USA

‘WE TORTURED SOME FOLKS’

THE WAIT FOR TRUTH, REMEDY AND ACCOUNTABILITY CONTINUES AS REDACTION ISSUE DELAYS RELEASE OF SENATE REPORT ON CIA DETENTIONS

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Table of contents

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Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction
UN Convention against Torture, Article 12

One measure of a country's failure to meet its international human rights obligations might be when its president acknowledges that country's responsibility for crimes under international law that have been public knowledge for many years but still fails to take the required next step. A further indicator might be if the president takes to issuing something akin to a plea for sympathy for the perpetrators, even as the government blocks remedy for the victims.

In early August 2014, referring to the secret detention program operated by the Central Intelligence Agency (CIA) under authorization granted by his predecessor in September 2001 and which he himself ordered terminated soon after taking office in January 2009, President Barack Obama acknowledged that the USA turned to torture in its response to the attacks of 11 September 2001 (9/11). While not the first time he has said so, he did appear to go further than before by stating that torture was carried out under "some" of the "enhanced interrogation techniques" used in the program, not just the one known as "waterboarding", where the detainee is subjected, effectively, to mock execution by interrupted drowning.[1]

The fact that President Obama not only ended the CIA secret detention program, but has also publicly acknowledged that torture was a part of it, is to be welcomed. There has been no shortage of US politicians who have advocated for continuation or resumption of the program, and US authorities generally have found it difficult to name torture, and somewhat easier to resort to euphemisms such as "stress and duress" or "enhanced" interrogation techniques.[2]

Nevertheless, the President once again failed to say that torture is a crime under international law whenever and wherever it occurs, that every instance of it must be subjected to thorough investigation and that anyone responsible for authorizing or carrying it out, no matter their level of office or former level of office, must be brought to justice.

President Obama's silence on accountability and redress (victims of human rights violations have the right under international law to effective access to meaningful remedy) reflects the USA's continuing and active failure to meet its international human rights obligations on these issues. In addition, the President made no reference to enforced disappearance, let alone acknowledge that most if not all of those held in the CIA secret detention program were subjected to this crime under international law, some of them for years.

President Obama was speaking at a press conference on 1 August 2014. Towards the end of the session he noted that the summary report and findings of the review conducted by the US Senate Select Committee on Intelligence (SSCI) into the CIA secret detention program was now back from the declassification process. He continued:

> *"Even before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values… And that's what that report reflects. And that's the reason why, after I took office, one of the first things I did was to ban some of the extraordinary interrogation techniques that are the subject of that report.*
>
> *And my hope is, is that this report reminds us once again that the character of our country has to be measured in part not by what we do when things are easy, but what we do when things are hard. And when we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-*

> *minded person would believe were torture, we crossed a line. And that needs to be – that needs to be understood and accepted. And we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future.*"

If the USA really wants to avoid doing this again in the future, not only must it release the full SSCI report – not just the summary – without any redactions that obscure information about human rights violations (the three-volume report runs to more than 6,600 pages, and has over 37,000 footnotes), it must also fully implement its international treaty obligations to render their protections real to those in US custody or control. Furthermore, it must break the impunity which the architects of the CIA program attempted to embed into its operations, an attempt which has so far been rewarded by the absence of political will even to recognize that this lack of accountability leaves the USA in serious violation of its international obligations. Moreover, the US authorities must stop blocking access to remedy – including by invocation of state secrecy – for those who were subjected to these abuses.

The authority under which this unlawful program was conducted has long been known. As a federal judge put it in 2010: "Immediately following the attacks of 11 September 2001, President Bush authorized new steps to combat international terrorism"; the CIA established the "Rendition, Detention, and Interrogation Program", "pursuant to which the CIA maintained clandestine facilities abroad at which suspected terrorists were detained, interrogated, and debriefed".[3] In using "coercive methods" at secret detention sites, the CIA was acting "upon the highest authority".[4] Indeed, the former President himself said as much in his 2010 memoirs.

It was the US Department of Justice that over the course of several years after 9/11 gave the CIA legal approval for the "enhanced interrogation techniques" and detention conditions used in the secret program. And it was limited Department of Justice investigations into CIA interrogations that were ended in 2012 without anyone being charged, including in relation to the deaths of two detainees in Iraq and Afghanistan. Likewise the CIA's destruction of videotapes of interrogation sessions – in other words the destruction of possible evidence of crimes under international law, including recordings of waterboarding – led to no charges.

Meanwhile, domestic political considerations and a tendency among officials effectively to excuse such human rights violations on the basis of their historical context has gone hand in hand with the failure to end the impunity and to ensure transparency and redress.

A month after President Obama made his comments, the SSCI summary report has still not been released as the committee and the executive are still in discussion about the amount of text to be blacked out ("redacted") from the declassified version.

'I UNDERSTAND WHY IT HAPPENED'

> *What did surprise me, in a good way, is that Obama went on to point out that the people who first conceived and carried out the program in the wake of 9/11 were under tremendous pressure to protect the country at a time of national crisis. He even called us patriots*
>
> John Rizzo, former CIA Acting General Counsel, August 2014[5]

It would be unsurprising if the architects and operatives of the CIA detention program were left somewhat unconcerned by President Obama's reiteration that torture – a criminal act – had occurred in it. For at the August 1 press conference, instead of committing the USA to compliance with its obligation to ensure full truth, accountability and remedy in relation to the crimes under international law that were part of the program, President Obama made a plea for a measure of understanding about why the USA resorted to torture after 9/11:

> "*I understand why it happened. I think it's important when we look back to recall how afraid people were after the Twin Towers fell and the Pentagon had been hit and the plane in Pennsylvania had fallen, and people did not know whether more*

> *attacks were imminent, and there was enormous pressure on our law enforcement and our national security teams to try to deal with this. And it's important for us not to feel too sanctimonious in retrospect about the tough job that those folks had. And a lot of those folks were working hard under enormous pressure and are real patriots*."

Whatever the merits of the above comments, they are irrelevant to the question of accountability and redress. Under international law, torture and other cruel, inhuman or degrading treatment are never legal. Even in a time of war or threat of war, even in a state of emergency which threatens the life of the nation, there can be no exemption from this obligation. The same is true of enforced disappearance. It is not that understanding why torture or enforced disappearances happen is not important in ensuring that they do not happen again. But in the USA, "understanding" has become part of an official narrative that is interwoven with impunity. As such, it effectively becomes justification.

