USA

TIME FOR TRUTH AND JUSTICE

REFLECTIONS AND RECOMMENDATIONS ON TRUTH, REMEDY AND ACCOUNTABILITY AS DECLASSIFICATION OF SENATE COMMITTEE SUMMARY REPORT ON CIA SECRET DETENTIONS AWAITED

AMNESTY INTERNATIONAL

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'JUST ASK ABU ZUBAYDAH'

Just ask Abu Zubaydah what it's like to be on the wrong side of the United States of America
President George W. Bush, 16 April 2002[1]

We still cannot ask Abu Zubaydah "what it's like to be on the wrong side of the United States of America" as he remains virtually incommunicado in US custody without charge or trial 12 years after his arrest. Even if we could speak to him, what he told us would be classified Top Secret, disclosure of which could expose the discloser to possible criminal prosecution.

We do not have to ask former President George W. Bush if he authorized the use of torture against Abu Zubaydah, however. He has already provided an answer in his 2010 memoirs. The Central Intelligence Agency (CIA) applied "enhanced interrogation techniques", including the torture technique of "water-boarding", with his express authorization, according to these memoirs, although this Bush claim has been called into question by the CIA's chief lawyer from that time.[2] In any event, the former President's assertion should have been subjected to criminal investigation.[3] No such investigation has occurred.

The CIA secret detention program was operated under authorization signed by President Bush on 17 September 2001 and was terminated pursuant to an executive order signed by President Barack Obama on 22 January 2009. During the lifetime of this program, scores of detainees were subjected to enforced disappearance – held incommunicado in solitary confinement at undisclosed locations, some of them for years, their fate and whereabouts unknown to their families and the public. Among the interrogation techniques authorized for use against such detainees were prolonged sleep deprivation, stress positions, confinement in a box, as well as "water-boarding" (effectively mock execution by interrupted drowning) and various other forms of physical and mental assault. "Unauthorized" techniques were also used.

Under international law, torture and other cruel, inhuman or degrading treatment are never legal. No president can render them lawful; no legislator, judge, soldier, police officer, prison guard, doctor, interrogator or lawyer can override this prohibition. 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 now 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.[4] This report – subsequently leaked from within government – was based upon the ICRC's interviews of 14 "high-value detainees" in the US Naval Base at Guantánamo Bay in Cuba. The 14 men had been held by the CIA at undisclosed locations prior to their transfer to military custody at Guantánamo on 4 September 2006. Abu Zubaydah was one of the 14, and had been held in secret detention for the longest of any of them – four and a half years.

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. Seven years later, no one has been brought to justice for the crimes under international law committed in the context of this program and the associated program of rendition, secret transfers of detainees between countries.

We cannot ask Abu Zubaydah "what it's like to be on the wrong side" of the USA. We can, however, ask the US Senate Select Committee on Intelligence what it has found out about the treatment of over 100 detainees held in the CIA program. It should be allowed to tell us.

PUBLICATION APPROACHES AND LOOKING TO BIGGER PICTURE

Information related to the CIA's former rendition, detention, and interrogation program is extraordinarily sensitive. Likewise, the fact-based declassification review of the SSCI Report's executive summary, findings and conclusions, must be made with the utmost sensitivity to our national security

Central Intelligence Agency, 15 May 2014[5]

In late 2012, the US Senate Select Committee on Intelligence (SSCI) completed a review it had begun in 2009 into the secret detention and interrogation program operated by the CIA after the 11 September 2001 attacks. On 3 April 2014, the SSCI voted to submit for declassification the 480-page summary of its updated 6,600 page report, plus its findings and conclusions. The documents were submitted for declassification review on 7 April 2014.

SSCI Chairperson Senator Dianne Feinstein sought expedited declassification, and the White House said it was committed to a process conducted "as expeditiously as possible". The CIA is conducting the declassification review, in consultation with other agencies, and President Obama has requested that the Director of National Intelligence, James Clapper, oversee the process. In early June Director Clapper indicated that the CIA review should be completed by around 4 July 2014.[6] The CIA has said that it will be completed by 29 August 2014.[7]

The CIA has stressed the complexity of its review and the time needed to do it. In a brief filed in federal court on 15 May 2014 in the context of litigation concerning information about the secret program brought by the American Civil Liberties Union under the Freedom of Information Act (FOIA), the CIA emphasised that "the declassification review process currently underway for the executive summary, findings, and conclusions, of the SSCI Report" is a "complex process" requiring the "careful review of over 500 pages of highly classified material". It stressed that the "new version of the Executive Summary differs from and is considerably longer than the prior, 300-page version that the SSCI transferred to the Executive Branch in December 2012". The CIA stated that the review "requires coordination with classification experts, subject matter experts, several other agencies, and senior level government officials that will likely be completed this summer".[8]

The CIA added that even when the review was complete, the summary could not be made public until security measures had been taken. The agency pointed to what the White House had told the SSCI Chair, specifically that: "Prior to the release of any information related to the former RDI [rendition, detention, interrogation] program, the Administration will also need to take a series of security steps to prepare our personnel and facilities overseas".[9]

Precisely when and how much of this document will see the light of day remains thus unclear. As publication comes nearer (or perhaps, alternatively, is delayed as the SSCI and CIA disagree on how much should be redacted), Amnesty International offers some reflections and recommendations relating to the CIA detention program. It outlines the USA's international obligations on truth, remedy and accountability; points out that secrecy related to the now terminated program continues to impact current detainee cases; and reiterates how the USA's pick and choose approach to treaty ratifications contributed to the torture and other violations committed in that program, and that this approach remains the US modus operandi today despite repeated calls from treaty monitoring bodies for change. Amnesty International also suggests that an indicator of how entrenched impunity is in relation to the CIA program is the number of former senior officials – some of whom may be among those bearing personal responsibility for involvement in crimes under international law – who have felt safe enough to publish highly unapologetic memoirs touching on these detentions and interrogations. Their sense of security is presumably deepened by the government's continuing resort to secrecy to conceal the details of the program, including whatever details of human rights violations are contained in the main SSCI report. Among Amnesty International's recommendations is that this full report be declassified and made public.

SUMMARIES ARE NOT ENOUGH. FULL TRANSPARENCY REQUIRED

The State party should…declassify and make public the report of the Senate Select Committee on Intelligence into the CIA secret detention programme
United Nations Human Rights Committee, March 2014

The full updated SSCI report of its review into the CIA secret detention program consists of three volumes, runs to more than 6,600 pages, and has over 37,000 footnotes.[10] According to the Committee's Chairperson, Senator Dianne Feinstein, the report contains "details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated". In other words, given what we already know about the program, it is logical to believe that it contains information about human rights violations, including the crimes under international law of torture and enforced disappearance.

On 3 April 2014, the SSCI voted 11-3 to submit for declassification the summary of the report and its 20 findings and conclusions. This is to be welcomed, as was Senator Feinstein's request that these documents be declassified "quickly and with minimal redactions".[11] But it is a first step only. The full report remains classified and out of public view – held, according to Senator Feinstein, "for declassification at a later time". She said that the SSCI's review found that more than 100 detainees were subjected to the CIA detention program, uncovered "shocking" facts, "exposes brutality", and "chronicles a stain on our history that must never be allowed to happen again".[12]

A list said to be of the SSCI's 20 findings was then leaked. A number of the items on this list addressed the Committee's findings that the CIA had provided inaccurate information about the program to the Department of Justice and avoided or impeded oversight by the White House, Congress and the agency's own Office of Inspector General. Others accuse the CIA of ignoring contemporaneous internal objections or critiques of the program, and also of manipulating the media by "coordinating the release of classified information, which inaccurately portrayed the effectiveness of the agency's enhanced interrogation techniques".

Other of the leaked findings pointed more directly to human rights violations. For example, two of them reported that the SSCI had found that the CIA's use of "enhanced interrogation techniques" and "conditions of confinement for CIA detainees" had been "brutal and far worse that the agency communicated to policymakers".

Amnesty International calls for the full report to be declassified as a matter of priority – with redactions only where strictly necessary[13] – and any information that pertains to human rights violations, including crimes under international law, published. The USA's international obligations on truth, accountability and remedy demand this. And it would be consistent with the Obama administration's commitment made more than five years ago to an "unprecedented" level of transparency in the stated interest of promoting accountability.[14]

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 "high value detainee" (HVD) 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.

Certain assertions that the HVD program "saved lives" or led to useful intelligence appears to have contributed to reducing domestic calls for accountability – and has been the subject of division on the SSCI itself[15] – but whether or not these claims are true, any such rationalizations for crimes under international law are illegitimate.[16]

Whether torture or enforced disappearance are effective or not in obtaining useful information is irrelevant to the question of whether they are lawful – *they* are *absolutely banned in all*

circumstances – or to whether an individual responsible for these crimes is to be investigated or prosecuted. The USA has an international legal obligation to ensure full accountability for crimes under international law, genuine access to remedy for those subjected to them, and the whole truth about the human rights violations committed in and around this program.

This will require a U-turn on the part of the US authorities, given that impunity, lack of remedy, and an absence of truth have been the order of the day for years. Even the SSCI vote to declassify its summary report was not couched in terms of a need for accountability. Rather than any reference to the crimes under international law that were committed in the CIA program, for example, Senator Dianne Feinstein referenced instead the CIA's "serious mistakes". Her emphasis on future prevention – while an important aspect of US obligations – appears to come at the expense of accountability.

This eye on the future while turning a blind eye to impunity should come as no surprise. It was only a matter of days after the SSCI review was announced in early March 2009, that the question of criminal accountability was promptly sidelined. Just a month after he was sworn into office as the new Director of the CIA in February 2009, Leon Panetta announced that he had been assured by the Chair and Vice Chair of the SSCI that the goal of the review was to inform "future policy decisions" rather than "to punish". Here Director Panetta was echoing the forward-leaning orientation on this issue of the President who had nominated him, President Obama. In May 2009, the President expressed his belief that

> "our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws".

Anything else, the President suggested, including an independent commission of inquiry, would "distract us from focusing our time, our efforts, and our politics on the challenges of the future."[17]

The Department of Justice in 2012 announced the closure of its limited investigation into CIA interrogations, without any criminal charges being referred against anyone. Earlier, no charges had been levelled against those responsible for destroying videotapes of interrogations of detainees in CIA custody, including recordings of water-boarding sessions. Federal judges have effectively turned away from allegations of enforced disappearance, torture and other ill-treatment when confronted by them.[18] Release of the SSCI review into the CIA program now looks set, at least for the time being, to be restricted to the summary report, and from the outset the CIA had been assured that the SSCI was not interested in accountability for past conduct. The only reference to accountability on the leaked list of SSCI findings mentioned above was one that asserted that "CIA personnel who were responsible for serious violations, inappropriate behaviour, or management failures in the program's operation were seldom reprimanded or held accountable by the agency".

And so, more than a dozen years after the CIA began its secret detention operations, the institutions of the USA have singularly failed to prove themselves "strong enough to deliver accountability". It is not because they are incapable of such delivery, it is because officialdom has lacked the political will to bring it about. "We expect accountability here at home too", said US Secretary of State John Kerry at the February 2014 launch of the USA's human rights reports on other countries. Sitting back and "expecting" accountability to happen is never enough. Accountability must be pursued and enforced.

'THIS IS ABOUT ACCOUNTABILITY. IT'S ABOUT ENDING IMPUNITY'

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

On 26 June 2003, a matter of weeks after another detainee in secret US custody was tortured by multiple applications of "water-boarding" in the program of enforced disappearance being operated by the CIA, the President under whose authority this was being done made a public proclamation. He called upon "all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture". He asserted that "notorious human rights abusers" had long "shielded their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors".[19] According to his own memoirs, a few weeks earlier he had personally authorized the use of "water-boarding" against a detainee held in secret CIA detention at an undisclosed location.

Today, US double standards on accountability continue, as does the use of secrecy that obscures the details of the crimes under international law that occurred in the CIA's secret detention and interrogation program.

On 27 February 2014, US Secretary of State John Kerry launched the USA's latest human rights assessments of other countries compiled by the Department of State. As in previous years, one of the major themes running through the country entries was impunity for human rights violations. Indeed, this was reflected in Secretary Kerry's opening statement:

> "Even as we come together today to issue a report on other nations, we hold ourselves to a high standard, and we expect accountability here at home too..... This is the most comprehensive, authoritative, dispassionate, and factual review of the state of human rights globally, and every American should be proud of it.... This is about accountability. It's about ending impunity."

Two years earlier, Secretary Kerry's predecessor, Hillary Clinton, said at the launch of the 2012 reports: "These reports, which the United States Government has published for nearly four decades, make clear to governments around the world: We are watching and we are holding you accountable."[20]

Despite such reiterations of the USA's commitment to universal human rights and accountability for violations of those rights, US officialdom would apparently still prefer to draw a line under the CIA secret detention program without ensuring full truth, accountability and remedy in relation to what went on in it. This leaves the USA squarely on the wrong side of its international legal obligations.

U.S. OBLIGATIONS ON TRUTH, REMEDY AND ACCOUNTABILITY

The USA is required by international law to respect and ensure human rights, to thoroughly investigate every violation of those rights, and to bring perpetrators to justice, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation. In addition, there is a collective and individual right to the truth about violations.[21]

If the USA is to demonstrate that it is genuinely committed to human rights and the rule of law, the US administration and Congress must ensure that truth and accountability are no longer buried under laws or policies that exploit or facilitate secrecy or impunity. Without "observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation... there can be no effective remedy against the pernicious

effects of impunity".[22]

In its March 2014 concluding observations on US compliance with the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee noted "with concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment that had been committed in the context of the CIA secret rendition, interrogation and detention programs were closed in 2012" and that "many details of the CIA program remain secret thereby creating barriers to accountability and redress for victims". The Committee called upon the USA to ensure that all case of torture or other ill-treatment and enforced disappearance are "effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in command positions, are prosecuted and sanctioned, and that victims are provided with effective remedies". In addition, it urged that "the responsibility of those who provided legal pretexts for manifestly illegal behaviour should also be established".

