amnesty international

USA: Judge refuses to dismiss charges against former secret detainee, says remedy for torture or other abuses must be sought elsewhere

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It is more than three years since the International Committee of the Red Cross (ICRC) sent the US authorities its report about the treatment of 14 men who had been held in secret detention by the USA for up to four and a half years.[1] The ICRC had interviewed the men a few weeks after their transfer in early September 2006 from secret CIA custody at undisclosed locations to military detention at the US Naval Base in Guantánamo Bay, Cuba.

The ICRC's February 2007 report was leaked from within the US government in 2009. In it the ICRC had concluded that "the totality of the circumstances in which the fourteen were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law". This was in addition to the violations of the prohibition of torture and other cruel, inhuman or degrading treatment to which the ICRC found the men had been subjected as a result of their conditions of detention and the interrogation techniques used against them in the CIA-run program.

Enforced disappearance and torture are crimes under international law. Governments responsible for such human rights violations have an obligation under international law to bring those responsible to justice and to ensure that the victims of the violations have access to effective remedy.[2] In the case of the USA's secret detention program, however, the prospects for accountability and remedy seem as remote as ever.

On 10 May 2010, a federal judge in New York added a few words to the question of remedy, when he ruled against a defence motion to have the indictment against Tanzanian national Ahmed Khalfan Ghailani dismissed on the grounds that he had been tortured in CIA custody before his transfer to Guantánamo with the 13 others in September 2006. "Any remedy for any such violation", District Judge Lewis Kaplan wrote, "must be found outside the confines of this criminal case".[3] If Ahmed Ghailani was tortured, Judge Kaplan concluded, "he may have remedies". But such remedies "do not include dismissal of the indictment".

Ahmed Ghailani was transferred from Guantánamo to New York on 9 June 2009 to face trial under an indictment which had been pending against him in federal court in the Southern District of New York since March 2001.[4] He is charged with involvement in the 1998 bombings of the US Embassies in Tanzania and Kenya in which more than 200 people were killed and many others injured.[5] He was arrested in Pakistan on 24 or 25 July 2004 and handed over to US custody by the Pakistani authorities the following month. Rather than being brought to court in the USA to face the indictment against him he was held in secret detention at undisclosed locations by the CIA for the next two years.[6]

Details of his treatment in CIA custody and where he was held during that time remain classified Top Secret. According to previously classified information released into the public domain, all detainees in the CIA program were held incommunicado in solitary confinement. These were "standard" conditions of confinement in the covert CIA detention facilities along with 24-hour-a-day lighting, closed circuit camera surveillance in cells, and routine subjection to shackling, blindfolding and white noise.

In December 2004, the CIA's Office of Medical Services (OMS) issued a then-classified document providing "general references for medical officers" supporting the CIA program. The guidelines stated

that "captured terrorists turned over to the CIA for interrogation may be subjected to a wide range of legally sanctioned techniques… designed to 'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist our efforts to obtain critical intelligence". The OMS guidelines noted that interrogation techniques, "in approximately ascending degree of intensity", included forcible shaving, stripping, hooding, isolation, white noise or loud music, continuous light or darkness, subjection to cold environment, dietary manipulation, shackling in upright, sitting, or horizontal position, sleep deprivation, stress positions, dousing with water, and cramped confinement.

On 30 December 2004, the CIA sent the Office of Legal Counsel (OLC) at the US Justice Department a background paper which purported to provide "a look at a prototypical interrogation with an emphasis on the application of interrogation techniques, in combination and separately". According to what can be gleaned from the OLC's references to it, this CIA document stated that detainees were first subjected to "Initial Conditions" which "set the stage for use of the interrogation techniques, which come later". The CIA said that this period would typically consist of the following:

