treated in custody. Secretary Rumsfeld, for example, who authorized Mohamed al-Qahtani's special interrogation plan in 2002, as well as the hiding of a detainee in Iraq in 2003, said in June 2005: "These detainees are trained to lie, they're trained to say they were tortured, and the minute we release them or the minute they get a lawyer, very frequently they'll go out and they will announce that they've been tortured, and the press carries it and says another example of torture, when in fact they've been trained to do that and their training manual says so."

Amnesty International has spoken to numerous released detainees – including in Afghanistan, Canada, Australia, France, Germany, Bahrain, Yemen, Sweden, and the UK. Their allegations of ill-treatment have been consistent, restrained and credible. In addition, there are the allegations made by detainees still in the base, and the evidence from non-detainee sources such as leaked FBI documents.

The tribunals that the US administration has set up to review the status of detainees held as "enemy combatants" and the military commissions that it intends to convene to try a selection of them can rely on evidence extracted under torture or other ill-treatment. But if such detainees routinely make false allegations of such ill-treatment, why has it been necessary to allow these tribunals and commissions to admit evidence that has been coerced? If all detainees are treated humanely, then these tribunals could rely on information lawfully gathered. It would appear that it is the government, as much as any detainee, whose "war" tactics have included being economical with the truth.

Finally, it is worth recalling that when three detainees died in Guantánamo in June, apparently as a result of suicide, the Commander of the base said that the detainees had not killed themselves out of desperation, but as "an act of asymmetric warfare". The Deputy Assistant Secretary of State for Public Diplomacy dismissed the deaths as "a good PR move". As one US commentator said, such statements demand that the camp be closed, "not just because of what it's doing to the prisoners but because of how it is dehumanizing the American captors".

## Secret detentions and renditions

*Make no mistake: every regime that tortures does so in the name of salvation, some superior goal, some sort of paradise. Call it communism, call it the free market, call it the free world, call it the national interest, call it fascism, call it the leader, call it civilization, call it the service of God, call it the need for information; call it what you will, the cost of paradise, the promise of some sort of paradise...will always be hell for at least one person somewhere, sometime.*

Ariel Dorfman, May 2004

*They came to take our father at night, like thieves...*

12-year-old daughter of a victim of US rendition and 'disappearance'

In September 2006, US Congressman Peter King, the Chairman of the House Homeland Security Committee, said: "If we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that". More recently, Vice-President Cheney agreed that a "dunk in water is a no-brainer if it can save lives". Water-boarding, it seems, is still being viewed by some as a legitimate option in the "war on terror". However, it is now banned for use by the military under the army interrogation manual released in September. What about the CIA, to which the army manual does not apply outside military facilities?

The secrecy surrounding CIA activities in the "war on terror" calls to mind the theory of "knowns" and "unknowns" espoused by Secretary Rumsfeld. At NATO headquarters in Brussels in June 2002, he said: "There are things we know that we know ['known knowns']. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know".

We find ourselves in a similar situation in relation to US detentions and interrogations.

An example of a known known: We know that in December 2002, Secretary Rumsfeld authorized 20-hour interrogations, stress positions, isolation, sensory deprivation, hooding and the exploitation of detainees' phobias for use at Guantánamo as a "matter of policy". We know that Secretary Rumsfeld has justified such techniques by saying that they had been "checked with the lawyers, they were determined to be within the President's order that the treatment be humane". We know that such techniques were put to use on Mohammed al-Qahtani, for one. We know that no-one has been brought to account for this.

An example of a known unknown: We know that the CIA has operated a secret interrogation and detention program, linked to its program of abductions and renditions. We don't know precisely what has gone on in the CIA program. The government is currently trying to stop anyone finding out.

President Bush has defended the existence of the secret detention program on the grounds of necessity. It had been necessary, he asserted, to move certain individuals to an environment where they could be held in secret and questioned using unspecified “alternative” techniques to break resistance and extract information. The program was developed after Abu Zubaydah, captured in Pakistan in March 2002 and handed over to the USA, stopped “cooperation” with his US interrogators. President Bush emphasized that the program had been subject to “multiple legal reviews” by the Justice Department and CIA lawyers”. Again, there is a stark “disconnect” between the US authorities and the international community. President Bush confirmed the existence of the program only a matter of weeks after the Human Rights Committee and the Committee against Torture emphasized to the US government that secret detention violates the USA’s treaty obligations and called for an end to the practice.

The US secret detention program could not exist without renditions – secret detainee transfers bypassing judicial oversight. Here too, lawyers have come to the US government’s aid, and advised that Article 3 of the Convention against Torture – prohibiting the transfer of a person to another state where they would face torture – has no extraterritorial scope. In other words, they claim, the USA has no Article 3 obligation in the case of people in US custody outside the USA. Under this theory, renditions by the USA from, say, Italy to Egypt, or Mauritania to Jordan, or Gambia to Afghanistan, or from Bosnia (or anywhere else) to Guantánamo, would fall outside of Article 3 protections. The USA claims that as a matter of policy (not of law) it does not transfer detainees to torture, but has at the same time emphasized its view that Article 3 does not apply to the transfer of people to ill-treatment not amounting to torture and does not expressly prohibit the transfer of a person to enforced disappearance, which the USA does not consider torture. In addition, there is reported to be a Justice Department memorandum advising that US authorities could benefit with impunity from information extracted under torture in other countries if it could be shown that the detainees in question were not formally in US custody.<sup>8</sup> This memorandum has not been made public.