ACCOUNTABILITY

The fight to end impunity is a crucial part not only of dealing with past human rights violations, but also for preventing recurrences. The obligation for accountability derives in part from the USA's obligations under international law. The USA has been party to the ICCPR since 1992 and to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) since 1994. Under these treaties:

- All suspected violations must be promptly, thoroughly and effectively investigated through independent and impartial bodies.[23]
- Where torture or other ill-treatment, summary or arbitrary killing, or enforced disappearance, are revealed, states must ensure that "those responsible are brought to justice".[24] This includes not only those who directly perpetrated the acts, but also those who encouraged, ordered or tolerated them.[25] States may not relieve those responsible for such violations from personal responsibility through general amnesties, legal immunities or indemnities or other similar measures. Impediments such as immunities arising from official statutes, defences of obedience to superior orders or unreasonably short periods of statutory limitation must accordingly be removed.[26]
- The UNCAT specifically requires that each state ensure that "all acts of torture" (including at least all acts covered by the definition in article 1 of the UNCAT), any attempt to commit torture, and any "act by any person which constitutes complicity or participation in torture" are offences under its criminal law.[27] Any state where a person alleged to have committed any of these offences (anywhere in the world) is found must "submit the case to its competent authorities for the purpose of prosecution" unless it extradites him or her to another state for prosecution.[28] The UNCAT expressly precludes defences such as "exceptional circumstances", superior orders, or public authority from ever being capable of being invoked in justification of acts of torture.[29]

Similar obligations are found under the Geneva Conventions and under customary international law.[30]

The government must immediately take specific actions on individual investigations and prosecutions. These include the following measures:

- Effective, independent and impartial investigations, should be promptly 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. Where there is sufficient admissible evidence, suspects must be prosecuted.
- Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who either knew or consciously 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.
- Prosecutions should not be limited to members of the US armed forces or other US agents, but also should include private contractors and foreign agents where evidence of criminal wrongdoing by such individuals is revealed.
- Prosecutions must themselves meet international standards of fairness.
- Any complainant and witnesses must be protected against ill-treatment or intimidation as a consequence of the complaint or any evidence given.[31]
- Victims and their legal representatives should have access to information relevant to the investigation, as well as access to each other. If the results of the investigation are not to be revealed through prosecution of the case, the findings should be made public by other means.
- Claims of confidentiality on the basis of national security or other similar interests that might prevent successful investigation and prosecution of a person for human rights violations, including in cases of torture or other ill-treatment and enforced disappearance, should be precluded.
- Prosecutors should seek penalties which take into account the grave nature of the offences.[32] They should not seek the death penalty in any case.
- 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.[33]

Amnesty International believes that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture and enforced disappearance, in independent and impartial civilian courts, rather than military tribunals. Military tribunals should in any event never be used in respect of anyone who is not a member of the armed forces of a state.

The authorities must not only ensure that investigations and prosecutions in individual cases are initiated, but also work simultaneously to remove legal or practical obstacles to criminal responsibility. Among these obstacles may be the use of classification or other forms of secrecy. Among the actions that should be taken in this regard is declassification and release of the full SSCI report, and indeed declassification of the information related to the CIA programs of detention, interrogation and rendition, with redactions only where strictly necessary.

REMEDY

Victims of human rights violations have the right under international law to effective access to remedy and reparation. The struggle against impunity is linked to this too. In its General Comment on article 14 of UNCAT issued in 2012, for example, the UN Committee against Torture stated:

> "When impunity is allowed by law or exists de facto, it bars victims from seeking full

redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14".[34]

The Committee affirmed that "under no circumstances may arguments of national security be used to deny redress for victims".[35]

International law requires the USA to provide the victims of violations with remedies that are not only theoretically available in law, but are actually accessible and effective in practice.[36] 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.

Restitution seeks to restore the victim to the situation he or she was in before the violation, and could include: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." Compensation should cover any economically assessable damage, and rehabilitation should include medical and psychological care as well as legal and social services. Guarantees of non-repetition could include, among other things, reviewing and reforming laws that contribute to or allow the violations to take place. Among possible elements of satisfaction are:

- effective measures aimed at the cessation of continuing violations;
- verification of the facts and full and public disclosure of the truth;
- establishing the fate and whereabouts of people who have disappeared;
- acknowledgement of the detention of those held in the CIA secret detention program and subsequently released;
- an official declaration or judicial decision restoring the dignity, reputation and rights of the victim;
- a public apology, including acknowledgement of the facts and acceptance of responsibility; and
- judicial and administrative sanctions against perpetrators of human rights violations.

To ensure that the right to remedy and redress is effective as required by international law, any invocation of state secrets privilege that might prevent a victim of torture or other ill-treatment, arbitrary detention, unfair trial, enforced disappearance, or other human rights violations from establishing the violation and obtaining an effective remedy, must be precluded.

Rejecting impunity is a crucial step in preventing recurrence of human rights violations. The right of victims to remedy, including non-repetition, also demands steps such as:

- Prohibiting the provision of information to foreign governments, the posing of questions to detainees held abroad or other participation in interrogations, and other intelligence activities where there is a substantial risk that it will contribute to unlawful detention, torture or other ill-treatment, enforced disappearance, unfair trial or the imposition of the death penalty;
- Prohibiting any use, in judicial or other proceedings, of information or evidence obtained by torture or other ill-treatment or other serious violations of human rights;
- Not transferring anyone to the custody of the agents of another state, or facilitating such transfers, unless the transfer is carried out under judicial supervision and is in line with international human rights law and standards;

- Ensuring that no one is forcibly returned or transferred to any place where there are substantial grounds to believe that the person would be at risk of serious human rights violations or the death penalty; and not seeking or accepting "diplomatic assurances" where there are substantial grounds for believing that a person for whom a forcible return or transfer is contemplated would be at risk of serious human rights violations, including torture or other ill-treatment.

TRUTH

President Obama said in a key address on national security in 2009 that he "will never hide the truth because it's uncomfortable".[37] He could have added that there is a collective and individual right to the truth about human rights violations. In this regard, it is worth recalling what a US government representative said at a panel discussion on the right to truth at the UN Human Rights Council in 2010:

> "Respect for the right to truth serves to advance respect for the rule of law, transparency, honesty, accountability, justice and good governance – all key principles underlying a democratic society."

The United Nations, among others, has formally recognised "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", referring in part to "the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred".[38]

The right to the truth has clearly been a casualty of the USA's "global war" against al-Qa'ida and associated groups. The Obama administration has maintained that "with limited exceptions, the specific details of the capture, detention, and interrogation of particular enemy combatants remains highly classified".[39] This use of secrecy, even if by effect and not design, continues particularly to obscure human rights violations committed in the CIA's secret detention program, including against those who were held in that program and remain today in Guantánamo.

NOT JUST IN THE PAST: SECRECY IMPACTS CURRENT DETAINEES

I believe that Mr al Nashiri has suffered torture, physical, psychological and sexual torture

Expert on treatment of torture survivors, Guantánamo, 24 April 2014

The secrecy about what happened in the CIA detention program has served to block remedy and accountability for the crimes under international law that occurred in the context of that program. At the same time, the administration has taken to emphasising the "former" or "historical" status of the program, following President Obama's decision to end it.

The injustice of this lack of accountability, remedy and truth keeps these human rights violations "current", far from something that can be consigned to the history books. At the same time, the continuing Top Secret classification of details of the now terminated program impacts cases of detainees still held in US custody.

During proceedings at Guantánamo on 29 February 2012, military commission judge US Army Colonel James Pohl steered the detainee before him – Pakistani national Majid Khan – away from referring to his past treatment in US custody. At one point, Majid Khan alluded to the fact that under the plea arrangement to which he was agreeing, he would not be able to sue the government:

> "Going back to the paragraph, you know, just to be on the record, I can't sue the United States Government, CIA, whatever, but I can always have the right to sue--"

At this point, the "security classification button" was pressed to cut off transmission so that observers behind the glass wall dividing the commission room from the public observation area, and anyone observing from remote locations, could not hear what was said. Colonel Pohl warned Majid Khan not to "discuss any individual agencies of government" – Majid Khan had mentioned the CIA, the US agency in whose custody he was subjected to enforced disappearance and to torture or other cruel, inhuman or degrading treatment.

Majid Khan continued, "Sir, talking about public record, talking about public record" – presumably stressing that he was only referring to what was already in the public domain. Nevertheless, Colonel Pohl interrupted by saying "no, no" and the transmission to the observation areas was again cut. When it resumed Colonel Pohl said, "Okay. Just – so we are sliding away from that area".

Under his plea of guilty that was the subject of the hearing, Majid Khan agreed to "not initiate any legal claims against the United States Government, any United States Government Agency or official, or any civilian or civilian agency regarding my capture, detention, or confinement conditions prior to my plea".

As far as is known, Pakistani security agents seized Majid Khan from his brother's house in Karachi, Pakistan, in the first week of March 2003. There was no official news of his fate or whereabouts until President Bush announced on 6 September 2006 that Majid Khan and 13 others had just been transferred from secret CIA custody to Guantánamo.

The ICRC report to the US authorities leaked a few years later revealed that Majid Khan had alleged that he was subjected to prolonged stress standing, a technique whereby the detainee had his wrists shackled to a bar or hook in the ceiling above his head. This was apparently done to him for three days in Afghanistan, his alleged second place of detention after his original arrest and detention in Pakistan, and seven days in his third, unknown place of detention. In Afghanistan and during this latter period he was allegedly kept naked. He also alleged that he was denied solid food for seven days in US custody in Afghanistan.

The ICRC report highlighted a number of methods of torture or other ill-treatment alleged by the 14 detainees, including prolonged "stress standing" position with arms extended and chained above the head, physical assaults, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, threats of ill-treatment, deprivation or restriction of solid food, and water-boarding. The ICRC further stressed that even the two (unidentified) men who had not alleged use of these particular methods against them had nevertheless, like all the detainees in the CIA program, been subjected to conditions of detention that violated the prohibition against torture and other ill-treatment – in the form of months and years of continuous solitary confinement and incommunicado detention.

Majid Khan was subjected to numerous transfers between various secret facilities in various countries between the time of his arrest and his eventual transfer from his final undisclosed location to Guantánamo in early September 2006.

While it seems that Saudi Arabian national Ahmed Mohammed Ahmed Haza al Darbi was not held in the HVD program – so it is not clear if his case is referenced in the SSCI report – he was subjected to CIA rendition, prior to his transfer to Guantánamo, where he remains today. Like Majid Khan, Ahmed al Darbi has now pled guilty under an agreement whereby he will "not initiate any legal claims against the United States Government, any United States Government Agency or official, or any civilian or civilian agency regarding my capture, detention, or confinement conditions prior to my plea".

Ahmed al Darbi was arrested by civilian authorities at Baku airport in Azerbaijan on 4 June 2002 and held in Azerbaijani custody for about two months. In August 2002, he was handed

over to US agents. In a 2009 declaration, Ahmed al Darbi recalled how these agents,

> "blindfolded me, wrapped their arms around my neck in a way that strangled me, and cursed at me. [Redacted], and somebody else kept saying 'fuck you' in my ear. I was terrified and feared for my life, because I did not know who had seized me, which government's custody I was in, or where they were taking me. They did not tell me where we were going. I was eventually taken to a place that I now know was Bagram Air Force Base in Afghanistan. I was imprisoned at Bagram for about eight months… In late March 2003, I was transferred to Guantánamo."

A brief filed in February 2009 in the context of Ahmed al Darbi's habeas corpus case alleged:

> "According to written records and corroborated testimony obtained by Mr Al Darbi's military defense counsel, Mr Al Darbi has been a victim of torture and coercion during his more than six years in United States custody. Mr Al Darbi has been beaten, suspended by his arms and placed in other excruciating positions for extended periods of time, sexually assaulted, threatened with further sexual assault and rape, sexually humiliated, forced to perform hard labor, exposed to loud music and bright lights, kept in isolation for extended periods of time, and deprived of sleep for extended periods of time. To this day, Mr Al Darbi continues to suffer mental and physical harm as a result of his torture, reporting headaches, mood swings, recurring nightmares involving his interrogators, night terrors, incontinence and, until recently, back pain."[40]

In December 2009, US District Court Chief Judge Royce Lamberth ordered the government to produce "all reasonably available evidence" that could show that Ahmed al Darbi was subjected to "abuse, torture, coercion, or duress prior to or contemporaneous with the time he made statements" that were included in the government's case for continuing to detain him. Until that point, the government had produced only one document, but Judge Lamberth pointed to evidence of the existence of other relevant documents. This included the fact that a named US army interrogator had been tried by court martial in 2006 for certain alleged abuses, including against Ahmed al Darbi, and al Darbi's allegations made to military investigators were used at the trial. In addition, Judge Lamberth noted that three reports issued by army investigators contained "detailed accounts" of Ahmed al Darbi's allegations of "physical and psychological abuse at Bagram". Moreover, continued Judge Lamberth, the military commission proceedings against Ahmed al Darbi "produced many documents, both unclassified and classified, showing that petitioner was subject to abuse".[41]

As of 20 February 2014, when a hearing was held at Guantánamo at which Ahmed al Darbi's guilty plea was accepted by the military commission judge, Colonel Mark Allred, there had been no judicial findings on the torture issue in the habeas case in US District Court. Under the plea agreement, Ahmed al Darbi has agreed to "withdraw or dismiss without prejudice any pending litigation regarding my capture, detention, confinement conditions".

On 2 June 2014, charges against another detainee who had been held in CIA custody prior to transfer to military custody at Guantánamo were referred for trial by military commission. Seven years after this transfer in April 2007, the US authorities have yet to disclose when 'Abd al Hadi al Iraqi, an Iraqi man, was taken into custody, where the CIA held him, or what detention conditions or interrogation techniques he faced during his secret detention.

Regardless of pleas such have been made in the Majid Khan and Ahmed al Darbi cases, the USA has an ongoing obligation to ensure full investigation of their allegations of torture or other ill-treatment or of their enforced disappearance. Obliging detainees to keep secret and give up any right to a remedy for such abuses itself violates the USA's explicit obligation under international human rights law to provide access to effective remedies to *anyone* who alleges he has been subjected to such human rights violations.[42] Neither is the USA absolved of its duty to fulfil the individual and collective right to truth about such violations.

Of course, the default position of the USA with regard to detainees has been indefinite detention without trial, rather than trial even by military commission (while the government has also asserted the right to return an acquitted detainee, or a detainee who has served his sentence, back to indefinite detention under the "law of war").[43] Among those subjected to torture and enforced disappearance in the CIA secret detention program, and who remain in indefinite detention without charge or trial, is Abu Zubaydah. In April 2002, then Secretary of Defense Donald Rumsfeld was asked whether Abu Zubaydah would stand trial. He replied "I would certainly assume so".[44] Twelve years later, Abu Zubaydah has not even been charged, and has not had a decision on the lawfulness of his detention six years after the US Supreme Court ruled that the detainees held at Guantánamo had the right to a prompt adjudication of this question. Those responsible for the crimes committed against Abu Zubaydah and others in the secret detention program have not been brought to justice, and their access to any genuine remedy appears to be minimal or non-existent.

A judgment issued on 13 December 2012 by the European Court of Human Rights should have shamed the USA into its much needed U-turn on truth, accountability and remedy. The 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.[45]

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.[46]

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.

Coincidentally, the US Senate Select Committee on Intelligence voted to approve its report and findings on the CIA program on the same day as the European Court issued its *El-Masri* decision. The US authorities should now redress their shameful failures on truth, accountability and remedy. As part of this, the full SSCI report into the CIA detention program should be declassified.

