

USA

**GUANTÁNAMO: A
DECADE OF
DAMAGE TO
HUMAN RIGHTS**

*AND 10 ANTI-HUMAN RIGHTS MESSAGES
GUANTÁNAMO STILL SENDS*

**AMNESTY
INTERNATIONAL**



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GUANTÁNAMO: A DECADE OF DAMAGE TO HUMAN RIGHTS

We decided to hold detainees at a remote naval station on the southern tip of Cuba

George W. Bush, memoirs (2010)¹

Less than two months passed between President George W. Bush ordering his Secretary of Defense to find an “appropriate location” to hold foreign nationals detained in the so-called “war on terror” and the first 20 such detainees – treated like so much human cargo – arriving at the US Naval Base at Guantánamo Bay in Cuba on 11 January 2002.² A decade on, it can seem as if this ill-begotten prison was conceived and born in the blink of an eye.

Not so its demise. If it took about seven weeks to get the Guantánamo detention facility up and running, it is now nigh on seven years since US authorities say they have been working to shut it down.³

In his memoirs, former President Bush defends the decision to locate the detention facility at Guantánamo but also recalls that by early in his second term beginning in January 2005 he had recognized that the detentions had become “a propaganda tool for our enemies and a distraction for our allies”. He subsequently worked, he said, to “find a way to close the prison”.⁴ If indeed he or his administration made efforts after 2005 to close the detention centre, they clearly ended in failure. There were some 245 detainees still held there at the end of his presidency on 20 January 2009.⁵

Two days later, the newly inaugurated President Barack Obama committed his administration to closing the Guantánamo detention facility “promptly” and at the latest by 22 January 2010. To do so, he said, would further the USA’s national security and foreign policy interests as well as the “interests of justice”.⁶ He later said that Guantánamo had become “a symbol that helped al Qaeda recruit terrorists to its cause”. The US electorate, he said, had called for a new approach, “one that recognized the imperative of closing the prison at Guantánamo Bay.”⁷

If so, the electorate has not got what it called for. Today there are more than 150 detainees still at Guantánamo.⁸ The country that was first to put a human being on the moon apparently cannot find its way to closing a prison its last two presidents have said does the country serious harm. Surely this is not rocket science, so what on earth is the problem?

The most immediate reason is that the failure of the administration to act decisively to meet President Obama’s January 2009 commitment on ending the detentions at Guantánamo allowed the issue to become mired in a domestic political impasse in which Congress has acted against closure and the administration has been unwilling or unable to find a way around this. Amnesty International would suggest, however, that the roots of the problem lie further back, in the long-standing reluctance of the USA to apply to itself international human rights standards it so often says it expects of others. A pick and choose approach to international law by the USA long preceded the Bush administration, but was built upon in that administration’s policy responses to the attacks of 11 September 2001. This included its decision to concoct a global “war” framework for its counter-terrorism policies under which the applicability of international human rights law was wholly denied. This global war

“FROM DAY ONE, THE USA FAILED TO RECOGNIZE THE APPLICABILITY OF HUMAN RIGHTS LAW TO THE GUANTÁNAMO DETENTIONS. AS WE APPROACH 11 JANUARY 2012, DAY 3,653 IN THE LIFE OF THIS NOTORIOUS PRISON CAMP, THE USA IS STILL FAILING TO ADDRESS THE DETENTIONS WITHIN A HUMAN RIGHTS FRAMEWORK. THE NOW LONG-STATED GOAL TO CLOSE THE FACILITY WILL REMAIN ELUSIVE – OR ACHIEVED ONLY AT THE COST OF RELOCATING THE VIOLATIONS – UNLESS THE US GOVERNMENT ADDRESSES THE DETENTIONS AS AN ISSUE THAT SQUARELY FALLS WITHIN THE USA’S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS”

theory – under which the Guantánamo detentions were but one outcome, though perhaps its best-known and enduring symbol – continues to infect the body politic in the USA, to the detriment of respect for human rights both by the USA and more generally.

