

# UNITED STATES OF AMERICA

SUBMISSION TO THE  
UNITED NATIONS  
COMMITTEE AGAINST  
TORTURE

53<sup>RD</sup> SESSION OF THE COMMITTEE (3-28  
NOVEMBER 2014)

**AMNESTY**  
INTERNATIONAL



**Amnesty International Publications**

First published in October 2014 by  
Amnesty International Publications  
International Secretariat  
Peter Benenson House  
1 Easton Street  
London WC1X 0DW  
United Kingdom  
[www.amnesty.org](http://www.amnesty.org)

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Index: AMR 51/049/2014  
Original Language: English  
Printed by Amnesty International, International Secretariat, United Kingdom

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# 1. INTRODUCTION

It is now two decades since the USA ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Over the past decade in particular, regular proclamations from the White House have asserted, in no uncertain terms, the USA's commitment to this treaty and to leading the global struggle against torture.

The USA's combined third, fourth and fifth periodic reports to the UN Committee against Torture, due to be reviewed by the Committee in November 2014, open by referencing such statements made by President Barack Obama in 2009 and 2011. The report quotes, for example, his words from 24 June 2011:

“As a nation that played a leading role in the effort to bring this treaty into force, the United States will remain a leader in the effort to end torture around the world and to address the needs of torture victims”.<sup>1</sup>

President Obama's immediate predecessor made similar proclamations, and such statements were cited in the USA's second periodic report to the Committee against Torture, reviewed in 2006.<sup>2</sup> In 2003, for example, President George W. Bush called on all governments to join the USA in “prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment”.<sup>3</sup> In 2004, he promised that the USA would “investigate and prosecute all acts of torture and undertake to prevent other cruel and unusual punishment in all territory under our jurisdiction”.<sup>4</sup> And in 2005, he reaffirmed the USA's “commitment to the worldwide elimination of torture” and “to building a world where human rights are respected and protected by the rule of law.”<sup>5</sup>

As has long been known, such promises were hollow. Even as President Bush was making them, the USA was resorting, in systematic fashion, in the context of what it was then calling the “war on terror”, to conduct that was entirely contrary to UNCAT. Since leaving office in 2009, the former President has even asserted that he personally authorized the use of “water-boarding” – effectively mock execution by interrupted drowning – and other “enhanced interrogation techniques” against detainees against whom such techniques are known to have been used and who were at the same time being subjected to enforced disappearance in secret US custody at undisclosed locations.<sup>6</sup>

This is a state of affairs that should be highly troubling to anyone seeking the promotion of and compliance with international human rights law and standards. A former president of the USA has asserted on primetime television and in his memoirs that he personally authorized conduct that constituted torture and which his successor and the current US Attorney General agree is torture.<sup>7</sup> Yet no investigation has been carried out into the President's assertion, or into other assertions published in other memoirs and materials from other former officials who have also claimed leading involvement in the Central Intelligence Agency (CIA)'s programme of enforced disappearance and “enhanced” interrogation using techniques that clearly violated UNCAT's prohibition of torture and other cruel, inhuman or degrading treatment. No one, at any level of office, has been charged or brought to trial for the crimes under international law that are known to have been committed in this programme.<sup>8</sup> Many were involved.

While President Obama has recently suggested that “any fair-minded person” would consider that some of the “enhanced interrogation techniques” employed by the USA constituted torture (while failing to make any reference to criminal accountability),<sup>9</sup> US authorities have yet even to acknowledge that most, if not all, of those held in the CIA secret detention programme were subjected to enforced disappearance, some of them for years. In its 2006 concluding observations, the Committee against Torture expressed its concern that the USA had been involved in enforced disappearances, a practice which “constitutes, per se, a violation of the Convention”, and expressed its regret at the USA's “view that such acts do not constitute a form of torture”. The previous administration responded to the Committee's findings with the assertion that this expert body had strayed “outside its mandate and outside the scope of the Convention Against Torture”.<sup>10</sup> Amnesty

International is concerned that paragraph 6 of the current administration's periodic report to the Committee may amount to the same stance. This paragraph reads:

“in the spirit of cooperation, the United States has provided detailed and thorough answers to the questions posed by the Committee, whether or not the questions or information provided in response to them bear directly on obligations arising under the Convention. It should be noted that the report does not address the geographic scope of the Convention as a legal matter, although it does respond to related questions from the Committee in factual terms”.<sup>11</sup>

On the question of enforced disappearances, in its 2006 concluding observations the Committee had called on the USA to “prosecute and punish perpetrators”. The previous administration ignored this, as has the current administration. In response to the Committee's request for information about what steps have been taken in this regard, the USA's periodic report provides none, because it cannot. As with torture, accountability for this crime under international law committed by US personnel in the CIA programme remains effectively non-existent.

The seriousness of this accountability gap has led Amnesty International to focus a substantial part of this submission on this question. The organization considers that the lack of truth, remedy and accountability that exists in relation to US conduct in the counter-terrorism context over the past decade represents a very serious challenge to the international human rights system. This is a particular moment to redouble efforts to persuade the USA to address this systemic accountability failure, as the international community marks the 30<sup>th</sup> anniversary of UNCAT, awaits disclosure of a 6,600 page classified Senate report on the CIA secret detention programme (only the summary has been submitted for declassification), and as the USA enters the final two years of a presidency that held out hope for justice for the victims of US rendition, torture, enforced disappearance, and other violations and has so far dashed it.

For sure, as the USA has already emphasised to the Committee, President Obama took steps to end the use of torture and the secret detention programme which the CIA had operated under authorization granted by President Bush after the attacks of 11 September 2001 (9/11). This much is to be welcomed – and has been by Amnesty International and others. But for all President Obama's assertions of the USA's “commitment to the Convention's tenets”, those responsible for crimes under international law carried out in the CIA rendition, interrogation and detention programmes continue to enjoy impunity. And despite assertions about the USA's commitment to meeting the needs of torture victims, US authorities have continued to block access to remedy for victims of such violations.

Without the necessary investigations, prosecutions, reparations, transparency and legislation, President Obama's executive order of 22 January 2009 prohibiting long-term secret detention and certain “enhanced interrogation techniques” may yet come to be seen as no more than a paper obstacle if and when any future US president decides that torture or enforced disappearance are once again expedient for national security. Moreover, the USA's operation of a programme of enforced disappearance and torture or other ill-treatment was not only a gross injustice to those subjected to the human rights violations, but an affront to UNCAT and other international instruments. If the impunity is allowed to persist, the harm done by the USA's assault on international human rights principles in its response to the 9/11 attacks will be seen as having no legal consequences for those that authorized and carried out crimes under international law. The affront to the rule of law and respect for human rights of the US example is very real.

The secret detention programme was built on the USA's refusal to apply international standards to its own conduct, and its exploitation of the caveats it submitted upon ratification of various human rights treaties, caveats that have been criticized by treaty monitoring bodies and others long before 9/11. In this submission Amnesty International therefore calls particular attention again to the USA's reservations, understandings and declarations attached to its ratification of UNCAT, conditions which the Obama administration has already told the Committee the USA has no intention of removing.

A reluctance to acknowledge the equal application of international human rights standards to the USA can be seen as an aspect of “American exceptionalism”. Such exceptionalism may be based in part on an assumption that universal human rights principles are somehow inferior to the constitutional and other laws and values of the USA. The grave dangers of reliance on any such assumption has been starkly demonstrated in recent years when the invocation of “American values” as a sole point of reference by public officials became a familiar refrain even as the USA adopted counter-terrorism detention policies that clearly contradicted basic rules of international human rights and humanitarian law.

Each year, the US Department of State publishes an assessment of the human rights records of other countries, as measured against the very same international human rights instruments the USA fails to fully apply to itself. A May 2005 US Department of Justice memorandum (still secret when the Committee against Torture last reviewed the USA's record under UNCAT), concluding that the CIA's use of “enhanced interrogation techniques”, including water-boarding, would not violate article 16 of UNCAT, stated that “A United States foreign relations tradition of condemning torture...says little about the propriety of the CIA's interrogation practices... The CIA programme is designed to subject detainees to no more duress than is justified by the Government's interest in protecting the United States from further terrorist attacks”.<sup>12</sup>

This was repeated in July 2007, a little over a year after the Committee issued its conclusions on the USA's second periodic report, including condemnation of secret detention and “enhanced” interrogation. The Department of Justice gave the CIA another classified memorandum in which it said that the Department of State had “informed us” that its human rights assessments “are not meant to be legal conclusions, but instead they are public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests.” US public condemnation of torture and of the “coercion of confessions in ordinary criminal cases”, it said, “is not inconsistent with the CIA's proposed interrogation practices”.<sup>13</sup> The memo gave legal approval for forms of physical assault and prolonged sleep deprivation against detainees already being subjected to enforced disappearance.

In its periodic report to the Committee against Torture, the USA also “directs the Committee's attention” to the Fourth Periodic Report of the USA to the UN Human Rights Committee, filed in December 2011 and reviewed by the Human Rights Committee in March 2014. Amnesty International directs the attention of the Committee against Torture to the Human Rights Committee's concluding observations, especially to its “concern that all reported investigations into enforced disappearances, torture and other cruel, inhuman or degrading treatment committed in the context of the CIA secret rendition, interrogation and detention programmes were closed in 2012”. The Human Rights Committee has called on the USA to 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 positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behavior should also be established.”<sup>14</sup>

The Human Rights Committee also expressed its concern “that many details of the CIA programmes remain secret, thereby creating barriers to accountability and redress for victims”.<sup>15</sup> At the time of writing, publication of the summary report of the US Senate Select Committee on Intelligence (SSCI)'s review of the CIA secret detention programme was pending more than six months after the SSCI voted to submit it for declassification.<sup>16</sup> Even this limited step towards transparency about a programme that systematically breached international law has proved difficult for the USA authorities to countenance, despite President Obama having committed his administration from the outset to an “unprecedented” level of transparency, including in the interest of accountability.<sup>17</sup> Amnesty International is calling for publication of the full report, which according to the SSCI Chairperson contains “details of each detainee in CIA custody, the conditions under which they were detained, [and] how they were interrogated”.<sup>18</sup> In other words, given what we already know about the

programme, it is logical to believe that it contains information about human rights violations, including the crimes under international law of torture and enforced disappearance. This information should be fully disclosed, as should all information about human rights violations.

Amnesty International is concerned that the domestic political and public discourse that will follow publication of the summary will likely focus on questions of effectiveness of the programme in obtaining intelligence and on whether the CIA had been economical with the truth in ways that hindered Congressional oversight and blindsided the Department of Justice when the latter was providing legal advice on the programme.<sup>19</sup> Any such focus could overshadow the obligation under international law for accountability and redress. All efforts must continue to be made to have the USA recognize these obligations.

Amnesty International's focus in this submission on the issue of accountability for the USA's human rights violations in the context of counter-terrorism, particularly in relation to the now terminated CIA programme of secret detention, should not be taken as an indication that all is well elsewhere in the USA's record under UNCAT. There are many issues of concern, including the widespread use of isolation in maximum security prison units, the use of electro-shock weapons, the death penalty, the use of life imprisonment without the possibility of parole against people who were under 18 years old at the time of the crime, the indefinite detention without charge or criminal trial at Guantánamo, and resort to military commission trials there. Some information and recommendations on these issues are provided in the second half of this submission.

## 2. RATIFICATION AND IMPLEMENTATION

The negative example set by the USA's pattern and practice on human rights treaty ratification is clear. Ratification tends to be a long time coming, and when it does come, it tends to be freighted with conditions to make the ratification more symbolic than real for those facing violations.

This approach is set to continue, and perhaps of particular relevance to the Committee against Torture, it will continue to be influenced by a reservation to UNCAT long since deemed by the Committee to be a violation of that treaty. The USA signed the UN Convention on the Rights of Persons with Disabilities in 2009, and in July 2012, the US Senate Committee on Foreign Relations recommended that the full Senate consent to ratification of this treaty only if it is conditioned on certain "reservations, understandings and declarations". Among the reservations are the following:

"Article 15 of the Convention memorializes existing prohibitions on torture and other cruel, inhuman, or degrading treatment or punishment contained in Articles 2 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and further provides that such protections shall be extended on an equal basis with respect to persons with disabilities. To ensure consistency of application, the obligations of the United States of America under Article 15 shall be subject to the same reservations and understandings that apply for the United States of America with respect to Article 16 of the CAT and Article 7 of the ICCPR".

As with UNCAT and the ICCPR, the advice and consent of the Senate to ratification of the Disabilities Convention would also be subject to the following declaration:

"The United States of America declares that the provisions of the Convention are not self-executing. The Senate declares that, in view of the reservations to be included in the instrument of ratification, current United States law fulfils or exceeds the obligations of the Convention for the United States of America".

In relation to the Disabilities Convention, the administration's Senior Counselor to the Assistant Attorney General for Civil Rights told the Senate Foreign Relations Committee on 12 July 2012:

"ratifying the Disabilities Convention will not require new legislation and will not create any new

rights, so long as it moves forward with the recommended Reservations, Understandings, and Declaration (or RUDs)... The proposed non-self-executing Declaration... would make it clear that the Convention could not be directly enforced by US courts and would not give rise to individually enforceable rights. This is consistent with our treaty practice under the ICCPR, CERD, and the Convention Against Torture.”<sup>20</sup>

☑ ***The USA should be urged, in the strongest possible terms, to change its approach to its human rights treaty ratifications – resulting in real protections and access to justice for individuals who have faced or are facing human rights violations at the hands of US personnel.***

### 3. RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

*“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”*  
US periodic report<sup>21</sup>

After reviewing the USA’s initial report under UNCAT in 2000, and again in 2006 after reviewing its second, the Committee urged the USA to enact a federal crime of torture consistent with Article 1 of UNCAT. “Because existing law fully implements its obligations in this regard”, the current administration has responded, repeating what its predecessor had said, “the United States is not actively considering adopting new federal legislation to duplicate existing applicable laws”.<sup>22</sup> The Committee’s long-standing call on the USA to “withdraw its reservations, interpretations and understandings relating to the Convention” has similarly been dismissed. The “process of stock-taking and self-examination” in which the USA says it has engaged in preparing its latest periodic report apparently leaves some fundamental problems with the USA’s approach to international human rights law unresolved.<sup>23</sup>

The Committee against Torture has said in its General Comment No. 2 that “serious discrepancies between the Convention’s definition and that incorporated into domestic law create actual or potential loopholes for impunity”.<sup>24</sup> For its part, the USA has frequently taken the position upon ratifying a treaty that its domestic legal system already meets international law standards on remedy and accountability, or by the same measure that there is no reason for the USA to ratify the international instrument in question.

In the USA’s latest periodic report under UNCAT, the Obama administration has told the Committee against Torture, among other things, that the USA has no current intention of ratifying the Optional Protocol to UNCAT (OPCAT) or of making a declaration under article 22 of UNCAT to recognize the competence of the Committee to receive and consider complaints from individuals alleging that the USA has violated its UNCAT obligations. The Committee has recommended each of these steps after previous sessions with the USA in Geneva. For each of these two recommendations, the Obama administration has given the same response, namely that “the United States continues to address and deal with any violations of the Convention primarily pursuant to its own domestic legal system” which “affords adequate opportunities for individuals to complain of abuse and to seek remedies”.<sup>25</sup>

Amnesty International submits that while indeed, as the periodic report asserts, “various remedies and protections are available that individuals may seek” in the US system, for many people justice is far from accessible and effective. Those whose rights have been violated in the counter-terrorism context, many of whom are foreign nationals, are a particularly stark case in point.

As was the case with ratification of the ICCPR two years earlier, the USA made its ratification of UNCAT with numerous limiting conditions, including a reservation to the prohibition of cruel, inhuman or degrading treatment or punishment and a declaration that “the provisions of articles 1

through 16 of the Convention are not self-executing”, that is, none of the substantive provisions of UNCAT would be enforceable in the US courts.

In 2000, having considered the USA’s Initial Report, the Committee against Torture called on the USA to “withdraw its reservations, interpretations and understandings relating to the Convention”.<sup>26</sup> The Committee reiterated this recommendation in its 2006 concluding observations on the USA’s second report. Fourteen years after the Committee first made this call, the USA has not taken the required action. Instead, during this period, government officials have cited those same ratification conditions to advise that harsh interrogation techniques could be authorized and used lawfully. The US reservation to article 16 of UNCAT and the identical reservation to article 7 of the ICCPR featured in legal memorandums produced by US government lawyers as part of the flawed legal arguments used to justify conduct that amounted to torture or other ill-treatment, enforced disappearance and other violations of international law.

In its 2000 concluding observations, the Committee against Torture stated that the reservation to article 16 was “in violation of the Convention”.<sup>27</sup> As little as two years later, however, US government lawyers were exploiting the reservation in giving legal approval for conduct that clearly violated international law. Impunity for such violations continues to this day.