A week before the European Court's decision, Colonel Pohl, in his role as a military commission judge at Guantánamo, issued an order in favour of the US government. This was a protective order to prevent disclosure of "national security information" during proceedings against five Guantánamo detainees charged with involvement in the attacks of 11 September 2001 and facing capital trial by military commission. All five – Yemeni nationals Walid bin Attash and Ramzi bin al-Shibh, Saudi Arabian national Mustafa Ahmed al Hawsawi, and Pakistani nationals Khalid Sheikh Mohammed and Ammar al Baluchi (Ali Abdul-Aziz Ali) – had previously been held in the CIA secret detention program.

Under the protective order, the term "information" applies, "without limitation", to the "observations and experiences" of the detainees themselves. To prevent disclosure of such

information at any proceedings, a 40-second delay in broadcast from the courtroom to the public gallery is built in. Information concerning gross violations of human rights or serious violations of international humanitarian law should never be subject to withholding from the victims or the public on national security grounds. However, the information to be prevented from disclosure under the order includes:

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

On 6 January 2014, Senators Dianne Feinstein and Carl Levin in their roles as, respectively, Chairpersons of the Senate Select Committee on Intelligence and the Senate Armed Services Committee wrote to President Obama with their concerns about the impact of the continued classification of information relation to the CIA detention program. The two Senators expressed the view that this continuing secrecy was responsible for "much of the delay" in the prosecution of the 9/11 defendants in military commission trials at Guantánamo, as well as interfering with efforts to "publicly shine a light on a misguided CIA program that you rightfully ended almost five years ago".[47]

The Senators urged President Obama "to declassify the remaining information related to the CIA's coercive interrogation techniques and conditions of confinement as soon as possible to move forward with the military commissions process."

On 10 February 2014, the White House Counsel responded to the Senators, stating that the administration "will continue to take all appropriate steps to help support these military commission proceedings, including through declassification of information relation to the RDI program."

Since then there have been further commission proceedings at Guantánamo at which the classified nature of the former CIA detention and interrogation program has become an issue.

'Abd al Rahim Hussayn Muhammad al Nashiri is charged with offences under the Military Commissions Act of 2009 and the US government is planning to seek the death penalty against him, as it is against the five "9/11 defendants". And as with those five defendants, 'Abd al Nashiri was held in the CIA secret detention program. At his Combatant Status Review Tribunal conducted six months after his September 2006 transfer from nearly four years of secret CIA detention to military custody at Guantánamo, he asserted the following:

> "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way, and another time they tortured me in a different way… Many things happened. There were doing so many things…Before I was arrested I used to be able to run about 10 kilometers. Now, I cannot walk for more than 10 minutes. My nerves are swollen in my body."[48]

At a pre-trial hearing at Guantánamo on 24 April 2014 on a defence motion alleging that 'Abd al Nashiri has not received necessary treatment for the torture and other ill-treatment he suffered in secret CIA custody (which if true would among other things violate article 14 of UNCAT), more evidence emerged about his experience. The defence lawyers presented an expert on the treatment of torture survivors, Dr Sandra Crosby. Having made clear that in her

work, she uses the definition of torture contained in the UN Convention Against Torture,[49] she stated:

> "I believe that Mr al Nashiri has suffered torture, physical, psychological and sexual torture".

Dr Crosby testified that her diagnosis of 'Abd al Nashiri was that he suffers from "chronic, more complex post-traumatic stress disorder that we often see in survivors of torture". She said that she had "considered multiple things, some of which are classified and I can't discuss, and those include records that are classified. Those include multiple conversations and evaluations of Mr al Nashiri. Those include my observations of Mr Nashiri… I have reviewed portions of the unclassified medical records". Dr Crosby variously testified that:

> "Mr Nashiri suffers from post-traumatic stress disorder that has not been addressed – or it hasn't been diagnosed except for a brief period, or treated. He suffers from chronic pain. He suffers from anal-rectal complaints, and all of these are documented in the unclassified records. Multiple other physical complaints, headaches, chest pain, joint pain, stomach pain. These are all symptoms that are highly prevalent in people who have suffered torture and to have chronic PTSD. These are all kind of red flags…"
>
> "Mr al Nashiri displayed a wide range of emotions, depending on the content of what we were discussing, from irritability, to anger to extreme emotional intensity, including crying, to silence, to wanting a timeout. These are all things that are consistent with somebody who is under duress and stress and consistent with a history of trauma…"
>
> "Mr al Nashiri also had a number of scars on his wrists, his legs, his ankles, that – I can't tell you what the allegations were for either the musculoskeletal pain in the shoulders and the back or the scars, but I can say that they are consistent with the allegations and the history that he gave me…"
>
> "Other red flags in Mr al Nashiri are his persistent and chronic anal-rectal complaints, difficulty defecating, bleeding, haemorrhoids, pain with sitting for prolonged periods of time. This is very common in survivors of sexual assault…"
>
> "I did see multiple behavioural psychological symptoms that Mr al Nashiri exhibited that would alert me to the possibility of post-traumatic stress disorder, and I can list some of those… Severe sleep deregulation; sleep disturbance; irritability, anger outbursts; sadness; decreased concentration, energy; avoidance behaviour. Avoidance behaviour is one of the clusters of symptoms we see in post-traumatic stress disorder, and there was evidence in the record that is unclassified that he avoided coming to appointments because of ear coverings and eye coverings. And I can't really go into the basis for why he was avoiding that, but that was documented in the record."

The classified nature of so much of the CIA program restricted this expert witness's ability to provide detail (for example, 'Abd al Nashiri's "psychological evidence is highly consistent with allegations of torture that are classified and that I cannot discuss").

Materials that have come into the public domain over the years include the following details about what happened to him in CIA detention. 'Abd al Nashiri was arrested in Dubai, United Arab Emirates in October 2002. He was held and interrogated for a number of weeks by Dubai authorities before being handed over to US custody on or around 15 November 2002 and taken to a secret CIA facility, apparently the same facility in which Abu Zubaydah was being held. For at least two days continuously here he was allegedly held in the "prolonged stress standing" position, with his hands shackled above his head, while naked.

Twelve days into his CIA interrogation, Abd al Nashiri was subjected to waterboarding. He was subjected to two "waterboard sessions" in November 2002, and his "enhanced" interrogation continued through to 4 December 2002, at which point he was deemed

"compliant". "Enhanced" interrogation techniques were apparently also used against him for two weeks in December 2002. After a "debriefer" was despatched from CIA Headquarters, this officer assessed al-Nashiri as withholding information. The detainee was subsequently subjected to handcuffing, hooding and nudity. A number of "unauthorized" techniques were also used on him, including "potentially injurious stress positions" and the use "of a stiff brush [used in bathing] that was intended to induce pain on Al-Nashiri", and "standing on al-Nashiri's shackles, which resulted in cuts and bruises". On one occasion, there was concern that his "arms might be dislocated from his shoulders… the interrogators were attempting to put Al Nashiri in a standing stress position. Al Nashiri was reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt".

In addition to the above, the CIA Inspector General's report of 2004, a redacted version of which was released in 2009, found that:

> "Sometime between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information… [T]he debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head. On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri… [T]he debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded… During another incident… the same Headquarters debriefer… threatened Al-Nashiri by saying that if he did not talk, 'We could get your mother in here', and 'We can bring your family in here'."[50]

At this point, one might recall an interview conducted with former Vice President Richard Cheney in August 2009, eight months after the end of the Bush presidency.

> Fox TV: "The Inspector General's report which was just released from 2004 details some specific interrogations – mock executions, one of the detainees threatened with a handgun and with an electric drill, waterboarding Khalid Sheikh Mohammed 183 times… Do you think what they did was wrong?
>
> Cheney: "… It was good policy. It was properly carried out. It worked very, very well."
>
> Fox TV: "So even those cases where they went beyond the specific legal authorization, you're OK with it?"
>
> Cheney: "I am".[51]

Five years later, on 14 April 2014, Colonel Pohl, acting as military commission judge in the 'Abd al Nashiri case, partly granted a defence motion to compel the government to provide information related to al Nashiri's time in secret detention prior to this transfer to Guantánamo in September 2006. While Colonel Pohl denied most of what the defence requested, the information he ordered the prosecution to provide included the following:

- A chronology identifying where 'Abd al Nashiri was held in detention between the date of his capture to his arrival at Guantánamo in September 2006;
- A description of how he was transported between the various locations in which he was held, including how he was restrained and how he was clothed;
- All records, photographs, videos, and summaries documenting the conditions of his detention at each location and the conditions during each transfer;
- The identities of medical personnel, guard force personnel, and interrogations who had direct and substantial contact with 'Abd al Nashiri at each secret locations;
- Copies of the standard operating procedures, policies or guidelines on handling, moving, transporting, treating, interrogating, etc, "high value detainees" between CIA black sites;

- All statements, summaries, reports, logs, notes and so on obtained from interrogators or related to interrogations of 'Abd al Nashiri;
- Un-redacted copies of requests with any accompanying justifications and legal reviews to use "enhanced interrogation techniques" against 'Abd al Nashiri, and un-redacted copies of documents memorializing decisions to employ such techniques.[52]

The prosecution had argued that the defence request was overbroad, and amounted to a "fishing expedition". The defence had argued that their request was entirely legitimate, given that the government was wanting to execute their client, asserting:

> "the government made a decision, and they can end this in a second. They made the decision they want to kill Mr Nashiri. And because they want to kill Nashiri, that gives us certain rights. And one of the rights it to do this kind of investigation. They don't want us to do the investigation? Fine. Withdraw the death request.
>
> But you can't have it both ways. You can't say we have got all this classified stuff, we acknowledge it is potentially mitigating, we are not going to give it to you because it is classified, and too bad, but, oh, we still want to go kill him. It doesn't work that way in any other place in America".[53]

In the USA, for example, the Federal Death Penalty Act states that "In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider *any mitigating factor*..." [emphasis added]. In its most recent report to the UN Human Rights Committee on US compliance with the International Covenant on Civil and Political Rights, the USA assured the Committee that under the "heightened procedural protections" required under US constitutional law in capital cases, "the jury must be able to consider and give effect to *any mitigating evidence that a defendant proffers as a basis for a sentence less than death*" (emphasis added).[54] In these military commission cases, then, the defendants surely should be allowed to offer as a reason for a sentence of less than death any unlawful conduct, including crimes under international law, committed against the defendant by the detaining authority after arrest.[55]

On 23 April 2014, the military commission prosecution filed a motion asking for Colonel Pohl's order to be reconsidered. Among its arguments, it called on Colonel Pohl to take into account the declassification of the SSCI summary report and findings "underway within the Executive Branch". The prosecution brief stated that:

> "The President is committed to making public the findings of the SSCI Report... The President intends the declassification process to be expeditious. The process will include consideration of information relating to interrogation techniques as applied to particular detainees. All declassification decisions will of course be subject to the need to protect national security interests, but the President has expressed a clear intent to declassify as much of the executive summary, findings, and conclusions of the SSCI Report as possible. The Commission should reconsider its Order in light of these new facts".[56]

It remains to be seen how much of the SSCI summary report will be made public, or eventually, how much of the full report. Amnesty International reiterates that information concerning gross violations of human rights or serious violations of international humanitarian law should never be subject to withholding from the victims or the public on national security grounds. It also emphasizes that allowing a government to, in effect, indefinitely and unilaterally keep secret the details of allegations of such human rights violations in a manner that by purpose or effect deprives the person of access to an effective remedy and preserves the impunity of the perpetrators, is fundamentally inconsistent with international law.

Colonel Pohl's order of 14 April 2014 – described by a member of the al-Nashiri defence team at a hearing in Guantánamo on 28 May as "a step towards breaking the [CIA's] stranglehold on the truth" – was welcome as far as it goes. It should be noted, however, that

the military commission judge did not expressly order the prosecution to provide anything on the CIA program that originated from, say, the White House or anywhere else implicating high-level authorization of the secret detention program and the activities in it. Much the same happened at the trials of soldiers charged with involvement torture in Abu Ghraib. Colonel Pohl presided over those trials also. In the al-Nashiri case, for example, the defence had requested, among numerous other materials, the following:

> "A list of, and copies in unredacted form, of all Presidential directives and White House documents concerning authorization for and scope of the CIA's powers to apprehend, detain and interrogate terrorism suspects, including communications about specific detainees, specific interrogations, and use of specific techniques from 2001 through 2006;" and
>
> "All records associated with White House approval of interrogation techniques, including approval documents and records of CIA briefings for members of the National Security Council (NSC) and other senior Administration officials".

After all, for example, the former FBI Director's former Chief of Staff told a US Department of Justice Office of Inspector General review that "in the context of the Zubaydah interrogation", he had attended a meeting at the NSC at which "CIA techniques were discussed", and at which a lawyer from the Office of Legal Counsel (OLC) had given advice "about the legality of CIA interrogation techniques".[57] In its inquiry into the treatment of detainees in US custody, the US Senate Armed Services Committee pursued this reference to the NSC meeting, and concluded in its summary report issued in December 2008 that:

> "Members of the President's Cabinet and other senior officials attended meetings in the White House where specific interrogation techniques were discussed. Secretary of State Condoleezza Rice, who was then National Security Advisor, said that, 'in the spring of 2002, CIA sought policy approval from the National Security Council (NSC) to begin an interrogation program for high-level al-Qaida terrorists'. Secretary Rice said that she asked Director of Central Intelligence George Tenet to brief NSC Principals on the program and asked the Attorney General John Ashcroft 'personally to review and confirm the legal advice prepared by the Office of Legal Counsel'. She also said that Secretary of Defense Donald Rumsfeld participated in the NSC review of CIA's program".[58]

Nevertheless, the above two defence requests for discovery, and many others, were not granted by Colonel Pohl in the al-Nashiri case.

Earlier in 2014, the memoirs of one of the chief CIA lawyers closely involved in the secret detention program were published. In these memoirs, John Rizzo recalled the 1 August 2002 memorandum that had been produced by the OLC at the US Department of Justice giving legal approval for 10 "enhanced interrogation techniques" (EITs) which the CIA proposed for use on Abu Zubaydah. The John Rizzo memoirs recall:

> "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 al-Nashiri and [Ramzi] bin al-Shibh"[59]

These are not the only memoirs of former officials to have been published in recent years. Neither is this the only reference in such memoirs to the CIA secret detention program. The state of impunity and the absence of truth in relation to this program has left their versions of history overly unchallenged. Among other things, the full report of what the SSCI found out about the CIA program should be declassified.

THANKS FOR THE MEMOIRS, NOW FOR TRUTH AND JUSTICE

The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention, or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in command positions, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behaviour should also be established
UN Human Rights Committee, March 2014

Although President Obama brought an end to this CIA detention program soon after taking office, and voided the Department of Justice memorandums approving interrogation methods in it, US officials have for years turned an all but deaf ear to the demands for full transparency, accountability and remedy in relation to the program. Domestic political considerations, and a tendency among officials, in public statements and in litigation, effectively to excuse such human rights violations on the basis of their historical context has gone hand in hand with the USA's failure to take the necessary steps towards ending the current state of impunity.