> "Before being flown to the site of interrogation, a detainee is given a medical examination. He then is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods during the flight… Upon arrival at the site, the detainee finds himself in the complete control of Americans and is subjected to precise, quiet, and almost clinical procedures designed to underscore the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread a detainee may have of US custody. His head and face are shaved; his physical condition is documented through photographs while he is nude…"[7]

The ICRC's 2007 report said that in addition to the "severe physical pain" to which detainees in the CIA detention program were subjected during transfers (for example, as a result of shackling and being held in painful positions), the transfers "to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the [detainees], increasing their sense of disorientation and isolation". According to the ICRC, the transfers increased the vulnerability of the detainees to interrogation, and were "performed in a manner that was intrusive and humiliating and that challenged the dignity of the persons concerned".

The CIA's background paper goes on to describe how if, in the "relatively benign" second phase – known as the "transition to interrogation" – the detainee in CIA custody did not provide "high value" intelligence information to interrogators, the third phase would see the detainee brought to "a baseline dependent state, demonstrating to the detainee that he has no control over basic human needs". The "conditioning techniques" used to achieve this would typically be nudity, sleep deprivation (shackled and in a diaper), and dietary manipulation.

Ahmed Ghailani's trial lawyers have alleged that he was "kept incommunicado and interrogated without counsel for approximately two years in CIA Black Sites and continually subjected to "Enhanced Interrogation Techniques".[8] Precisely which interrogation techniques were used against him remain classified Top Secret, and the administration is arguing that any such information should be kept from public disclosure on grounds of national security.

A psychologist retained by Ahmed Ghailani's defence counsel has concluded that Ghailani is suffering from post-traumatic stress disorder as a result of his treatment in CIA custody. Of relevance to the question of strip searches in his current pre-trial custody in the Metropolitan Correction Center in New York, the psychologist has said that, "nudity serves as a profound 'trigger' for Mr Ghailani, thrusting him into vivid memories of the interrogation process he endured".[9] Eleven of the 14 detainees interviewed by

the ICRC at Guantánamo said that they had been subjected to "extended periods of nudity during detention and interrogation, ranging from several weeks continuously up to several months intermittently".

In his ruling on 10 May 2010, Judge Kaplan denied the defence motion to dismiss the indictment against Ahmed Ghailani on the grounds that, under US Supreme Court precedent, "mistreatment of a defendant is not sufficient to justify dismissal where, as here, the connection between the alleged misconduct and the prosecution is non-existent or, at least... remote". Specifically, he noted that "the government has stated that it will not use anything that Ghailani said while in CIA custody, or the fruits of any such statement, in this prosecution".

The US government had urged Judge Kaplan to deny the defence motion, arguing that US "courts have made clear that it is particularly inappropriate where there is any other remedy for the alleged misconduct". In the case of Ahmed Ghailani, it continued, "there are other, plainly more appropriate remedies". An example of such a remedy, the government said, was the government's decision not to use at trial any statements made by the defendant when in custody. The government "does not intend to offer at trial in this case any of the statements the defendant made in response to interrogation while in American custody – regardless of where, when, or under what circumstances they were made.... [T]he Government's decision to forego use of these inculpatory statements is akin to a remedy already being afforded the defendant."[10]

This characterization of its decision not to use any of Ghailani's in-custody statements as a remedy for the human rights violations, including the crime under international law of enforced disappearance, to which he was subjected, must be set against the government's utter failure to ensure accountability for what went on in the CIA program. A decision to forego use of any statements obtained under torture or other ill-treatment is not a remedy for Ahmed Ghailani, it is a specific international legal obligation on the US government.[11]

The USA is also obliged to investigate and bring to justice those responsible for the human rights violations committed as part of the CIA program and to ensure access for survivors of these violations to meaningful remedy.[12] For individuals subjected to enforced disappearance or torture or other ill-treatment the right to a full and meaningful remedy goes well beyond the exclusion of any evidence obtained as a consequence of the abuse. The UN Convention against Torture, for instance, 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."[13]

Amnesty International does not challenge Judge Kaplan's decision to dismiss the defence motion. Indeed, his ruling only turns the question back to the administration: the international legal obligations of the USA to provide full remedy and bring perpetrators of such human rights violations to justice are clear; those obligations clearly remain wholly unfulfilled in relation to the violations committed in the secret detention program. It is long past time for the administration to answer fully the question of exactly when and where a full and effective remedy, and criminal justice and accountability, for the human rights violations committed in the CIA program will be provided.

