USA

REMEDY BLOCKED AGAIN

INJUSTICE CONTINUES AS SUPREME COURT DISMISSES RENDITION CASE

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We cannot accept portions of these recommendations concerning reparation, redress, remedies, or compensation. Although mechanisms for remedies are available through US courts, we cannot make commitments regarding their outcome
US government, UN Human Rights Council, March 2011[1]

The above response of the US administration to international criticism of the lack of remedy for US human rights violations in the counter-terrorism context is somewhat misleading. While the administration implies that its officials leave it to the courts to determine whether an alleged human rights violation occurred and a remedy is required, in fact, the reality is that the administration has frequently done all it can to prevent the courts from making precisely such determinations.

The USA gave this formal response at the UN Human Rights Council in March 2011 as part of the scrutiny of the US human rights record under the Universal Periodic Review (UPR) process. The following month, the Department of Justice filed a brief in the US Supreme Court. The brief urged the Court to refuse to hear the case of five men who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment as part of the USA's "rendition" programme.

On 16 May 2011, the administration got what it wanted when the Supreme Court, without comment, dismissed the case. This leaves in place a divided decision of the Court of Appeals upholding the US administration's invocation of the "state secrets privilege" as justification for dismissing the lawsuit without any review of its merits. "Further review is unwarranted", the administration had argued to the Supreme Court.

The US government has not only successfully argued that the courts should not even consider allegations of human rights violations, including the crimes under international law of torture and enforced disappearance, committed in the context of the USA's secret detention and rendition programmes operated by the Central Intelligence Agency (CIA) from 2002 to 2009, it has failed to bring anyone to justice for these crimes.

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

The USA says it is committed to international human rights standards. Its failure to ensure accountability and access to effective remedy for human rights violations carried out by its own agents in the counter-terrorism context, however, directly calls that commitment into question.

As on the question of remedy, the positive aspects of the USA's response in the UPR process to calls from other governments to ensure accountability for human rights violations in the counter-terrorism context were less than absolute. The USA "supports recommendations calling for prohibition and vigorous investigation and prosecution of any serious violation of international law, *as consistent with existing US law, policy and practice*... We investigate allegations of torture, and prosecute *where appropriate*" (emphasis added). The absence of vigorous and thorough investigations into the crimes under international law committed in the CIA programmes is an injustice that continues to fester. The blocking of access to an effective procedure for claiming a remedy is the other side of this same coin.

The lawsuit that the lower courts had dismissed on the grounds of state secrecy and the US Supreme Court refused to revive had been filed in federal court in 2007 by UK resident Binyam Mohamed, Italian national Abou Elkassim Britel, Egyptian national Ahmed Agiza, Yemeni national Muhammad Faraj Ahmed Bashmilah, and Bisher al-Rawi an Iraqi national and UK permanent resident. The lawsuit alleged that Jeppesen Dataplan, Inc. (Jeppesen), a subsidiary of the Boeing Company, had provided "direct and substantial services" to the CIA for the rendition programme. In so doing, the lawsuit claimed, "Jeppesen knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine".

The administration of President George W. Bush moved to intervene in the case, to assert "state secrets privilege", and to have the lawsuit dismissed on that basis. In support of the Bush administration's assertion that the subject matter of the lawsuit was a state secret that should be dismissed at the outset, the then Director of the CIA, General Michael Hayden, filed declarations in District Court asserting that proceeding with the case would cause "exponentially grave damage" to national security by revealing CIA methods and sources and "extremely grave damage" to the USA's foreign relations and activities by revealing which governments the CIA had cooperated with.

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

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

By six votes to five, the Ninth Circuit ruled in favour of the government and affirmed the original District Court decision. The five dissenting judges, noting that "abuse of the Nation's information classification system is not unheard of", warned that the state secrets doctrine "is so dangerous as a means of hiding governmental misbehaviour under the guise of national security, and so violative of common rights to due process, that courts should confine its application to the narrowest circumstances that still protect the government's essential secrets". They accused the majority of "gratuitously attaching 'allegedly' to nearly each sentence describing what Plaintiffs say happened to them, and by quickly dismissing the voluminous publicly available evidence supporting those allegations, including that Jeppesen knew what was going on when it arranged flights described by one of its officials as 'torture flights'."