This is not a case of a few rogue agents running a system of enforced disappearance, torture and other ill-treatment and then fleeing justice. This was a program authorized at high levels of office, and the former officials in question – individuals who may have personal responsibility for crimes under international law – remain at home in the perpetrator state. So entrenched is the problem that some individuals – who may be among those bearing personal responsibility for involvement in crimes under international law – have felt safe enough to publish highly unapologetic memoirs. Their sense of security is presumably deepened by the government's continuing resort to secrecy to conceal details of the CIA program, including whatever details are contained in the more than 6,000 pages of the main SSCI report.

The right to truth "entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation… and, where appropriate, the process by which the alleged violation was officially authorized".[60]

The memoirs from former Bush administration officials have come thick and fast. In his own memoirs published in 2010, the former President related how on 28 March 2002, "I could hear excitement in George Tenet's voice".[61] The CIA Director's "excitement" had been sparked by hearing that Pakistani police in Faisalabad had arrested Zayn al Abidin Muhammad Husayn, more commonly known as Abu Zubaydah, a 31-year-old Palestinian man suspected by the US authorities of being a leading al-Qa'ida operative.

Abu Zubaydah had sustained life-threatening gunshot wounds during his arrest. In his memoirs, former President Bush said that "the CIA flew in a top doctor" to treat the detainee. George Tenet had already made this assertion in more detail in his own memoirs, and had added that "Once Abu Zubaydah was stabilized, the Pakistanis turned him over to CIA custody."[62] This transfer, according to the memoirs of the former Pakistan President Pervez Musharraf, occurred on 30 March 2002.[63]

The manner in which the CIA transferred detainees between different locations itself violated the prohibition against torture and other cruel, inhuman or degrading treatment. A CIA background paper described a typical rendition in the secret program:

> "The HVD is flown to a Black Site… During the flight, the detainee is securely shackled, and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods… Upon arrival at the destination airfield, the HVD is moved to the Black Site under the same conditions…The HVD finds himself in the complete control of Americans… [T]he

> rendition and reception process generally creates significant apprehension in the HVD because of the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread an HVD might have of US custody… The HVD's head and face are shaved. A series of photographs are taken of the HVD while nude."[64]

As already noted, the leaked SSCI findings include one that conditions and treatment were "brutal" and "far worse" than the CIA had let on to other officials. The ICRC report which came into the public domain in 2009 had added some human reality to the picture painted by the CIA about transfers and conditions of detention:

> "The transfer procedure was fairly standardised in most cases. The detainee would be photographed, both clothed and naked prior to and again after transfer. A body cavity check (rectal examination) would be carried out and some detainees alleged that a suppository (the type and effect of such suppositories was unknown by the detainees), was also administered at that moment. The detainee would be made to wear a diaper and dressed in a track suit. Earphones would be placed over his ears, through which music would sometimes be played. He would be blindfolded with at least a cloth tied around the head and black goggles. In addition, some detainees alleged that cotton wool was also taped over their eyes prior to the blindfold and goggles being applied. Mr Abu Zubaydah alleged that during one transfer operation the blindfold was tied very tightly resulting in wounds to his nose and ears. He does not know how long the transfer took but, prior to the transfer, he reported being told by his detaining authorities that he would be going on a journey that would last twenty-four to thirty hours.
>
> The detainee would be shackled by hands and feet and transported to the airport by road and loaded onto a plane. He would usually be transported in a reclined sitting position with his hands shackled in front. The journey times obviously varied considerably and ranged from one hour to over twenty-four to thirty hours. The detainee was not allowed to go to the toilet and if necessary was obliged to urinate or defecate into the diaper. On some occasions the detainees were transported lying flat on the floor of the plane and/or with their hands cuffed behind their backs. When transported in this position the detainees complained of severe pain and discomfort".[65]

Abu Zubuaydah has been in US detention ever since he was first taken into custody in late March 2002. He was eventually transferred out of CIA custody and into US military detention in Guantánamo, on 4 September 2006. He remains at the naval base today. In his first four and a half years, the US authorities transferred him to a series of secret locations, reportedly including Thailand, Poland, Guantánamo Bay, Morocco, Lithuania and Afghanistan.

A 2006 US Department of Justice memorandum noted that "the covert facilities in which the CIA houses these detainees were not designed as ordinary prisons", and that this purportedly justified the use of certain conditions of detention, including blindfolding, white noise, 24-hour lighting, shackling, and forced shaving, as security measures in addition to the incommunicado and solitary confinement of those held and the interrogation techniques to which they were subjected.

The question of detention conditions in the CIA program has been somewhat overlooked with the focus instead on interrogation techniques authorized and used in the program. Conditions of detention, including during transfers, can violate the international prohibition of torture and other cruel, inhuman or degrading treatment. As the ICRC noted in the report of its interview with the 14 former CIA detainees held at Guantánamo, the conditions of detention – from solitary confinement, and incommunicado detention to "deprivation of access to the open air; deprivation of exercise; deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation; and restricted access to the Koran linked with interrogation –

must be understood as forming part of the whole picture. As such, they also form part of the ill-treatment to which the fourteen were subjected".[66]

George Tenet asserted in his memoirs that formal congressional approval for this secret detention program had not been sought "as it was conducted under the president's unilateral authorities".[67] Bush recalled in his own memoirs that following the 9/11 attacks, "George [Tenet] proposed that I grant broader authority for covert actions, including permission for the CIA to kill or capture al Qaeda operatives without asking for my sign-off each time. I decided to grant the request".[68] While working on his own memoirs in 2011, former CIA legal counsel John Rizzo wrote:

> "A few days after the attacks, President Bush signed a top-secret directive to CIA authorizing an unprecedented array of covert actions against Al Qaeda and its leadership… [T]he White House directed that details about the most ambitious, sensitive and potentially explosive new program authorized by the President – the capture, incommunicado detention and aggressive interrogation of senior Al Qaeda operatives – could only be shared with the leaders of the House and Senate, plus the chair and ranking member of the two intelligence committees… Only they were briefed on CIA's secret detention facilities overseas and the employment of so-called 'enhanced interrogation techniques' (EITs), including the waterboarding of high-value detainees like Abu Zubaydah and Khalid Sheik Mohammed."[69]

While the former President speculated in his memoirs that he "could have avoided some of the controversy and legal setbacks" if he had sought congressional legislation on the CIA program at the outset, his assertion that he personally approved the use of "enhanced interrogation techniques" against detainees held in secret custody is otherwise unapologetic. "Damn right", he recalls as his response to CIA Director Tenet's request in 2003 for such authorization in the case of Khalid Sheikh Mohammed who was subsequently subjected, among other things, to more than 180 applications of "water-boarding".

On 2 June 2010, in response to a question at the Annual Dinner Meeting of The Economic Club of Grand Rapids in Michigan, former President Bush said "Yeah, we water-boarded Khalid Sheikh Mohammed… I'd do it again to save lives." [70] Asked in an interview with NBC five months later, on the eve of publication of his memoirs, the former President was asked whether he would make the same decision on the interrogations today. He responded, "Yeah, I would". In his memoirs he adds that "Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program for them as well."[71]

In relation to Abu Zubaydah, former President Bush pointed to his authorization of "enhanced" techniques as well as to the involvement of doctors – this time not to medically treat the detainee, but to give the green light to his torture:

> "I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning. No doubt the procedure was tough, but medical experts assured the CIA that it did no lasting harm…I approved the use of the interrogation techniques".[72]

Here was the former President asserting that he had personally authorized the use of a torture technique against two detainees against whom that torture technique is known to have been used. Even though a subsequent set of memoirs – those of former CIA legal counsel John Rizzo – call the Bush assertion into question – suggesting that he "squarely puts himself up to his neck in the creation and implementation of the most contentious counterterrorist program in the post 9/11 era when, in fact, he wasn't" – the former President's assertion should have been subjected to criminal investigation and still should be. As the current President and Attorney General of the USA have acknowledged, water-boarding is torture. The former President's assertion is enough in and of itself to trigger the international legal

obligation to carry out a criminal investigation with a view to prosecution, whether in the USA or in other countries to which George W. Bush travels.[73]

Former Vice President Richard Cheney – whose influence on President Bush has been described as "enormous" in another set of memoirs, those of Jack Goldsmith, head of the OLC at the Department of Justice for a period during the Bush administration[74] – has indicated his involvement in the approval of waterboarding. "If necessary", he told CNN a few days before leaving office in January 2009, "I would certainly recommend it again".[75] He has repeated this in 2014.[76]

In August 2011, the former Vice President's memoirs were published. The book stated that after Abu Zubaydah was taken into custody he "stopped answering questions" and the CIA "approached the Justice Department and the White House about what they might do to go further in interrogating him and other high-value detainees." The CIA "developed a list of enhanced interrogation techniques," obtained Justice Department advice that the techniques were "lawful" and then the "program was approved by the president and the National Security Council".[77]

The former Vice-President had not waited until writing his memoirs, or even until he was out of office, to assert that he was himself involved in the approval of "enhanced" interrogation techniques against detainees held in secret detention. A month before leaving office, for example, the Vice President said:

> "After 9/11, we badly needed to acquire good intelligence on the enemy. That's an important part of fighting a war. What we did with respect to al Qaeda high-value detainees, if I can put it in those terms, I think there were a total of about 33 who were subjected to enhanced interrogation; only three of those who were subjected to waterboarding... I signed off on it; others did, as well, too. I wasn't the ultimate authority, obviously. As the Vice President, I don't run anything. But I was in the loop. I thought that it was absolutely the right thing to do."[78]

Former President Bush has been similarly unapologetic about his executive order of 13 November 2001 authorizing military commission trials and indefinite detention without trial of selected foreign nationals, and about the detentions at Guantánamo Bay, without due process, of individuals taken into custody in a wide range of circumstances (many far removed from any armed conflict).[79] Holding "captured terrorists on American soil", the former President reasserted in his memoirs, "could [have] activate[d] constitutional protections they would not otherwise receive, such as the right to remain silent"; so the decision to hold the detainees at Guantánamo came after the US Department of Justice "advised me" that detainees held on "Cuban soil" had no right of access to the US criminal justice system.[80] Jack Goldsmith's memoirs had put it that choosing Guantánamo had "seemed like a good bet to minimize judicial scrutiny".[81] As indicated in the leaked ICRC report mentioned above, one of the "black sites" in 2003 and 2004 in the CIA's secret detention program appears to have been Guantánamo.

In his memoirs published in 2011, former Secretary of Defense Donald Rumsfeld focussed more on the Guantánamo detentions than he did on the secret CIA program. Indeed, he dealt with the Abu Zubaydah detention and the CIA program in just three of his book's more than 700 pages. He asserted that, as a member of the National Security Council, he had been briefed on the CIA program in 2003, including the use of water-boarding, and that he "saw no contradiction" in the fact that the CIA used this and other techniques that he had not authorized for use by military interrogators. Some techniques that might be "appropriate" for CIA interrogators to use against "high-value terrorists" held in a "controlled environment", he wrote, were "not appropriate for use by military personnel".[82] His legal counsel had considered "water-boarding" to be legally available for military interrogators at Guantánamo, but had not recommended policy approval.[83]

At the time Abu Zubaydah was handed over to US custody, Secretary Rumsfeld had been a little more forthcoming on the subject of this detainee than he would be nine years later in his memoirs. At that time, he appeared to be well "in the loop". A few days after Abu Zubaydah's transfer to US custody, Secretary Rumsfeld said that where the detainee was being held was secret "as a matter of security".[84] He said that he would be "properly interrogated by proper people who know how to do those things", and described as "enormously unhelpful", "irresponsible", "inaccurate" and "wrong" media reports that the detainee might be transferred to a third country where he would face torture, although he did not rule out that he would be held by the USA in a country other than Afghanistan, Pakistan, or the USA.[85] Secretary Rumsfeld said that Abu Zubaydah was "high enough up" in *al-Qa'ida* "that he merits some very special attention" in relation to information extraction.[86] He said that the detainee was a "fountain of knowledge" who "just hasn't turned the spigot on yet." Two weeks after the transfer, he said that "I checked this morning and his health is better".[87] Three weeks after the USA took custody of Abu Zubaydah, Secretary Rumsfeld was asked whether he had been moved from the secret location in which he had been held so far. Secretary Rumsfeld replied that "he's not been moved".[88]

> "*There are five people who we have requested interviews that – who are going to be subpoenaed, or whatever passes for a subpoena in this process, who we are going to try and get on the stand, because they clearly have knowledge germane to this case. Those people are former President Bush, former Vice President Cheney, John Rizzo, José Rodriguez, and former President Clinton.*
>
> *Now, last week the prosecutor sent us a notice saying, well, yes, we reached out to those guys on your behalf and they basically aren't interested. Those folks are willing to write articles in the New York Times, they are willing to write books, they are willing to give $100,000 speeches, they are willing to go on Fox and C-SPAN and talk about how wonderful all this is, but when it comes to sitting down and being subjected to the crucible of the truth of an interview, forget under oath, oh, no, I'm not doing that….*"
>
> Defence lawyer for former CIA detainee 'Abd al-Nashiri, military commission hearing, Guantánamo, 28 May 2014[89]

If the former Secretary of Defense was involved in this enforced disappearance, it would not be the only time. While details of most cases of "ghost detainees" in Iraq remains unknown, US authorities have let it be known that in November 2003, Secretary Rumsfeld, acting on the request of the CIA's then director George Tenet, ordered military officials in Iraq to keep a particular detainee, an Iraqi national, off any prison register.[90] In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. Secretary Rumsfeld, acknowledging his approval of the CIA Director's request to keep the detainee unregistered and away from the ICRC, added that "there are instances where that occurs", implying that this was not an isolated case.[91] In response to litigation brought under the Freedom of Information Act, the CIA stated in 2005 that it had located 72 documents "responsive" to the case of the Iraqi national kept off prison registers at the request of the CIA Director, but had determined that the documents "must be withheld in their entirety" from public disclosure[92] Again, secrecy confounded accountability and remedy.

The Rumsfeld memoirs fail to address the question of this or other "ghost detainees" (that is, enforced disappearances). The book does confirm that in late 2002, he had authorized "counter-resistance" techniques for use by military interrogators at Guantánamo, although, in a claim reflecting a distorted perspective, he said that "I understood that the techniques I authorized were for use with only one key individual", Mohamed al-Qahtani, as if authorizing torture or other ill-treatment for even one person was acceptable and lawful. He made this claim despite the fact that the memorandum he signed expressly stated that the techniques were for use "in the interrogation of detainees" (plural) and "at the discretion" of the military authorities (moreover, the request for his approval from the military expressly referenced "some detainees" having resisted "our current interrogation methods").