President Obama is not the first US official to have resorted to this narrative. Indeed his words echo those of one of the Bush administration lawyers who was closely involved in giving the legal green light to interrogation techniques used in the CIA program:

> "*Our opinions were rendered under the most difficult circumstances and pressures of time imaginable, and addressed an unprecedented question during time of war. We gave the best answers we could, in good faith, about how far the CIA could interrogate top al-Qaeda leaders... without violating the congressional ban on torture*".[6]

This was former Deputy Assistant Attorney General John Yoo writing in 2010, shortly after the Department of Justice had rejected the finding of a four-year Office of Professional Responsibility review (into legal advice given to the CIA for its detention program) that Yoo had "committed intentional professional misconduct when he violated his duty to exercise independent legal judgment and render thorough, objective, and candid legal advice". John Yoo applauded the Department's decision to end "the witch-hunt", as he put it. [7] He had been the principal author of a memorandum dated 1 August 2002 giving Department of Justice approval for the use of 10 "enhanced interrogation techniques" (EITs) against Zayn al-Abidin Muhammad Husayn (Abu Zubaydah), a Palestinian man who was at that time being held in secret CIA detention. Upon receipt of that memo, the CIA "quickly converted" it into a detailed "guidance" cable transmitted to the "black site where Zubaydah was being held, and the EITs started".[8]

If anyone is in any doubt that this was a program not just of "enhanced interrogation" but also of enforced disappearance, they should consider what John Rizzo, the former chief CIA lawyer and named recipient of that 1 August 2002 torture memorandum has recently recalled about certain meetings in late 2001 and early 2002 of the Counterterrorist Center (CTC), the branch of the CIA delegated by its then Director George Tenet to run the detention program.[9] The question of where the agency would hold detainees was discussed at such meetings, and how to keep their fate and whereabouts secret:

> "*They needed to be held somewhere where no one but we could get access to them, the CTC said, where no one but we knew where they were*".[10]

Under the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, an enforced disappearance occurs when:

> "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of

> their liberty, which places such persons outside the protection of the law... [E]nforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and...the systematic practice of such acts is of the nature of a crime against humanity".[11]

Article 1 of the UN Declaration states that "any act of enforced disappearance is an offence to human dignity", which

> "*places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life*".

The UN Declaration states that: "All acts of enforced disappearance shall be offences under the criminal law punishable by appropriate penalties which shall take into account their extreme seriousness" (Article 4). Furthermore: "No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it" (Article 6). It makes clear that enforced disappearance cannot be justified under any circumstances whatsoever, including "a threat of war, a state of war, internal political instability or any other public emergency" (Article 7). Article 10 states that: "Any person deprived of liberty shall be held in an officially recognized place of detention" and "be brought before a judicial authority promptly after detention". Article 10 further states that: "Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other person having a legitimate interest in the information".

Enforced disappearances have been recognized as crimes under international law since the judgment of the Nuremberg Tribunal in 1946.[12] International instruments adopted since then have reiterated that enforced disappearances are crimes under international law.[13]

More than 12 years on, the location of the CIA facility to which the Zubaydah memo was transmitted remains classified by the US authorities, and is unlikely to be disclosed in the SSCI report or its summary. As the European Court of Human Rights has recently noted it is believed to have been in Thailand and code-named "Cats Eye".[14] In any event, it was, according to John Rizzo, the "first such black site" to be set up by the CIA. "Just in time", recalled Rizzo in his 2014 memoirs, "because its first guest was about to arrive". This "guest", of course, was Abu Zubaydah, and he would be tortured there, including under techniques listed in the Yoo memo to Rizzo.

Given President Obama's plea "for us not to feel too sanctimonious in retrospect about the tough job that those folks had", or indeed John Yoo's own claims about the pressure he and others were under, it is perhaps timely to recall some of the words from that now notorious memo, drafted not in the "immediate aftermath" of 9/11 but many months later:

> *Two particular stress positions are likely to be used on Zubaydah: (1) sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) kneeling on the floor while leaning back at a 45 degree angle...*
>
> *You have orally informed us that you would not deprive Zubaydah of sleep for more than eleven days at a time and that you have previously kept him awake for 72 hours....*
>
> *You would like to place Zubaydah in a cramped confinement box with an insect. You have informed us that he appears to have a fear of insects. In particular, you would like to tell Zubaydah that you intend to put a stinging insect in the box with him...*

> *You would like to use a technique called the 'waterboard'... [which] produces the perception of 'suffocation and incipient panic,' i.e., the perception of drowning... We find that the use of the waterboard constitutes a threat of imminent death...*
>
> *We conclude that a course of conduct using these procedures and culminating in the waterboard would not violate [the US law against torture].*

John Yoo was also the primary author of a longer Office of Legal Counsel (OLC) memorandum, also dated 1 August 2002, that accompanied the Zubaydah memo, which stated that "under the current circumstances" interrogation techniques that violated the USA's anti-torture statute could be justified. John Rizzo has said that he was a principal mover behind this memo which, he has said, was about "legal cover" – or to look at it another way, impunity.

> "*Above all, I wanted a written OLC memo in order to give the Agency – for lack of a better term – legal cover... An OLC legal memorandum would protect the Agency and its people for evermore*"[15]

The message of the memorandum, according to a former head of the OLC (2003-2004) was clear:

> "*violent acts aren't necessarily torture; if you do torture, you probably have a defense; and even if you don't have a defense, the torture law doesn't apply if you act under color of presidential authority. CIA interrogators and their supervisors... viewed the opinion as a 'golden shield'*."[16]

The memo was not a document hastily drafted on the back of an envelope in the wake of the 9/11 attacks. It was begun seven months after the attacks, was 16 weeks in the writing, and many individuals were involved at some level, including John Rizzo. He recalled in 2014:

> "*I spent the last two weeks of July [2002] fielding John [Yoo]'s final few questions as he completed work on his memo*."[17]

On 12 July 2002, for example, John Yoo and his attorney assistant had a meeting with White House Counsel Alberto Gonzales and left a copy of the memo with him and another official present.[18] The following day, a meeting on the memo took place in the office of the NSC Legal Advisor, John Bellinger, in which Yoo and his assistant met with a number of officials from the Department of Justice, the FBI, the CIA and the White House.[19] Also, before the memo was drafted, there had been discussions about its contents. In 2008, for example, the Senate Armed Services Committee noted that:

> "*Before drafting the August 1, 2002 opinions, Deputy Assistant Attorney General for the OLC John Yoo had met with Counsel to the President Alberto Gonzales and Counsel to the Vice-President David Addington to discuss the subjects that he intended to address.*"[20]

John Yoo dubbed this memorandum the "bad things opinion" in emails to the attorney-advisor working with him (to which she replied "I like the opinion's new title").[21] He also nicknamed Abu Zubaydah, the initial primary target of these "bad things", as "Boo boo", including when seeking to establish whether Zubaydah had a fear of insects that the CIA was proposing to exploit.[22] Whatever such references may have betrayed about their author, it is beyond dispute that John Yoo had close knowledge of the CIA program, indeed of a particular detainee who at the time was being subjected to enforced disappearance and was being readied for "an increased pressure phase" in which the CIA was proposing to use a range of "enhanced" interrogation techniques "in some sort of escalating fashion, culminating with the waterboard".[23] Those responsible for this "increased pressure" on Zubaydah have yet to be held to account, with the "pressure" under which officials are said to have been operating

effectively used now to excuse the human rights violations that were being and continue to be euphemized.

While President Obama, John Yoo and others have emphasized this pressure, John Rizzo has at the same time said it would have been "relatively easy" to stop the CIA interrogation initiative. He recalled in his 2014 memoirs:

> "*I have no doubt that if I had said the word, much if not all of the EIT initiative would have quietly died before it was born. It would have been a relatively easy thing to do, actually...*"[24]

Instead, however, the program was not only conceived, but implemented, resourced, expanded, and protected against external scrutiny.

