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Truth, justice and the American way?

Details of crimes under international law still classified Top Secret

On his first full day in office, 21 January 2009, President Barack Obama signed a memorandum committing his administration to an "unprecedented" level of openness in government, on the grounds that "transparency promotes accountability". He signed another memorandum on the same day, this one relating to the Freedom of Information Act (FOIA), in which he asserted that "accountability requires transparency". To this, he added the well-known words of US Supreme Court Justice Louis Brandeis from 1913, namely that "sunlight is said to be the best of disinfectants."

Without official light being thrown upon precisely what happened in the secret detention, interrogation and rendition programmes operated by the Central Intelligence Agency (CIA) under the authority of then President George W. Bush, the human rights violations that were committed in those programmes continue to fester. This lack of truth, compounded by the absence of accountability and remedy for victims, leaves the USA in serious violation of its international human rights obligations.

A judgment issued on 13 December 2012 by the European Court of Human Rights should shame the US authorities into the sort of action they have so far failed to take. The decision centres on the case of Khaled El-Masri, a German national who was handed over to a CIA rendition team by Macedonian authorities in early 2004 and flown to enforced disappearance and further abuse in secret US custody in Afghanistan. While the ruling focused on the responsibility of Macedonia in this episode, the USA cannot escape the fact that the European Court of Human Rights expressly found that US personnel had subjected Khaled El-Masri to *torture* at Skopje airport and to *enforced disappearance* until his release four months later.

Torture and enforced disappearance are crimes under international law. There has been no accountability, no remedy, and little truth in the USA about such crimes and other human rights violations committed during these programmes. Khaled El-Masri pursued redress in the USA, but the lawsuit he brought against the CIA was met by the Bush administration's invocation of the "state secrets privilege" and dismissed by the federal courts. He is not the only one to have had this happen to him – for example, the Obama administration adopted its predecessor's use of this doctrine in the case of five men who say they were the victims of multiple human rights violations in the context of the CIA rendition programme. In 2011, without comment, the US Supreme Court refused to take the case, leaving in place the lower courts' dismissal of the lawsuit and the plaintiffs without judicial remedy in the USA, precisely as had happened to Khaled El-Masri in 2007.

The European Court noted the fate of Khaled El-Masri's lawsuit in the USA, pointedly adding that "the concept of 'State secrets' has often been invoked to obstruct the search for the truth." The *El-Masri* judgment highlights the principle that victims and the public have the right to the truth about such serious human rights violations. Without the truth, the full extent of the crimes and human rights violations committed will never be revealed, and the pain and suffering of the victims never fully recognized.

A week before the European Court's decision, a US Army Colonel in his role as a military judge overseeing trial proceedings at the US naval base in Guantánamo Bay in Cuba issued an order that illustrates an alternative approach to truth and justice, one that if adopted by any other government could be expected to end up condemned in the Department of State's global human rights reports.

The military judge's ruling of 6 December 2012 gave the US government precisely what it had asked for, namely a protective order to prevent disclosure of "national security information" during proceedings against five Guantánamo detainees charged with involvement in the attacks of 11 September 2001 and facing capital trial by military commission. To look at it another way, there remains the prospect of the US government executing these five men after proceedings that do not meet international fair trial standards and without disclosing the specifics about the enforced disappearance, torture and other ill-treatment to which they were subjected in secret CIA custody, and without bringing anyone responsible to justice. Would that warrant US condemnation if committed by any other government?

Under the protective order, the term "information" applies, "without limitation", to the "observations and experiences" of the detainees themselves. To prevent disclosure of such information at any proceedings, there will be a 40-second delay in broadcast from the courtroom to the public gallery. Information concerning gross violations of human rights or serious violations of international humanitarian law should never be subject to withholding from the victims or the public on national security grounds. However, the information to be prevented from disclosure under the order will include:

- the names of the "foreign countries" in which the five detainees were held in secret US custody prior to their transfer to Guantánamo in early September 2006 – periods lasting from three and a half to four years;
- the "enhanced interrogation techniques" applied to the detainees in secret custody, including "descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques";
- any description of the conditions of confinement which the five endured in secret custody;
- the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of the detainees.