The case of Mohamed al-Qahtani is one that links the CIA secret detention program and the military. At a meeting in October 2002 in Guantánamo, the participants discuss interrogation techniques and strategy, including the specific case of Mohamed al Qahtani. Jonathan Fredman, chief council to the CIA's Counterterrorist Center, the part of the CIA which was running the agency's secret detention program for "high value" detainees, was a participant at the meeting. He advised the other participants – who were mainly military personnel – that the Department of Justice had provided "much guidance" on the interrogation issue. He asserted that the USA's anti-torture statute was "written vaguely", and also pointed to the fact that when the USA had ratified the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment it had filed a reservation to Article 16's prohibition on cruel, inhuman or degrading treatment to the effect that it was only bound by existing US constitutional limits, which "gives us more license to use controversial techniques". He pointed to "water-boarding", and pointed out that it was also "effective" to "identify phobias and use them". He agreed that the military could see a CIA request to the Department of Justice to use "advanced aggressive techniques". The meeting also heard that sleep deprivation was being used in Afghanistan and was available by approval, and that the ICRC "is a serious concern" and should not be "exposed" to "any controversial techniques. Fredman recalled that "in the past when the ICRC has made a big deal about certain detainees, the DoD [Department of Defense] has 'moved' them away from the attention of the ICRC".[93] By this time, the CIA had also been keeping detainees in undisclosed locations, away from the ICRC, for months.

Nine days after this Guantánamo meeting, one of its participants, a military lawyer, completed a legal memorandum on proposed "counter-resistance" techniques for use at the base, including stress positions, exploitation of phobias, water-boarding, sleep disruption, sensory deprivation, hooding, and isolation. The memo noted the USA's Article 16 reservation and recommended approval of the proposed methods. The memo formed the basis for Secretary Rumsfeld's approval on 2 December 2002 of some of these techniques, the memo he referenced in his memoirs as being for the purpose of Mohamed al Qahtani's interrogation.

Rumsfeld also confirmed in his memoirs (in a footnote) that he had approved "interrogation techniques beyond the traditional Army Field Manual" in August 2003 in the case of Mohamedou Ould Slahi, a Mauritanian national held at Guantánamo. With echoes of what occurred in Iraq, the ICRC was kept from these two detainees during the periods of these "special interrogations".

The convening authority for military commissions in 2008 refused to forward charges against Mohamed al-Qahtani on for trial because "we tortured" him.[94] In the case of Mohamedou Ould Slahi, a military prosecutor assigned to the case withdrew from it because he reached the conclusion that "what had been done to Slahi amounted to torture."[95] The former Defense Secretary's personal involvement in these cases has not been subjected to criminal investigation, despite what he confirmed in his memoirs.

Another set of memoirs was published in 2012. This time it was José Rodriguez who was putting out his version of history. From late 2005, he became head of the CIA's newly-established National Clandestine Service and before that, from spring 2002, he was director of the Counterterrorist Center, the branch of the CIA delegated by its then Director George Tenet to run the detention program.[96] In his memoirs, José Rodriguez asserts 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'."[97] Since the SSCI voted to submit the summary of its report for declassification, José Rodriguez has reiterated his leading involvement in the program: "unlike the Committee's staff, I don't have to examine the program through a rear-view mirror. I was responsible for administering it".[98]

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".[99] 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, however, the US Department of Justice announced that no-one would be prosecuted for the destruction of the tapes.[100] 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.

In his memoirs, José Rodriguez linked the decision to destroy the CIA tapes to the release of the Abu Ghraib photographs. Broadcast of those photos, he said, firmed up the view that "getting rid of the [CIA interrogation] tapes was vitally important". What would happen, he asked, "if a photo [sic] of a senior al-Qa'ida leading being waterboarded by CIA officers were to get out?"

In addition to the need for accountability to be pursued regardless of level of office of the alleged perpetrator, including those in "command positions", the UN Human Rights Committee recently called on the USA to establish the responsibility of those who "provided legal pretexts for manifestly illegal behaviour".

John Rizzo was the CIA's chief legal officer during much of the Bush administration's term in office and recipient of a number of the most notorious Department of Justice memos on interrogations as well as the ICRC's 2007 report on its interviews with the 14 detainees transferred from the secret program to Guantánamo in 2006.[101] In his own memoirs published in 2014, John Rizzo asserts that he stayed in his office at CIA Headquarters in Langley, Virginia, on the day of the 9/11 attacks and "scribbl[ed] a laundry list of potential covert actions the CIA could undertake in the weeks and months ahead". His "scribblings", he said, included: "'Lethal action against members of Al Qaeda and any affiliated groups' or words to that effect…But then I wondered, was that all that we could do?... Maybe, I thought, we should retain the option to take terrorists alive… I scribbled down the phrase 'capture, detain and question' on my legal pad".[102]

These jottings apparently formed the basis for the "memorandum of notification" signed by President Bush on 17 September 2001, authorizing the CIA to detain and interrogate outside the USA. In his memoirs, John Rizzo also asserts that "I have no doubt that if I had said the word, much if not all of the EIT ['Enhanced Interrogation Technique'] initiative would have quietly died before it was born. It would have been a relatively easy thing to do, actually…"[103] It was not terminated, however, and Rizzo recalls how by 2004, "the secret prison/EIT program was growing like Topsy, with more HVDs 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."[104] He also stated 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.[105]

"My fingerprints", John Rizzo asserts in his memoirs, "had been all over the CIA's post-9/11 detention and interrogation practices since their inception". Another lawyer whose "fingerprints" were "all over" the USA post-9/11 detention and interrogation practices was John Yoo, who served as Deputy Assistant Attorney General at the Office of Legal Counsel (OLC) of the US Department of Justice from 2001 to 2003. During that time, John Yoo worked on numerous legal opinions, including one that gave OLC approval for interrogation techniques that amounted to torture or other ill-treatment under international law for use by the CIA against detainees held in secret custody at undisclosed locations.

The "enhanced interrogation techniques" used against Abu Zubaydah had been given legal approval in a memorandum written by John Yoo. John Yoo was also the primary author of a longer legal memorandum 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 Yoo had apparently called this the "bad things opinion" in email communications to his assistant at the OLC.[106] In another email, John Yoo had nicknamed Abu Zubaydah, the initial primary target of these "bad things", as "Boo boo".[107] That John Yoo was closely involved on this issue is beyond debate.

A former head of the OLC during the Bush administration has recalled in his memoirs how John Yoo had been a member of "a secretive five-person group with enormous influence over the administration's antiterrorism policies".[108] Within that group, "Yoo played a vital role", former Assistant Attorney General Jack Goldsmith said (head of the OLC in 2003 and 2004).

John Yoo was one of the links between the legal approval given for interrogation techniques used by the CIA and by the military. In addition to the above memorandums for the CIA's secret detention program, he also wrote a similar one, dated 14 March 2003, for the US Department of Defense. In his memoirs, John Yoo wrote:

> "Critics tell a 'torture narrative', which goes like this: The Bush administration used torture to extract information from al Qaeda leaders, and decided to use the same methods on the detainees at Guantánamo Bay, whom it deprived of Geneva Conventions protections precisely for this purpose. Harsh interrogation techniques became part of military culture and 'migrated' to Iraq, where they produced the horrible abuses at Abu Ghraib… Believers of the narrative refuse to trust a word of the bipartisan investigations that have demolished the link between the decisions about Guantánamo Bay and Abu Ghraib, or between decisions in Washington and the prison abuses".[109]

The 2008 report on detainee abuse compiled by the Senate Armed Services Committee (SASC) was released two years after publication of John Yoo's version of events and far from demolishing the link, the SASC added further compelling evidence to the "torture narrative".[110] In addition, after a four and a half year investigation into the OLC interrogation memorandums, the Office of Professional Responsibility (OPR) at the US Department of Justice concluded, among other things, John Yoo had "put his desire to accommodate the client above his obligation to provide thorough, objective, and candid legal advice" and that in so doing he committed "intentional professional misconduct".[111] The aim of the client (the administration), according to former Assistant Attorney General Jack Goldsmith's memoirs, was to "go right to the edge of what the torture law prohibited, to exploit every conceivable loophole".[112]

Numerous administration lawyers were involved in producing memorandums on interrogations and detentions over the years. In addition to its findings of misconduct, the OPR pointed to evidence of substantial White House pressure being placed on OLC lawyers to mould the law to the administration's policy preferences. The OPR concluded, for example, that the OLC had produced three memos in 2005 under pressure from the White House and with the "goal of allowing the CIA program to continue".

The proximity of the White House to the interrogation issue was noted by the OPR in relation to two OLC memorandums dated 1 August 2002 and provided to the CIA – the one already noted above and another that authorized 10 "enhanced interrogation techniques", including water-boarding, for use against a specific detainee being subjected to enforced disappearance at an undisclosed location.[113] On 31 July 2002, John Yoo emailed the Attorney-Adviser who was assisting him on the memos to tell her that he, Yoo, would be leaving for the White House at 11.30am that morning and asked her to provide him with "a print out of the classified [10-technique] opinion… with a copy to take to the White House". At 12.12pm, the Attorney-Adviser sent Deputy Assistant Attorney General Patrick Philbin an

email message to inform him that Yoo "wanted me to let you know that the White House wants both memos signed and out by [close of business] tomorrow".[114] The 10-technique memo was faxed to the CIA at 10.30pm on 1 August 2002.

In an interview with the OPR on 24 February 2009, former Deputy Attorney General James Comey claimed that there had been substantial pressure from the White House, particularly Vice President Cheney and his staff, to produce legal opinions in support of the CIA's secret interrogation and detention program.[115] Former Deputy Assistant Attorney General Philbin told the OPR that in November 2004, the Counsel to the Vice President, David Addington, had suggested that Philbin's career in government would no longer advance because of his support for withdrawal in June 2004 of the 1 August 2002 memorandum written by John Yoo that had been leaked into the public domain after the Abu Ghraib revelations. Philbin further alleged that Addington accused him of having violated his oath to defend the US Constitution when he had supported withdrawal of the memo, a memo that among other things concluded that "under the current circumstances, necessity or self-defense may justify" interrogation techniques amounting to torture.[116]

At a hearing before the House Judiciary Committee on 17 June 2008, David Addington responded to questions about Deputy Assistant Attorney General John Yoo's inclusion in that same August 2002 memorandum of broad notions of presidential power to order torture and of possible defences against criminal liability for any interrogator accused of torture. Addington said that he had told Yoo at the time "Good, I'm glad you're addressing those issues". A response consistent with international law would have been to point out the USA's absolute obligation to prevent torture and other cruel, inhuman or degrading treatment. Addington also told the Committee that "In defense of Mr Yoo, I would simply like to point out that is what his client asked him to do".

It remains the case that precisely who was involved in the CIA program and what their involvement was in the enforced disappearance, torture and other cruel, inhuman or degrading treatment of detainees held in it is unknown. It is one reason why Amnesty International has long called for a full independent commission of inquiry into all aspects of the USA's detention, interrogation and rendition programs. In the meantime anyone against whom there is already evidence of responsibility for crimes under international law should be the subject of criminal investigation and brought to fair trial where there is sufficient admissible evidence for prosecution.

A NEW APPROACH TO INTERNATIONAL LAW LONG OVERDUE

The State party should reconsider its position regarding its reservations and declarations to the [International] Covenant [on Civil and Political Rights] with a view to withdrawing them

United Nations Human Rights Committee, March 2014

In 2009, President Obama said that in response to the 9/11 attacks, "we compromised our basic values – by using torture to interrogate our enemies, and detaining individuals in a way that ran counter to the rule of law".[117] Five years later, announcing the decision of the Senate Select Committee on Intelligence to submit for declassification the summary of its report into the CIA secret detention program, Senator Dianne Feinstein said that the report itself "exposes brutality that stands in stark contrast to our values as a nation". She added, "this is not what Americans do."

Appeals to national values and tradition is a part of political debate in every country, and reference to domestic values and history can facilitate a country's constructive self-criticism as much as it can feed unhelpful myth-building and self-satisfaction over domestic laws and institutions. Embracing universal human rights values as a key part of national values can

contribute to respect for the rights of all persons within a state's territory or otherwise under its control. The message that has too often emanated from the USA's counter-terrorism policies over the years since 9/11 is that the answers lies in national values, *to the exclusion of* international human rights standards.

From early on in what it was calling the "war on terror", the White House issued assurances that "as Americans, the way we treat people is a reflection of America's values…, based upon the dignity of every individual".[118] This particular statement was issued in February 2002. The following month, Abu Zubaydah was arrested in Pakistan and within weeks would be subjected to waterboarding 83 times in a single month as part of the torture and other cruel, inhuman and degrading treatment he endured during four and a half years held incommunicado in solitary confinement in undisclosed locations.

In his memoirs, former Vice President Cheney returned to the subject of a speech he had made in May 2009, re-asserting his view that "American values" had been upheld throughout the Bush administration's response to the attacks of 11 September 2001: "I also challenged the whole assumption that American values were abandoned, or even compromised, in the fight against terrorists. For all that we've lost in this conflict, the United States has never lost its moral bearings". In that 2009 speech, the Vice President had defended, among other things, "water-boarding" and its use against three detainees then being subjected to enforced disappearance by the CIA, and now held in Guantánamo.[119] His remarks illustrated how the concept of "American values" can be a malleable and subjective notion, indeed twisted to imply that full respect for universal human rights cannot also be an "American value".

An overarching concern, one to which the Human Rights Committee and other treaty bodies have repeatedly found themselves returning, is the question of the USA's interpretation of its international obligations.

Among the limiting elements are the reservations and declarations which the USA lodged at the time of its ratification of the ICCPR. When the USA ratified the ICCPR in 1992, it filed a reservation to article 7 on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment:

> "the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."

This was the first and, until 2000, only reservation to article 7 of the ICCPR made by any country.[120] In November 1994, the UN Human Rights Committee issued General Comment 24 to address the question of reservations lodged by countries when ratifying the ICCPR. The Committee noted that under international law, specifically the Vienna Convention on the Law of Treaties, a state may not make a reservation that is incompatible with the object and purpose of the treaty. Provisions of the ICCPR which constituted customary international law or peremptory norms, the Committee said, "may not be the subject of reservations". Such provisions included article 7's prohibition of torture or other cruel, inhuman or degrading treatment or punishment and the prohibition on arbitrary deprivation of life or the execution of juvenile offenders under article 6. The Committee stated that

> "Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted."

In 1995, the Human Rights Committee issued its concluding observations on the USA's initial report to it on US compliance with the ICCPR. The Committee expressed its regret at

the extent of the USA's reservations, declarations and understandings to the treaty and stated its belief that:

> "taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant."