During his arrest in Pakistan in late March 2002, Abu Zubaydah had been shot and seriously wounded and soon after he was transferred to US custody and taken to the secret facility believed to be in Thailand, he went into sceptic shock. The problem for his captors, according to a former FBI interrogator originally involved in the case, was that their presence in the location was "supposed to be a secret" and if the whereabouts of Abu Zubaydah had been revealed "it would probably cause problems for our host country". A plan was apparently devised to dress Abu Zubaydah in military uniform, and for the US interrogators and others to dress as fellow soldiers, and in that way he was reportedly taken to a local hospital where he received emergency surgery.[25]

By the time Abu Zubaydah was brought back from the hospital to the secret facility (in April or May 2002), the planning for his continuing disappearance and interrogation had continued. The facility had apparently been "transformed", with "an actual cell" built for him, "monitored by hidden cameras and microphones".[26] A machine, possibly a white noise generator, was subsequently received at the location for use as an interrogation tool.[27] CIA Headquarters at Langley in Virginia authorized up to 24 hours continuous sleep deprivation, and not long after that authorized 48 hours.[28] Abu Zubaydah was allegedly "stripped naked", "loud rock music" was "blasted into the cell" and he was "forcibly kept awake".[29] An office at the CTC learned that "due to a misunderstanding", the limit of 24-48 hours for sleep deprivation approved for use on Abu Zubaydah, after consultation with the National Security Council and the Department of Justice, "had been exceeded". Nevertheless, the CTC office in question advised that "since the process did not have adverse medical effects or result in hallucination... it was within legal parameters".[30]

Having obtained the legal go-ahead from the Department of Justice, in the subsequent 1 August 2002 memorandums, to subject Abu Zubaydah to methods that violated the international legal prohibition of torture and other ill-treatment, and having used such techniques on Zubaydah the CIA and members of the Bush administration pressed on. According to John Rizzo,

> "*Since the OLC memo we had gotten a couple of months before was specifically addressed to the EITs being applied only to Zubaydah, I quickly got confirmation from the DOJ that the conclusions reached by the OLC on its August 1 memo pertaining to Zubaydah would also cover similarly high-value – and resistant – Al Qaeda prisoners. And so the EITs began with [Abd] al-Nashiri and [Ramzi] bin al-Shibh*"[31]

Again, is this indicative of irresistible pressure in the heat of the moment, or knowing choices made in the cold light of day in pursuit of a program of enforced disappearance and ill-treatment that was clearly in violation of international law?

On 4 December 2002, the CIA discontinued its practice of videotaping interrogations of secret detainees.[32] The tapes recorded so far included depictions of water-boarding, including of Abu Zubaydah. The following day, an aircraft used by the CIA, number N63MU,

flew from Bangkok, Thailand, via Dubai, and landed at Szymany airport in Poland.[33] In July 2014, the European Court of Human Rights found "beyond reasonable doubt" that among those on board this "CIA rendition aircraft" were Abu Zubaydah and Abd al Nashiri. Both detainees were taken to the CIA detention facility at Stare Kiejkuty in Poland codenamed "Quartz". On 6 June 2003 Al Nashiri was transferred to another black site elsewhere. The European Court said that it found "beyond reasonable doubt" that this transfer took place and that it was carried out using "CIA rendition aircraft N379P". Abu Zubaydah was transferred out of Poland on 22 September 2003. The European Court found "beyond reasonable doubt" that Abu Zubaydah was transferred "by the CIA from Poland to another CIA secret detention facility elsewhere on board the rendition aircraft N313P".

In between these two transfers of detainees – both of whom had been tortured and subjected to enforced disappearance by the USA – President George W. Bush proclaimed his country's commitment to human rights and the rule of law:

> "*Torture anywhere is an affront to human dignity everywhere. We are committed to building a world where human rights are respected and protected by the rule of law. Freedom from torture is an inalienable human right… Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors. Until recently, Saddam Hussein used similar means to hide the crimes of his regime*".[34]

The USA's "elaborate deceptions" to shield the human rights violations from the eyes of the world continued. By 2004, according to Rizzo's 2014 account,

> "*the secret prison/EIT program was growing like Topsy, with more HVDs [high value detainees] being captured and the number and location of the prisons changing as operational requirements dictated… We agreed to continue administering EITs to new, deserving Al Qaeda candidates coming into CIA custody*."[35]

In December 2004, over three years after the 9/11 attacks, not in its "immediate aftermath", 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.

The memos kept coming and the CIA program continued year after year. In July 2007, for example, the Department of Justice provided the CIA with another memo, classified Top Secret in its entirety, providing legal approval for the application of EITs.[36] Involved in the drafting process were the Offices of the Attorney General and Deputy Attorney General, the Criminal and National Security Divisions of the Department of Justice, the State Department, the National Security Council, and the CIA.

Among the techniques approved in this memo – not in the immediate wake of 9/11, but six years later – was prolonged sleep deprivation. CIA interrogators were seeking and obtained approval to use sleep deprivation to "wear down the detainee's resistance and to secure his agreement to talk in return for permitting him to sleep". The detainee – held incommunicado in solitary confinement, subject to enforced disappearance – would be kept awake by the use of "physical restraints", that is, by being shackled in a position that would prevent him from falling asleep. This could be in a standing position with hands shackled around shoulder

height, or in a sitting position on a small stool of "insufficient width for him to keep his balance during rest".

Sleep deprivation would frequently be combined with "diapering": that is, with the detainee made to wear a diaper:

> "*because releasing a detainee from the shackles to utilize toilet facilities would... interfere with the effectiveness of the technique, a detainee undergoing extended sleep deprivation frequently wears a disposable undergarment designed for adults with incontinence or enuresis.*"

The CIA told the OLC that the agency particularly favoured the use of sleep deprivation, as it was used to bring the detainee to a "baseline state".

Rather than characterizing the CIA program as an understandable error of judgment that can be put down to the fear and pressure generated in the immediate wake of the crime against humanity that was committed on 11 September 2001, should not President Obama have described it as a chillingly detailed, planned and resourced operation incorporating systematic unlawful and criminal conduct stretching over years and facilitated among other things by the USA's reluctance to apply international law to itself, antipathy that long preceded 11 September 2001 and continues to this day?

Par for the course, the President made no reference to international law in his comments, choosing instead to speak of domestic values.

'WE DID SOME THINGS THAT WERE CONTRARY TO OUR VALUES'

I knew that an interrogation program this sensitive and controversial would one day become public. When it did, we would open ourselves up to criticism that America had compromised our moral values

Former President George W. Bush, 2010[37]

In the same 1 August 2014 press conference, when discussing the situation in Gaza, President Obama described the USA as the "indispensable nation", terminology that is part of the vocabulary of US "exceptionalism".[38] The latter is the notion that the USA is qualitatively different from other countries, in its institutions and "values". US exceptionalism has been described as a "double-edged sword", a valid label when it comes to its impact on the USA's stance on human rights – an articulate advocate of international human rights standards on the one hand, on the other a country that refuses to apply such standards to its own conduct.[39]

President Obama's assertion that resort to torture under the Bush administration constituted a break from domestic values – "we did some things that were contrary to our values" – is familiar territory but still begs the question as to what is meant by "our values". Former Vice President Cheney, for example, who was an ardent supporter of the CIA secret detention program and the use of "enhanced interrogation techniques" when in office, and has continued to defend them since, has repeatedly asserted his view that in its the response to the attacks of 11 September 2001, the Bush administration never wavered from "American values". He has refuted the idea that "American values" had been "abandoned, or even compromised, in the fight against terrorists".[40]

In a country where torture, enforced disappearance, abduction, rendition, execution after discriminatory military commission trials falling short of international fair trial standards, or indeed execution at all, are at one time or another deemed consistent with domestic values (and indeed domestic law), it might be particularly helpful for the US public and body politic to actively assess such values against international human rights principles and recognise that in fact domestic standards may be falling short.