The minutes of a meeting between various government lawyers and others which took place at Guantánamo on 2 October 2002 (which were made public by the Senate Armed Services Committee in late 2008), recorded that the chief legal counsel to the CIA’s Counterterrorism Center, the agency managing the CIA’s secret detention programme, advised that while torture was prohibited under UNCAT, US domestic law implementing the treaty was “written vaguely”. He said that the USA “did not sign up to” the prohibition of cruel, inhuman or degrading treatment, thereby giving it “more license to use more controversial techniques”. He described waterboarding, and suggested that it was “effective to identify phobias” and use them against the detainee. Death threats, he said, should be “handled on a case by case basis”.<sup>28</sup>

A memorandum written in the days after this meeting by one of its participants informed the authorization for interrogation techniques at the US detention facility in Guantánamo Bay in Cuba that violated the prohibition of torture and other ill-treatment. The memo stated on the USA’s 1994 ratification of UNCAT:

“the United States took a reservation to Article 16, which defined cruel, inhumane [sic] and degrading treatment or punishment, by instead deferring to the current standard articulated in the 8<sup>th</sup> Amendment to the United States Constitution. Therefore, the United States is only prohibited from committing those acts that would otherwise be prohibited under the United States Constitutional Amendment against cruel and unusual punishment... The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, prohibits inhumane treatment in Article 7, and arbitrary arrest and detention in Article 9. The United States ratified it on the condition that it would not be self-executing, and it took a reservation to Article 7 that we would only be bound to the extent that the United States Constitution prohibits cruel and unusual punishment”.<sup>29</sup>

This was a position that had already been articulated in a memorandum written by the US Department of Justice, dated 1 August 2002, providing the legal green light for the CIA to use “enhanced interrogation techniques” in its secret detention programme. The Guantánamo memorandum itself recommended approval of stress positions, prolonged isolation, deprivation of light and auditory stimuli, hooding, “removal of clothing”, exploitation of detainee phobias (such as fear of dogs), “the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family”, exposure to cold weather or water, and “use of a wet towel and dripping water to induce the misperception of suffocation”. The last three techniques listed were not authorized by the Secretary of Defense on this occasion (the others were), but this was not because they were considered unlawful. The Pentagon’s General Counsel held that all were “legally available”, and indeed were authorized or used in the CIA programme.<sup>30</sup>

In a 2003 memorandum, the Department of Justice advised the Pentagon of legal standards governing military interrogations of “alien unlawful combatants” held outside the USA:

“the United States is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman, or degrading treatment or punishment... In its instrument of ratification to the Torture Convention, the United States expressly defined the term ‘cruel, inhuman, or degrading treatment or punishment’ for purposes of Article 16 of the Convention. The reservation limited ‘cruel, inhuman, or degrading treatment or punishment’ to the conduct prohibited under the Fifth, Fourteenth and Eighth Amendments... The United States took the same reservation with respect to a provision in the International Covenant on Civil and Political Rights that prohibited cruel, inhuman, or degrading treatment or punishment”.<sup>31</sup>

The US reservations also featured in Department of Justice memorandums giving legal clearance for the CIA to use interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment against detainees who were being subjected to years of enforced disappearance in incommunicado solitary confinement. Among the methods approved were prolonged sleep deprivation, confinement in a box, stress position, and “water-boarding”.

The USA also attached an understanding of what is meant by torture to its ratification of UNCAT.<sup>32</sup> It is a definition that is arguably narrower than that contained in Article 1.1 of the Convention, and which has been criticized by the Committee against Torture.<sup>33</sup>

The Department of Justice’s memorandum dated 1 August 2002 emphasised the narrowness of the US definition of torture in advising that there was broad scope for US agents to engage in harsh interrogation tactics in the “war on terror”. It pointed out that both the Reagan and first Bush administrations, in their moves to ratify the Convention, “consistently emphasise[d] the extraordinary or extreme acts required to constitute torture”.<sup>34</sup> The same approach was indicated in a letter from the Justice Department to the White House, also dated 1 August 2002. The letter stated that the US “understanding” on torture “accomplished two things”:

"First, it made crystal clear that the intent requirement for torture was specific intent. By its terms, the Torture Convention might be read to require only general intent... Second, it added form and substance to the otherwise amorphous concept of mental pain or suffering. In so doing, this understanding ensured that mental torture would rise to a severity comparable to that required in the context of physical torture".<sup>35</sup>

The August 2002 Justice Department memorandum emphasized that the USA’s ratification history in relation to the Convention “confirm[s] our view that the treaty... prohibits only the worst forms of cruel, inhuman or degrading treatment or punishment”.

A May 2005 memorandum from the US Department of Justice’s Office of Legal Counsel (OLC) that had not yet been made public by the time the Committee against Torture issued its concluding observations in 2006, concluded that article 16 of UNCAT did not extend to CIA interrogations of non-US nationals in facilities outside the USA.<sup>36</sup> Of continuing relevance today, even since passage of the Detainee Treatment Act of 2005, legislation which the USA’s current periodic report repeatedly cites for its protective provisions, is that the Department of Justice further concluded that, even if article 16 did apply to CIA interrogations conducted against foreign nationals held outside the USA, under the US reservation (through which the OLC argued the “Senate intended to limit the scope of United States obligations under Article 16 to those imposed by the relevant provisions of the Constitution”), the CIA’s “enhanced interrogation techniques” complied with article 16. The Eighth Amendment ban on “cruel and unusual punishments”, the Department wrote, only applied to convicted prisoners and so “because the high value detainees on whom the CIA might use enhanced interrogation techniques have not been convicted of any crime, the substantive requirements of the Eighth Amendment would not be relevant here”. As to the Fifth Amendment guarantees of due process, including the protection against self-incrimination, they only prohibited government conduct that “shocks the conscience”, the Department advised. The CIA’s “enhanced

interrogation techniques”, including “water-boarding”, it concluded, “do not shock the conscience” because their use was furthering a legitimate government interest.

As late as July 2007 – that is, a year after the Committee had reviewed the USA’s Second Periodic Report under UNCAT – the OLC advised the CIA that six “enhanced interrogation techniques”, singly or in combination, would not violate the War Crimes Act (as amended by the Military Commissions Act of 2006), Common Article 3 of the Geneva Conventions, or the Detainee Treatment Act (DTA) of 2005.<sup>37</sup> The DTA, the memorandum explained, incorporated the USA’s reservation on cruel, inhuman or degrading treatment or punishment. And while the reservation purportedly binds the USA only to the constitutional standards under the Fifth, Eighth and Fourteenth Amendments, “only the Fifth Amendment is directly relevant here”, as the Fourteenth Amendment “does not apply to actions taken by the federal Government”, and the Eighth Amendment “applies only after an individual is convicted of a crime”. The memo pointed out that “none of the high value detainees on whom the CIA might use enhanced interrogation techniques has been convicted of any crime in the United States”. Under constitutional precedent, the Fifth Amendment would protect against “interrogation practices that shock the conscience”. The proposed techniques used against detainees in secret detention outside the USA would not constitute cruel, inhuman or degrading treatment “within the meaning of the DTA” – that is, they would not “shock the [domestic] conscience” – because their use would be furthering a government interest (i.e. intelligence gathering and prevention of terrorism), the memo asserted.<sup>38</sup>

In January 2009, President Obama issued an executive order that revoked the Department of Justice memorandums.<sup>39</sup> However, while these particular memos have been withdrawn, the reservations to article 16 and the understanding to article 1 have not. Although the DTA, for example, prohibits persons in the custody or control of the USA, regardless of their nationality or physical location, from being subjected to cruel, inhuman, or degrading treatment or punishment, interpreting whether treatment falls below this standard is determined by reference solely to the Constitution.

The USA also filed an understanding in relation to article 14 of UNCAT. This read:

“it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party”.

During the time that the USA was running its secret detention programme, the Department of Justice took the position that “territory under United States jurisdiction includes, at most, areas over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas.”<sup>40</sup>

The Committee against Torture has said:

“The Committee considers reservations which seek to limit the application of article 14 to be incompatible with the object and purpose of the Convention. States parties are therefore encouraged to consider withdrawing any reservations to article 14 that limit its application so as to ensure that all victims of torture or ill-treatment have access to redress and remedy.”<sup>41</sup>

The US understanding to article 14 would appear to amount to a reservation.

***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 article 16 of UNCAT, and any understandings and declarations which may amount to reservations (including its understanding of Article 1) and fully implement the treaty in national law.***

***The USA should enact a federal crime of torture, fully consistent with article 1 of UNCAT, including appropriate penalties.***

***The USA should make a declaration under article 22 of UNCAT that it recognizes***

*the competence of the Committee to receive and consider communications from or on behalf of individuals subject to US jurisdiction who claim to be victims of a violation by the USA or the provisions of UNCAT.*

*The USA should ratify the Optional Protocol to the Convention against Torture (OPCAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) as soon as possible and without any form of reservation*

## 4. IMPUNITY FOR CRIMES UNDER INTERNATIONAL LAW

*“US law provides jurisdiction in a number of ways that could be relied on for criminal prosecution of torture and ill-treatment of detainees”  
US periodic report to UNCAT<sup>42</sup>*

It is not that before 9/11 the USA ensured accountability and redress for human rights violations, and afterwards did not. Indeed, one of the Committee’s recommendations in 2000 after reviewing the USA’s initial report under UNCAT was to call on the US authorities to “take such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished”. It also expressed concern at significant restriction on domestic prisoners seeking remedy for abuses. Such problems persist today (see Section 8 below, for example).

However, what occurred at the hands of US personnel in response to the 9/11 attacks, in particular in relation to the CIA programmes of rendition, interrogation and detention, was a step change, albeit it one built on a familiar antipathy on the part of the USA to the application of international law to itself. Human rights violations, including crimes under international law, were authorized at the highest levels of government, with an eye from the outset on building in immunity from prosecution for those involved.

Scores of detainees were subjected to enforced disappearance and to conditions of detention and/or interrogation techniques which violated UNCAT’s prohibition of torture and other ill-treatment. No one has been charged and brought to justice for the crimes under international law committed against detainees held in this CIA programme.

In its 2006 concluding observations on the USA’s second periodic report, the Committee against Torture called on the USA to “ensure that perpetrators of acts of torture are prosecuted and punished appropriately”, “ensure that no doctrine under domestic law impedes the full criminal responsibility of perpetrators of acts of torture”, and to “promptly, thoroughly and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates”. As noted above, it also called on the USA to “prosecute and punish perpetrators” of enforced disappearance, a practice that is, “per se, a violation of the Convention”.

The USA’s latest report to the Committee ignores the question of accountability for the enforced disappearances that were carried out under the Bush administration. On the question of torture, the report explains that “before ratifying the Convention, the United States enacted a criminal torture statute (18 U.S.C. 2340A et seq.) to enable it to implement fully the obligations under Articles 5 and 7 (e.g to ensure that all cases of torture committed by a United States national are criminalized”).

In addition, as noted above, the current US administration has told the Committee in response to the latter’s request for information about investigation and prosecution that “US law provides jurisdiction in a number of ways that could be relied on for criminal prosecution of torture and ill-treatment of detainees”. It prefaces this statement, however, with reference to the earlier qualifier in

its periodic report, namely that

“in the spirit of cooperation, the United States has provided detailed and thorough answers to the questions posed by the Committee, whether or not the questions or information provided in response to them bear directly on obligations arising under the Convention. It should be noted that the report does not address the geographic scope of the Convention as a legal matter, although it does respond to related questions from the Committee in factual terms”.<sup>43</sup>

It would appear from this qualifier that the current administration considers that the issue of accountability for human rights violations committed outside the territory of the USA is not necessarily one that implicates its obligations under UNCAT. The previous administration took the position that in the context of the “war on terror” as conducted outside the USA against foreign nationals, US interrogators could effectively be protected from prosecution despite 18 U.S.C. 2340 even if their conduct constituted torture.

A legal memorandum from the OLC dated 1 August 2002 on “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A” stated, among other things, that “torture as defined in and proscribed by Sections 2340-2340A, covers only extreme acts”, that “because the acts inflicting torture are extreme, there is significant range of acts that although they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture”, and that “under the current circumstances” interrogation techniques that violated Section 2340 could be justified.<sup>44</sup>

The former acting chief CIA legal counsel John Rizzo has recently said that he was a principal mover behind this memo which, he has also said, was about “legal cover” – or to look at it another way, impunity.

*“Above all, I wanted a written OLC memo in order to give the Agency – for lack of a better term – legal cover... An OLC legal memorandum would protect the Agency and its people for evermore”*<sup>45</sup>

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

*“violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under color of presidential authority. CIA interrogators and their supervisors... viewed the opinion as a ‘golden shield’.”*<sup>46</sup>

In another OLC memo accompanying the 1 August 2002 memorandum, the “enhanced” interrogation techniques proposed for use by the CIA upon a detainee then in his fifth month of what would become a four and a half year enforced disappearance in US custody, would “not violate Section 2340A”. Among the techniques was “water-boarding”, which the memo acknowledged “constitutes a threat of imminent death”.<sup>47</sup>

President Bush confirmed the existence of the CIA secret detention programme publicly for the first time some four and a half years after it began, on 6 September 2006, a few weeks after the Committee Against Torture had reviewed the USA’s second report under UNCAT. This presidential speech came as a result of the US Supreme Court’s 29 June 2006 ruling in *Hamdan v. Rumsfeld* which, the President suggested, had led to the possibility of a challenge to the immunity being enjoyed by US interrogators.

Because the US Supreme Court had not yet issued its *Hamdan* ruling when the Committee against Torture last reviewed the USA’s record under UNCAT, and because the USA has provided less than adequate information on the government’s response to *Hamdan* to treaty monitoring bodies, including in its report to the Committee against Torture, Amnesty International provides the following brief chronology to illustrate how the notion of immunity was in the mix from the outset and how there has been a systemic human rights failure on the part of the two elected branches to bring US conduct into compliance with international law, including UNCAT:

**25 January 2002** – White House Counsel Alberto Gonzales drafted a memorandum advising President Bush that a “positive” consequence of determining that Geneva Convention protections would not apply to detainees held in the “war against terrorism”, a “new kind of war” which “places a high premium” on “the ability to quickly obtain information from captured terrorists and their sponsors”, would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the War Crimes Act. The latter criminalized as war crimes under US law conduct prohibited under Article 3 common to the four Geneva Conventions of 1949, including torture, cruel treatment, and “outrages upon personal dignity, in particular, humiliating and degrading treatment”.<sup>48</sup>

**1 February 2002** – Attorney General Ashcroft wrote to President Bush that a presidential determination against applying Geneva Convention protections to detainees “would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States”.<sup>49</sup>

**29 June 2006** – the US Supreme Court ruled that Article 3 common to the four Geneva Convention of 1949 applied to the conflict with al-Qa’ida, reversing the presidential determination of four and a half years earlier. Common Article 3 requires that all detainees be treated humanely and prohibits, among other things, torture, cruelty, “outrages upon personal dignity, in particular, humiliating and degrading treatment”, and unfair trials. As pointed out by one of the Justices, US law (the War Crimes Act) defined “war crimes” to include violations of Common Article 3. Officials from the Departments of State, Defense, Justice subsequently met with the President and CIA and NSC officials to consider post-*Hamdan* options, including legislation.<sup>50</sup>

**30 June 2006** – The CIA asked for advice from OLC in light of *Hamdan*. According to the OLC, the ruling meant that Common Article 3 “now applies, as a matter of treaty law, to detainees held by the CIA in the Global War on Terror”. CIA is orally told by OLC – one day after the ruling – that detention conditions in CIA secret detention facilities “are permitted by common Article 3”.<sup>51</sup>

**31 August 2006** – The OLC responded to the CIA’s request as to whether six standard conditions of confinement in CIA secret facilities – blindfolding, forced shaving, incommunicado detention in solitary confinement (to which some detainees had already been subjected for years), white noise, 24-hour-a-day lighting, and shackling – complied with the Detainee Treatment Act. The OLC advised that whether applied singly or in combination, the conditions were compatible with the DTA.<sup>52</sup>

**31 August 2006** – In a letter to the CIA, OLC “memorializes and elaborates” on its earlier oral advice that conditions of confinement in the CIA’s detention facilities complied with common Article 3. Even years of incommunicado detention in solitary confinement, the letter asserted, did not constitute prohibited treatment.<sup>53</sup>

**6 September 2006** – In a key speech, President Bush responded to the *Hamdan* ruling, asserting that common Article 3’s prohibitions on “outrages upon personal dignity” and “humiliating and degrading treatment” were “vague and undefined”. He stated that it was “unacceptable” that US “military and intelligence personnel...could now be at risk of prosecution under the War Crimes Act”. His administration submitted draft legislation, the MCA of 2006, to Congress.