In other words, the reservations were unlawful and should be withdrawn. Two decades after they were filed, the USA has yet to withdraw them.

The same has been the case in relation to UNCAT, on article 16 of which the USA lodged the same reservation it had attached to article 7 of the ICCPR. In 2000, after considering the USA's initial report to it, the UN Committee against Torture urged the USA to withdraw its reservations, understandings and declarations to UNCAT. However, the USA has not done so. Indeed, the Obama administration responded to the Committee's request for information on whether there was any change in the USA's position on this issue by telling the Committee in late 2013 that "the United States does not have any changes to report with respect to the reservations, declarations, and understandings it lodged at the time of ratification of the Convention".[121]

In 2006, the Bush administration told the Committee against Torture that the USA had entered the reservation to article 7

> "because of concern over the uncertain meaning of the phrase 'cruel, inhuman or degrading treatment or punishment'…The reasons underlying the decision by the United States to file its reservation to Article 7 have not changed, as the underlying vagueness of this provision remains. Because of the concern that certain practices that are constitutional in the United States might be considered impermissible under possible interpretations of the vaguely-worded standard in Article 7, the United States does not currently intend to withdraw that reservation."[122]

The USA's reservation to the 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 a number of 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:

- ☒ In a memorandum dated 1 August 2002, the Office of Legal Counsel (OLC) at the US Department of Justice argued that the prohibition of torture covered "only extreme acts". It also pointed to the Senate and Bush administration's agreement to ratify UNCAT with a reservation to article 16, thereby "establishing the Constitution as the baseline for determining whether conduct amounted to cruel, inhuman or degrading treatment or punishment" and preventing the USA from being held to a higher standard under international law. The memorandum concluded that "because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture" and would therefore not violate the US Constitution.[123] In an accompanying memo, the OLC provided the legal green light for the CIA to use 10 "enhanced interrogation techniques" against detainees held in secret CIA custody outside the USA, including physical assaults, cramped confinement, stress positions, sleep deprivation, exploitation of a detainee's fear of insects, and "water-boarding".[124]
- ☒ At a meeting between government lawyers and military personnel at the US Naval

Base at Guantánamo on 2 October 2002 to discuss "counter-resistance" interrogation techniques against detainees held at Guantánamo, the chief legal counsel to the CIA's Counterterrorism Center advised that the Department of Justice had "provided much guidance" on this issue, and said that the USA "did not sign up to" the international prohibition of cruel, inhuman or degrading treatment, giving it "more license to use more controversial techniques".[125] One of the participants at the meeting, a US military lawyer, finalized a legal memorandum the following month endorsing a range of interrogation techniques by the US military, including death threats, stress positions, exploitation of detainee phobias, exposure to cold temperatures, waterboarding, stripping, hooding, prolonged isolation, sensory deprivation and sleep deprivation. Among other things, she pointed to the USA's reservations to article 7 of the ICCPR and to article 6 of UNCAT which she said meant that the USA was only bound by constitutional standards on detainee treatment.[126]

☒ In March 2003, the OLC provided a memorandum to the Pentagon addressing military interrogations. The memo again pointed to the reservations to article 7 of the ICCPR and article 16 of UNCAT, asserting that the reservations meant that the USA was only bound by its own constitutional constraints. The OLC memo asserted that the USA "is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman or degrading treatment or punishment".[127]

☒ In May 2005, approving the "enhanced" interrogation of detainees held in secret CIA detention, the OLC again cited the reservation to article 16 of UNCAT and that this bound the USA only to its own constitutional constraints. The OLC said that this reservation is "legally binding and defines the scope of United States obligations under Article 16 of the CAT." The constitutional test, the OLC said, was whether the conduct in question "shocks the conscience". If it did, the conduct would be unlawful. The OLC asserted that the CIA interrogation techniques in question, including water-boarding and sleep deprivation used against detainees held incommunicado in isolation in secret detention at undisclosed locations did not shock the (domestic) conscience and were therefore constitutional and therefore did not violate article 16.[128]

☒ In August 2006, the OLC instructed the CIA that the conditions of confinement in its secret detention facilities were lawful, even under the Detainee Treatment Act of 2005 (DTA) which prohibited the "cruel, inhuman or degrading treatment or punishment" of anyone in US custody, regardless of nationality or location. In these facilities, detainees were being subjected to years of incommunicado solitary confinement, enforced disappearance (a crime under international law), white noise, 24-hour lighting, and shackling whenever they were moved. The OLC's position was based on the fact that the DTA had expressly incorporated the US reservation to article 16 of UNCAT and the USA was therefore only bound by constitutional constraints, and thereby the "shocks the conscience" test. The domestic contemporary conscience, it concluded, was not shocked by such treatment, even in the case of a detainee who "is isolated from most human contact, confined to his cell for much of each day, under constant surveillance, and is never permitted a moment to rest in the darkness and privacy that most people seek during sleep"; even though these conditions were "unrelenting and, in some cases, have been in place for several years"; and even though "these conditions, taken together and extended over an indefinite period, may exact a significant psychological toll". These conditions, the OLC said, "considered both individually and collectively, are consistent with the DTA". The OLC noted that the UN Committee against Torture had told the USA in May 2006 that secret

detention per se violated UNCAT, but the OLC summarily dismissed this conclusion as "neither authoritative nor correct".[129]

- ☒ In July 2007, the OLC provided the CIA with legal advice on the application of "conditioning techniques" and "corrective techniques" for use against detainees held in secret custody, including dietary manipulation, various forms of physical assault, extended sleep deprivation, and the use of diapering.[130] The CIA had told the OLC that the agency particularly favours the use of sleep deprivation, as it was used to bring the detainee to a "baseline state". The OLC concluded that this and the other techniques, singly or in combination, were lawful. In so concluding it pointed, among other things, to the US reservation to article 16 of UNCAT. [131]

Seven years later, does the CIA or any other government agency still consider sleep deprivation or prolonged isolation indispensable for bringing detainees held incommunicado to a "baseline state"? What is known is that the reservations to article 16 of UNCAT and article 7 of the ICCPR are still in place. In the case of the ICCPR so, too, is the USA's "declaration" that the provisions of that treaty are not "self-executing", in other words not enforceable in the US courts. The USA told the UN Human Rights Committee two decades ago that because the rights protected under the ICCPR were "already guaranteed as a matter of US law", it was "not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law."[132] At the same time the USA continues to take the position that the ICCPR does not apply extraterritorially, that is, to individuals held in US custody outside US territory. So inside and outside the USA, as the Human Rights Committee noted again recently, "taken together, these elements considerably limit the legal reach and practical relevance of the Covenant".[133]

At a hearing before the Senate Committee on Foreign Relations on 21 May 2014, the Principal Deputy Legal Adviser for the US Department of State said that among the principles that should guide "our efforts to identify a future legal framework" for counter-terrorism operations would be that "any authorization to use military force, including any detention operations, must be consistent with international law".[134] Without a change in approach, however, what the USA means by "consistent with international law" in this context apparently will continue to not include extraterritorial application of the ICCPR.

In its April 2014 concluding observations on the USA's compliance with the ICCPR, the UN Human Rights Committee expressed its regret that the USA "continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1 [of the ICCPR], supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and State practice." The Committee called on the USA to "interpret the Covenant in good faith" and "review its legal position so as to acknowledge the extraterritorial application of the Covenant".[135]

At the 21 May 2014 hearing before the Senate Committee on Foreign Relations, the General Counsel for the Department of Defense noted the case of Abu Anas al Libi, who was abducted from Tripoli in Libya by US forces on 5 October 2013 and interrogated aboard a ship, the *USS San Antonio*, in the Mediterranean before being taken to the USA.[136]

At the time of Abu Anas al Libi's abduction and subsequent incommunicado detention, Amnesty International had expressed concern not only about the abduction itself but about his treatment during the interrogation process then ongoing – given that methods authorized for use in such cases under Appendix M of the Army Field Manual can include, for example, prolonged isolation and sleep deprivation.[137] Prolonged incommunicado detention can itself amount to cruel, inhuman or degrading treatment, as does prolonged sleep deprivation.

Abu Anas al Libi has since told his US lawyer that on the ship he was interrogated by a CIA agent,[138] was not told during the time he was held on the vessel where he would be taken,

and also that things could only get worse, raising the fear in his mind of transfer to Guantánamo or of rendition to secret detention elsewhere. He said that he was held in some sort of "pod" located, he thought, on the deck. All he had in the way of facilities in that pod was a blanket – no bed and no toilet. The lights were on the whole time. He said he was cold. When interrogated, he was taken to another pod, and during transfer there was made to wear ear muffs and was blindfolded and handcuffed. He thinks this pod, too, was located on the deck of the ship. He has alleged that his treatment did indeed include, effectively, sleep deprivation, through the use of prolonged back-to-back interrogations. He was eventually held on the ship for about a week, with his incommunicado detention and interrogation cut short due to his ill-health.[139]

"The absolute prohibition of torture is of fundamental importance to the United States", the Obama administration has told the UN Committee against Torture in preparation for upcoming scrutiny of the USA's record by that treaty monitoring body. It added that the administration had taken the opportunity afforded by this review process to "engage in a process of stock-taking and self-examination".[140]

With this in mind, and recognizing that torture *and* other cruel, inhuman or degrading treatment are absolutely prohibited under international law,[141] the USA should not only amend its Army Field Manual to ensure that it any interrogations conducted under it comply with international law, but set about a program of ratification of international human rights treaties, withdrawal of reservations to its existing ratifications, and implementation of treaty body recommendations.

And it ensure full truth, accountability and remedy in relation to the torture, enforced disappearances and other human rights violations that occurred in the CIA secret detention program. Until this happens, the program may have been terminated, but its injustices will remain live issues.

CONCLUSION – NOT THE END

The CIA wants to put the rendition, detention, and interrogation chapter of its history behind it

CIA Director John Brennan, 11 March 2014[142]

The Central Intelligence Agency, its current Director says, wants to put the secret detention program behind it. At the same time, the Obama administration emphasises the "former" or "historical" status of this program. However, no line can be drawn under the secret detention, interrogation and rendition programs while the injustices and impunity associated with them continue to fester.

And the government's use of classification which by design or effect continues to block truth, accountability and remedy is also impacting the cases of those still held by the USA. They include eight men currently facing trial or sentencing under the Military Commissions Act of 2009 at Guantánamo, all of whom were held in the secret "high value detainee" program and whose cases and details of how they were treated by the CIA presumably appear in the full SSCI report.[143] The government is intending to seek the death penalty against six of them, even as it denies justice for any crimes under international law committed against them and others.[144] At least another seven detainees now at Guantánamo were previously held in the HVD program and remain detained without charge or trial, six of them nearly eight years after their transfer from CIA to military custody at the US naval base, and the seventh more than six years after being so transferred.[145] Again, presumably information about their treatment in CIA custody is contained in the full SSCI report.[146]

Other detainees still held at Guantánamo include Ahmed al-Darbi, facing sentencing under the MCA of 2009 after agreeing, as a part of his guilty plea, not to sue the USA for his prior treatment which included CIA rendition from Azerbaijan in 2002. If not held at all in the HVD program, his case is presumably not addressed in the SSCI report. And others still in Guantánamo, who may have been subjected to secret detention, for example at the CIA-operated 'Dark Prison' near Kabul in Afghanistan, but not held as part of the HVD program, may likewise not feature in the report.[147] There may also be others still in US custody but not at Guantánamo, who were previously held in secret CIA detention. As of June 2014, there were some 38 non-Afghan nationals in US custody at the Bagram airbase in Afghanistan.[148] One of them is Amin al-Bakri, a Yemeni national, who was allegedly abducted by US agents in Bangkok on 30 December 2002 when on his way to the airport to fly back to Yemen after a trip to Thailand. After allegedly being held for about six months in secret CIA custody and subjected to torture and other abuse, he was transferred to the US detention facility at Bagram, now known as the Afghan National Detention Facility in Parwan.[149] Tunisian national Redha al-Najar is also held there, more than 11 years after he was taken into US custody. He is said to have been seized from his home in Karachi, Pakistan in May 2002, to have been subjected to enforced disappearance "in one or more of the secret prisons run by or at the behest of the CIA" for some 18 months, and subjected to torture or other ill-treatment, prior to being taken to Bagram.[150]

In relation to CIA detention activities, while release of the SSCI summary report is a step towards truth and justice, it is only one small step. Neither would release of the full report be enough, although it would be another important step towards full and public disclosure about human rights violations committed in the context of CIA programs after 9/11.

We are now in the 30th anniversary year of the opening for signature of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), to which some 155 countries are party. The USA ratified in 1994. Two decades later, the absence of truth, accountability and remedy in relation to the CIA program is an affront to UNCAT and other international human rights treaties and instruments and leaves the USA in violation of its obligations under international law.

Words alone will never eradicate torture or other ill-treatment – whether those words are contained in a treaty or come from the mouth or pen of a government official, or indeed are contained in a Senate committee report. In the end, it is actions that count.

At a time, during 2003 and 2004, when the CIA's secret detention and interrogation program being operated under his authority was "growing like Topsy" and officials "agreed to continue administering EITs ["enhanced interrogation techniques"] to new, deserving Al Qaeda candidates coming into CIA custody",[151] President George W. Bush publicly proclaimed the USA's commitment to UNCAT. On 26 June 2003, he noted that despite the fact that UNCAT had been ratified by more than 130 countries, "torture continues to be practiced around the world by rogue regimes". He said that the USA was "committed to the worldwide elimination of torture", and was "leading this fight by example".[152] A year later, he asserted that the USA had ratified UNCAT as part of its commitment to "building a world where human rights are respected and protected by the rule of law". Torture, he said, "is wrong wherever it occurs, and the United States will continue to lead the fight to eliminate it everywhere".[153] Today, Amnesty International considers that there is already enough material in the public domain – even if one were to rely only upon information released by US authorities and by this former President himself – to give rise to an obligation on other states he visits to investigate his alleged involvement in and responsibility for crimes under international law, including particularly torture, and to secure his presence during that investigation.[154]

On 24 June 2011, President Obama reiterated the USA's commitment to UNCAT and the global struggle against torture. As "a nation that played a leading role in the effort to bring this treaty into force", he said, "the United States will remain a leader in the effort to end

torture around the world".[155] The USA has reminded the UN Committee against Torture of this statement in the latest US periodic report under UNCAT, filed at the end of 2013 and due to be scrutinized by the Committee later this year. In response to the Committee's request for information on what investigations have been carried out into CIA interrogations and what accountability has been achieved, the administration's lack of action means its response is brief. It can report only that the Department of Justice's "preliminary review" into "whether federal laws were violated in connection with interrogation of specific detainees at overseas locations" had concluded in 2011 that no further investigation was warranted, and that its criminal investigation into two deaths in CIA custody had been closed in 2012 without anyone being charged.[156] The USA's stated commitment to UNCAT and other international instruments appears not to include a commitment to bring to justice those who authorized or carried out enforced disappearance, torture and other cruel, inhuman or degrading treatment against detainees held in the CIA program.