An aspect of US exceptionalism has been "exemptionalism", a tendency described as "a perceived need to safeguard the special features and protections of the US Constitution from external interference".[41] In the field of international human rights, one manifestation of this has been a reluctance on the part of the USA to apply international human rights law to its own conduct, even as it assesses the conduct of other countries against these very same standards. Thus, for example, the USA has ratified the International Covenant on Civil and Political Rights and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but did so in a manner that made clear it was only agreeing to US constitutional standards.

The USA's reservation to the international prohibition of cruel, inhuman or degrading treatment or punishment became a part of the USA's flawed legal justification given for the abuse of detainees in US custody. In the then secret memorandums issued from 2002 to 2007 giving legal approval for interrogation techniques and detention conditions that violated the international prohibition of torture or other ill-treatment against detainees held in CIA or military custody, government lawyers repeatedly cited the reservations the USA attached to article 16 of UNCAT and article 7 of the ICCPR.

The SSCI summary, or indeed the full report, is unlikely to be critical of the "reservations" problem, not least because the Senate itself is the body which, with the administration of the day, imposed such conditionality upon the various ratifications in the first place. In any event, despite repeated calls from UN treaty monitoring bodies on the USA to remove such reservations and other limiting conditions, the US government has not done so and has said that it has no intention of changing its approach. Principled human rights leadership is called for.

AN AGENCY 'THAT THRIVES THROUGH DECEPTION'

Many times, although intelligence bodies are not authorized by legislation to detain persons, they do so, sometimes for prolonged periods. In such situations, oversight and accountability mechanisms are either absent or severely restricted, with limited powers and hence ineffective

UN Joint Study on secret detention, 2010

An aspect of the SSCI's focus will concern questions about whether the CIA accurately portrayed the effectiveness of the program in obtaining intelligence, whether it had provided accurate information about the program to the Department of Justice when seeking legal approval for it, and whether if avoided or impeded oversight by the White House, Congress and the agency's own Office of Inspector General.

These questions, of course, make entirely no difference to the program's compliance with international law. It was unlawful from day one. Whether the CIA engaged in deception about an already unlawful program is of relevance to the effectiveness of the USA's oversight mechanisms, but of more profound relevance is the question of why officials ever thought it was acceptable to institute, develop and operate a program of enforced disappearance, and to authorize interrogation techniques and detention conditions that "any fair minded person" would consider violated the absolute international prohibition of torture and other cruel, inhuman or degrading treatment.

In addition to the authorization for it to engage in detentions abroad signed by President Bush a week after 9/11, the CIA sought specific "policy approval from the National Security Council [NSC] to begin an interrogation program for high-level al Qaida terrorists".[42] John Bellinger, NSC Legal Advisor, asked the CIA to have the proposed program reviewed by the Department of Justice, and to seek advice from the OLC and the Criminal Division at the DoJ.[43] National Security Advisor Condoleezza Rice asked the Director of the CIA to brief NSC Principals on the proposed program and Attorney General Ashcroft "personally to review" its

legality.[44] All the meetings attended by Dr Rice on the CIA interrogation program were held at the White House, with the Justice Department's legal advice apparently coordinated by the Counsel to the President, Alberto Gonzales.[45] NSC officials established a "special access program governing access to information relating to the CIA terrorist detention and interrogation program" due to the "sensitive nature of the activities contemplated" in the program. Even the name of the special access program was itself classified SECRET.[46]

Whether the CIA did indeed engage in deceptive practices after moving forward with the program under authority granted in a "memorandum of notification" (MON) signed by President George W. Bush on 17 September 2001 (itself prepared by lawyers from the NSC with input from lawyers at the Department of Justice and the CIA), is only one question. Perhaps the more important question is whether the President should have considered more carefully whether the CIA was in fact a singularly unsuitable candidate to operate a detention regime. At that point, the CIA "had no institutional experience or expertise in that area" (of detentions and interrogations).[47] President Bush could also have considered whether an accurate description of the CIA is that it is an agency that "thrives through deception".[48] Secrecy and deception are anathema to lawful detentions.

But sign the authorization President Bush did. According to John Rizzo:

> "*Multiple pages in length, it was the most comprehensive, most ambitious, most aggressive, and most risky Finding or MON I was ever involved in. One short paragraph authorized the capture and detention of Al Qaeda terrorists, another authorized taking lethal action against them. The language was simple and stark*".[49]

Simple is the obligation on the USA to bring those involved in crimes under international law to justice. Stark is its continuing failure to do so.

EFFECTIVE? IRRELEVANT TO THE QUESTION OF ACCOUNTABILITY

One argument that has been presented in the past and is often heard today is that torture is inefficient… This line of argumentation based on inefficiency is totally inadmissible. To place the debate on such grounds is to give the argument away; in effect it means that if it can be shown to be efficient it is permissible
Amnesty International, Report on Torture, 1973

Politicians and the public in the USA should be demanding accountability for the crimes under international law that were committed in the CIA program. Instead, it is likely that when the SSCI summary report is eventually published, the question of whether the program was "effective" will again be a dominant part of the political discourse. Already one member of the SSCI who opposed the committee's review of the CIA program in the first place has emphasised that "information gleaned from these interrogations was, in fact, used to interrupt and disrupt terrorist plots".[50] Make that topic the centre of attention and accountability will take a back seat. Or vice versa, do nothing about impunity, and the gap will be filled by competing assertions about effectiveness. As the Executive Editor of the New York Times recently wrote:

> "*the Justice Department, under both the Bush and Obama administrations, has made clear that it will not prosecute in connection with the interrogation program. The result is that today, the debate is focused less on whether the methods violated a statute or treaty provision and more on whether they worked – that is, whether they generated useful information that the government could not otherwise have obtained from prisoners.*"[51]

If another example of the coldly calculated use of torture and enforced disappearance were needed to dispel the "explanation" that this was an operation conceived and run in the confusing immediate aftermath of the 9/11 atrocity, the CIA's exploitation of the Abu

Zubaydah case is one. Alleged effectiveness was a part of this narrative.

The CIA tortured Abu Zubaydah and subjected him to enforced disappearance, starting from early April 2002. In something akin to a dystopian corporate mentality, the occurrence of these crimes under international law were then turned, not over to the prosecuting authorities, but into a business case for expanding the CIA program based on "anticipated future demand". According to this version of events, the "results from the first Al Qaeda HVT [high-value target] interrogated using the aforementioned enhanced techniques, Abu Zubayda", were "outstanding"; "because of this, US Government decision makers have a positive view of the program, and there is pressure to increase HVT Interrogation Program capabilities in the shortest time possible". "Even more HVT candidate captures and the likewise increase in demand for more HVT program services" could be "reasonably expected". The "operational assumptions" of the program's advocates included that the "required resources will be approved and available for the HVT Interrogation Program" resources which would be "critical to the success of the Program's ability to meet identified customer requirements".[52]

John Rizzo has said that in 2005 he visited two CIA secret detention facilities – "located in two countries in two different parts of the world" – in which detainees being subjected to enforced disappearance were being held). In that same year, the then Director of the CTC also visited a secret detention facility. In anticipation of the forthcoming release of the SSCI summary report, this former official, Robert Frenier, recalled the visit to this "black site" over which "I was ultimately responsible" as CTC Director:

> "*On a bright sunny spring day in 2005, in a country I cannot name* [because it is classified top secret]*, I entered a drab, unremarkable building, a gateway to a grim, unaccustomed world. Its spaces were impersonal, antiseptic, institutional. The residents of that alien world, both the guards and the guarded, were never exposed to natural light. They inhabited a claustrophobic universe of their own, a placed suffused with a permanent air of foreboding, in which both time and external reality had been suspended*".