Despite the fundamental issues raised in the lawsuit, and the serious split on the Court of Appeals, the US Supreme Court declined to take the case.

Three days later President Obama gave a speech on US policy towards the Middle East and North Africa.[2] For the past six months, he said, "we have witnessed an extraordinary change taking place in the Middle East and North Africa. Square by square, town by town, country by country, the people have risen up to demand their basic human rights." He made a number of references to the need for "accountable institutions" to be a part of the new dawn in the region.

President Obama said that "the question before us is what role America will play as this story unfolds", noting that among the "core interests" that the USA had pursued and would continue to pursue in the region was "countering terrorism". He did not elaborate on what the USA's past counter-terrorism practices had meant for the region, but research and findings by Amnesty International and other human rights organizations, as well as the UN and other inter-governmental organisations, a Canadian judicial commission of inquiry, and other sources, tell part of the story: security services in Middle East and North Africa countries would detain, frequently in secret, and torture prisoners transferred or identified to them by the USA, and give the USA information thereby obtained.

The five plaintiffs in the Jeppesen lawsuit between them had alleged that they were "rendered" to secret detention in Morocco, Egypt and Afghanistan and subjected to enforced disappearance and to various forms of torture or other ill-treatment at the hands of US personnel and agents of other governments.

There is ample evidence now in the public domain that for some years the CIA operated a programme of secret detention that involved the systematic perpetration of enforced disappearances and torture and other intentional cruel, inhuman or degrading treatment. Yet the US government has failed even to acknowledge that any crimes under international law were committed in the CIA programmes, let alone to bring those responsible to justice and provide remedy to those subjected to human rights violations.

If accountable government is an essential ingredient for the future of the Middle East and North Africa, why is it not essential for the United States of America? After all, the US administration says it is committed to following "universal standards, not double standards".[3]

The USA rightly asserts that it should seek to set a positive example on human rights. According to US Secretary of State Hillary Clinton, "A commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves… When injustice anywhere is ignored, justice everywhere is denied. Acknowledging and remedying mistakes does not make us weaker, it reaffirms the strengths of our principles and institutions."[4] In practice, however, the US administration is not just continuing to ignore injustice in relation to the abuses committed in the CIA programmes, it is actively perpetuating that injustice by preventing those claiming to be victims of such abuses from having a court hear the substance of their case, rule on all relevant questions of fact and law, and order an effective remedy where the claim is found to have been established.

All too often, the US administration seems to think that words are enough. In a footnote in its legal brief to the US Supreme Court in April 2011, seeking dismissal of the Jeppesen lawsuit, the US administration said:

> "This case does not concern the propriety of torture. Torture is illegal and the government has repudiated it in the strongest possible terms".

Fine words, but a government's obligations on torture and other ill-treatment (or on enforced disappearance) do not end with public condemnation or merely issuing formal orders to its agents, as Amnesty International makes clear in its 12-point Program to Prevent Torture by Agents of the State.[5] In 2004, as part of its campaign to have the USA comply with international law in the counter-terrorism context, the organization assessed the USA's policies against the 12-point program, and found them wanting, despite the Bush administration's condemnation of torture.[6] Although there have been some positive steps taken by the Obama administration, such as ending the CIA's operation of long-term secret detention facilities and use of "enhanced" interrogation techniques, this gap has not yet been filled.

Indeed, as part of the scrutiny of the USA under the UPR process of the UN Human Rights Council in late 2010, the government of Ecuador called on the USA to observe Amnesty International's 12-point program. In its formal responses in March 2011, the US administration said that it supported Ecuador's recommendation.

Again, however, this "support" came with a qualification. The USA said that some of the 12 points "may not be fully applicable in every context". It did not elaborate, but judging by its actions it may have had at least three in mind – points 6, 7 and 10 – in the context of counter-terrorism. Those three points are:

- **6. Investigate.** All complaints and reports of torture should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

- **7. Prosecute.** Those responsible for torture must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments must exercise universal jurisdiction over alleged torturers or extradite them, and cooperate with each other in such criminal proceedings. Trials must be fair. An order from a superior officer must never be accepted as a justification for torture.