**Late September 2006** – Congress passed the MCA.<sup>54</sup> In addition to §7, purporting to strip habeas corpus away from those foreign nationals held as “enemy combatants” it amended the War Crimes Act (WCA) so as to decriminalize in US law certain violations of common Article 3 (“outrages upon personal dignity, in particular humiliating and degrading treatment”). It granted “retroactive immunity to CIA interrogators by providing that it would be effective as of November 26, 1997, the date the War Crimes Act was enacted”.<sup>55</sup> The MCA retroactively (to 11 September 2001) applied Section 1004 of the DTA providing a “good faith” defence for US personnel relying on authorized techniques. It prohibited federal courts from consulting any “foreign or international source of law” in interpreting the prohibitions of Common Article 3 and the WCA.

**17 October 2006** – President Bush signed the MCA into law, stating that it would allow the CIA secret detention programme to continue, and that this was his primary test for whether he favoured the Act.<sup>56</sup> The OLC later justified continued CIA use of “enhanced interrogation techniques”, in part, by pointing to the fact that the passage of the MCA could be seen as an indicator of “support within contemporary community standards for the CIA interrogation program”.

Indeed, the OLC will argue, the MCA “was proposed, debated, and enacted in no small part on the assumption that it would allow the CIA program to go forward”.<sup>57</sup>

The impunity for torture and enforced disappearance persists to this day. President Obama signed the revised MCA of 2009 into law with no change to the War Crimes Act amendment. Neither Congress nor the executive have taken the necessary steps to end this injustice. Early in his term in office, President Obama opposed a commission of inquiry into the violations in the “war on terror” on the grounds 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.”<sup>58</sup>

President Obama’s confidence in US institutions ensuring accountability was misplaced. As noted below, the limited investigations conducted by the Department of Justice have ended with no charges against anyone. At the same time, the administration has blocked the pursuit of remedy by victims of human rights violations in this context and has been successful in having courts agree to this.<sup>59</sup> Federal judges have effectively turned away from allegations of enforced disappearance, torture and other ill-treatment when confronted by them.<sup>60</sup>

Congress seems disinterested in real accountability. On 5 March 2009, US Senators Dianne Feinstein and Kit Bond, respectively Chair and Vice Chair of the US Senate Select Committee on Intelligence (SSCI), announced that the Committee would “review the CIA’s detention and interrogation program”.<sup>61</sup> The then CIA Director, Leon Panetta, promptly revealed that he had been assured by the SSCI leadership that the goal of the review was to inform “future policy decisions” rather than “to punish those who followed guidance from the Department of Justice.”<sup>62</sup>

The following month, as his administration released into the public domain a number of the legal memorandums that had approved the use by the CIA in its secret detention programme of techniques that violated the international prohibition of torture and other cruel, inhuman or degrading treatment, President Obama said

“In releasing these memos, it is our intention to assure those who carried out their duties relying in good faith upon legal advice from the Department of Justice that they will not be subject to prosecution.”<sup>63</sup>

US Attorney General Eric Holder added that “it would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department”.<sup>64</sup> He stressed that

“intelligence community officials who acted reasonably and relied in good faith on authoritative legal advice from the Justice Department that their conduct was lawful, and conformed their conduct to that advice, would not face federal prosecutions for that conduct.”

In turn, CIA Director Panetta emphasised that the agency’s “detention and interrogation effort was authorized and approved by our government”, and that he would “strongly oppose any effort to investigate or punish those who followed the guidance of the Department of Justice.”<sup>65</sup>

Although Attorney General Holder subsequently ordered a “preliminary review” into “whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations”, he went out of his way to emphasise that “neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow.”<sup>66</sup> The Justice Department had already declined to prosecute anyone for destroying tapes of interrogations that apparently showed torture, amongst other things.

On 1 August 2014, referring to the CIA secret detention programme, President Obama again acknowledged that the USA turned to torture in its response to the 9/11 attacks. While not the first time he has said so, he did appear to go further than before by stating that torture was carried out under “some” of the “enhanced interrogation techniques” used in the programme, not just the one known as “waterboarding”.<sup>67</sup>

It would be unsurprising if the architects and operatives of the CIA detention programme were left somewhat unconcerned by President Obama’s reiteration that torture – a criminal act – had occurred in it (John Rizzo, the former chief legal officer of the CIA who wrote in his memoirs published in 2014 that his “fingerprints had been all over the CIA’s post-9/11 detention and interrogation practices since their inception”, welcomed that fact that President Obama had said “that the people who first conceived and carried out the programme in the wake of 9/11 were under tremendous pressure to protect the country at a time of national crisis. He even called us patriots”.<sup>68</sup>) Indeed, at the August 1 press conference, instead of committing the USA to compliance with its obligation to ensure full truth, accountability and remedy in relation to the crimes under international law that were part of the programme, President Obama made a plea for a measure of understanding about why the USA resorted to torture after 9/11:

“I understand why it happened. I think it’s important when we look back to recall how afraid people were after the Twin Towers fell and the Pentagon had been hit and the plane in Pennsylvania had fallen, and people did not know whether more attacks were imminent, and there was enormous pressure on our law enforcement and our national security teams to try to deal with this. And it’s important for us not to feel too sanctimonious in retrospect about the tough job that those folks had. And a lot of those folks were working hard under enormous pressure and are real patriots.”

Whatever the merits of the above comments, they are irrelevant to the question of accountability and redress. As the Committee against Torture has made clear:

“no exceptional circumstances whatsoever may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any effort by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations... The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability”.<sup>69</sup>

It is not that understanding why torture or enforced disappearances happen is not important in ensuring that they do not happen again. But in the USA, “understanding” has become part of an official narrative that is interwoven with impunity. As such, it effectively becomes justification. President Obama is not the first US official to have resorted to this narrative.<sup>70</sup>

On 30 August 2012, the US Attorney General announced the closure of criminal investigations into the deaths of two men held in CIA custody. This ended all announced investigations into the CIA secret rendition, interrogation and detention programmes, with no criminal charges brought against anyone for the crimes under international law that were committed.<sup>71</sup>

The current US President and Attorney General have each acknowledged that water-boarding constitutes torture. Nevertheless, the President who has said that he authorized the torture (as well as the enforced disappearance of those who were tortured) continues to enjoy impunity, as do numerous other officials who authorized, condoned, or carried out the torture and enforced disappearance.

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.

As the Committee has said in its General Comment No. 2,

“The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of torture. Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities.”<sup>72</sup>

Publication of George W. Bush’s memoirs in late 2010 prompted Amnesty International to call for him to be the subject of a criminal investigation.<sup>73</sup> In his book, he recalled the case of Abu Zubaydah, taken into custody in Pakistan in 2002 and transferred to secret US custody. Abu Zubaydah was resisting interrogation, recalled the former President; “CIA experts” drew up a list of “enhanced interrogation techniques”; “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... I approved the use of the interrogation techniques”.<sup>74</sup> Khalid Sheikh Mohammed was arrested in Pakistan in 2003 and also transferred to secret CIA custody. The Bush memoirs recalled: “[CIA Director] George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed.... ‘Damn right,’ I said.”<sup>75</sup> Declassified documents point to Zubaydah having been subjected to more than 80 “applications” of water-boarding, and Khalid Sheikh Mohammed to more than 180.

In November 2010, the US Department of Justice announced, without further elaboration, that no one would be prosecuted for the “destruction by CIA personnel of videotapes of detainee interrogations”.<sup>76</sup> In December 2007, to pre-empt a report that was about to be published in the media, General Michael Hayden, then Director of the CIA, had confirmed that videotapes of interrogations during 2002 had been destroyed by the CIA in 2005. In the course of litigation in federal court in 2009, the CIA revealed that 92 videotapes of interrogations of Abu Zubaydah (90) and ‘Abd al-Nashiri (2) recorded between April and December 2002 had been destroyed. Twelve of the tapes depicted use of “enhanced interrogation techniques”, including “water-boarding”.<sup>77</sup>

The memoirs of José Rodríguez were published in 2012. From late 2005, he had become 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 to run the secret detention programme.<sup>78</sup> In his memoirs, José Rodríguez asserted that “I was responsible for helping develop and implement the Agency’s techniques for capturing the world’s most dangerous terrorists and collecting intelligence from them, including the use of highly controversial ‘enhanced interrogation techniques’.”<sup>79</sup> In his memoirs, Rodríguez confirmed that it was he who approved the destruction in November 2005 of videotapes of CIA interrogations.<sup>80</sup> 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 Department of Justice announced that no-one would be prosecuted for the destruction of the tapes.<sup>81</sup> Nevertheless, Rodriguez's own admissions of his role in a programme 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.

The USA's periodic report deals with the Committee's question for information about "steps taken to hold the responsible persons accountable" for violations in the CIA programme in a single paragraph, reporting that the "investigations were closed in 2012 after DoJ determined that the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt".<sup>82</sup> This is an entirely unacceptable state of affairs, albeit a predictable one given the USA's refusal over the past decade to account for crimes under international law committed by its personnel in the counter-terrorism context.

On 5 March 2009, it was announced that the Senate Committee on Intelligence would "review the CIA's detention and interrogation program", including "how the CIA created, operated, and maintained its detention and interrogation program".<sup>83</sup> A few days later, the CIA Director announced that he had been assured that the goal of the review was to inform "future policy decisions", rather than "to punish those who followed guidance from the Department of Justice."<sup>84</sup> On 13 December 2012, the Intelligence Committee voted to approve the report of its review which, according to the Committee's Chairperson, runs to more than 6,000 pages, with 35,000 footnotes, and "uncovers startling details" of the CIA programme. It is "a comprehensive review of the CIA's detention program that includes details of each detainee in CIA custody, the conditions under which they were detained, how they were interrogated". The report was provided to the administration for "review and comment."<sup>85</sup> As of October 2014, the report remained classified, although the summary of the report was submitted for declassification review in April 2014 and at the time of writing its publication was expected in late 2014.

While this submission focusses on the CIA programme, it should not be forgotten that torture and other ill-treatment have occurred against detainees held in military custody at Guantánamo (the latter is also believed to have been one of the CIA's "black sites" in 2003/4). Just as no criminal investigation followed former President Bush's assertion that he personally authorized conduct that amounted to torture in the CIA programme, none followed the statement by an administration official in 2008 that "we tortured" Mohamed al Qahtani, a Saudi Arabian national in Guantánamo.<sup>86</sup> Nor did any investigation follow Donald Rumsfeld's confirmation in his 2011 memoirs that he had authorized "counter-resistance" techniques against this specific detainee.<sup>87</sup> These techniques included sleep deprivation (in the form of 20-hour interrogations), prolonged isolation, removal of clothing, stress positions, exploitation of detainee phobias such as fear of dogs, and deprivation of light and auditory stimuli.

Mauritanian national Mohamedou Ould Slahi was arrested in Mauritania in November 2001, rendered to Jordan for eight months, taken to Bagram in July 2002 and then transferred to Guantánamo on 5 August 2002. He remains in Guantánamo today, over 12 years after he was first sent there. While the previous administration had slated Slahi for trial by military commission, 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."<sup>88</sup> In his memoirs published in 2011, Donald Rumsfeld confirmed that he had approved "interrogation techniques beyond the traditional Army Field Manual" in August 2003 for use against Mohamedou Ould Slahi.<sup>89</sup> Again there has been no investigation up to higher levels of office. Yet, as the Committee against Torture has stated in relation to implementation of UNCAT, "it is essential to investigate and establish the responsibility of persons in the chain of command, as well as that of the direct perpetrator(s)."<sup>90</sup>

**☑ *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 before an ordinary civilian court.***<sup>91</sup>

**☑ *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.***<sup>92</sup> *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.*<sup>93</sup>

**☑ *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 extraditing any alleged perpetrators who it is unwilling or unable itself to prosecute.***<sup>94</sup>

**☑ *The USA should declassify all government documents providing authorization or legal clearance or discussion of secret detention, rendition, and enhanced interrogation by the CIA or other agencies. It should make public the full Senate Intelligence Committee report into the CIA secret detention programme.***<sup>95</sup>

## **5. RIGHT TO AN EFFECTIVE REMEDY**

*“As the United States explained in its previous treaty reports and in response to questions in this submission, the US legal system affords numerous opportunities for individuals to complain of abuse and to seek remedies for alleged violations”*  
US periodic report<sup>96</sup>

Victims of human rights violations have the right under international law to effective access to remedy and reparation. 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.<sup>97</sup> 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.

As the Committee against Torture has said, in General Comment No. 3 on article 14 of UNCAT:

*“Each State party is required 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.’ The Committee considers that article 14 is applicable to all victims of torture and acts of cruel, inhuman or degrading treatment or punishment without discrimination of any kind.”*

The struggle against impunity is linked to this too. The Committee has stated 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."<sup>98</sup>

It has further underlined that

"granting immunity, in violation of international law, to any State or its agents or to non-state actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. 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. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims".<sup>99</sup>

This is precisely what has occurred in the USA, where state secrets doctrine has been invoked to deny redress.<sup>100</sup> In April 2011, the Obama administration filed a brief in the US Supreme Court in **Mohamed v. Jeppesen**, urging the Court not to hear the case of five men who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment as part of the USA's rendition programme. The administration got what it had requested when the Supreme Court dismissed the case entirely without comment on 16 May 2011, leaving in place a lower court decision upholding the administration's invocation of the "state secrets privilege" as justification for dismissing the lawsuit without any review of its merits.<sup>101</sup> The decision exhausted the final legal route for the five plaintiffs, whose cases remain unheard.

Earlier, the Bush administration had successfully invoked the "state secrets privilege" in the case of **El-Masri v. Tenet**, concerning Khaled El-Masri, who was subjected to CIA rendition from Macedonia to secret US custody in Afghanistan in 2004. On 13 December 2012, the Grand Chamber of the European Court handed down a landmark ruling in his case, finding Macedonia responsible for complicity in the torture and enforced disappearance to which Khaled El-Masri was subjected in US custody.<sup>102</sup> The ruling served to highlight the shocking absence of accountability and remedy in the USA.<sup>103</sup> The European Court noted that "the concept of 'State secrets' has often been invoked to obstruct the search for the truth".<sup>104</sup>

The UN has recognized "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".<sup>105</sup> The blocking of remedy at every turn, by way of "special factors", state secrets or qualified immunity, has deprived victims, and the general public, of this right.

The USA's Second Periodic Report states that "United States law provides a variety of avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights". While US domestic law does indeed provide for a range of remedies for victims of violations, including the right to seek compensation or injunctive relief in the courts, not all victims are able to avail themselves of such remedies in practice. Few states have independent external monitoring bodies authorized to conduct regular inspections of jails or prisons and to report on conditions and investigate abuses. Some police oversight bodies also lack scope, independence or resources. While the US Department of Justice can seek injunctions to change practices through the Civil Rights of Institutionalized Persons Act and "pattern and practice" lawsuits against police departments, these focus on individual jurisdictions and cannot cover every institution. Individual or class-action litigation brought by or on behalf of the victims of abuses is often the most effective remedy, but such actions are costly and may take years to reach conclusion. The Prison Litigation Reform Act (PLRA) passed in 1996, although not preventing such litigation, imposed restrictions making it more difficult for prisoners to file lawsuits and reducing the compensation for attorneys who represent inmates in civil rights cases.

A "*Bivens*" remedy is one of the avenues the USA points to in its Fourth Periodic Report, as in

previous reports. This refers to a 1971 US Supreme Court decision establishing that victims of constitutional violations have a right to recover damages in federal court even in the absence of a statutory route to remedy passed by Congress.<sup>106</sup> In 2007 the Supreme Court set out a two-step process in *Bivens* cases, while stating that the courts must pay “particular heed to any special factors counselling hesitation before authorizing a new kind of federal litigation”.<sup>107</sup> This notion of “special factors”, which appeared in the original *Bivens* ruling, has been successfully used by both the Bush and Obama administrations to persuade courts not to provide a judicial remedy for abuses alleged by detainees and former detainees in the post 9/11 context. “Special factors” asserted by the government have included national security, intelligence gathering, waging war, and foreign relations. Under US law, even in the absence of a finding of “special factors”, the court may find the officials in question to be entitled to “qualified immunity” which will also block the lawsuit.<sup>108</sup>

On 7 November 2012, in *Vance v. Rumsfeld*, the US Court of Appeals for the Seventh Circuit blocked a lawsuit brought by two men seeking remedy for their alleged unlawful detention and torture in US military custody in Iraq in 2006. The majority acknowledged that the conduct alleged by the two men “appears to violate the Detainee Treatment Act and may violate one or more treaties”. However it said that “civilian courts should not interfere with the military chain of command – not, that is, without statutory authority”. Pointing to, among other things, the DTA and the Military Commissions Act (MCA) of 2006, the court stated that “the political branches have not been indifferent to detainees’ interests”. From a human rights perspective, any suggestion that Congress has fully met its obligations on detainee issues is wholly inaccurate. While there have been some efforts within the legislature to restrain executive excess and inquire into detainee treatment – the report in November 2008 of the Senate Armed Services Committee was a high point in this regard<sup>109</sup> – its legislative efforts have fallen short in numerous ways.<sup>110</sup>

Judge Wood issued a separate opinion concurring in the *Vance* judgment, but asserting that the alleged treatment of the two plaintiffs “easily” qualified as torture, adding that “this shameful fact should not be minimized by using euphemisms such as the term ‘harsh interrogation techniques’.” Three of the 10 judges dissented, arguing that the lawsuit should have been allowed to proceed. The dissent accused the majority of failing in the “judiciary’s responsibility to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government”.<sup>111</sup> On 10 June 2013, the US Supreme Court declined to take the case, leaving the plaintiffs without judicial remedy in the USA.