The CIA may finish its declassification review of the SSCI summary report soon after this year's International Day in Support of Victims of Torture, 26 June. This year will be the 27th anniversary of the entering into force of UNCAT on 26 June 1987.[157] The distance the USA has to travel to meet its obligations under UNCAT and other international instruments will again stand in stark relief on this anniversary day without a substantial change in the US approach towards truth, accountability and remedy in relation to the CIA detention and rendition programs.

A state's obligations on truth, accountability and remedy are inter-related, including under UNCAT. The Committee against Torture, for example, has said that "in addition to the obligations of investigation and criminal prosecution under articles 12 and 13 of the Convention", satisfaction – one possible form of reparation for victims of human rights violations – should include remedies such as "verification of the facts and full and public disclosure of the truth"[158]; "judicial and administrative sanctions against persons liable for the violations"; and "public apologies, including acknowledgement of the facts and acceptance of responsibility". The Committee further emphasised that "A State's failure to investigate, criminally prosecute, or to allow civil proceedings related to allegations of acts of torture in a prompt manner, may constitute a de facto denial of redress and thus constitute a violation of the State's obligations under article 14" of UNCAT.[159]

Ensuring "verification of the facts and full and public disclosure of the truth" related to the human rights violations committed in the CIA program are one part of the USA's obligations under UNCAT and other international instruments.

In a letter dated 18 April 2014, the Counsel to President Obama told the Chairperson of the SSCI, Senator Dianne Feinstein, that:

> "the President and this Administration are committed to working with you to ensure that the 500-plus page executive summary, finding, and conclusions of the report on the former RDI [rendition, detention and interrogation] program undergo a declassification review as expeditiously as possible, consistent with our national security interests. The President supports making public the Committee's important review of the historical RDI program, as he believes that public scrutiny and debate will help to inform the public understanding of the program and to ensure that such a program will not be contemplated by a future administration.
>
> The Committee's report reflects extraordinary effort, and we commend the Committee and its staff on the completion of this significant achievement. The Executive Branch has initiated its review of the executive summary, findings, and conclusions. As I know you appreciate, declassification decisions, even with respect to discontinued programs, are fact-based and must be made with the utmost sensitivity to our national security. As

> such, the CIA, in consultation with other agencies, will conduct the declassification review." [160]

In an earlier letter to Senator Feinstein and Senator Carl Levin in his role as Chairperson of the Senate Armed Services Committee, the Counsel to the President had written that

> "the President and Director Brennan are committed to working…to ensure that information regarding the RDI program is declassified, consistent with our national security interests".[161]

As already noted, the CIA itself asserted in May 2014 that the "declassification review of the SSCI Report's executive summary, findings and conclusions, must be made with the utmost sensitivity to our national security".

Amnesty International reiterates that information concerning gross violations of human rights or serious violations of international humanitarian law should never be subject to withholding from the victims or the public on national security grounds. This was reiterated by the UN Committee against Torture in 2012 – "under no circumstances may arguments of national security be used to deny redress for victims".[162]

History repeats itself when its lessons are ignored. Without the necessary investigations, prosecutions, reparations, transparency and legislation, President Obama's executive order of 22 January 2009 prohibiting long-term secret detention and "enhanced interrogation techniques" may yet come to be seen as no more than a paper obstacle if and when any future US President decides that torture or enforced disappearance are once again expedient for national security.

As an important step toward ensuring no recurrence of these crimes under international law and other human rights violations, the USA must end the secrecy, impunity and obstruction of remedy associated with this now terminated program. As part of ending the secrecy and establishing the truth, the full SSCI report should be declassified and made public.

RECOMMENDATIONS

Amnesty International has welcomed the vote of the Senate Select Committee on Intelligence to submit for declassification the summary of its review into the CIA secret detention program. At the same time, the organization has made it clear that this is just one small step on the road to the USA meeting its obligations on truth, remedy and accountability in relation to the CIA programs of rendition, detention and interrogation.[163] The USA must take many more steps to bring about real change and to meet its international obligations.

Amnesty International makes the following recommendations to the US authorities:

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);[164]
- 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;[165]
- 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;[166]
- 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;[167]
- 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] Remarks to the leaders of the Fiscal Responsibility Coalition, 16 April 2002.

[2] George W. Bush, Decision points, Virgin Books, 2010, page 169. See also John Rizzo, Company Man: Thirty years of controversy and crisis in the CIA. Scribner (2014), pages 197-199.

[3] See Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en

[4] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007. This leaked report is available at http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf

[5] *ACLU v CIA*, Defendant's motion for extension of time. US District Court for the District of Columbia, 15 May 2014.

[6] Feinstein: CIA to finish declassifying Senate report by July 4. The Hill, 6 June 2014, http://thehill.com/policy/defense/208514-cia-report-declassification-expected-by-july-4-feinstein-says

[7] *Leopold v. CIA*, Status Report, US District Court for the District of DC, 20 June 2014.

[8] *Ibid*. On 29 May 2014, in the context of this FOIA litigation, District Court Judge James E. Boasberg ordered the CIA to file a status report by 20 June 2014 providing the timeline for completion of declassification review of the CIA's response to the SSCI Report which the CIA had produced after receiving a copy of the SSCI report in 2012; and for completion of a separate report, commissioned by former CIA Director Leon Panetta, on the secret detention program.

[9] Letter from Kathryn H. Ruemmler, Counsel to the President, to Senator Dianne Feinstein (in her role as chairperson of the Senate Select Committee on Intelligence), 18 April 2014.

[10] Letter to President Barack Obama from Senator Dianne Feinstein as Chair of the Senate Select Committee on Intelligence, 7 April 2014.

[11] *Ibid*.

[12] Intelligence Committee votes to declassify portions of CIA study. US Senator Dianne Feinstein news release, 3 April 2014, http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=de39366b-d66d-4f3e-8948-b6f8ec4bab24

[13] Amnesty International recognizes that there may be circumstances in which the government could lawfully restrict disclosure of certain information, for example in cases where disclosure would put the lives or safety of identifiable individuals or the general population at risk. However, the need for sensitive material to be handled appropriately does not negate the right of victims of human rights violations to disclosure of the truth.

[14] Transparency and Open Government. Memorandum to the Heads of Executive Departments and Agencies, signed by President Barack Obama, 21 January 2009, http://www.whitehouse.gov/the-press-office/transparency-and-open-government

[15] "While I agree with some of the conclusions in this report, I take strong exception to the notion that the CIA's detention and interrogation program did not provide intelligence that was helpful in disrupting terrorist attacks or tracking down Usama bin Ladin. This claim contradicts the factual record and is just flat wrong. Intelligence was gain from detainees in the program, both before and after the application of enhanced interrogation techniques, which played an important role in disrupting terrorist plots and aided our overall counterterrorism operations over the past decade". Chambliss votes to declassify CIA interrogation report. US Senator Saxby Chambliss (Vice Chair, SSCI), News release, 3 April 2014, http://www.chambliss.senate.gov/public/index.cfm/pressreleases?ID=109952c7-a256-4948-9703-6bcd438e012e

[16] For recent examples, see '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; and Brennan must defend CIA's terrorist interrogation program, Marc A. Thiessen, http://www.washingtonpost.com/opinions/marc-thiessen-brennan-must-defend-cias-terrorist-interrogation-program/2014/04/07/ba0382d2-ba7f-11e3-96ae-f2c36d2b1245_story.html

[17] Amnesty International first called for an independent commission of inquiry in 2004. The organization's specific recommendations in this regard are set out in USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', AI Index: AMR 51/151/2008,

issued in December 2008, and available at http://www.amnesty.org/en/library/info/AMR51/151/2008/en

[18] See USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, 3 February 2011, http://www.amnesty.org/en/library/info/AMR51/005/2011/en

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

[20] Release of the 2011 Human Rights Report. Remarks of Hillary Rodham Clinton, Secretary of State, Washington, DC, USA, 24 May 2012, http://www.state.gov/secretary/rm/2012/05/190826.htm. See USA: Human rights betrayed. 20 years after US ratification of ICCPR, human rights principles sidelined by 'global war' theory, 7 June 2012, http://www.amnesty.org/en/library/info/AMR51/041/2012/en

[21] It is a decade since Amnesty International first called, in May 2004, for the US authorities to establish a comprehensive independent commission of inquiry into the USA's detention policies and practices since 11 September 2001, including the programs of rendition and secret detention operated largely by the CIA. If and when such an inquiry concluded that particular conduct may have amounted to crimes under national or international law not known to be already under investigation, the information gathered should have been referred to the appropriate federal authorities with a view to possible prosecution of the individual or individuals concerned. The establishment and operation of the commission, however, should not have been used to block or delay the prosecution of any individuals against whom there was already sufficient evidence of wrongdoing. See, generally, USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004.

[22] UN Doc.: E/CN.4/2005/102/Add.1, 8 February 2005, Updated set of principles for the protection and promotion of human rights through action to combat impunity. Preamble.

[23] Human Rights Committee, General Comment no. 31 (2004), para. 15. See also General Comments no. 7 (1982) and 20 (1992). UNCAT, articles 12 and 13.

[24] General Comment no. 31 para. 18.

[25] Human Rights Committee, General Comment no. 20 (1992), para. 13. UNCAT, articles 1 and 4. Committee against Torture, General Comment no. 2 (2008), para. 26.

[26] General Comment no. 31 para. 18.

[27] UNCAT article 4.

[28] UNCAT articles 5-7.

[29] UNCAT article 2; Committee against Torture, General Comment no. 2 (2008), para. 5.

[30] See Geneva Convention III, articles 129-131 and IV, articles 146-248; ICRC Study on Customary International Humanitarian Law (2005).

[31] See e.g. UNCAT article 13.

[32] See e.g. UNCAT article 4.

[33] See e.g. UNCAT articles 5-7, 9.

[34] UN Doc.: CAT/C/GC/3, Committee against Torture, General Comment No. 3 (2012), Implementation of article 14 by States parties. 13 December 2012, para. 42. Article 14 states: "Each State Party shall 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. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation."

[35] *Ibid.*

[36] See UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution A/RES/60/147 (21 March 2006); ICCPR, article 2(3); Human Rights Committee, General Comment no. 31 (2004), paras. 15 & 16; UNCAT, article 14; Committee against Torture, Dzemajl v Yugoslavia (161/2000), 21 November 2002, para. 9.6.

[37] Remarks by the President on National Security, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[38] UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, para. 1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005.

[39] *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

[40] *Al Darbi v. Obama*, Petitioner al Darbi's opposition to respondents' motion to dismiss habeas petition without prejudice or, alternatively, to hold petition in abeyance pending completion of military commission proceedings. In the US District Court for DC, 18 February 2009.

[41] *Al Darbi v. Obama*. Memorandum opinion and order, US District Court for DC, 22 December 2009.

[42] See ICCPR Article 2(3): "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted." See also UN Convention against Torture articles 12-14 and 16, referring to among other things the obligation to ensure "a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed", "the right" of alleged victims "to complain to, and to have his case promptly and impartially examined by, … competent authorities" and the obligation 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". See also the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[43] See, for example, USA: 'Heads I win, tails you lose'. Government set to pursue death penalty at Guantánamo trial, but argues acquittal can still mean life in detention, 8 November 2011, http://www.amnesty.org/en/library/info/AMR51/090/2011/en

[44] Secretary Rumsfeld Live Interview with MSNBC TV, 12 April 2002, Department of Defense transcript, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3400.

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

[46] 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

[47] See Feinstein, Levin: Reduce Over-Classification in Military Commission Trials, News release, 23 May 2014, http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=77c288b3-eaeb-4ef7-9081-4c775cda87f1

[48] Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10015, held at Guantánamo on 14 March 2007, as declassified on 12 June 2009.

[49] Article 1.1 UNCAT – "the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

[50] Special Review. Counterterrorism detention and interrogation activities (September 2001 – October 2003), CIA Office of Inspector General, 7 May 2004, paras. 92 and 94.

[51] Dick Cheney on Fox News Sunday, 30 August 2009.

[52] *USA v al Nashiri*, AE 120C Order. Defense motion to compel discovery of information in the possession of any foreign government and the United States related to the arrest, detention, rendition and interrogation of the Accused. Military Commissions Trial Judiciary, 14 April 2014.

[53] Unofficial/Unauthenticated transcript of military commission proceeding, called to order at 0914, 22 February 2014.

[54] USA, Fourth Periodic Report to the Human Rights Committee, para. 152.

[55] Amnesty International continues to campaign not only for the USA to abandon these military commission trials and to conduct any such prosecutions in ordinary federal court, but to drop pursuit of the death penalty in any case, whatever the trial forum.

[56] *USA v al Nashiri*, Military Commission Trial Judiciary, Guantánamo Bay Cuba. AE 120D, Government motion to reconsider AE 120C in part so the Commission may take into account declassification efforts underway at prior prosecution request, clarify the discovery standard the Commission is applying, and safeguard national security while ensuring a fair trial. 23 April 2014.

[57] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Oversight and Review Division, Office of Inspector General, US Department of Justice, May 2008. Secretary of State Rice told the Senate Armed Services Committee that she recalled Deputy Assistant Attorney General John Yoo providing advice at "several of these meetings".

[58] Senate Armed Services Committee inquiry into the treatment of detainees in US custody. Executive summary, page xv.

[59] John Rizzo, Company Man (2014), *op. cit.*, page 194.

[60] UN Doc: A/HRC/24/42, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, 28 August 2013, para. 20.

[61] George W. Bush, Decision points, Virgin Books, 2010, page 168.

[62] "We found ourselves suddenly concerned with trying to save a terrorist's life. Not that we had any sympathy for Zubaydah; we just didn't want him dying before we could learn what he might have to tell us about plans for future attacks. Fortunately, Buzzy Krongard, our [CIA] executive director, was also on the board of directors of John Hopkins Medical Center. Using his contacts there, he arranged for a world-class medical expert to jump aboard an aircraft we had chartered so he could be flown to Pakistan and save a killer's life." George Tenet, At the Center of the Storm, Harper 2007, page 365.

[63] Pervez Musharraf, In the Line of Fire, Pocket Books, 2006, page 238.

[64] Background paper on CIA's combined use of interrogation techniques,

http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf

[65] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, February 2007, page 6, *op. cit.*

[66] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007.

[67] George Tenet, At the Center of the Storm, Harper Books 2007, page 366.

[68] George W. Bush, Decision points, Virgin Books, 2010, pages 186.

[69] John Rizzo, 9/11: Three major mistakes. Hoover Institution, 8 September 2011, http://www.hoover.org/publications/defining-ideas/article/91992

[70] See 'I'd do it again' former President Bush tells Grand Rapids crowd about waterboarding terrorists, 2 June 2010, http://www.mlive.com/news/grand-rapids/index.ssf/2010/06/id_do_it_again_former_presiden.html

[71] George W. Bush, Decision points, Virgin Books, 2010, page 171.