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See also:

- USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, http://www.amnesty.org/en/library/info/AMR51/151/2008/en
- USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, http://www.amnesty.org/en/library/info/AMR51/120/2009/en
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- 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: Impunity for crimes in CIA secret detention program continues, 29 January 2010, http://www.amnesty.org/en/library/info/AMR51/008/2010/en

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[1] ICRC report on the treatment of fourteen 'high-value detainees' in CIA custody. International Committee of the Red Cross, February 2007.
[2] Among the ICRC's recommendations to the US government in its February 2007 report was that the USA "investigate all allegations of ill-treatment and take steps to punish the perpetrators".
[3] *USA v. Ghailani*. Memorandum opinion. United States District Court, Southern District of New York, 10 May 2010.
[4] Ahmed Ghailani was first indicted in the SDNY on 16 December 1998, and was thereafter charged in several superseding indictments, including on 12 March 2001, the latter being the indictment under which he is currently being prosecuted.
[5] Amnesty International has welcomed the US administration's decision not to seek the death penalty. See Amnesty International Urgent Action, 3 July 2009, http://www.amnesty.org/en/library/info/AMR51/081/2009/en and update, 8 October 2009, http://www.amnesty.org/en/library/info/AMR51/110/2009/en
[6] In District Court, the Obama administration has argued that its predecessor "justifiably" treated Ahmed Ghailani as an "intelligence asset" rather than a criminal defendant. It added that the Bush administration had made the "entirely reasonable" decision to continue to hold Ghailani without charge as an "enemy combatant".
[7] Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005 (Internal quotation marks omitted).
[8] *USA v. Ghailani*, Memorandum of law in support of defendant Ahmed Khalfan Ghailani's omnibus motions. US District Court, Southern District of New York, 26 March 2010. The lawyers also stated that the interrogations continued after his transfer in 2006 to Guantánamo, and that he did not have access to counsel for his first 18 months in the Naval Base.
[9] See *USA v. Ghailani*. Memorandum and order. US District Court, Southern District of New York.
[10] *USA v. Ghailani*, Government's memorandum of law in response to defendant Ahmed Khalfan Ghailani's motion to dismiss the indictment on the grounds of outrageous government conduct. US District Court, Southern District of New York, 23 April 2010.
[11] UN Convention against Torture, article 15; Human Rights Committee, General Comment no. 20 (1992), para. 12 .
[12] The right to an effective remedy is recognised in all major international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992. Under Article 2.3 of the ICCPR, any person whose rights under the ICCPR have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". Among other things, the ICCPR prohibits arbitrary detention, torture and other cruel, inhuman or degrading treatment or punishment, unfair trial, and discrimination in the enjoyment of human rights including the right to equal protection of the law. The UN Human Rights Committee, established under the ICCPR to oversee its implementation, has affirmed that the right to an effective remedy can never be derogated from, even during times of national emergency. International law requires that remedies not only be available in law, but accessible and effective in practice. Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. See Human Rights Committee, General Comment no. 31 (2004), paras 16 and 18. See also UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment; Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly res 47/133 (18 December 1992).
[13] UN Convention against Torture, article 14(1). This right applies also to other ill-treatment (see Committee against Torture, General Comment no. 2 (2008), para 3; Human Rights Committee, General Comment no. 20 (1992), para 14; General Comment no. 31 (2004), para 16). The same right exists with respect to enforced disappearance: see Declaration on Enforced Disappearance, article 19.