A year earlier, on 11 June 2012, the Supreme Court had refused to review the January 2012 *Lebron v. Rumsfeld* decision of the Fourth Circuit Court of Appeals which blocked the lawsuit brought by former “enemy combatant” detainee José Padilla. In light of the Supreme Court’s decision not to intervene, Padilla decided not to seek further review of the May 2012 *Padilla v. Yoo* decision of the Ninth Circuit which had blocked another lawsuit brought by Padilla, this one against John Yoo, who served as Deputy Assistant Attorney General at the Office of Legal Counsel (OLC) of the Department of Justice from 2001 to 2003. During this time 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 against detainees held in secret custody at undisclosed locations.

On 15 June 2012, in *Doe v. Rumsfeld*, the Court of Appeals for the District of Columbia (DC) Circuit blocked a lawsuit brought by another man alleging unlawful detention and treatment by the US military in Iraq in 2005 and 2006. Former Secretary of Defense Donald Rumsfeld was again the defendant. The panel stated: “we perceive that special factors present in this case counsel against the implication of a new *Bivens* remedy...” On 30 July 2012, the Court of Appeals refused to have the full court reconsider the panel ruling.

An unusual aspect of the above lawsuits was that the plaintiffs were all US citizens. In that regard, they could be said to be the exceptions to the more general rule – namely that the vast majority of those subjected by US forces to these types of abuses have been foreign nationals. As with the US citizen lawsuits, efforts by foreign nationals to obtain redress and accountability have been

systematically blocked, in breach of the USA's international legal obligations.<sup>112</sup>

In 2006, in *Rasul v. Myers*, a District Court Judge granted the Bush administration's motion to dismiss a lawsuit brought by four UK nationals, who were held without charge or trial in Guantánamo from 2002 to 2004 after being transferred there from Afghanistan.<sup>113</sup> The four were seeking damages for prolonged arbitrary detention and alleged torture and other ill-treatment.<sup>114</sup> The judge ruled that the defendants had been acting, "at least in part, to further the interests of their employer, the United States". Under US law, once individual government officials are deemed to have been acting within the scope of their employment, the US government is substituted as the defendant in their place. The judge ruled that this had the effect of granting the individual defendants absolute immunity from civil liability in US courts for violations of international law. Because of the "unsettled nature" of the detainees' constitutional rights in US courts at that time, he ruled, the officials were "entitled to qualified immunity" under US law. In 2008 the Court of Appeals upheld the ruling. Even the 2008 *Boumediene v. Bush* decision did not change the outcome, the Court of Appeals ruled in 2009, as the claims raised were not based on rights that were "clearly established" at the time they were held and "the doctrine of qualified immunity shields government officials from civil liability" under such circumstances. On 14 December 2009, the US Supreme Court announced that it would not take the *Rasul v. Myers* case.

In *Ali v. Rumsfeld* in 2007, the Chief Judge on the District Court for DC dismissed a lawsuit brought by nine former detainees alleging torture and other abuse while held by the US military in Afghanistan and Iraq, including at Bagram air base and Abu Ghraib prison.<sup>115</sup> The judge described the allegations as "horrifying",<sup>116</sup> but concluded that "no matter how appealing it might be to infer a *Bivens* remedy to vindicate injuries caused by federal officials committing abuses as severe as those alleged here", the reach of the US Constitution "is not so expansive that it encompasses these non-resident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars". Also, "special factors" required judicial restraint – to allow the lawsuit to proceed would "place the Court in the position of inquiring into the propriety of specific interrogation techniques and detention practices employed by the military". Moreover, "there being no violation of clearly established constitutional rights in this case, the defendants are entitled to qualified immunity". As to claims that their rights under international law were violated the court held that the defendants were "entitled to absolute immunity" under US law.<sup>117</sup> In 2011, the US Court of Appeals affirmed the ruling.

In 2007, in *Saleh v. Titan Corporation*, a District Court judge granted a motion to summarily dismiss a lawsuit brought against Titan Corporation by Iraqi nationals alleging the involvement in torture or other ill-treatment of interpreters provided to the US military by Titan. He denied a motion to summarily dismiss a lawsuit brought by Iraqi nationals against CACI International, a contractor that supplied interrogators to the US military in Iraq. In 2009, the Court of Appeals affirmed the District Court's summary dismissal of the lawsuit against Titan and reversed its denial of summary dismissal of lawsuit against CACI.<sup>118</sup> On 27 June 2011, the US Supreme Court announced that it would not review the case.

A year earlier, on 14 June 2010, the Supreme Court had refused to take the case of *Arar v. Ashcroft*, leaving the plaintiff without judicial remedy in the USA. Dual Syrian/Canadian national Maher Arar had been arrested at New York airport in 2002 and sent, via Jordan, to Syria, where he was held for a year, including 10 months in a small underground cell, and subjected to torture and other ill-treatment before being released to Canada. The lawsuit alleged that he had been removed to Syria to undergo interrogation under torture and other ill-treatment. In 2009 the Second Circuit Court of Appeals ruled that "special factors" counselled judicial hesitation: "it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us as judges – to decide whether an individual may seek compensation..." Four judges dissented against what they said was a "miscarriage of justice".<sup>119</sup>

The USA's latest periodic report to the Committee against Torture states:

“US law provides various avenues for seeking redress in cases of torture and other violations of constitutional and statutory rights relevant to the Convention. A wide range of civil remedies includes injunctions, compensatory and/or punitive damages and equitable relief. In addition, where Congress has so provided, the federal government may bring civil actions to enjoin acts or patterns of conduct that violate constitutional rights, including those that would amount to acts of torture.”

The USA's less than accurate treaty reporting on the issue of remedy was raised in the *Vance v. Rumsfeld* case. One judge pointed out that in 2005 the USA had cited *Bivens* in seeking to persuade the UN Committee against Torture that the USA was in compliance with its obligations under UNCAT.<sup>120</sup> Another wondered whether the USA would be returning to that Committee to inform it that the government had been wrong to cite *Bivens* in this way.<sup>121</sup>

The Obama administration has not told the Committee of the USA's systematic invocation of state secrecy or various forms of immunity under US law to have courts block access to remedy of victims of human rights violations committed in the rendition, detention and interrogation programmes.

***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.***

## 5.1 MILITARY COMMISSIONS ACT (MCA) §7.2

The *Boumediene v. Bush* ruling of June 2008 struck down §7 of the MCA that “denied federal courts habeas corpus jurisdiction over claims of aliens detained at Guantánamo”. However, the US administration has continued to rely on §7.2 of the MCA of 2006 to prevent judicial review and remedy for claims deemed as falling outside of straight lawfulness of detention challenges brought by Guantánamo detainees.<sup>122</sup> §7.2 states:

“No court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention,... treatment,... or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination”.

The revisions to the MCA signed into law by President Obama on 28 October 2009 left the clause above untouched and the administration continues to rely upon it.

### 5.1.1 TORTURE OR OTHER ILL-TREATMENT AND MCA §7.2

Former and current detainees have sought remedy for various human rights violations they have allegedly endured at the hands of US personnel. Section 7.2 of the MCA is one obstacle they face, an obstacle the current administration is only too willing to put in their way.

In December 2011, the US District Court for DC granted the Obama administration's motion to dismiss a lawsuit brought by former Guantánamo detainee **Abdul Rahim Abdul Razak al Janko**, a Syrian national of Kurdish origin who was held in US military custody without charge or trial for over seven years. He was seeking damages for physical and psychological injuries suffered as a result of abuse in US custody. He has alleged among other things that when in US custody in Afghanistan he was subjected to “abusive interrogation techniques”, including “striking his forehead; threatening to remove his fingernails; sleep deprivation; exposure to very cold temperatures; humiliation; and rough treatment” and in Guantánamo that he was tied, shackled, force-fed, had his Koran desecrated, was subjected to “extreme sleep deprivation” in solitary confinement, and to “severe beatings and threats against himself and his family”. He alleged that as a result of the abuse, he attempted suicide 17 times. The District Court granted the government's motion to dismiss, citing §7.2 of the MCA, which he said stripped jurisdiction of the court to consider such

claims.<sup>123</sup> The Department of Justice asserted in the Court of Appeals in March 2013 that “All of plaintiff’s claims are jurisdictionally barred” by §7.2.<sup>124</sup> On 28 June 2013 the administration filed a copy of the decision in *Ameur v. Gates* (see below) with the Court of Appeals arguing that the decision in that case was “consistent with arguments we have asserted in this [*al Janko v. Gates*] case. On 17 January 2014, the US Court of Appeals for the DC Circuit affirmed the District Court ruling dismissing al Janko’s claims, concluding that “the Constitution, subject to certain limitations, leaves exclusively to the Congress questions of fairness, justice and the soundness of policy in the allocation of our jurisdiction. The Congress has communicated its directive in unmistakable language and we must obey”.<sup>125</sup>

In 2012 a “Bivens” action was filed in the District Court for the Eastern District of Virginia on behalf of **Mammar Ameur**, an Algerian national who was held in US custody for more than six years without charge or trial. The complaint against more than 20 officials sought compensation for enforced disappearance, arbitrary detention, ill-treatment, and other abuses. It alleged that he was seized at his apartment in Peshawar in Pakistan on 18 July 2002, and held in Pakistani custody before being handed over to US custody and held in Bagram for about two months in early 2003 before being transferred to Guantánamo in mid-March 2003. He was held there before being transferred to Algeria in October 2008. He has alleged that in US military custody he was subjected to a range of torture or other ill-treatment, including prolonged incommunicado detention, forced standing, sleep deprivation, stress positions, prolonged isolation, beatings, and humiliation.<sup>126</sup>

The Obama administration substituted itself for the defendants in the case – former officials under the Bush administration. It then argued that MCA §7.2 meant that the court lacked jurisdiction over “all of Plaintiff’s claims”.<sup>127</sup> On 20 June 2013, the District Court ruled that §7.2 “remains in force”, leaving Ameur’s claims “beyond the jurisdiction of the Court”.<sup>128</sup> On 16 July 2014, the US Court of Appeals for the Fourth Circuit affirmed the District Court ruling.<sup>129</sup>

#### 5.1.2 HUNGER STRIKES AND MCA §7.2

During hunger strikes at Guantánamo, the Obama administration has also turned to MCA §7.2 to seek to have lawsuits brought by detainees in this context blocked. Concern is heightened by the fact US policies and practices on the hunger strikes fall short of international standards on medical ethics.<sup>130</sup> Moreover, whatever an individual detainee’s reasons for going on hunger strike, the unavoidable backdrop is US human rights violations.

Even when US judges, in the context of habeas corpus proceedings, have made findings on torture and other human rights violations, there have been no moves to ensure accountability and remedy.<sup>131</sup> The case of **Musa’ab al Madhwani** is illustrative. This Yemeni national has been in US custody for 11 years without charge or trial. He is one of the 48 detainees whom the Obama administration decided during 2009 could neither be tried nor released by the USA, but would continue to be held under the AUMF. The administration has recently successfully invoked MCA §7.2 in seeing off an emergency motion on his behalf during a hunger strike in which he was participating.

In 2010, a US federal judge found “credible” Musa’ab al Madhwani’s detailed allegations of torture and other ill-treatment following his arrest in Pakistan in September 2002.<sup>132</sup> After five days in Pakistani custody he was handed over to US custody and flown to Afghanistan. He says he was taken to the “Dark Prison”, a secret CIA-operated facility in or near Kabul, where he was held for about a month. There “he suffered the worst period of torture and interrogation, treatment so terrible that it made him miss his time with the Pakistani forces”. He was allegedly held for 30-40 days “in darkness so complete that he could not see his hand in front of his face”; “not allowed to sleep for more than a few minutes at a time”; “was fed only about every 2½ days, in very small portions”; and “twenty-four hours a day, obnoxious music blared at a deafening volume”.<sup>133</sup>

Musa’ab al Madhwani was transferred to Bagram where he was held for another five days. There he has alleged that: “I was forced to stand the entire time until my feet swelled and I was exhausted. I was dragged by the neck to interrogation, where dogs would bark in my face.” He was transferred to

Guantánamo in late October 2002, held in isolation and subjected to further interrogations. In 2010, the federal judge overseeing habeas corpus proceedings noted that there was “no evidence in the record” that al Madhwani’s allegations were inaccurate and in fact that they were corroborated by “uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions.” The judge emphasised al Madhwani’s “credible” testimony that the USA “was involved in the prisons where he was held, and believed to have orchestrated the interrogation techniques, the harsh ones to which he was subject”. No investigations ensued, as far as Amnesty International is aware.

On 26 March 2013, lawyers filed an emergency motion for “humanitarian and life-saving relief” in District Court, relaying that Musa’ab al Madhwani had the previous day told them in a telephone call, through an interpreter, that he had been on hunger strike for some time to protest what he said were deteriorating conditions of detention, including lack of potable water and cold temperatures in his cell. In a statement filed in court, the detainee expressed his sense of hopelessness and of “dying of grief and pain on a daily basis because of this indefinite detention”.

A doctor retained by al Madhwani’s lawyers signed a statement on 13 April 2013 in which, among other things, he expressed concern that a deterioration of conditions of confinement “could trigger in Mr Al Madhwani the symptoms of post-traumatic stress disorder linked to the effects of his torture”. The re-traumatization or the re-experiencing of trauma by torture victims is well documented. The UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) describes how “distress at exposure to cues that symbolize or resemble the trauma is frequently manifested by a lack of trust and fear of persons in authority, including physicians and psychologists.”<sup>134</sup> Any of those detained at Guantánamo and previously subjected to torture may in any event already be experiencing re-traumatization as a result of the detention regime they are subjected to. The authorities are under an obligation to provide rehabilitation to any victims who have suffered torture or other ill-treatment by US officials.<sup>135</sup>

On 11 April 2013, the Department of Justice urged the District Court to summarily dismiss the emergency motion for lack of jurisdiction under §7.2 of the MCA.<sup>136</sup> On 15 April, the judge dismissed the emergency motion on these grounds.

On 3 July 2013, in a case brought on behalf of four Guantánamo detainees seeking to end the use of force-feeding against them, the administration again moved to have the lawsuit rejected.<sup>137</sup> On 16 July, the Court ruled that it was “without jurisdiction here” as MCA §7.2 “expressly deprives federal courts of jurisdiction to consider actions regarding the treatment of Guantánamo detainees or their conditions of confinement”.<sup>138</sup>

***The USA should adopt the necessary amendments to bring the Military Commissions Act and the Detainee Treatment Act 2005 in compliance with its international law obligations, including by amending or repealing, as appropriate, Section 7 of the Military Commissions Act, as well as Sections 5, 6 and 8, and Section 1004 of the Detainee Treatment Act 2005.***

## 5.2 DEATHS IN CIA CUSTODY

In 2011, the US Attorney General announced that a preliminary review then being conducted into some interrogations of some detainees by the CIA was at an end, and that a full criminal investigation was not warranted, except into the cases of the deaths in custody of two individuals.<sup>139</sup> One was Gul Rahman, an Afghan national taken into custody in Pakistan who died in a secret CIA facility north of Kabul in Afghanistan in November 2002, reportedly after being stripped, assaulted, and left in a cold cell without blankets. The other was Manadel al-Jamadi, who died in Abu Ghraib prison on 4 November 2003. On 30 August 2012, the Attorney General announced that there would be no criminal charges brought against CIA personnel in relation to

either of the two deaths.<sup>140</sup>

Manadel al-Jamadi was a CIA “ghost detainee”, who had just been brought into the prison by Navy Seals and the CIA but kept off the prison register by the CIA. Eight Navy Seals and a sailor were later given administrative punishments for assaulting Manadel al-Jamadi and other detainees. The only person brought to trial by court-martial, a Lieutenant accused of hitting al-Jamadi and of failing to restrain the men in his unit, was acquitted of all charges.<sup>141</sup> In 2009, the Office of Inspector General at the Department of Justice said it was “not aware of any charges or any other discipline having been brought against any CIA agent involved in the interrogation of this detainee”.<sup>142</sup>

According to a military investigation, Manadel al-Jamadi was arrested at his home in Baghdad by members of Navy Seals Team Seven (ST-7), and initially taken to a forward operating base where he was “repeatedly kicked punched and struck with weapons by ST-7 members”. He was taken to a facility at Baghdad International Airport, interrogated there by the CIA and then transported to Abu Ghraib. When brought into the prison, he was still naked from the waist down, his legs were shackled and he was hooded with a plastic sack. His hands were cuffed behind his back with flexi-cuffs secured so tightly that a guard would later reportedly have “trouble cutting them off”. He was initially put in a holding cell, where the guards reported hearing the CIA interrogator and interpreter “yelling” at the detainee. One guard reported that he saw the detainee “in the corner of the cell in a seated position like a scared child with the translator and interrogator leaning over him yelling at him” The CIA personnel then ordered the guards to take the detainee to “tier one” in the prison. Manadel al-Jamadi was taken to a shower room for interrogation, and on the orders of the CIA interrogator, who “did not want the prisoner to sit down”, was secured to the window bars with “leg irons”.<sup>143</sup> The CIA personnel then resumed the interrogation.