Of course, the identity of at least one person involved in the detention and interrogation of these detainees is already widely known. His name is George W. Bush, and it was he who on 17 September 2001 signed the authorization under which the CIA set up their secret detention programme. After leaving office, he confirmed this in his memoirs and even went so far as to assert that he had personally approved the use of "water-boarding" – mock execution by interrupted drowning – against one of these "9/11 defendants". The precise wording in the Bush memoirs is: "[Then CIA Director] George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed…. 'Damn right,' I said." According to official documents, this detainee was subjected to more than 180 applications of water-boarding in secret CIA custody during March 2003. As the current President and Attorney General of the USA have acknowledged, water-boarding is torture. The former President's assertion is enough in and of itself to trigger the international legal obligation to carry out a criminal investigation with a view to prosecution, whether in the USA or in other countries to which George W. Bush travels.

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>
> US representative at a panel discussion on the right to truth at the UN Human Rights Council, 2010

Meanwhile, President Obama has just been, or is about to be, provided with a copy of a congressional report on the CIA's secret detention and interrogation programme. Said to be over 6,000 pages long, with more than 35,000 footnotes, the report is the outcome of a review by the Senate Select Committee on Intelligence initiated in 2009. Coincidentally, the Committee voted to approve the report and its findings on the same day as the European Court issued its *El-Masri* decision.

According to the Committee's Chairperson, Senator Dianne Feinstein, the report includes "details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated". She said that it reveals some "startling" details about the CIA programme and added that she and a majority of the Committee strongly believe that "the creation of long-term, clandestine 'black sites' and the use of so-called 'enhanced-interrogation techniques' were terrible mistakes." It was not just mistakes that were made, however; crimes were committed.

Senator Feinstein said that she would be giving a copy of the report to President Obama and "key executive branch officials" for their review and comment. How much of the report will be declassified

and made public will be decided by the Committee "after receiving the executive branch comments", she said.

Unless the relevant US authorities adopt a fundamental change of approach to the facts of the CIA programme, the details of the human rights violations to which those held in it were subjected will remain hidden and those responsible for these crimes will remain unaccountable. Colonel Pohl's protective order is just the latest indicator that the CIA and the administration intend to keep the public in the dark in this regard. In June 2009, for example, then CIA Director (and now Secretary of Defense) Leon Panetta signed a declaration in federal court in the context of FOIA litigation, opposing the disclosure of documents relating to the CIA programme as operated during the Bush administration, including those relating to where detainees were held and how they were treated. The courts have generally deferred to such invocations of secrecy by the executive. At the same time, the Department of Justice has shut down all criminal investigations into the secret detention programme, including against those responsible for the destruction of videotapes depicting evidence of crimes under international law, namely of a detainee subjected to enforced disappearance being water-boarded.

Soon after the Senate Intelligence Committee announced in early 2009 that it would review the CIA secret detention programme, CIA Director Panetta announced that the Committee's Chair and Vice Chair had assured him that the goal of the review was to inform "future policy decisions" rather than "to punish those who followed guidance from the Department of Justice." This mirrors the forward-looking orientation adopted by President Obama, to the exclusion of full truth and accountability for the human rights violations committed in the counter-terrorism context.

Within months of taking office, President Obama said that he opposed the creation of an independent commission to investigate human rights violations in this context, because he believed that the USA's "institutions are strong enough to deliver accountability". The institutions of the three branches of government, however, have collaborated to perpetuate impunity and a lack of truth and remedy, leaving the USA in serious breach of its international obligations.

Four years on, President Obama should revisit his words on the interdependence of transparency and accountability. He and the other administration officials tasked with reviewing and commenting on the Senate Intelligence Committee's report should do so not only with the century-old words of Justice Brandeis in mind, but also the recent *El-Masri* ruling of the European Court of Human Rights, and its affirmation of the rights to truth and remedy and of the state's obligations relating to accountability. As the US representative at a panel discussion on the right to truth at the UN Human Rights Council in 2010 said, "respect for the right to truth serves to advance respect for the rule of law, transparency, honesty, accountability, justice and good governance – all key principles underlying a democratic society."

Any information contained in the report relating to human rights violations, including the crimes under international law of torture and enforced disappearance should be declassified and made public. Those responsible should be brought to justice. Victims should be provided genuine access to meaningful remedy.

It is not as if the USA needs to call upon Superman to make this happen – just its own officials armed with the necessary political will to meet US obligations to ensure truth and justice.