Of course the "guards", unlike the detainees, were not being subjected to enforced disappearance or to interrogations while held incommunicado solitary confinement. In any event, after this brief scene-setting description of a US-operated facility in which crimes under international law were being committed, Frenier moved on to what has become familiar territory – reference to the effectiveness of the program:

> "*[W]hen I spoke with the Americans there, it was another reality, far outside their confined spaces, that I referred. I told them of the importance of what they were doing, how the information they generated… may well have saved the lives of hundreds and perhaps thousands of innocents…*"

Robert Frenier attacked the forthcoming SSCI summary report as a publication that "purports to be a Senate Intelligence Committee report, [but] is in fact nothing of the sort; it is a partisan Democratic Senate committee staff report, masquerading as something it is not".

After the SSCI voted to submit the summary for declassification, another former CTC director, José Rodriguez, had reiterated his leading involvement in the secret detention program and at the same time criticized the SSCI review, asserting that "unlike the Committee's staff, I don't have to examine the program through a rear-view mirror. I was responsible for administering it".[53] Two years earlier, his memoirs had been published. In them he asserted that

> "*I was responsible for helping develop and implement the Agency's techniques for capturing the world's most dangerous terrorists and collecting intelligence from them, including the use of highly controversial 'enhanced interrogation techniques'.*"[54]

In his memoirs, Rodriguez confirmed what had already been revealed during litigation under the Freedom of Information Act, namely that it was he who approved the destruction in November 2005 of videotapes of CIA interrogations, including recordings of "water-boarding".[55] The destruction of the tapes may have concealed crimes by state agents. Concealing evidence of a crime may constitute criminal complicity. Complicity in torture is expressly recognised as a crime under international law. In 2010, the US Department of Justice announced that no-one would be prosecuted for the destruction of the tapes.[56] However, Rodriguez's own admissions of his role in a program in which detainees were subjected to enforced disappearance and interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment, and his admission that he ordered the destruction of the interrogation tapes, warrant the opening by the US authorities of a criminal investigation into his involvement.

Torture and enforced disappearance were prohibited under international law long before 9/11, regardless of the sophistry of Bush administration lawyers and other officials who gave the green light to the CIA to operate its secret detention program and the "enhanced" interrogation techniques and detention conditions employed in it, and regardless of who within US officialdom knew what about the program and when they knew it.

Whether torture or other ill-treatment, or enforced disappearance are effective or not in obtaining useful information has expressly been made irrelevant under international law to the question of whether they are lawful – they never are – or whether an individual responsible for these crimes is to be investigated or prosecuted. The issue of the effectiveness or otherwise of these human rights violations, and the noise that is likely to surround it, is a distraction to this question that must be answered in line with the USA's international obligations.

THE WAIT FOR TRUTH AND JUSTICE CONTINUES

Truth is truth to the end of reckoning
Act V, Scene I, Measure for Measure, William Shakespeare

Precisely when and how much of the SSCI summary will be published still remains to be seen. And even more crucially, is that the same can be said of the full SSCI report, or even if any of that full report will see the light of day.

At the 1 August press conference, President Obama said that it would be released "at the pleasure of the Senate committee". On the same day, the SSCI Chairperson, Senator Dianne Feinstein, reported that there were "significant redactions" in the declassified version the committee had received that afternoon and that "we need additional time to understand the basis for these redactions and determine their justification". The summary, she said, would therefore "be held until further notice and released when that process is completed." On 4 August, the Director of National Intelligence characterized the redactions as "minimal" and stated that "more than 85%" of the summary report had been declassified, and "half of the redactions are in footnotes." The following day, Senator Feinstein disclosed that after further review, she had concluded that "the redactions eliminate or obscure key facts that support the report's findings and conclusions. Until these redactions are addressed to the committee's satisfaction, the report will not be made public."

Senator Feinstein said that she was sending a letter that same day to President Obama

> "laying out a series of changes to the redactions that we believe are necessary prior to public release. The White House and the intelligence community have committed to working through these changes in good faith. This process will take some time, and the report will not be released until I am satisfied that all redactions are appropriate."

Two days later, on 7 August, the White House spokesperson emphasised that the 85 per cent figure for the unredacted content of the summary report "is a rather large percentage when you consider the subject matter that's included in the report" and repeated what the Director of National Intelligence had said, namely that "about half of those redactions were actually included in the footnotes." As of 27 August 2014, the executive branch's "discussions with SSCI over the redactions are still ongoing".[57]

Delays are nothing new here. The wait for truth, remedy and accountability in relation to the CIA programmes of renditions, interrogations and detentions has already gone on for years, leaving the USA in serious violation of its international human rights obligations.

It is more than a dozen years since evidence began to emerge that the USA was resorting, among other things, to secret transfers, detentions and interrogations of detainees captured in what it then called the "war on terror". Amnesty International, for one, sent a memorandum to the US government in April 2002 raising such allegations. Among the cases cited was that of Abu Zubaydah, in secret detention at an unknown location.

It is more than seven years since the International Committee of the Red Cross (ICRC) transmitted to the US authorities its findings relating to the CIA's secret detention program. Among other things, the ICRC concluded that US agents were responsible for enforced disappearance, torture and other ill-treatment, and called on the USA to bring the perpetrators to justice. It found that Abu Zubaydah had been subjected to all of the techniques reported.

It has been six and a half years since the then CIA Director confirmed that the agency had used waterboarding against detainees held in secret detention. The three about whom the USA has admitted this are Abu Zubaydah, Abd al Nashiri and Khalid Sheikh Mohammed.

It is three and a half years since former President George W. Bush asserted in his memoirs and on primetime television that he had personally authorized the use of "enhanced interrogation techniques", including water-boarding, against Abu Zubaydah and Khalid Sheikh Mohammed (between them these two were subjected more than 250 "applications" of this latter technique).

This is not to say that the injustice is confined to what went on in that particular detention program. After all it is now more than six years since Susan Crawford, then convening authority for the military commissions at Guantánamo, dismissed charges against Mohamed al-Qahtani. In January 2009, reminiscent of what President Obama has now said about the CIA program, she explained: "We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case". Mohamed al-Qahtani – like Abu Zubaydah and scores of others – remains in detention at Guantánamo without charge or criminal trial.

How much longer must the world wait before the USA does what is required of it, and to investigate and bring to justice those responsible for these crimes under international law?

In his statement on the redactions on text in the summary report, the Director of National Intelligence stated that they were there to "protect sensitive classified information". Amnesty International stresses that information concerning gross violations of human rights should never be subject to withholding from the victims or the public on national security grounds.

SHARED RESPONSIBILITIES

The Court concludes that the treatment to which [Abu Zubaydah] was subjected by the CIA during his detention in Poland at the relevant time amounted to torture
European Court of Human Rights, 24 July 2014

While the wait goes on for the USA to release not only the SSCI summary but also the full report, along with all other information concerning human rights violations committed in the

CIA programs of rendition and detention, other countries must press forward with their own efforts. This could be by disclosing or investigating their own roles in the violations or investigating any US national who is present on their territory and against whom there is evidence of involvement in the CIA program.