Later a guard was called down by the CIA and found al-Jamadi “slouched in the corner on his knees”, still shackled to the window, with no pulse. Removal of the hood revealed the detainee had a very swollen eye, and when his head tipped forward, “a large amount” of blood poured out. A guard told military investigators that both of the CIA personnel “appeared to be excited about what to do”, and that the “short fat” CIA “guy” said, “No one’s ever died on me before when I interrogated them”. The cause of death was “homicide”, according to the autopsy report.<sup>144</sup>

### 5.3 GUANTÁNAMO DEATHS

In 2004, the International Committee of the Red Cross said it had “observed a worrying deterioration in the psychological health of a large number” of the Guantánamo detainees.<sup>145</sup> In 2006, the Committee against Torture said that indefinite detention without charge was *per se* a breach of UNCAT.<sup>146</sup> In 2013, the UN Special Rapporteur on torture said: “At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment.” There have been nine detainee deaths at Guantánamo, in most cases the official cause of death has been suicide:

- ⊗ June 2006 – Two Saudi Arabians, **Mane’i bin Shaman al-‘Otaybi** and **Yasser Talal al-Zahrani**, and one Yemeni, **Salah Ahmed al-Salami** (suicide)
- ⊗ May 2007 – Saudi Arabian **Abdul Rahman Ma’ath Thafir al-Amri** (suicide)
- ⊗ December 2007 – Afghan **Abdul Razzak Hekmati** (cancer)
- ⊗ June 2009 – Yemeni **Mohammed Ahmed Abdullah Saleh al-Hanashi** (suicide)
- ⊗ February 2011 – Afghan **Awal Gul** (natural causes)
- ⊗ May 2011 – Afghan **Inayatollah** (suicide)
- ⊗ September 2012 – Yemeni **Adnan Farhan Abdul Latif** (suicide)

Adnan Farhan Abdul Latif had repeatedly expressed despair at his indefinite detention. By 8

September 2012, three months after the US Supreme Court refused to take his appeal against denial of his habeas corpus petition, Adnan Latif was dead.<sup>147</sup> The military authorities determined that his death was the result of suicide by overdosing on medication.<sup>148</sup> The Guantánamo Review Task Force had approved him for “transfer to a country outside the United States that will implement appropriate security measures, taking into account any necessary mental health treatment”.<sup>149</sup> This “final disposition” was dated 22 January 2010 – more than two and a half years before this detainee killed himself – yet the USA continued to subject him to the cruelty of indefinite detention.

In 2009, the parents of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami, two of the three men who died in 2006 in Guantánamo, brought a lawsuit seeking compensation and other redress “on behalf of their sons for the prolonged arbitrary detention, torture and cruel treatment” they had suffered in US custody. The lawsuit sought compensation and punitive damages for physical, psychological, and emotional injuries; loss of earnings and earning capacity; loss of interfamilial relations; and medical expenses.<sup>150</sup>

The defendants – former Bush administration officials – moved to have the District Court dismiss the claims on the grounds that the Court lacked jurisdiction to hear the claims under MCA §7.2, that “special factors” precluded a “*Bivens*” remedy, and even if *Bivens* could be invoked, the defendants were entitled to qualified immunity.<sup>151</sup> On 16 February 2010 the judge granted the Obama administration’s motion to dismiss (the administration had moved to substitute itself for the defendants). The judge dismissed the lawsuit on the *Bivens* angle.<sup>152</sup> The case went to the Court of Appeals, where the Obama administration argued that the District Court had lacked jurisdiction under MCA §7.2.<sup>153</sup> The Court agreed, ruling that “this ends the litigation and requires that we affirm the dismissal of the action”.<sup>154</sup>

☑ ***The USA must ensure that all deaths in custody are promptly and impartially investigated, in a manner that is consistent with international law and standards, and that there is full accountability and remedy for any wrongdoing found.***

## 6. INDEFINITE DETENTION AT GUANTÁNAMO

It is now more than eight years since the Committee against Torture, after reviewing the USA’s last report to it under UNCAT, noted that “detaining people indefinitely without charge constitutes per se a violation of the Convention”. It called on the USA to “cease to detain any person at Guantánamo Bay and close the detention facility”.<sup>155</sup>

In an executive order on 22 January 2009, President Obama committed his administration to closing the Guantánamo detention facilities by 22 January 2010 at the latest. Nearly five years later, there are still more than 100 detainees held at the base, most of them without charge or trial. The US administration blames Congress for the failure to close the facility, and Congress has indeed tried to place a variety of obstacles in the way of closure. This is no excuse. Any attempt by the US authorities to invoke domestic political and legislative obstacles as justification for its failure to meet its international law obligations should be rejected as illegitimate under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law.<sup>156</sup>

In any event, there is a near-consensus between these two branches that the USA is engaged in a global war, and that human rights obligations are largely inapplicable in this context. Without a fundamental shift in approach, even if the administration were to close the Guantánamo detention facility tomorrow, a similar system of detentions, and many of the detainees themselves, would simply be moved elsewhere. Closing Guantánamo will represent real improvement in respect for human rights only if it is accompanied by an end to the related practices it has come to symbolize. The administration even asserts the right to return detainees acquitted at trial to indefinite detention under the ‘law of war’.<sup>157</sup>

In January 2010, the Guantánamo Review Task Force established under President Obama’s 2009

order revealed that it had decided that there were some four dozen detainees who could neither be tried nor released by the USA, and were “approved for continued detention under the AUMF”.<sup>158</sup> Forty-one of the 48 remain in detention today, as two Afghan nationals in this category have since died (Awal Gul and Inayatollah), and five Afghan nationals were released to Qatar in May 2014 as part of a prisoner swap.<sup>159</sup>

Among the 41 detainees is Kenyan national Mohammed Abdulmalik. Illustrating the scope of the USA’s global war framework, he was arrested in February 2007 by police in Kenya before being handed over “to the Americans, who took me to Djibouti, Bagram, Kabul and Guantánamo Bay”.<sup>160</sup> He remains in Guantánamo, without charge or trial, six and a half years after he was taken there on 23 March 2007. Another is Somali national Hassan Ahmed Guleed, who was arrested in March 2004 in his home in Djibouti by local authorities. He was transferred to CIA custody and subjected to enforced disappearance for two and a half years before being transferred on 4 September 2006 to Guantánamo where he remains without charge or trial and no currently stated intention on the part of the USA to change that status.

The vast majority of detainees have been held in indefinite detention without charge, not knowing if or when they will be brought to trial or released. This includes those who have been “approved for transfer” (for at least the past four and a half years) and those “referred for prosecution” but who have not been charged in those same four and a half years since the Task Force report.

Among the latter, for example, is Saifullah Paracha, a 67-year-old Pakistan national who was seized by US agents believed to be with the CIA, in Bangkok, Thailand in July 2003. He was taken to Afghanistan, and held for over a year in Bagram before being transferred to Guantánamo on 19 September 2004. He has been held without charge for 11 years. Another detainee in this “referred for prosecution” category is Zayn al Abidin Muhammad Husayn (more commonly known as Abu Zubaydah). This stateless Palestinian man has been in US custody for more than 12 years without charge or trial. During that time he has been subjected to four and a half years of enforced disappearance in CIA custody, followed by more than eight years in US military custody at Guantánamo. He has yet to have a ruling on the habeas corpus petition filed on his behalf in 2008.

No government should be permitted to diminish the quality of justice to compensate for its own past injustices, even if that injustice took place under a previous executive and legislature. Any Guantánamo detainee who cannot be brought to fair trial should be released. This is whether the government does not have enough evidence to bring a prosecution or whether the evidence the government does have has been rendered inadmissible in a fair trial by the way in which it was obtained, for example through torture or other ill-treatment.

The families of Guantánamo detainees are forced to share the twilight world of despair inhabited by their relatives. Detainee and family alike have no idea about when, if ever, release or fair trial will come. For example, Obaidullah, an Afghan man who has been in US custody since July 2002, is held without trial at the naval base, some 8,000 miles from home. His daughter, born two days before he was seized, is now over 12, only seven years younger than Obaidullah himself was when taken from his home by US forces and allegedly subjected to torture or other ill-treatment in Afghanistan before being transported to Guantánamo.

Musa’ab Al Madhwani has also been held in Guantánamo since 2002. His allegations of ill-treatment in secret US custody in Afghanistan before his transfer to Cuba have been found credible by a US judge. Last year, this Yemeni man recalled: “Both of my parents have died during the time that I have been in prison in Guantánamo Bay. They were waiting for me to come home and now they are gone. I am afraid that my entire family will be dead before I am released from this prison... I am dying of grief and pain on a daily basis because of this indefinite detention”.<sup>161</sup>

When the Bush administration chose to flout international law in its detention and interrogation policies in what it called the “global war on terror,” it set in train a sequence of events that generated injustices for individuals and their families that continue to fester to this day. The failure of the Obama administration and Congress to put this situation right – as they are obliged to do

under US international human rights obligations – leaves the USA operating a detention facility from which detainees get out, not by judicial ruling or other transparent process equally applied, but by executive discretion (or death). This is an affront to the rule of law and human rights.

☑ ***The detentions at Guantánamo must be addressed in a way that fully complies with the USA's obligations under international law.***

☑ ***Pending resolution of the situation, there should be full access to independent medical professionals, UN experts, and human rights organizations, and a review to ensure all policies comply with international human rights law and standards and medical ethics.***

☑ ***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 fair trial conducted by ordinary federal civilian court, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.***

☑ ***All detainees shall have access to effective remedies for the harm suffered as a consequence of unlawful detention, as well as of resulting from unlawful conditions and treatment in detention.***

## 7. APPENDIX M OF THE ARMY FIELD MANUAL

The DTA of 2005 provides that no-one in the custody or effective control of the US Department of Defense (DoD) or held in a DoD facility shall be subjected to any interrogation technique not authorized by the US Army Field Manual on interrogations. The DTA prohibits “cruel, inhuman, or degrading treatment or punishment”, as defined in US law.<sup>161</sup>

On 13 April 2006, the OLC at the Department of Justice produced a secret “memorandum for the files” explaining its conclusions relating to DoD draft documents on the treatment and interrogation of detainees, including Appendix M of a revised Army Field Manual. At this stage, Appendix M guided the use of six “restricted interrogation techniques” not otherwise authorized under the manual (believed to include isolation, dietary manipulation, environmental manipulation, and sleep adjustment). The OLC gave legal approval for all six techniques (including under the DTA), as long as they would be restricted to the interrogation of “enemy combatants believed to possess important intelligence that may help safeguard US forces and protect US interests” and not to anyone protected by the Geneva Conventions.<sup>162</sup>

On 6 September 2006, the US Army released its updated version of the Army Field Manual on interrogations, implementing the requirements of the DTA. The manual expressly prohibits certain techniques, including water-boarding, electric shocks, sexual humiliation, hooding, use of dogs, mock executions and deprivation of food, water or medical care.

Appendix M, however, provides for an interrogation method described as “physical separation” (i.e. solitary confinement), initially for 30 days, but with provisions for unlimited extensions. At the same time, the Manual states that the use of separation must “not preclude the detainee getting four hours of continuous sleep every 24 hours.” Again there are no limitations placed on this, apparently meaning that such limited sleep could become a part of the 30-day separation regime, and extendable indefinitely.<sup>163</sup>

As already noted, in July 2007, the OLC gave the CIA legal approval for the use of six “enhanced interrogation techniques”, including prolonged sleep deprivation used against detainees held incommunicado in solitary confinement. The CIA had told the OLC that the agency particularly favoured the use of sleep deprivation, used to bring the detainee to a “baseline state”. The detainee

would be kept awake by being shackled in a position that would prevent him from falling asleep, either in a standing position with hands shackled around shoulder height, or in a sitting position on a small stool of “insufficient width for him to keep his balance during rest”. Sleep deprivation would frequently be combined with “diapering” – the detainee made to wear a diaper “because releasing a detainee from the shackles to utilize toilet facilities would... interfere with the effectiveness of the technique.”<sup>164</sup>

At that point, the Army Field Manual governed procedures for military interrogators, not the CIA. However, the 20 July 2007 OLC memorandum considered the Manual in its assessment. It noted that “while none of the six enhanced techniques proposed by the CIA is expressly prohibited under the current Manual, two of the proposed techniques – ‘dietary manipulation’ and ‘sleep deprivation’ – were prohibited in an unspecified form by the prior Manual”. This earlier Manual, it noted, “was designed for traditional armed conflicts” rather than the “war on terror”. It noted that Appendix M, authorizing “an additional interrogation technique for persons who are unlawful combatants and who are ‘likely to possess important intelligence’”, “reinforces the traditional executive understanding that certain interrogation techniques are appropriate for unlawful enemy combatants that should not be used with prisoners of war”.<sup>165</sup> Further OLC authorizations on this issue occurred through the remainder of 2007.

The Department of Justice memos were withdrawn pursuant to President Obama’s executive order on interrogations, signed on 22 January 2009. Under this order, the CIA is limited to using interrogation techniques authorized in the Army Field Manual, including Appendix M. The CIA is thereby, as the Obama administration notes in its written answers of 3 July 2013, currently prohibited from using “water-boarding”, as it is specifically prohibited in this version of the Manual. It bears repeating, however, that no-one has been prosecuted for previous CIA use of this and other techniques, and that one executive order can be overturned by another.

With US reservations to UNCAT and the ICCPR still in place, prolonged sleep deprivation used against detainees held in isolation, including as described in the 2007 memorandum, could currently be considered lawful by the USA under Appendix M.

At a 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.<sup>166</sup>

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.<sup>167</sup> Prolonged incommunicado detention can itself amount to a violation of the prohibition of torture or other 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,<sup>168</sup> 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.<sup>169</sup>

***☑ The USA should ensure that the Army Field Manual contains a single set of***

***interrogation rules applicable to all detainees and consistent with its international obligations***

## 8. ACCOUNTABILITY FOLLOWING ALLEGATIONS OF TORTURE BY CHICAGO POLICE

In response to the Committee against Torture's request for updated information on investigations and prosecutions relating to the allegations of torture perpetrated in Area 2 and Area 3 police headquarters in Chicago between 1972 and 1991, the US administration has related that in 2010 a federal jury convicted former Chicago Police Department (CPD) Commander Jon Burge on perjury and obstruction charges relating to his denials that he had participated in acts of torture on suspects in police custody. The USA reported that Burge was sentenced to 54 months in prison in January 2011. He has been released since the USA submitted its periodic report to the Committee.<sup>170</sup>

In addition to beatings, individuals alleged that they had been subjected to electric shocks, had plastic bags placed over their heads and had been threatened with mock executions. Confessions made in this context contributed to dozens of individuals being sentenced to long prison sentences or, in the case of 11 individuals, death sentences. Sixteen of the alleged victims have since been released on grounds of innocence, according to the People's Law Office of Chicago. At least 19 others remain incarcerated.

No officer has ever been prosecuted or convicted for any acts of torture committed by members of the CPD. After years of inaction by the authorities, two special prosecutors were appointed in 2002. In 2006, the prosecutors concluded that the statute of limitations prevented the prosecution of Burge or others under his command.

In 2010, members of Chicago's congressional delegation introduced federal legislation criminalizing acts of torture when committed by law enforcement officials in the USA and precluding a statute of limitations for the prosecution of such crimes. However, the Law Enforcement Torture Prevention Act (LETPA) has not been passed (See Section 3 recommendations above).

Many victims are still waiting for reparations. An ordinance is still pending in the Chicago City Council that would allocate \$20 million toward redress to torture victims. The ordinance aims to create a commission to administer financial compensation, as well as creating a medical, psychological, and vocational center on the South Side of the city.

***☑ The competent city and state officials should ensure that effective investigations into allegations of torture or other ill-treatment committed by law enforcement officials are conducted; that suspected perpetrators are brought to justice; and that effective reparations are provided;***

***☑ The City Council of Chicago should pass the city council ordinance providing reparations to the victims of such acts by the Chicago Police.***

## 9. LIFE SENTENCES FOR UNDER-18-YEAR-OLDS

On 25 June 2012, the US Supreme Court outlawed mandatory life imprisonment without the possibility of parole (life without parole) for offenders who were under 18 at the relevant time. Amnesty International had joined a legal brief to the Court seeking a categorical prohibition of this sentence against this age group as required by international law.<sup>171</sup>

The *Miller v. Alabama* ruling came two years after the Court found life without parole sentences imposed for non-homicide crimes committed by under-18-year-olds unconstitutional (*Graham v. Florida*, 2010), and seven years after the Court banned the death penalty against this age group (*Roper v. Simmons*, 2005).