Neither has the administration elaborated upon what the CIA’s “alternative” interrogation techniques in its secret program have entailed. Sued in court, the CIA has so far been successful in its ploy of refusing to confirm or deny the existence of an alleged presidential directive and an alleged Justice Department memorandum authorizing and outlining the secret detention program and its interrogation methods. However, the methods are widely reported to have included techniques that would clearly violate international law, including “waterboarding” (simulated drowning), forced standing for more than 40 hours while shackled to a bolt in the floor, and the “cold cell” (whereby the detainee is left standing naked in a cold cell while being repeatedly doused with cold water).

When confirming the CIA program on 6 September, President Bush simultaneously announced that 14 “high-value” detainees had just been transferred from secret custody to

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<sup>8</sup> Muhammad Haydar Zammar, a German national of Syrian descent, was reportedly “rendered” by CIA jet from Morocco to Syria in December 2001. US officials said that they did not have direct access to Muhammad Zammar in Syria, but reportedly provided written questions to his Syrian interrogators.

military detention at Guantánamo. They had been held incommunicado in secret locations for up to four and a half years. President Bush was producing them now as pawns – in the charged climate of the fifth anniversary of the 9/11 attacks and the upcoming mid-term elections – to seek to persuade Congress to replace the military commissions struck down by the Supreme Court, to strip the US courts of the jurisdiction to consider *habeas corpus* appeals from “enemy combatants”, and to provide legislative cover for the CIA secret program and all those involved in it. Congress passed the Military Commissions Act, which President Bush has said will allow the CIA program to continue.

***Historians will evaluate, and legislators debate, how wise it is for a society to give such regard to secrecy. The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society.***

US federal judge, September 2005

The transfer of the 14 has left the administration with a potential problem, however. The government has turned them from detainees with allegedly high intelligence value to detainees with information about possible government crimes. The administration is thus seeking to ensure that what the 14 detainees know about the CIA program – such as the location of secret detention facilities, conditions of confinement in them, or what interrogation techniques have been used – never see the light of day. The government is arguing in court that such information is classified as *TOP SECRET, Sensitive Compartmented Information*, and would cause “exceptionally grave damage” to national security if revealed. Secrecy is being used to cover up human rights violations, and to facilitate a lack of accountability.

Such secrecy could yet be used against detainees in trials by military commission, bodies with the power to admit coerced evidence and to hand down death sentences. Under the Military Commissions Act, any classified information “shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security”. The prosecution may be permitted to introduce evidence while protecting from disclosure “the sources, methods, or activities by which the United States acquired the evidence”. The prosecution may also object to any examination of a witness that could lead to the disclosure of classified information. It seems clear that the government will seek to prevent any disclosure of what has gone on in the CIA program. Not only may certain defendants thus face an insurmountable barrier in relation to certain classified evidence used against them, the Act facilitates the admission of evidence that has been obtained by unlawful methods. This is antithetical to the rule of law and would seriously damage the integrity of proceedings.

There is another known unknown: We know that more than 14 people have been held in the CIA program. We don't know precisely who or how many. We don't know where they have been held and how they have been treated. We don't know where they are now. We will continue to seek clarification on their fate and whereabouts.



And finally, there are the unknown unknowns, the things that “we don’t even know we don’t know”. To put it another way, the story of how human rights protections have been bypassed by the USA in the “war on terror” is far from complete.

## A fresh perspective?

*For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.*  
Thomas Paine, *Common Sense*, 1776

To conclude, in this “nation of laws”, the US administration has indeed turned to lawyers to clear its policies. Those lawyers have told their government masters what they want to hear. The law has been stretched to give cover for abhorrent policies. This is not the rule of law. As John Locke said four centuries ago, this is the first step toward tyranny.

In the “war on terror”, the USA’s three-branch system of government has failed to put the necessary check on the executive, notwithstanding the Supreme Court rulings in 2004 (*Rasul v. Bush*) and 2006 (*Hamdan v. Rumsfeld*). Litigation against the Military Commissions Act and for the basic rights of detainees is continuing, and will likely reach the Supreme Court again before too long. Human rights organizations and others will continue to support the tireless efforts of the US legal community to restore the rule of law.

In addition to efforts in the courts, a new Congress from January brings hopes of renewed oversight and investigation and improved legislation. This is not a foregone conclusion, however. Amnesty International will continue to call on Congress to establish a full commission of inquiry into the USA’s “war on terror” detention policies and practices, to repeal or substantially amend the Military Commissions Act and to amend the Detainee Treatment Act, as well as to withdraw treaty reservations and seal loopholes for torture and other ill-treatment. Full accountability for past human rights violations must be ensured.

Finally, we must also continue to seek to persuade the executive to change tack. When President Bush announced the resignation of Secretary Rumsfeld the day after the mid-term congressional elections last month, he said that the two men agreed that “sometimes it’s necessary to have a fresh perspective”. The administration (including its lawyers) should take a fresh approach to US detention policy, bringing it into full compliance with international law. It should abandon the “dark side” promoted by Vice-President Cheney five years ago. Closing Guantánamo and ending secret detentions and renditions would be a good start.

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