[72] George W. Bush, Decision Points, Virgin Books 2010, page 169.

[73] See USA: Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en

[74] Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration, W.W. Norton, 2007, page 76. Vice President Cheney and his Counsel, David Addington, had, according to Goldsmith, "long before 9/11…set out to reverse what they saw as Congress's illegitimate decades-long intrusions on 'unitary' executive power" (page 85) and "the President and the Vice President always made clear that a central administration priority was to maintain and expand the President's formal legal powers" (page 132).

[75] Cheney defends waterboarding, CNN, 11 January 2009.

[76] See, for example, US Senator 'stunned' by Cheney torture denials, suggests he 'sit in a waterboard' himself, 7 April 2014, http://washington.cbslocal.com/2014/04/07/us-sen-stunned-by-cheney-torture-denials-suggests-he-sit-in-a-waterboard-himself/

[77] Dick Cheney. In my time: A personal and political memoir. Threshold Editions (2011), p. 357-8.

[78] Interview with the *Washington Times,* 17 December 2008.

[79] Military Order – Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001. See Decision Points, *op. cit.*, page 166-167.

[80] See also: Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 28 December 2001.

[81] Jack Goldsmith, The Terror Presidency: Law and Judgment inside the Bush Administration, W.W. Norton Books, 2007, page 108.

[82] Donald Rumsfeld. Known and Unknown. Sentinel (2011), pages 583-586.

[83] Counter-Resistance Techniques. Action Memo. For Secretary of Defense. From: William J. Haynes, II, General Counsel. 27 November 2002.

[84] US Department of Defense news briefing, 3 April 2002.

[85] US Department of Defense news briefing, 3 April 2002.

[86] Department of Defense News Briefing, 8 April 2002.

[87] Secretary Rumsfeld live interview with MSNBC TV, 12 April 2002, Department of Defense transcript.

[88] Department of Defense news briefing, 22 April 2002.

[89] *USA v. Al-Nashiri,* military commission hearing, 28 May 2014, LDC Kammen, for the defence Unofficial/Unauthenticated transcript, pages 4477-4478.

[90] Secretary Rumsfeld himself acknowledged the case. "With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of *Ansar al-Islam.* And we did so. We were asked to not immediately register the individual. And we did that." Defense Department regular briefing, US Department of Defense transcript, 17 June 2004, http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3347

[91] *Ibid.*

[92] *ACLU et al v. Department of Defense et al*. In the US District Court for the Southern District of New York, Fourth Declaration of Marilyn Dorn, Information Review Officer, Central Intelligence Agency, 30 March 2005.

[93] Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[94] See USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en; and USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en. Mohamed al-Qahtani – always in shackles during interrogation – was variously forced to wear a woman's bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number dog tricks; was forced to dance with a male interrogator while made to wear a towel on his head "like a burka"; was forced to wear a mask made from a box with a "smiley face" on it, dubbed the "happy Mohammed" mask by the interrogators; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of "swimsuit models" hung round his neck; was subjected to hooding, loud music for up to hours on end, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning. At the outset of his interrogation, the detainee had been moved to a different part of the camp, was led to believe that "he was sent to a hostile country which advocated torture" and that that he "might be killed if he did not cooperate with questioning", according to a psychiatrist involved in the interrogation. SASC 2008 report, page 88.

[95] See, for example, Torture at Guantánamo: Lt. Col. Stuart Couch on His Refusal to Prosecute Abused Prisoner, Democracy Now, 22 February 2013, http://m.democracynow.org/stories/13478. See also SASC 2009 report, *op. cit.* notes 1100 and 1101. Also, USA: Rendition - torture - trial? : The case of Guantánamo detainee Mohamedou Ould Slahi, 19 September 2006, http://www.amnesty.org/en/library/info/AMR51/149/2006/en

[96] "[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. "My transition to chief of CTC came during a precarious time. We had just captured our first major al-Qa'ida figure, Abu Zubayda" in late March 2002. José A. Rodriguez, Jr., Hard measures: How aggressive

CIA actions after 9/11 saved American lives. Threshold Editions (2012), page 79. "Once Abu Zubaydah was stabilized, the Pakistanis turned him over to CIA custody. It was at this point that we got into holding and interrogating high-value detainees – 'HVDs', as we called them – in a serious way". George Tenet, At the Center of the Storm, Harper 2007, page 365.

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

[98] 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

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

[100] 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

[101] John Rizzo was General Counsel of the CIA from 2001 through 2002 and from 2004 through 2009.

[102] John Rizzo, Company Man (2014), pages 172-173.

[103] John Rizzo, Company Man (2014), page 186.

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

[105] John Rizzo, Company Man (2014), page 218-223.

[106] 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 44-45.

[107] *Ibid.* page 57.

[108] "The 'War Council', as the group called itself, included the White House Counsel, Alberto Gonzales; the Vice President's Counsel, David Addington; [William] Haynes [General Counsel, Department of Defense]; Gonzales's first deputy (and former OLC head under George H.W. Bush), Tim Flanigan; and Yoo. The War Council met every few weeks, either in Gonzales's White House office or behind closed doors in Haynes's Defense Department office. It would plot legal strategy in the war on terrorism, sometimes as a prelude to dealing with lawyers from the State Department, the National Security Council, and the Joint Chiefs of Staff who would ordinarily be involved in war-related interagency legal decisions, and sometimes to the exclusion of the interagency process altogether". Jack Goldsmith, The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton (2007), page 20.

[109] John Yoo. War by other means: An insider's account of the war on terror. Atlantic Monthly Press (2006), pages 168-169.

[110] See USA: 'Judge us by our actions': A reflection on accountability for US detainee abuses 10 years after the invasion of Iraq, 15 March 2013, http://www.amnesty.org/en/library/info/AMR51/012/2013/en

[111] Associate Deputy Attorney General David Margolis subsequently decided that he would "not authorize OPR to refer its findings to the state bar disciplinary authorities". Memorandum of decision regarding the objections to the findings of professional misconduct in the Office of Professional Responsibility's report of 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. David Margolis, Associate Deputy Attorney General, Office of the Deputy Attorney General, US Department of Justice, 5 January 2010. John Yoo applauded "David Margolis, one of the Justice Department's most distinguished civil servants" for having "finally put an end to the farce", "the witch-hunt", and the "cooked-up ethics

investigation" being "waged" by the OPR. David Margolis' decision, Yoo concluded, represented a "victory for the people fighting the war on terror". John Yoo: Finally, an end to Justice Dept. investigation. Philadelphia Inquirer, 28 February 2010, available at http://www.aei.org/article/101726.

[112] Jack Goldsmith, The Terror Presidency: Law and Judgment inside the Bush administration. W.W. Norton and Company (2007), page 146.

[113] 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 (The detainee was Abu Zubaydah, and according to the OPR, the author of the memorandum was John Yoo). http://www.justice.gov/olc/docs/memo-bybee2002.pdf

[114] 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 2009 report'), page 61.

[115] OPR 2009 report, *op. cit.*, pages 144-145.

[116] OPR 2009 report, *op. cit.*, page 143.

[117] Remarks by the President on National Security, 21 May 2009, http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09

[118] Statement by the White House Press Secretary on the Geneva Conventions, 7 February 2002.

[119] Remarks at the American Enterprise Institute, 21 May 2009, *op. cit.*

[120] In September 2000, Botswana signed and ratified the ICCPR, with effectively the same reservation to article 7 as made eight years earlier by the USA. The USA and Botswana remain the only two countries to have made reservations to article 7.

[121] UN Doc.: CAT/C/USA/3-5. Third to Fifth periodic reports of States parties due in 2011, United States of America, 4 December 2013, para. 256.

[122] #2, List of Issues To Be Taken Up in Connection With the Consideration of the Second and Third Periodic Reports of the United States of America, 16 July 2006, http://www.state.gov/j/drl/rls/70385.htm

[123] Re: Standards of conduct for interrogations under 18 U.S.C. §§ 2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[124] 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.

[125] Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting.

[126] Legal brief on proposed counter-resistance strategies. Memorandum for Commander, Joint Task Force 170, From Diane E. Beaver, LTC, USA, Staff Judge Advocate, 11 October 2002.

[127] Re: Military interrogation of alien unlawful enemy combatants held outside the United States. Memorandum for William Haynes II, General Counsel of the Department of Defence, From John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

[128] Re: Application of United States obligations under Article 16 of the Convention Against Torture to certain techniques that may be used 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, 30 May 2005.

[129] Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities, Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

[130] "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."

[131] 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.

[132] UN Doc.: CCPR/C/81/Add.4. Initial report of the USA to the UN Human Rights Committee, July 1994, para. 8.

[133] UN Doc.: CCPR/C/USA/CO/4, 23 April 2014. Concluding observations on the fourth periodic report of the United States of America, para. 4.

[134] US Senate Committee on Foreign Relations. Authorization for Use of Military Force after Iraq and Afghanistan, Statement of Mary E. McLeod, Principal Deputy Legal Adviser, US Department of State, 21 May 2014.

[135] UN Doc.: CCPR/C/USA/CO/4, 23 April 2014.

[136] Prepared statement of Stephen W. Preston, General Counsel, Department of Defense, on the framework under US law for current military operations. Committee on Foreign Relations, United States Senate, 21 May 2014. The General Counsel referenced the case as an example of an operation undertaken "in reliance on the AUMF". The AUMF, the Authorization for Use of Military Force, passed on 14 September 2001 after little substantive debate, has been exploited over the years to justify a range of human rights violations. See, for example, USA: Doctrine of pervasive 'war' continues to undermine human rights, 15 September 2010, http://www.amnesty.org/en/library/info/AMR51/085/2010/en

[137] See USA: Abduction in Libya violates human rights, undermines rule of law, 7 October 2013, http://www.amnesty.org/en/library/info/AMR51/065/2013/en and USA: 'I'm not sure what they're basing that on', 11 October 2013, http://www.amnesty.org/en/library/info/AMR51/069/2013/en.

[138] Who presumably was a member of the "High Value Interrogation Group (HIG), established under the Obama administration. "The HIG has a Director, who is an FBI employee, and two Deputy Directors, who are drawn from the CIA and DoD [Department of Defense]. The HIG's Mobile Interrogation Teams bring together experienced interrogators, analysts, subject matter experts, behavioural science experts, linguists, and others drawn from across the intelligence community, military and law enforcement to conduct and/or provide support to interrogation of high-value detainees". UN Doc.: CAT/C/USA/3-5. Third to Fifth periodic reports of States parties due in 2011, United States of America, 4 December 2013, para. 123.

[139] See Amnesty International Urgent Action, http://www.amnesty.org/en/library/info/AMR51/066/2013/en and update, http://www.amnesty.org/en/library/info/AMR51/071/2013/en. See also, Man seized in Libya faces death penalty in USA, 18 June 2014, http://www.amnesty.org/en/library/info/AMR51/037/2014/en

[140] Combined Third, Fourth and Fifth Periodic Reports of the USA to the UN Committee against Torture, 12 August 2013, http://www.state.gov/j/drl/rls/213055.htm, paras 2 and 4.

[141] For example, ICCPR article 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") and article 4 ("1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.")

[142] Director Brennan Speaks at the Council on Foreign Relations, 11 March 2014, https://www.cia.gov/news-information/speeches-testimony/2014-speeches-testimony/a-conversation-with-john-o-brennan.html

[143] Walid bin Attash, Ramzi bin al-Shibh, Mustafa Ahmed al Hawsawi, Khaled Sheikh Mohammed, Ammar al Baluchi (Ali Abdul-Aziz Ali), 'Abd al Nashiri, and Majid Khan.

[144] The government is intending to seek the death penalty for Walid bin Attash, Ramzi bin al-Shibh, Mustafa Ahmed al Hawsawi, Khaled Sheikh Mohammed, Ammar al Baluchi (Ali Abdul-Aziz Ali), and 'Abd al Nashiri.

[145] Abu Zubaydah, Encep Nuraman (Hambali), Haned Hass Ahmad Guleed, Mustafah Faraj al Azibi, Ali Abdul Aziz Mohammed, Mohammed Nazir Bin Lep, and Muhammad Rahim al Afghani

[146] Another whose case presumably appears in the SSCI report is Ahmed Khalfan Ghailani, a Tanzanian national held in the HVD program from 2004 to 2006 and to date the only Guantánamo detainee to have been brought to the USA for trial in federal court. He was convicted in District Court in New York in 2010 and sentenced to life imprisonment in January 2011. See USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 1 October 2010, http://www.amnesty.org/en/library/info/AMR51/094/2010/en

[147] See, for example, case of Musa'ab al Madhwani in USA: 'I have no reason to believe that I will ever leave this prison alive', 3 May 2013, http://www.amnesty.org/en/library/info/AMR51/022/2013/en

[148] Letter from the President – War Powers Resolution. Text of a letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, 12 June 2014, http://www.whitehouse.gov/the-press-office/2014/06/12/letter-president-war-powers-resolution

[149] *Al-Bakri et al v. Obama et al*. Amended petition for writ of habeas corpus and complaint for declaratory and injunctive relief. In the US District Court for the District of Columbia, April 2011.

[150] *Al-Najar et al v. Obama et al*, First amended petition for writ of habeas corpus, In the US District Court for the District of Columbia, April 2011.

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

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

[153] President George W. Bush. Statement on United Nations International Day in Support of Victims of Torture, 26 June 2004.

[154] USA: Bringing George W. Bush to justice: International obligations of states to which former US President George W. Bush may travel, November 2011, http://www.amnesty.org/en/library/info/AMR51/097/2011/en

[155] Statement by the President on the International Day in Support of Victims of Torture, 24 June 2011.

[156] UN Doc.: CAT/C/USA/3-5. Third to Fifth periodic reports of States parties due in 2011, United States of America, 4 December 2013, para. 135.

[157] See http://www.un.org/events/torture/

[158] "to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations".

[159] UN Doc.: CAT/C/GC/3. Committee against Torture. General Comment No. 3 (2012). Implementation of article 14 by States parties.

[160] Letter from Kathryn H. Ruemmler, Counsel to the President, to Senator Dianne Feinstein (in her role as chairperson of the Senate Select Committee on Intelligence), 18 April 2014.

[161] Letter from Kathryn H. Ruemmler, Counsel to the President, to Senators Dianne Feinstein and Carl Levin (in their respective roles as chairpersons of the Senate Select Committee on Intelligence and Senate Armed Services Committee), 10 February 2014.

[162] *Ibid.*

[163] See USA: A step in the rights direction, 3 April 2014, http://www.amnesty.org/en/library/info/AMR51/021/2014/en

[164] 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.

[165] 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

[166] 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.

[167] 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