At the time of the *Miller* ruling, there were about 2,500 child offenders serving life without parole in the USA, in some 38 states and in federal prison. According to the Chief Justice, one of the four

Justices who dissented from the Miller opinion, more than 2,000 of these inmates were sentenced under mandatory sentencing schemes.

While *Miller* was a welcome step (notwithstanding the questions about its implementation<sup>172</sup>), the USA remains in violation of international law on this issue, and children or persons who were under 18 years old at the relevant time still face life without parole. For example, on 20 August 2013, in Michigan, a defendant was sentenced to life imprisonment without the possibility of parole for a murder which occurred when he was 16 years old.<sup>173</sup> On 3 September 2013 in Florida, another defendant was sentenced to life without parole for a murder which occurred when he was 16.<sup>174</sup> In October 2014, again in Florida, another defendant was sentenced to this sentence for a murder which occurred when he was 16 years old. Sentencing the defendant, the judge told him “You have forfeited the right to ever be free”.<sup>175</sup>

***☑ The USA should ratify the UN Convention on the Rights of the Child, without reservation or any declaration amounting to a reservation, including to Article 37. It should ensure commutation of all life without parole sentences being served by individual for crimes which occurred when they were younger than 18 years old, to sentences that recognize the individual's age at the relevant time, and are fully consistent with international standards on juvenile justice.***

## 10. PRISON ISOLATION UNITS

An estimated 25,000 prisoners in more than 40 US states and the federal system are held in long-term solitary confinement or isolation in high security facilities, commonly referred to as “super-maximum security” prisons.<sup>176</sup> This number does not include the tens of thousands of other prisoners serving shorter periods in disciplinary or administrative segregation cells.

Prisoners in isolation facilities are typically confined alone, or sometimes with one other prisoner, in small cells for 22-24 hours a day, with no work, educational or rehabilitation programmes or association with other inmates.<sup>177</sup> Some facilities are designed to further reduce environmental stimulation by obstructing vision or access to natural light.<sup>178</sup> Out-of-cell exercise is limited to between five and 10 hours a week and often takes place in bare, high-walled concrete yards providing no view to the outside. Within the units, contact between inmates and prison staff is kept to a minimum, with cell doors remotely controlled and prisoners placed in heavy restraints when escorted outside their cells. Even consultations with medical or psychological staff typically take place behind barriers. Contact with the outside world is also more restricted than for other prisoners, with visits taking place behind a glass screen in most states; in California, prisoners in Security Housing Units (SHUs) who are not in a transition programme are not allowed phone calls to their families, despite the distant location of some facilities meaning many prisoners rarely receive visits.<sup>179</sup>

Conditions such as those described above breach minimum international standards for the treatment of prisoners, including those set out under the UN Standard Minimum Rules, and can amount to torture or other cruel, inhuman or degrading treatment especially if imposed for prolonged periods. Failure to provide meaningful social contact, educational or other programmes to prisoners in long-term segregation units is also contrary to article 10(3) of the ICCPR on rehabilitation.

A significant body of evidence indicates that isolating people, even for relatively short periods, causes serious psychological harm. In the USA thousands of prisoners continue to spend months or years in solitary or isolation cells, sometimes for repeated minor disciplinary infractions or because they are alleged associates of prison gangs. In California, hundreds of prisoners have spent more than 10 years, and many more than 20 years, confined alone for 22 to 24 hours a day in windowless cells in Pelican Bay SHU. While general population prisoners in the federal Administrative Maximum (ADX) “supermax” facility in Florence, Colorado, may progress to less restrictive conditions through a step-down programme after a minimum of one year, many ADX inmates spend years in isolation, confined to solitary cells in conditions that breach international standards for humane treatment.<sup>180</sup>

In most US states and the federal system, prisoners can be held in administrative segregation on security grounds for an indeterminate period. While the US Supreme Court has ruled that this must be subjected to periodic review, there are no clear due process protections in such cases and the review process is regarded as inadequate by advocates in many jurisdictions. There is usually no fixed limit to the time someone can spend in isolation, and decisions by review boards are often discretionary. Even if clear criteria are established, these can be difficult to meet or to challenge due to the restrictive nature of the conditions and lack of activities where prisoners' behaviour can be measured.

The UN Special Rapporteur on Torture, reviewing the findings of UN treaty bodies, regional human rights organizations and other human rights experts, as well as studies on the severe negative psychological and physical effects of solitary confinement, has called on states to limit their use of solitary confinement, applying it "only in exceptional circumstances and for the shortest possible period of time".<sup>181</sup> He has called for the absolute prohibition of solitary confinement for under-18-year-olds and people with mental disabilities, on the ground that its imposition in such cases, for any duration, is cruel, inhuman or degrading treatment.

Although US courts have found that isolating people who are seriously mentally ill in "super-maximum security" facilities is incompatible with the constitutional prohibition of "cruel and unusual punishment", prisoners with mental illness continue to be held in such facilities. Even where policies prohibit the practice, mental health monitoring of prisoners in isolation is often inadequate. According to an ongoing lawsuit, prisoners with serious mental illness have been confined in the federal ADX prison without adequate monitoring or treatment.<sup>182</sup>

Under-18-year-olds continue to be held in solitary confinement in conditions of severe isolation in many jurisdictions, including juvenile facilities, and adult jails and prisons.

Prisoners in pre-trial detention in the federal system have also been held in cruel conditions of solitary confinement. For example, detainees in the Special Housing Unit of the federal Metropolitan Correctional Center (MCC) in New York City have been confined for 23-24 hours a day to small solitary cells with the windows painted over and little access to natural light or fresh air. Syed Fahad Hashmi spent nearly three years in the unit before pleading guilty to one count of conspiring to provide material support to terrorists. Amnesty International has condemned conditions in the unit as amounting to cruel, inhuman or degrading treatment and incompatible with the presumption of innocence in the case of untried prisoners whose detention should not be a form of punishment. The conditions may also impair a defendant's right to assist in his or her defence and thus the right to a fair trial.<sup>183</sup> Chelsea Manning, the former US army analyst charged for leaking classified documents to Wikileaks, was held for nine months in isolation in US military custody following her arrest in 2010 in conditions condemned by the UN Special Rapporteur on torture as "cruel, inhuman and degrading" treatment.

US courts provide only a limited remedy for prisoners held in isolation, generally deferring to prison administrators in deciding what restrictions are necessary on security grounds. The US Supreme Court has not ruled that solitary confinement, even when imposed indefinitely, is per se a violation of the Constitution. The courts have set a high threshold for deciding when prison conditions violate the prohibition of "cruel and unusual" punishments. They have held that conditions must be so severe as to deprive inmates of a "basic necessity of life" – interpreted to mean the physical requirements of food, clothing, shelter, medical care and personal safety – and that the authorities must have shown "deliberate indifference" to a risk of harm.<sup>184</sup> Courts have been less willing to consider psychological pain or suffering as sufficient to render conditions unconstitutional, a situation compounded by the 1995 Prison Litigation Reform Act, which provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury" (42 U.S.C. §1997 e (e)).

Some prisoners have spent years in solitary confinement within the ordinary prison system. Albert

Woodfox (and the late Herman Wallace) has spent most of the past 40 years confined to a solitary cell in Louisiana prisons for 23 hours a day, with no access to work, education or rehabilitation programmes, no association with other prisoners and only limited exercise. Denied any meaningful review of the reasons for their isolation, their solitary confinement continued, despite a 2007 ruling by a federal magistrate that the conditions had taken a serious toll on their health.<sup>185</sup>

***☑ The USA should impose strict limits on the use of solitary confinement of prisoners in the federal system, as well as nationwide, so that prisoners are isolated only when strictly necessary as last resort and for the shortest possible time. Solitary confinement should be abolished for children (anyone under the age of 18) and prisoners with mental illness, mental disability or severe behavioural disorders. All segregated prisoners should be provided with adequate exercise and out-of-cell time, with opportunities for some group interaction and association.***

***☑ The US authorities should grant the UN Special Rapporteur on torture access to federal and state facilities under the terms of his mandate to investigate the use of solitary confinement in prisons across the country.***

## 11. INADEQUATE REGULATION OF STUN WEAPONS

Thousands of police departments, as well as local jails, some state prisons and the military, use conducted energy devices (CEDs) or 'Tasers', the most common form of Electro-Muscular Disruption device in the USA. Authorities deploying Tasers claim they cause fewer injuries than conventional impact weapons, such as batons, and can save lives by preventing an escalation to lethal force in situations involving combative subjects. However, Amnesty International is concerned by the low threshold at which 'Tasers' are deployed in US law enforcement and by a lack of stringent national standards governing their use. Such weapons are particularly open to abuse, as they are portable and easy to use, can inflict severe pain at the push of a button without leaving substantial marks and can be used to apply repeated shocks.<sup>186</sup> As well as firing darts designed to bring down subjects at a distance, they can be used close-up as stun guns against individuals already in custody. The organization's research has shown that 'Tasers' are also potentially lethal and have been implicated in dozens of deaths in recent years.<sup>187</sup>

Most US law enforcement agencies allow use of 'Tasers' at far below the threshold for use of lethal force. Many authorize them as an "intermediate" force tool where they may be applied to avoid the use of impact weapons or even hands-on force. Police have used Tasers against unarmed individuals who resist arrest or who fail to comply immediately with commands; uncooperative suspects being booked into jails; mentally disabled or intoxicated individuals posing no imminent threat to anyone's life; suspects fleeing minor crime scenes, and even schoolchildren. For example, in September 2011 a police officer in Pennsylvania fired a 'Taser' at a 14-year-old schoolgirl, striking her in the groin as she stood against a police car allegedly resisting arrest; police officials said the use of the 'Taser' was justified, and no charges or disciplinary proceedings were brought against the officer responsible. In August 2013, Israel Hernandez, an unarmed 18-year-old graffiti artist who had been paint-spraying an abandoned building, died when Miami police officers chased him and shot him in the chest with a 'Taser'; police said the 'Taser' was used "to avoid a physical incident". In such cases 'Taser' use appears to have violated the prohibition of cruel, inhuman or degrading treatment, as well as international standards requiring law enforcement officials to use force only to the extent strictly necessary, in a manner designed to minimise damage or injury. ■

Since 2001, there have been more than 60 deaths in which medical examiners have listed 'Tasers' as cause or contributing factor; there are other cases where cause of death was undetermined but where the 'Taser' may have played a role.<sup>188</sup> More than 550 people altogether have died after being shocked by 'Tasers' during arrest or while in jail. Most of the deaths have been attributed to other causes, such as drug intoxication or heart disease. Some medical experts and studies have found that shocks from 'Tasers' or similar weapons can exacerbate the effects of drug intoxication or

underlying medical conditions, and a 2012 study published in the American Heart Foundation journal, *Circulation*, found that ‘Taser’ shocks can have a direct fatal effect [on the heart].<sup>189</sup> While deaths may be relatively rare compared to the number of Taser deployments, adverse effects can happen quickly and be impossible to reverse. This underscores the need for strict limits to be placed on their use.

Amnesty International’s research has found that the vast majority of people who have died following ‘Taser’ use were unarmed and most did not appear to present a serious threat when they were shocked and often subjected to other force. The deceased include individuals subjected to repeated shocks, or shocks to the chest, despite evidence indicating increased risk of adverse effects with such use. Some of the deaths after unnecessary or excessive force by police may constitute arbitrary deprivation of life, in violation of Article 6 of the Covenant.

***☑ The USA should introduce strict national guidelines limiting police, military or other use of ‘Tasers’ and similar conducted energy devices to situations in which their use is necessary in order to protect life, and where lesser alternatives are unavailable.***

## 12. THE DEATH PENALTY

There have been over nearly 1,400 executions in the USA since use of the death penalty resumed there in 1977 under revised capital statutes.<sup>190</sup> Amnesty International believes that the death penalty is the ultimate cruel, inhuman and degrading punishment and that it should be abolished in all circumstances. The organization’s opposition to the death penalty is unconditional, regardless of the nature of the crime, the culpability of the offender, or the method chosen by the state to kill the prisoner. The cruelty of the death penalty is not confined to what goes on in the execution chamber, and the cruelty of holding someone under a sentence of death, often for years or even decades, is often exacerbated by the harsh and isolating conditions of detention faced by those on death row.

Recognition under international law of the existence of the death penalty should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. More than 30 years have passed since the Human Rights Committee issued General Comment No. 6 on Article 6 on the desirability of abolition.<sup>191</sup>

The US federal government should:

***☑ Impose a moratorium on federal and military executions, consistent with recommendations from the Human Rights Committee, the Committee for the Elimination of Discrimination, the Inter-American Commission on Human Rights, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and the four UN General Assembly resolutions on a moratorium on the use of the death penalty;***

***☑ Commute the death sentences of those on federal death row.***

***☑ The Attorney General should withdraw any existing authorization for federal prosecutors to seek death sentences and cease any further such approvals;***

***☑ Abandon military commission trials, and drop pursuit of the death penalty against any detainee currently held at Guantánamo;***

***☑ Do nothing in support of any efforts by any state to expedite or facilitate executions of prisoners on death row;***

***☑ Work with federal and state authorities to develop concrete plans to abolish the death penalty across the country as a matter of priority.***

# ENDNOTE

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- <sup>1</sup> Statement by the President on the International Day in Support of Victims of Torture, 24 June 2011.
- <sup>2</sup> “As part of a broader effort to educate and inform the public, on June 26, 2004 honoring the UN International Day in Support of Victims of Torture, President Bush reaffirmed the US commitment to ending torture and stated that the US ‘stands against and will not tolerate torture.’ In so doing, the President informed the public and the international community of US programmes aimed at combating torture and assisting victims of torture. President Bush issued a similar statement in honor of victims of torture on June 26, 2003”, Second Periodic Report of the United States of America to the Committee Against Torture, 6 May 2005, para. 59.
- <sup>3</sup> Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2003.
- <sup>4</sup> Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2004.
- <sup>5</sup> Statement on United Nations International Day in Support of Victims of Torture, 26 June 2005.
- <sup>6</sup> 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>
- <sup>7</sup> See President Barack Obama, News Conference, 29 April 2009 (“I believe that waterboarding was torture”). Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009 (“As I unequivocally stated in my confirmation hearing before the US Senate, water-boarding is torture). On 25 September 2014, Attorney General Holder announced his resignation from the office (he remains in post until a successor is appointed). See <http://www.justice.gov/opa/speech/remarks-attorney-general-eric-holder-announcing-his-plans-depart-justice-department>
- <sup>8</sup> In its Fourth Periodic Report to the UN Human Rights Committee, the USA highlighted its prosecution of David Passaro, a civilian contracted by the CIA who was convicted of assault in the case of Abdul Wali, an Afghan detainee who died in US military custody in Afghanistan in 2003. The prosecution of David Passaro – who was released in 2011 after serving just over four years in prison – remains the exception to the more general rule of impunity for CIA personnel or contractors, despite the agency’s undoubted involvement in crimes under international law. This case was not one that involved the CIA’s “high value detainee” programme, which is the focus of this submission to the Committee against Torture.
- <sup>9</sup> USA: ‘We tortured some folks’: The wait for truth, remedy and accountability continues as redaction issue delays release of senate report on CIA detentions, 2 September 2014, <http://www.amnesty.org/en/library/info/AMR51/046/2014/en>
- <sup>10</sup> Daily Bulletin, US Mission to the UN in Geneva, 22 May 2006.
- <sup>11</sup> USA periodic report, para. 6.
- <sup>12</sup> 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 Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.
- <sup>13</sup> 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, page 39.
- <sup>14</sup> UN Doc.: CCPR/C/USA/CO/4, para. 5.

<sup>15</sup> *Ibid.*

<sup>16</sup> 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, 23 June 2014, <http://www.amnesty.org/en/library/info/AMR51/035/2014/en>

<sup>17</sup> See, for example, Memorandum for the Heads of Executive Departments and Agencies. Subject: Classified Information and Controlled Unclassified Information, The White House, 27 May 2009, <http://www.whitehouse.gov/the-press-office/presidential-memorandum-classified-information-and-controlled-unclassified-informat>

<sup>18</sup> Feinstein statement on CIA detention, interrogation report, 13 December 2012, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635>

<sup>19</sup> USA: 'We tortured some folks', *op. cit.*

<sup>20</sup> Statement of Eve Hill, Senior Counselor to the Assistant Attorney General for Civil Rights, Department of Justice, before the Committee on Foreign Relations, United States Senate, regarding the United Nations Convention on the Rights of Persons with Disabilities, 12 July 2012, [http://www.foreign.senate.gov/imo/media/doc/Eve\\_Hill\\_Testimony.pdf](http://www.foreign.senate.gov/imo/media/doc/Eve_Hill_Testimony.pdf)

<sup>21</sup> Para 256.