- **10. Provide reparation.** Victims of torture and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

It should be noted that these three elements of the Amnesty International 12-point program reiterate legal obligations to which the USA is subject under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (including article 7 (prosecute), articles 12 and 13 (investigate), article 14 (reparations)) and under the International Covenant on Civil and Political Rights (articles 2 and 7).

The efforts of the plaintiffs in the Jeppesen case to have effective access to a judicial procedure in the USA capable of providing an effective remedy would now appear to have been exhausted. The same has happened to others, for example Maher Arar, who was held for nearly two weeks in US custody in 2002 before being transferred from the USA via Jordan to detention and torture in Syria. In 2009, the US Court of Appeals for the Second Circuit upheld a District Court judge's dismissal of his claims, with the majority stating that "it is for

the executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us judges – to decide whether an individual may seek compensation from government officers and employees directly, or from the government, for a constitutional violation". On 14 June 2010, the US Supreme Court announced, again without explanation, that it was refusing to consider the case.

In similar vein, the Ninth Circuit's majority opinion in the Jeppesen case, left intact by the US Supreme Court, said that its ruling was "not intended to foreclose – or to prejudge – possible *non-judicial* relief, should it be warranted for any of the plaintiffs". It recognized that dismissal of the lawsuit deprived the plaintiffs of "the opportunity to prove their alleged mistreatment and obtain damages", and eliminated "one important check on alleged abuse by government officials and putative contractors".

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

This abdication by the judiciary of responsibility for examining allegations of, and remedying where established, such grave human rights violations, leaving complainants and victims to the whims of the political branches of government, is in itself a cause for concern and leaves the USA in violation of its international obligations. Article 14 of the UN Convention against Torture explicitly requires the USA to "ensure *in its legal system* that the victim of an act of torture obtains redress and has *an enforceable right* to fair and adequate compensation, including the means for as full rehabilitation as possible [emphasis added]." When it comes to torture and other human rights violations committed by the USA in the name of countering terrorism, remedy and accountability remain missing. It is up to the US government – all three branches of it, singly or in combination – to bring the USA into line with its international obligations on accountability and remedy.

Rejecting impunity is crucial not only for dealing with past human rights violations, but also for preventing recurrences. The US administration must ensure that investigations and prosecutions in individual cases are initiated while simultaneously working to remove legal or practical or political obstacles to criminal responsibility. And it must cease and reverse the jurisprudential and legislative roadblocks it has constructed that are currently preventing those who claim to have been victims of human rights violations from having access to any effective opportunity to establish their case and to receive a remedy.

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See also:

USA: See no evil. Government turns the other way as judges make findings about torture and other abuse, February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en

Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention, 15 November 2010, http://www.amnesty.org/en/library/info/EUR01/023/2010/en
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USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes, 10 November 2010, http://www.amnesty.org/en/library/info/AMR51/104/2010/en

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

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

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

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

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

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

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[1] UN Doc: A/HRC/16/11/Add. 1. Report of the Working Group on the Universal Periodic Review. United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies represented by the State under review.

[2] Remarks by the President on the Middle East and North Africa, US Department of State, Washington, DC, USA, 19 May 2011, http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa

[3] The Obama administration and international law. Speech by Harold Hongju Koh, Legal Adviser, US Department of State at the Annual Meeting of the American Society of International Law, Washington DC, 25 March 2010, http://www.state.gov/s/l/releases/remarks/139119.htm

[4] Remarks on the Human Rights Agenda for the 21st Century. Hillary Rodham Clinton, Secretary of State, Georgetown University's Gaston Hall, Washington DC, 14 December 2009.

[5] For Amnesty International's 12-point program see Appendix 16 of Combating torture: A manual for action, June 2003, http://www.amnesty.org/en/library/info/ACT40/001/2003/en.

[6] See USA: Human dignity denied – torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en