It is unlikely that the USA is about to disclose which countries cooperated in hosting secret detentions.

As already noted, on 24 July 2014, the European Court of Human Rights found that it had been established beyond reasonable doubt that Abu Zubaydah was transferred on 5 December 2002 to a secret CIA detention facility located at Stare Kiejkuty in Poland and held there until transfer to "another CIA secret detention facility elsewhere" on 22 September 2003. This marked the first time a European Union member state had been found complicit in the USA's rendition, secret detention, and torture of alleged terrorism suspects. Many other countries, in Europe and elsewhere, were involved over the years. The USA's secret detention and rendition programs relied upon their cooperation.

A judgment issued a year and a half earlier by the European Court of Human Rights should have shamed the USA into its much needed U-turn on truth, accountability and remedy. The 13 December 2012 ruling came in 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 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.[58]

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 program. 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.[59]

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.

CONCLUSION

Accountability for security force abuses is essential to the realization of the promise of the Universal Declaration of Human Rights
US Secretary of State John Kerry, 27 February 2014

"We don't do torture", former CIA Director Porter Goss said in 2005.[60] Clearly that was untrue. And not only did the agency engage in torture in its secret detention program, it subjected scores of detainees to enforced disappearance.

"We tortured some folks", President Obama has now said, in a turn of phrase that may have seemed somewhat incongruous to some, given that he was admitting to the USA's responsibility for crimes under international law. In a recent interview, John Rizzo – the

former chief legal officer of the CIA who had already admitted that his "fingerprints had been all over the CIA's post-9/11 detention and interrogation practices since their inception" – said that he had been "startled to hear the president use such a breezy word like 'folks'". Rizzo himself appears to have forgotten that his own memoirs referred to Abu Zubaydah as the first "guest" of the CIA secret detention program. Or that when building the case for expansion of the program, the CIA had referred to "HVT candidate captures" and "customer requirements".

Euphemism or other turns of phrase should not fool anyone into thinking that CIA program or the "bad things" committed against dozens of detainees held in it were anything but unlawful. Systematic human rights violations were part and parcel of this program. Neither should references to domestic "values" or assertions about "effectiveness" of the program be allowed to divert attention to the fact that the USA remains in serious violation of international law for its failure to ensure full truth, remedy and accountability in relation to this program.

Perhaps deeply ingrained notions of "exceptionalism" not only contributed to the idea that US government lawyers could unilaterally redefine torture, but has even led some individuals still to believe that as a result of such legal gymnastics, what Porter Goss said was true, "we don't do torture".

The fact is, torture, enforced disappearance and other human rights violations were committed in the CIA program of secret detention. The fact is, the USA is failing to meet its obligations under international law to reveal the full truth about these violations and to ensure full remedy and accountability for them.

Releasing the summary SSCI report is one small step – yet even this the USA is struggling to take. It should operate with a sense of urgency and commitment to transparency in relation to the full report. The secrecy must end. So must the impunity.

RECOMMENDATIONS

As John Rizzo has said of the detention and interrogation program, "from the beginning, this proposal had deep trouble written all over it".[61] Until the USA ensures full truth, remedy and accountability for the crimes under international law and other human rights violations that occurred in the CIA rendition and detention programs, the "deep trouble" will continue and the USA will remain in serious violation of its international legal obligations. And as long as impunity continues, the commission of torture, enforced disappearance and other human rights violations will be seen as having no legal consequences, not only a profound injustice to the victims and their families but also a dangerous message for today and the future. Without the necessary investigations, prosecutions, reparations, transparency and legislation, President Obama's executive order of 22 January 2009 prohibiting long-term secret detention and certain "enhanced interrogation techniques" may yet come to be seen as no more than a paper obstacle if and when any future US President or administration decides that torture or enforced disappearance are once again expedient for national security.[62]

Amnesty International takes this opportunity to repeat the recommendations it has already made following the SSCI decision to submit for declassification the summary report of its review of the CIA detention program. The organization again urges the USA to do the following:

Truth, Remedy, Accountability

- Ensure necessary investigations. Ensure prompt, independent and impartial investigations into all credible allegations of human rights violations, with the

methodology and findings of such investigations made public. Effective and impartial investigations should be commenced into every instance where there is reasonable ground to believe an act of torture or other ill-treatment, unlawful detention, or enforced disappearance, has been committed. Every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution;

- Ensure full accountability. Ensure that anyone responsible for crimes under international law, including torture and enforced disappearance, committed in the post-9/11 counter-terrorism context is brought to justice, regardless of their level of office or former level of office. Where there is sufficient admissible evidence, suspects must be prosecuted in ordinary civilian courts. Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who knew or disregarded information that indicated that subordinates were committing violations, yet failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or was potentially complicit or participated in the acts, including by knowingly providing assistance. The USA may not relieve those responsible from personal responsibility through amnesties, legal immunities or indemnities or other similar measures that prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families. Impediments such as immunities arising from official statutes, defences of obedience to superior orders and any statutory limitation for crimes under international law or grave human rights violations must be removed;
- Where investigations or prosecutions are undertaken by foreign authorities into torture or other ill-treatment or enforced disappearance, the USA must assist the proceedings, including by supplying all necessary evidence at its disposal and, where necessary, extraditing any alleged perpetrators;
- Guarantee access to remedy. Ensure than all victims of US human rights violations have genuine access to meaningful remedy, as required under international law. The USA must amend its laws and practices to fully implement its international law obligations on the right of access to remedy for victims of human rights violations;
- End any use of secrecy that obscures truth about human rights violations or blocks accountability or remedy for violations. Any information that describes or details human rights violations for which the USA is responsible must be made public;
- Declassify, with redactions only where strictly necessary, the full report of the Senate Select Committee on Intelligence's review of the CIA detention and interrogation program, as well as other relevant information relating to the CIA programs of rendition, detention and interrogation authorized between 2001 and 2009;
- Declassify all government documents providing authorization or legal clearance or discussion of secret detention, rendition, and enhanced interrogation by the CIA or other agencies;
- Declassify all statements made by detainees setting out allegations of enforced disappearance, torture or other ill-treatment in US custody, including detainees held in the CIA's secret detention program;
- End any use of the state secrets doctrine that blocks remedy or accountability for human rights violations.

Removing obstacles to accountability

- Repeal Section 1004 of the Detainee Treatment Act 2005 (DTA) and Sections 5, 6, 7 and 8 of the Military Commissions Act 2006 (MCA);[63]
- Amend Executive Order 13292 on Classified National Security Information, itself an amendment to Executive Order 12958, to make it clear that information cannot be classified or remain classified if, by design or effect, to do so would conceal past or current violations of international human rights or humanitarian law, such as torture and other ill-treatment, secret detention and enforced disappearance;
- Work with Congress to repeal or amend §1101 of the National Security Act 1947 so as to ensure that it does not apply to any treaty or other international agreement relating to human rights or humanitarian law;
- Revoke Executive Order 13233 of 1 November 2001 which purports to give current and former US Presidents and Vice-Presidents broad authority to withhold presidential and vice-presidential records or delay their release indefinitely, and work with Congress to establish procedures ensuring timely release of such records.