<sup>22</sup> Periodic report, para. 11.

<sup>23</sup> Periodic report, para. 4.

<sup>24</sup> UN Doc.: CAT/C/GC/2, para. 9.

<sup>25</sup> Periodic report, see paras. 253 and 255.

<sup>26</sup> UN Doc. A/155/44, para. 180(a).

<sup>27</sup> UN Doc. A/55/44, para. 179(b). The reservation to article 16 reads: "the United States considers itself bound by the obligation under article 16 to prevent 'cruel, inhuman or degrading treatment or punishment', only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." The USA attached an identical reservation to its 1992 ratification of the International Covenant on Civil and Political Rights, Article 7 of which also prohibits cruel, inhuman or degrading treatment or punishment. It is now nearly 20 years since the Human Rights Committee stated that the US reservation is "contrary to the object and purpose of the treaty" and urged that it be withdrawn. Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/79/Add.50 (1995), para. 14. The USA has not withdrawn this reservation either.

<sup>28</sup> Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting. The former CTC legal counsel has challenged the accuracy of the paraphrasing, but apparently does not challenge the attributed comments on the US reservations. See <http://www.docstoc.com/docs/6199392/Jonathan-Fredman-to-SASC-November-17-2008>

<sup>29</sup> Memorandum for commander, Joint Task Force 170. Subject: Legal brief on proposed counter-resistance strategies. Signed by Diane E. Beaver, LTC, USA. Staff Judge Advocate. 11 October 2002.

<sup>30</sup> Counter-resistance techniques. Action memo for Secretary of Defense, from William J. Haynes, General Counsel, US Department of Defense, 27 November 2002.

<sup>31</sup> Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

<sup>32</sup> “The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.”

<sup>33</sup> UN Doc.: CAT/C/USA/CO/2, 25 July 2006, para. 13. The Government of the Netherlands entered an objection on 26 February 1996 objecting, among other things, to the US understanding on the grounds that “it appears to restrict the scope of the definition of torture under Article 1 of the Convention.”

<sup>34</sup> Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>35</sup> Letter to Alberto Gonzales, Counsel to the President from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>36</sup> “By its terms Article 16 is limited to conduct within ‘territory under [United States] jurisdiction’. We conclude that territory under United States jurisdiction includes, at most, areas over which the United States exercises at least de facto authority as the government. Based on CIA assurances, we understand that the interrogations do not take place in any such areas. We conclude therefore that Article 16 is inapplicable to the CIA’s interrogation practices and that those practices thus cannot violate Article 16”.

<sup>37</sup> The six techniques were “facial hold”, “attention grasp”, “abdominal slap”, “insult (or facial) slap”, “dietary manipulation” and “extended sleep deprivation”.

<sup>38</sup> 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.

<sup>39</sup> See USA: The promise of real change. President Obama’s executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>

<sup>40</sup> The Committee against Torture has said that it “understands that the concept of ‘any territory under its jurisdiction,’ linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or de facto control of a State party.” General Comment No. 2, para 7.

<sup>41</sup> General Comment No. 3. UN Doc.: CAT/C/GC/3, para. 43.

<sup>42</sup> Para 127.

<sup>43</sup> USA periodic report, para. 6.

<sup>44</sup> In its General Comment No. 2 issued in 2008, the Committee against Torture wrote: “The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter ‘ill-treatment’) under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment overlaps with and is largely congruent with the obligation to prevent torture.... The Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure”.

<sup>45</sup> John Rizzo, *Company Man* (2014), *op. cit.*, pages 186-187.

<sup>46</sup> See Jack Goldsmith, *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton (2007), page 144.

<sup>47</sup> 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, <http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-bybee2002.pdf>

<sup>48</sup> Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. Memorandum for the President, From Alberto R. Gonzales, 25 January 2002, Draft, 3.30 pm

<sup>49</sup> Letter to the President, from John Ashcroft, Attorney General, US Department of Justice, 1 February 2002.

<sup>50</sup> 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, page 153.

<sup>51</sup> Letter from Acting Assistant Attorney General Steven G. Bradbury, to John Rizzo, Acting General Counsel, Central Intelligence Agency, 31 August 2006.

<sup>52</sup> 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 Acting Assistant Attorney General Steven G. Bradbury, Office of Legal Counsel, US Department of Justice, 31 August 2006. Also Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

<sup>53</sup> Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

<sup>54</sup> See USA: Military Commission Act of 2006 – Turning bad policy into law, 29 September 2006, <http://www.amnesty.org/en/library/info/AMR51/154/2006/en>

<sup>55</sup> 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, page 154.

<sup>56</sup> "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? The bill meets that test" and "our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs". President George W. Bush, remarks on signing the Military Commissions Act of 2006, 17 October 2006. Public Papers of the Presidents of the United States, 2006, book 2, page 1858, <http://www.gpo.gov/fdsys/pkg/PPP-2006-book2/pdf/PPP-2006-book2-doc-pg1857.pdf>

<sup>57</sup> 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, page 34. See also pages 153-154 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. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009.

<sup>58</sup> 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>

- <sup>59</sup> See, for example, USA: Chronicle of immunity foretold: Time for change on counter-terrorism violations after another year of blocking truth, remedy and accountability, 17 January 2013, <http://www.amnesty.org/en/library/info/AMR51/003/2013/en>
- <sup>60</sup> 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>
- <sup>61</sup> Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009.
- <sup>62</sup> Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Senate Review of CIA's Interrogation Program, 5 March 2009, <https://www.cia.gov/news-information/press-releases-statements/senate-review-of-cia-interrogation-program.html>; Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the New Review Group on Rendition, Detention, and Interrogation, 16 March 2009, <https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html>
- <sup>63</sup> Statement of President Barack Obama on Release of OLC Memos, White House, 15 April 2009, <http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-release-olc-memos>
- <sup>64</sup> Department of Justice Releases Four Office of Legal Counsel Opinions, US Department of Justice news release, 16 April 2009, <http://www.justice.gov/opa/pr/2009/April/09-ag-356.html>
- <sup>65</sup> Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Release of Department of Justice Opinions, 16 April 2009, <https://www.cia.gov/news-information/press-releases-statements/release-of-doj-opinions.html>
- <sup>66</sup> Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, US Department of Justice, <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>
- <sup>67</sup> For example, see News Conference by President Obama, JW Marriott Ihilani Resort & Spa, Kapolei, Hawaii, 14 November 2011, transcript available at <http://www.whitehouse.gov/the-press-office/2011/11/14/news-conference-president-obama> ("Waterboarding is torture. It's contrary to America's traditions. It's contrary to our ideals. That's not who we are. That's not how we operate. We don't need it in order to prosecute the war on terrorism.")
- <sup>68</sup> 'I could have stopped them': Ex-CIA lawyer defends waterboarding decision, Spiegel Online, 20 August 2014, <http://www.spiegel.de/international/world/former-cia-lawyer-rizzo-defends-waterboarding-decision-a-986087.html>
- <sup>69</sup> UN Doc.: CAT/C/GC/2, General Comment No. 2 on the Implementation of article 2 by States parties, para. 5.
- <sup>70</sup> See USA: 'We tortured some folks', *op. cit.*
- <sup>71</sup> Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 August 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>
- <sup>72</sup> UN Doc.: CAT/C/GC/2, para. 26.
- <sup>73</sup> US must begin criminal investigation of torture following Bush admission, 10 November 2010, <http://www.amnesty.org/en/news-and-updates/us-must-begin-criminal-investigation-torture-following-bush-admission-2010-11-10>; See also memorandum to the Swiss authorities, 6 February 2011, <http://www.amnesty.org/en/library/info/AMR51/009/2011/en>; and to the Canadian authorities, 12 October 2011, <http://www.amnesty.org/en/library/info/AMR51/080/2011/en>
- <sup>74</sup> George W. Bush, Decision points, Virgin Books, 2010, page 168-169.
- <sup>75</sup> *Ibid.*, page 170-171.
- <sup>76</sup> Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9

November 2009, <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>

<sup>77</sup> *ACLU et al v. Department of Defense, et al.* Opinion and order denying motion to hold defendant CIA in civil contempt. US District Court, Southern District of New York, 5 October 2011.

<sup>78</sup> “[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.

<sup>79</sup> José A. Rodriguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012). Preface, ‘Who I am’.

<sup>80</sup> *Ibid.*, especially pages 183-196.

<sup>81</sup> See USA: Another door closes on accountability, 10 November 2010, <http://www.amnesty.org/en/library/info/AMR51/104/2010/en>. On 5 October 2011, a judge on the US District Court for the Southern District of New York ruled that he will not hold the CIA in civil contempt for destroying 92 videotapes, 12 of which depicted the use of “enhanced interrogation techniques” against two detainees, Abu Zubaydah and ‘abd al Nashiri, held in secret custody by the CIA, reportedly in Thailand. To hold the CIA in contempt for violating a court order, the judge said, would “serve no beneficial purpose”. He said that the CIA’s failure to produce the tapes in response to the court’s “repeated order” and the subsequent destruction of the tapes, “has been remedied” by the information about what was on them and who destroyed them having been produced and by the CIA’s assurances that new protocols against repetition of such an event having been put in place.

<sup>82</sup> Para. 135.

<sup>83</sup> Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009.

<sup>84</sup> Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Senate Review of CIA’s Interrogation Program, 5 March 2009, <https://www.cia.gov/news-information/press-releases-statements/senate-review-of-cia-interrogation-program.html>; Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the New Review Group on Rendition, Detention, and Interrogation, 16 March 2009, <https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html>

<sup>85</sup> Feinstein Statement on CIA Detention, Interrogation Report, 13 December 2012, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635>

<sup>86</sup> 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>

<sup>87</sup> *Ibid.* See Action memo, ‘Counter-resistance techniques’. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002.

<sup>88</sup> See Inquiry into the treatment of detainees in US custody. Report of the US Senate Committee on Armed Services, 20 November 2008, notes 1100 and 1101, <http://www.armed->

[services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf) See also, 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>. 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>

<sup>89</sup> Donald Rumsfeld, *Known and unknown: a memoir*. Sentinel books (2011), page 580n.

<sup>90</sup> CAT/C/GC/2, General Comment No. 2, para. 9.

<sup>91</sup> Human Rights Committee, General Comment 31 (2004), ¶¶15 and 18. Also General Comments 7 (1982) and 20 (1992). UNCAT, articles 12 and 13. Human Rights Committee, General Comment 20 (1992), ¶ 13. UNCAT, articles 1 and 4. Committee against Torture, General Comment 2 (2008), ¶26.

<sup>92</sup> 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.

<sup>93</sup> General Comment no. 31 para. 18.

<sup>94</sup> See e.g. UNCAT articles 5-7, 9.

<sup>95</sup> See USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>

<sup>96</sup> Para. 253.

<sup>97</sup> 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.

<sup>98</sup> UN Doc.: CAT/C/GC/3, para. 17.

<sup>99</sup> 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."

<sup>100</sup> See UN Doc.: CAT/C/GC/3, General comment No. 3, on implementation of article 14 by States parties ("States parties to the Convention have an obligation to ensure that the right to redress is effective. Specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include, but are not limited to: inadequate national legislation, discrimination with regard to accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures for securing the custody of alleged perpetrators, State secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well as the associated stigma, and the physical, psychological and other related effects of torture and ill-treatment. In addition, the failure of a State party to execute judgements providing reparative measures for a victim of torture, handed down by national, international or regional courts, constitutes a significant impediment to the right to redress. States parties should develop coordinated mechanisms to enable victims to execute judgements across State lines, including recognizing the validity of court orders from other States parties and assisting in locating the assets of perpetrators.")

<sup>101</sup> 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>

<sup>102</sup> *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012.

<sup>103</sup> See also *El-Masri v "The Former Yugoslav Republic of Macedonia"*, Written submissions on behalf of Amnesty International and the International Commission of Jurists, 29 March 2012, <http://www.amnesty.org/en/library/info/EUR65/001/2012/en>

<sup>104</sup> *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012, ¶191. Also on truth, see two recent landmark ECtHR rulings on *Husayn (Abu Zubaydah) v Poland* (para. 498) and *Al Nashiri v Poland* (para. 495), available here: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146047> and <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146044>. *Al Nashiri v Poland*: Written submissions on behalf of Amnesty International and the International Commission of Jurists, 5 November 2012, <http://www.amnesty.org/en/library/info/EUR37/002/2012/en>; and *Al Nashiri v Poland*: Written supplementary submissions on behalf of Amnesty International and the International Commission of Jurists, 15 February 2013, <http://www.amnesty.org/en/library/info/EUR37/003/2013/en>. *Husayn (Abu Zubaydah) v. Poland*: Written submissions on behalf of Amnesty International and the International Commission of Jurists, 17 October 2013, <http://www.amnesty.org/en/library/info/EUR37/007/2013/en>

<sup>105</sup> UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, ¶1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005 and UN Human Rights Council, Res. 21/7, 'Right to the truth', UN Doc. A/HRC/21/L.16, 24 September 2012, ¶1 and preamble. 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, at paras 22(b) and 24, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

<sup>106</sup> *Webster Bivens v. Six unknown named agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>107</sup> *Wilkie v. Robbins*, 551 U.S. 537, 25 June 2007.

<sup>108</sup> The doctrine of qualified immunity in US law protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, US Supreme Court (1982). An official's conduct violates clearly established law "when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Al-Kidd v. Ashcroft* (2011), citing *Anderson v. Creighton* (1987).

<sup>109</sup> Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008.

<sup>110</sup> One of the starkest examples was passage of the MCA which furthered impunity, blocked remedy, sought to strip courts of habeas corpus jurisdiction, provided for unfair trials by military commission, and gave the green light, as the administration saw it, for the CIA's secret detention programme to continue. The MCA retroactively (back to 11 September 2001) applied DTA §1004 which provided a "good faith" defence for US personnel relying on authorized interrogation techniques. And while DTA §1003 prohibiting the "cruel, inhuman or degrading treatment or punishment" of persons in US custody was a positive step, this protection was limited to US interpretations of what constituted such ill-treatment.

<sup>111</sup> *Vance v. Rumsfeld*, Seventh Circuit Court of Appeals, 7 November 2012, Judge Hamilton dissenting.

<sup>112</sup> See, for example, USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, <http://www.amnesty.org/en/library/info/AMR51/120/2009/en>

<sup>113</sup> Shafiq Rasul, Asif Iqbal, Rihel Ahmed and Jamal al-Harith.

<sup>114</sup> Their allegations of torture and other ill-treatment include: repeated beatings; prolonged solitary confinement; threats of attacks by dogs; forced nudity; repeated body cavity searches; denial of food and water; sleep

deprivation and disruption; and shackling in painful stress positions for extended periods.

<sup>115</sup> Iraqi nationals Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, Ali H., and Najeeb Abbas Ahmed; and Afghan nationals Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman.

<sup>116</sup> The men alleged, among other things, beatings, stabbing, stripping, hooding, confinement in a box, prolonged sleep deprivation, deprivation of adequate food and water, mock execution, death threats, sexual assault, sexual humiliation, threat of rape, exposure to extreme temperatures, denial of necessary medical care, intention exposure to infection, threats of transfer to Guantánamo, cruel use of restraints, racial abuse, stress positions, intimidation with dogs, threats to family members, sensory deprivation, humiliation through being photographed while naked, solitary confinement, and dousing with cold water.

<sup>117</sup> In Re: Iraq and Afghanistan detainee litigation, Memorandum opinion, US District Court for DC, 27 March 2007.

<sup>118</sup> The dissenting judge wrote: “The plaintiffs in these cases allege that they were beaten, electrocuted, raped, subject to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison... No act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors – who were neither soldiers nor civilian government employees”. He argues that the claims should have been allowed to proceed against both companies. *Saleh et al v Titan and CACI*, US Court of Appeals for the DC Circuit, 11 September 2009.

<sup>119</sup> *Arar v. Ashcroft et al*, US Court of Appeals for the Second Circuit, 2 November 2009.

<sup>120</sup> *Vance v. Rumsfeld*, Seventh Circuit Court of Appeals, 7 November 2012, Judge Hamilton dissenting.

<sup>121</sup> “The State Department relied on the availability of *Bivens* actions when it filed its answers to a number of questions posed by the [UN Committee against Torture]... I do not know whether the State Department will feel compelled to inform the Committee that it was in error with respect to its *Bivens/Davis* representation in light of the majority’s opinion, but there is no ambiguity in what it said”. *Vance v. Rumsfeld*, Judge Wood concurring in judgment.

<sup>122</sup> Although see *Aamer et al vs. Obama et al*, US Court of Appeals for the DC Circuit, 11 February 2014.

<sup>123</sup> *Al Janko v. Gates et al*, Memorandum Opinion, US District Court for DC, 11 December 2011

<sup>124</sup> *Al Janko v. Gates et al*. Brief for Defendants-Appellees, Court of Appeals, DC Circuit, 1 March 2013.