US law

- Drop the "law of war" framework, and withdraw or repeal the Authorization for Use of Military Force (AUMF), the domestic law underpinning this framework;[64]
- Legislate to explicitly make the human rights violation of torture, wherever committed, and at least as defined in Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and without a statute of limitations, a criminal offence punishable by appropriate penalties which take into account the grave nature of the offence;
- Legislate to explicitly make the human rights violation of enforced disappearance as defined in international law, and without a statute of limitations, a criminal offence punishable by appropriate penalties which take into account its extreme seriousness;
- Expressly reject and prohibit all use of secret detention by any agency of the USA, or the exploitation of secret detention or other internationally prohibited treatment or conditions of detention for detainees held in the custody other governments;[65]
- Prohibit the practice of secret transfers of detainees without independent oversight, and end the invocation of 'diplomatic assurances' in the face of real risk of human rights violations;
- The USA should establish a single set of interrogation rules for all detainees in US custody, to expressly apply in law to all detaining agencies, in the main body of the Army Field Manual, and revoke Appendix M. Any preserved elements of Appendix M – which must neither be inconsistent with international human rights law nor sow ambiguity about detainee treatment – should be located in the main body of the Manual.

International law

- Ratify the International Convention for the Protection of All Persons from Enforced Disappearance, without reservations;
- Ratify the Optional Protocol to the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other ill-treatment;

- Since US constitutional and statutory law remains open to interpretations incompatible with, among other things, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the USA should withdraw all of its reservations to the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), and any understandings and declarations which may amount to reservations, and fully implement these treaties in national law;
- Recognize extraterritoriality of UNCAT and ICCPR, and recognize their application at all times, including during armed conflict;
- Ratify the Rome Statute of the International Criminal Court;
- Implement all outstanding recommendations made to the USA by treaty bodies, including the UN Human Rights Committee and the UN Committee against Torture;
- Become party to the American Convention on Human Rights and other human rights instruments of the Organization of American States, including the Inter-American Convention to Prevent and Punish Torture.

Current detainees

- The USA must address the Guantánamo detentions as a human rights issue. The detentions must be resolved in a way that fully complies with international law;
- Pending resolution of the detentions, there should be full access to independent medical professionals, UN experts, and human rights organizations, and a review to ensure all detention policies comply with international human rights law and standards and medical ethics. Information about hunger strikes should be made public – including a resumption of regular bulletins on how many detainees are on hunger strike, how many are being force fed, and how many have been hospitalized. A full un-redacted version of the current hunger strike protocol should be made public;[66]
- The USA should not place any conditions on transfers of detainees that would, if imposed by the receiving government, violate international human rights law and standards;
- Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, applying fair trial standards fully consistent with international law. There should be no recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released – if repatriation is not possible then into the USA or any safe alternative;
- The USA should grant all those in US custody in Afghanistan – or anywhere – access to legal counsel, relatives, medical professionals, and to consular representatives, without delay and regularly thereafter, and to US courts to be able to challenge the lawfulness of their detention.

ENDNOTES

[1] For example, see News Conference by President Obama, JW Marriott Ihilani Resort & Spa, Kapolei, Hawaii, 14 November 2011, transcript available at http://www.whitehouse.gov/the-press-office/2011/11/14/news-conference-president-obama ("Waterboarding is torture. It's contrary to

America's traditions. It's contrary to our ideals. That's not who we are. That's not how we operate. We don't need it in order to prosecute the war on terrorism.")

[2] See also New York Times, 7 August 2014, The Executive Editor on the Word 'Torture' http://www.nytimes.com/times-insider/2014/08/07/the-executive-editor-on-the-word-torture/

[3] *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

[4] *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 6 October 2010. Redacted version released on 13 October 2010.

[5] 'I could have stopped them': Ex-CIA lawyer defends waterboarding decision, Spiegel Online, 20 August 2014, http://www.spiegel.de/international/world/former-cia-lawyer-rizzo-defends-waterboarding-decision-a-986087.html

[6] The investigation into the memorandums was by the Office of Professional Responsibility at the Department of Justice.

[7] Finally, an end to Justice Dept. investigation.

[8] John Rizzo, Company Man: Thirty years of controversy and crisis in the CIA. Scribner (2014), page 193. (It would seem clear that even before finalization of this memo and its conversion in a guidance cable, Abu Zubaydah had already been subjected to techniques that violated the international prohibition of torture and other ill-treatment).

[9] "[redacted] the DCI [Director of Central Intelligence] assigned responsibility for implementing capture and detention authority to the DDO [Deputy Director of Operations] and to the Director of the DCI Counterterrorist Center (D/DCI)". Special Review: Counterterrorism detention and interrogation activities (September 2001 – October 2003), Central Intelligence Agency, Inspector General, 7 May 2004, para 3.

[10] John Rizzo, Company Man (2014), op. cit., pages 178-179.

[11] See also, International Convention for the Protection of All Persons from Enforced Disappearance ("the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law").

[12] Field Marshal Wilhelm Keitel was convicted by the Nuremberg Tribunal for his role in implementing Adolf Hitler's Nacht und Nebel Erlass (Night and Fog Decree) issued on 7 December 1941 requiring that persons "'endangering German security' who were not to be immediately executed" were to be made to "vanish without a trace into the unknown in Germany". Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member) - Nuremberg 30th September and 1st October 1946 (Nuremberg Judgment), Cmd. 6964, Misc. No. 12 (London: H.M.S.O. 1946), p. 88.

[13] Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly; International Law Commission, 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18 (i); Rome Statute of the International Criminal Court, Article 7 (1)(i) and (2) (i); Elements of Crimes, Article 7 (1) (i). When the Elements of Crimes were adopted by the Preparatory Commission for the International Criminal Court, the US delegate, Lieutenant Colonel William Lietzau, stated that the United States was "happy to join consensus in agreeing that this elements of crimes document correctly reflects international law". Christopher Keith Hall, The first five sessions of the UN Preparatory Commission for the International Criminal Court, 94 Am. J. Int'l L. 773, 788 (2000).

[14]

[15] John Rizzo, Company Man (2014), *op. cit.*, pages 186-187.

[16] See Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 144.

[17] John Rizzo, Company Man (2014), *op. cit.*, page 192.

[18] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, (hereinafter OPR report) page 45-46

[19] OPR report page 45. Declassified narrative describing the Department of Justice Office of Legal Counsel opinions on the CIA's detention and interrogation program. Senator John D. Rockefeller IV, 22 April 2009.

[20] Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page 31.

[21] OPR report, pages 44-45.

[22] *Ibid*. page 57.

[23] Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency. From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[24] John Rizzo, Company Man (2014), op. cit., page 186.

[25] Ali H. Soufan. The Black Banners: The inside story of 9/11 and the war against al-Qaeda. W.W. Norton (2011), page page 382-3

[26] Black Banners, op. cit., page 396.

[27] Unconfirmed due to redactions in Black Banners, op. cit., page 397.

[28] Black banners, op. cit., page 398.

[29] Black banners, op. cit., pages, 397, 414. See also testimony of Ali Soufan, US Senate Committee on the Judiciary, 13 May 2009, http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da14945e6&wit_id=e655f9e2809e5476862f735da14945e6-1-2.

[30] The CIA interrogation of Abu Zubaydah, March 2001 (sic) – January 2003, http://www.aclu.org/files/assets/CIA_Interrogation_of_AZ_released_04-15-10.pdf

[31] John Rizzo, Company Man (2014), page 194.

[32] *ACLU et al v. Department of Defense et al*, Supplemental memorandum of law in support of plaintiffs' motion for contempt and sanctions. In the US District Court, Southern District of Jew York, 15 February 2011.

[33] Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report. Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe. 7 June 2007. (Rapporteur: Dick Marty), para. 182; UN Secret Detention Report 2010, op. cit., para. 116.

[34] President George W. Bush. Statement on United Nations International Day in Support of Victims of Torture, 26 June 2003.

[35] John Rizzo, Company Man (2014), page 211.

[36] Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

[37] George W. Bush, Decision Points (Virgin Books, 2010), page 169.

[38] See, e.g., Madeleine Albright, US Secretary of State, interview on NBC-TV, The Today Show with Matt Lauer, Columbus, Ohio, 19 February 1998 ("We are the indispensable nation. We stand tall and we see further than other countries into the future").

[39] See generally American exceptionalism: A double-edged sword. By Seymour Martin Lipset, Norton Books (1998).

[40] Dick Cheney. In my time: A personal and political memoir. Threshold Editions (2011).

[41] American exceptionalism, exemptionalism, and global governance, by John Gerard Ruggie, Chapter 10 in American Exceptionalism and Human Rights, Edited by Michael Ignatieff, Princeton University Press, 2005.

[42] Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page 16. Regular attendees of the National Security Council are the President, the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Assistant to the President for National Security Affairs (aka National Security Advisor). The Director of the CIA and the Chairman of the Joint Chiefs of Staff are statutory advisors to the NSC and attend also. The Counsel to the President is to be consulted on the agenda of NSC meetings and attends meetings as appropriate. See, for example, Organization of the National Security Council System. Memorandum from President George W. Bush, 13 February 2001.

[43] *Ibid*.

[44] *Ibid*. The NSC Principals Committee is chaired by the Assistant to the President for National Security Affairs (National Security Advisor). Regular attendees are the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Chief of Staff to the President. The Director of the CIA, Chairman of the Joint Chiefs of Staff, the Attorney General, and the Director of the Office of Management and Budget attend when appropriate. See, for example, Organization of the National Security Council System. Memorandum from President George W. Bush, 13 February 2001.

[45] *Ibid*., page 17.

[46] Declaration of Wendy M. Hilton, Associate Information Review Officer, National Clandestine Service, Central Intelligence Agency, 13 May 2009. *ACLU v. Department of Defense and ACLU v Department of Justice and its component Office of Legal Counsel,* US District Court for Southern District of New York.

[47] Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, pages 30-31. Although see, for example, Section 1.3 of 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 ("history repeats itself").

[48] The CIA is "an organization that thrives through deception". John Hamre, Quoted in Legacy of Ashes: The History of the CIA, by Tim Weiner. First Anchor Books Edition, May 2008, p. 578. From an interview by the author. John Hamre was US Deputy Secretary of Defense from 1997 to 2000.

[49] John Rizzo, Company Man (2014), op. cit., page 174.

[50] See Senator Chambliss on Face the Nation, 3 August 2014, http://www.chambliss.senate.gov/public/index.cfm/pressreleases?ID=a78382c3-3076-42c4-8ab3-d62c0b2d9909

[51] New York Times, 7 August 2014, The Executive Editor on the Word 'Torture' http://www.nytimes.com/times-insider/2014/08/07/the-executive-editor-on-the-word-torture/

[52] Page 13 of CIA planning document, 7 March 2003, redacted version available at http://www.aclu.org/torturefoia/released/082409/cia_ig/oig29.pdf

[53] I ran the CIA interrogation program. No matter what the Senate report says, I know it worked. Jose A Rodriguez, Jr., Washington Post, 4 April 2014, http://www.washingtonpost.com/opinions/i-ran-the-cia-interrogation-program-no-matter-what-the-senate-report-says-i-know-it-worked/2014/04/04/69dd4fae-bc23-11e3-96ae-f2c36d2b1245_story.html

[54] José A. Rodriguez, Jr., Hard measures: How aggressive CIA actions after 9/11 saved American lives. Threshold Editions (2012). Preface, 'Who I am'.

[55] *Ibid.*, especially pages 183-196.

[56] See USA: Another door closes on accountability. US Justice Department says no prosecutions for CIA destruction of interrogation tapes, 10 November 2010, http://www.amnesty.org/en/library/info/AMR51/104/2010/en

[57] *Leopold v. CIA*, Defendant's unopposed motion for extension of time. In the US District Court for the District of Columbia, 27 August 2014.

[58] *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012.

[59] See USA: Remedy blocked again: Injustice continues as Supreme Court dismisses rendition case, 25 May 2011, http://www.amnesty.org/en/library/info/AMR51/044/2011/en

[60] Statement by CIA Director of Public Affairs Jennifer Millerwise, 18 March 2005, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2005/pr03182005.html

[61] I could have stopped them': Ex-CIA lawyer defends waterboarding decision, Spiegel Online, 20 August 2014, http://www.spiegel.de/international/world/former-cia-lawyer-rizzo-defends-waterboarding-decision-a-986087.html

[62] Consider also, US Supreme Court Justice William Brennan (1988): "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". See USA: Five years on 'the dark side': A look back at 'war on terror' detentions, 13 December 2006 http://www.amnesty.org/en/library/info/AMR51/195/2006/en

[63] Section 1004 of the DTA (further amended by section 8 of the MCA) purports to create a sort of special "ignorance of the law" defence for any US personnel against whom civil or criminal proceedings are brought in relation to their activities in the detention and interrogation of foreign nationals suspected of involvement or association with "international terrorist activity". Section 5 of the MCA purports to prohibit anyone from invoking "the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories". Section 6 of the MCA purports to artificially restrict under US law the definition of certain war crimes under the Geneva Conventions. These changes must be

reversed as quickly as possible. Further, although Section 7 of the MCA, purporting to end habeas corpus challenges by alien "enemy combatants", was declared to be unconstitutional by the US Supreme Court in *Boumediene v Bush* (2008), the government has argued, mostly successfully, that the section is only unconstitutional in relation to a so-called "core habeas function" of challenging the legality of detention, and claims that it continues to preclude court review of any other aspect of detention.

[64] The USA's global war paradigm is an unacceptably unilateral and wholesale departure from the very concept of the international rule of law generally, and the limited scope of application of the law of armed conflict in particular. The USA should cease to invoke, and should publicly disavow, the "global war" doctrine, and fully recognize and affirm the applicability of international human rights obligations to all US counter-terrorism measures. This is so whether those measures are taken in the context of specific geographically-circumscribed non-international armed conflicts or away from any armed conflict, and whether on the ordinary territory of the USA or elsewhere. In taking these steps, the USA would simply be joining the opinion of the vast majority of the international community, as expressed in resolutions of the UN General Assembly, judgments of the ICJ, UN and regional human rights bodies established by treaties and inter-governmental organizations, and international legal experts

[65] President Obama's executive order of 22 January 2009 on ending the CIA's Bush-era secret detention program ordered the CIA does not cover facilities "used only to hold people on a short-term, transitory basis". By its wording, it also does not appear to prevent the CIA from using foreign-controlled secret detention facilities to conduct detentions or interrogations of individuals held there.

[66] See 10 April 2014 letter from US organizations, including Amnesty International USA, at, http://www.constitutionproject.org/wp-content/uploads/2014/04/140410-Coalition-Letter-GTMO-Hunger-Strikes-2.pdf