<sup>125</sup> *Al Janko v. Gates*, US Court of Appeals for the DC Circuit, 17 January 2014.

<sup>126</sup> *Ameur v. Gates*, Second amended complaint. In the US District Court for the Eastern District of Virginia, 12 September 2012.

<sup>127</sup> *Ameur v. Gates*, Memorandum in support of the United States’ motion to dismiss... for lack of subject matter jurisdiction. In the US District Court for the Eastern District of Virginia, 1 December 2012.

<sup>128</sup> *Ameur v. Gates*, Memorandum opinion and order. In the US District Court for the Eastern District of Virginia, 20 June 2013.

<sup>129</sup> *Ameur v. Gates*, US Court of Appeals for the Fourth Circuit, 16 July 2014.

<sup>130</sup> See Re Guantánamo: A human rights appeal to the US administration and Congress, 17 May 2013, <http://www.amnesty.org/en/library/info/AMR51/030/2013/en>

<sup>131</sup> USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, February 2011, <http://www.amnesty.org/en/library/info/AMR51/005/2011/en>

<sup>132</sup> For information and references on Musa’ab Al-Madwani’s case, see 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>; USA:

See *no evil, op. cit.*, and USA: Still failing human rights in the name of global 'war', 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/006/2010/en>

<sup>133</sup> *Al-Madhawi v. Obama*, Brief for petitioner-appellant Musa'ab Al-Madhawi, In the US Court of Appeals for the DC Circuit, 15 November 2010.

<sup>134</sup> UN Office of the High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004, UN Doc.: HR/P/PT/8/Rev.1, para. 241. The UN Committee against Torture (CAT) has also observed that "victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured." UN CAT, General Comment No. 3: Implementation of article 14 by States parties, 13 December 2012, UN Doc. CAT/C/GC/3, (GC 3) ¶13.

<sup>135</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 14 (ratified by the USA on 21 October 1994); see also CAT, GC 3, ¶¶11-15.

<sup>136</sup> *Anam et al v. Bush et al*, Supplemental Memorandum to The Issue of Jurisdiction Regarding Petitioner's Emergency Motion, In the US District Court for DC, 11 April 2013.

<sup>137</sup> "The Court lacks jurisdiction to consider a conditions-of-confinement and treatment request to enjoin [the administration] from providing essential nutritional and medical care... Here, through Section 7 of the Military Commissions Act of 2006, Congress has exercised its constitutional prerogative, not to grant, but to withdraw from federal courts jurisdiction to adjudicate conditions-of-confinement claims by detainees at Guantánamo Bay". *Hadjarab et al v. Obama et al*. Respondents' opposition to petitioners' motion for preliminary injunction to stop involuntary feeding. In US District Court for DC, 3 July 2013.

<sup>138</sup> *Shaker Amer et al v. Barack H. Obama et al*, Opinion. US District Court for DC, 16 July 2013.

<sup>139</sup> Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees, US Department of Justice 30 June 2011, <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>.

<sup>140</sup> Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 August 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>.

<sup>141</sup> CIA is likely to avoid charges in most prisoner deaths. New York Times, 23 October 2005. See also Seal Officer Hears Charges in Court-Martial in Iraqi's Death, New York Times, 25 May 2005.

<sup>142</sup> A review of the FBI's involvement and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. *op. cit.* (October 2009, revised). Note 173.

<sup>143</sup> Materials on this case are available at [http://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/DODDOACID009482.pdf](http://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOACID009482.pdf)

<sup>144</sup> "External injuries are consistent with injuries sustained during apprehension. Ligation injuries are present on the wrists and ankles. Fractures of the ribs and a contusion of the left lung imply significant blunt force injuries of the thorax and likely resulted in impaired respiration. According to investigative agents, interviews taken from individuals present at the prison during the interrogation indicate that a hood made of synthetic material was placed over the head and neck of the detainee. This likely resulted in further compromise of effective respiration.... The cause of death is blunt force injuries of the torso complicated by compromised respiration." Final autopsy report, at [http://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/dod003212\\_0.pdf](http://www.thetorturedatabase.org/files/foia_subsite/pdfs/dod003212_0.pdf) and other materials at [http://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/DODDOACID009482.pdf](http://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOACID009482.pdf)

<sup>145</sup> Guantanamo Bay: Overview of the ICRC's work for internees, 30 January 2004, Operational Update, <http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm>

<sup>146</sup> UN Doc.: CAT/C/USA/CO/2, 25 July 2006, para. 22.

<sup>147</sup> See USA: Another detainee dies at Guantánamo, 11 September 2012,

<http://www.amnesty.org/en/library/info/AMR51/077/2012/en>

<sup>148</sup> See also, The death of Adnan Latif, by David Remes (who was Adnan Latif's habeas counsel), 20 July 2013, <http://pubrecord.org/special-to-the-public-record/10900/the-death-of-adnan-latif/>

<sup>149</sup> The list was obtained by the Miami Herald under a Freedom of Information Act request, and is available at <http://media.miamiherald.com/smedia/2013/06/17/15/48/2VNPb.S0.56.pdf>

<sup>150</sup> "At the time of their deaths, both men had been detained for over four years without charge, without notice of why they were being held or a fair chance to defend themselves, and without knowing whether or when their imprisonment would end. They were held in conditions and subjected to techniques that were designed and intended to break them down physically and emotionally, and which caused them to suffer severely. To protest their conditions and illegal detention and demand their rights, they along with dozens of other detainees went on hunger strike for months at a time. Rather than bring their conditions and detention into compliance with basic standards for humane treatment and the rule of law, the government's response was to restrain the men in chairs, force tubes down their noses and throats, and pump food into their stomachs. On June 10 [2006], Mr Al-Zahrani and Mr Al-Salami were reportedly found dead in their cells. A third detainee, Mani Al-Utaybi, was found dead the same night. The day of the deaths, prior to conducting autopsies or an investigation, the government made a public statement describing the deaths as suicides by hanging. Certain high-level government and military officials had a different choice of words, calling the suicides 'asymmetrical warfare' and 'a good PR move'. The deceased's families and the public had no further information as to the cause and circumstances of the deaths apart from the government's initial public statements for two years, until the Naval Criminal Investigative Service (NCIS), the military agency charged with investigating the deaths, released its final report in June 2008. The military concluded that the deaths were suicides by hanging." *Al Zahrani v Rumsfeld*. Amended Complaint. In the District Court for DC, 29 January 2009.

<sup>151</sup> A "*Bivens*" remedy refers to a 1971 US Supreme Court decision establishing that victims of constitutional violations have a right to recover damages in federal court even in the absence of a statutory route to remedy passed by Congress. *Webster Bivens v. Six unknown named agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>152</sup> *Al-Zahrani v. Rumsfeld*, US District Court for DC, 16 February 2010.

<sup>153</sup> *Al-Zahrani v Rodriguez*, Brief for defendants-appellees, US Court of Appeals, DC Circuit, 13 July 2011.

<sup>154</sup> *Al-Zahrani v. Rodriguez*, US Court of Appeals for the DC Circuit, 21 February 2012.

<sup>155</sup> UN Doc.: CAT/C/USA/CO/2, 25 July 2006, para. 22.

<sup>156</sup> See, Annemie Schaus, Les Conventions de Vienne sur le droit des traités. Commentaire article par article, Olivier Corten & Pierre Klein (dir.), Bruxelles, Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, article 27, p.1124 ("Le principe d'impuissance du droit interne à justifier la non exécution d'un traité, telle que contenue à l'article 27, reflète en tout état de cause le droit international coutumier"). See also, Oliver Dörr & Kirsten Schmalenbach eds., Vienna Convention on the Law of Treaties, A Commentary, Springer, 2012, p.454 "In view of long-standing State practice and case law, Art 27 codifies a rule of customary law".

<sup>157</sup> 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>, and USA: More of the same: New Manual for Military Commissions confirms acquittal may not mean release, 29 April 2010, <http://www.amnesty.org/en/library/info/AMR51/036/2010/en>

<sup>158</sup> See Final Report of the Guantánamo Review Task Force, 22 January 2010, <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>

<sup>159</sup> USA: 'We have the ability to do things': President and Congress should apply human rights principles and close Guantánamo, 13 June 2014, <http://www.amnesty.org/en/library/info/AMR51/036/2014/en>

<sup>160</sup> *Abdulmalik v. Obama*, Declaration by Mohammed Abdulmalik, In the US District Court for the District of Columbia, 13 October 2010.

<sup>161</sup> USA: "I have no reason to believe that I will ever leave this prison alive": Indefinite detention at Guantánamo continues; 100 detainees on hunger strike, 3 May 2013, <http://www.amnesty.org/en/library/info/AMR51/022/2013/en>

<sup>162</sup> Memorandum for the Files. Re: Legal review of Department of Defense draft documents regarding treatment and interrogation of detainees. From Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 April 2006.

<sup>163</sup> Appendix M of FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations. Department of the Army, September 2006.

<sup>164</sup> 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.

<sup>165</sup> 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, page 39.

<sup>166</sup> 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>

<sup>167</sup> 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>.

<sup>168</sup> 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.

<sup>169</sup> 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>

<sup>170</sup> See, for example, Ex-cop Burge leaves prison, but torture victim is left seeking reparations, Chicago Tribune, 2 October 2014, <http://www.chicagotribune.com/news/ct-jon-burge-prison-release-met-20141002-story.html>

<sup>171</sup> The brief is at [http://www.njdc.info/njdc\\_members/images/pdfs/amicus\\_brief\\_miller\\_jackson.pdf](http://www.njdc.info/njdc_members/images/pdfs/amicus_brief_miller_jackson.pdf). See also USA: 'This is where I'm going to be when I die', 30 November 2011, <http://www.amnesty.org/en/library/info/AMR51/081/2011/en>

<sup>172</sup> There have been inconsistent state rulings on the question of whether the Miller ruling applies retroactively or only to future cases (see, for example, States struggling with limits on life for juvenile murderers, 28 August 2013, [http://blogs.findlaw.com/supreme\\_court/2013/08/states-struggling-with-limits-on-life-for-juvenile-murderers.html](http://blogs.findlaw.com/supreme_court/2013/08/states-struggling-with-limits-on-life-for-juvenile-murderers.html)). The Wall Street Journal reported in September 2013 that "the schism over the Miller ruling has helped sow deep confusion among inmates, their lawyers, lawmakers and sentencing-policy advocates. More than a year after the high court ruling, many of the approximately 2,100 people sentenced as juveniles to mandatory life-without-parole sentences before June 2012 are being held in a sort of legal limbo – with few answers in sight". Courts split over ruling on juvenile life sentence: confusion on 2012 decision creates a legal limbo for inmates, their lawyers. Wall Street Journal, 4 September 2013.

<sup>173</sup> See Flint teen gets life in prison without parole in first-of-its-kind juvenile sentencing hearing, 20 August 2013, [http://www.mlive.com/news/flint/index.ssf/2013/08/flint\\_teen\\_gets\\_life\\_in\\_prison.html](http://www.mlive.com/news/flint/index.ssf/2013/08/flint_teen_gets_life_in_prison.html)

<sup>174</sup> Man sentenced to life in prison for murder he committed as teen, 3 September 2013, [http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2013/9/3/man\\_sentence\\_d\\_to\\_lif.html](http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2013/9/3/man_sentence_d_to_lif.html)

<sup>175</sup> Life in prison for teen in fatal Miami Gardens carjacking. Miami Herald, 6 October 2014, <http://www.miamiherald.com/news/local/community/miami-dade/article2530613.html>

<sup>176</sup> For information on the federal system, see Entombed: Isolation in the US Federal prison system, 16 July 2014, <http://www.amnesty.org/en/library/info/AMR51/040/2014/en>

<sup>177</sup> While prisoners in most US long-term segregation facilities are allowed TVs and a limited number of books in their cells, access to hobby-craft and other materials can be severely limited. While in-cell activities may mitigate some of the effects of isolation they cannot compensate for the harsh conditions of long-term cellular confinement, inadequate exercise and lack of human inter-action.

<sup>178</sup> In the Special Management Unit (SMU) of Arizona State Prison and in Pelican Bay SHU, California, the cells have no windows to the outside and face a blank wall. The cell doors in both SMU and Pelican Bay are constructed of heavy gauge perforated metal which a federal judge found "significantly blocks vision and light" (*Madrid v Gomez*) (see USA: Cruel Isolation, AI's concerns about conditions in Arizona Maximum Security Prisons, 3 April 2012, <http://www.amnesty.org/en/library/info/AMR51/023/2012/en>, and USA: The Edge of Endurance, Prison Conditions in California's Security Housing Units, 27 September 2012, <http://www.amnesty.org/en/library/info/AMR51/060/2012/en> Since 1990, Texas has also constructed a series of long-term segregation units in which the cells have no windows and little access to natural light.

<sup>179</sup> SHU prisoners entering a new "step down" programme in California will be allowed one phone-call after the first year of successful completion of the programme, during which they will remain in the same isolated conditions while being monitored for possible progression to graduated group activity after two years.

<sup>180</sup> Although prisoners in ADX have access to in-cell programmes, their conditions of isolation are severe. All are single-celled and while the cells have outside windows, conditions are stark. Cells in the general population do not face other cells and have double-doors, further isolating the occupants. The exercise provision falls short of the UN SMR as inmates are allowed outdoor exercise only on two or three days each week (alternating with indoor exercise), and this takes place in individual cages with no equipment set in an enclosed yard with no view. While prisoners are eligible for the SDP after one year, according to a DOJ analysis provided to the European Court of Human Rights (ECHR) inmates were likely to spend at least three years before being admitted to the SDP; another survey found that at least 43 inmates at ADX had spent eight years in isolation at the facility

(evidence presented in case of *Babar Ahmad and Others v UK*, before ECHR).

<sup>181</sup> Interim Report by the Special Rapporteur on Torture Juan Mendez, 5 August 2011, UN General Assembly A/66/268. The SR defined solitary confinement as the “physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day”.

<sup>182</sup> *Cunningham v. Bureau of Prisons*, 1:12-cv-01570 (D.Colo). The BOP has also admitted that “The main mental health disorders such as bipolar affective disorder, depression, post-traumatic stress disorder and schizophrenia would not preclude a designation to ADX and could be managed successfully there” (*Case of Babar Ahmad and Others v UK*, Judgement of ECHR, 10 April 2012).

<sup>183</sup> See AI statement, *Cruel Conditions for pre-trial prisoners in US federal custody*, 12 April 2011, AI Index: AMR 51/030/2011.

<sup>184</sup> *Wilson v Seiter*, 501 U.S. (1991)

<sup>185</sup> They were placed in solitary in 1972 after the murder of a prison guard at Louisiana State Prison, Angola. They were subsequently convicted of the murder, based largely on the perjured testimony of another prisoner. Both have consistently denied the charges and there are serious concerns about the fairness of their state trials, including the withholding of key exculpatory evidence, which are still pending appeals in the federal courts. Their membership of the Black Panther Party and prison activism has been cited by the Warden of Angola Prison as a factor in the decision to keep them in solitary confinement. Together with another prisoner who has since been released (Robert King), they are known as the “Angola Three” (see USA: 100 Years In Solitary, The ‘Angola 3’ And Their Fight for Justice, 7 June 2011, <http://www.amnesty.org/en/library/info/AMR51/041/2011>). After being diagnosed with terminal cancer in 2013, Herman Wallace was removed to a dormitory in a prison infirmary; appeals for his release on humanitarian grounds have been turned down by the state authorities. Albert Woodfox remains in solitary confinement.

<sup>186</sup> In some US jurisdictions, including the Federal Bureau of Prisons, high security prisoners are made to wear electro-shock stun belts during transportation. Amnesty International has condemned such devices as inherently cruel and degrading because the wearer is under constant fear of being subjected to an electric shock at the push of a remote controlled button by officers for as long as the belt is worn.

<sup>187</sup> See USA: Less Than Lethal? The Use of Stun Weapons in US Law Enforcement, December 2008, <http://www.amnesty.org/en/library/info/AMR51/010/2008/en>

<sup>188</sup> In *Less than Lethal? op. cit.*, Amnesty International describes these concerns in more detail, based on information on more than 300 reported deaths from June 2001 to August 2008, including a review of more than 90 autopsy reports; see also, USA: Stricter limits urged as deaths following police Taser use reach 500, 15 February 2012, <http://www.amnesty.org/en/for-media/press-releases/usa-stricter-limits-urged-deaths-following-police-taser-use-reach-500-2012->

<sup>189</sup> Sudden Cardiac Arrest and Death Associated with Application of Shocks from a TASER Electronic Control Device, <http://circ.ahajournals.org/content/early/2012/04/20/CIRCULATIONAHA.112.097584>

<sup>190</sup> See also USA: Capital deficit: A submission on the death penalty to the UN Human Rights Committee for the 109th Session of the Committee, 16 September 2013, <http://www.amnesty.org/en/library/info/AMR51/062/2013/en>

<sup>191</sup> CCPR General Comment No. 6, The right to life (Article 6), 1982.

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