Two weeks before the first detainee flight landed at Guantánamo the US Department of Justice assured the Pentagon that holding “enemy aliens” on Cuban soil would in all likelihood keep them away from the US federal courts. A little noted aspect of this advice was that its authors warned that if a court was ever to scrutinize the detentions they might be found to breach the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992.⁹ This passing nod to international human rights law would remain notable by its rarity but also in the implied admission that the ICCPR could be applicable to the detentions.¹⁰ For, even before this Justice Department memo was written the USA took the position that the protections of the ICCPR do not reach detainees in US custody outside mainland USA.¹¹ It continues to do so despite the clear and unequivocal reiteration to the US government by the expert body established under the ICCPR to monitor its implementation – the UN Human Rights Committee – that this treaty applies to individuals held in US custody outside the USA’s ordinary territory, and that its obligations do not simply disappear in times of war.¹²

Among other things, the ICCPR prohibits torture or other cruel, inhuman or degrading treatment or punishment, arbitrary detention (thereby prohibiting secret detention and enforced disappearance), unfair trial, and discrimination in the application of human rights. It also incorporates the right to remedy for victims of human rights violations. One can see why the Department of Justice raised a red flag about the ICCPR in relation to the Guantánamo detentions, especially given the emphasis placed on this treaty by the USA on the international stage. The ICCPR, the Bush administration proclaimed at the United Nations, was “the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections.”¹³ Not so important, however, that the USA felt it should apply and respect those protections for its own “war on terror” detainees.

Violations of the ICCPR and other human rights treaties came to be part and parcel of the Guantánamo detentions. Detainees were subjected to torture or other ill-treatment either at the prison or before they arrived there. Prolonged incommunicado detention as well as possible enforced disappearances took place at Guantánamo as well as elsewhere in the US detention system. For years, hundreds of Guantánamo detainees were denied their right to have a judge rule on the lawfulness of their detention. The few that faced criminal charges during the Bush years were not brought before any ordinary US court of law; instead, for such prosecutions the government invented an ad hoc system of military commissions, applying rules that fell far short of international fair trial standards.

But, some might ask, is this not an old story? Interrogations at Guantánamo have all but ended, have they not, and anyway has not the ban on torture and other cruel, inhuman or degrading treatment been reinforced by presidential order? The military commissions, now in their third incarnation since 2001, are surely better than they once were, and the detainees have had access to habeas corpus review since 2008 when the US Supreme Court finally rejected the Bush administration’s notion that foreign nationals held at Guantánamo had no right to challenge the lawfulness of their detentions in federal court. Are not unhelpful terms like “alien unlawful enemy combatant” and “war on terror” now generally frowned upon by the administration, and is “unprecedented” transparency not one of its stated priorities?¹⁴ So, after 10 years, why is Amnesty International still talking about Guantánamo as a human rights problem?

The answer is that the detentions at Guantánamo, and the wider policies and practices of which they have been and remain a part, continue to inflict serious damage on global respect for human rights. While Guantánamo may have dropped from the news headlines, the human rights concerns associated with it are far from a finished story, as this report seeks to illustrate.

From day one, the USA failed to recognize the applicability of human rights law to the Guantánamo detentions. As we approach 11 January 2012, day 3,653 in the life of this notorious prison camp, the USA is still failing to address the detentions within a human rights framework. The now long-stated goal to close the Guantánamo detention facility will remain elusive – or achieved only at the cost of relocating the violations – unless the US government – all three branches of it – addresses the detentions as an issue that squarely falls within the USA's international human rights obligations.

The Obama administration has said it remains committed to closing the Guantánamo detention facility on the grounds that it continues to damage national security.¹⁵ What it has not acknowledged, at least not publicly, is the damage being done to international human rights principles. In this regard the damage is not being caused by the fact that the detentions take place at Guantánamo Bay, but by the underlying assertion by the administration that it can continue to hold detainees indefinitely without charge or criminal trial (or even after a detainee is acquitted at a military commission trial), wherever it pleases. The damage, then, will continue as long as the actual policies and practices that Guantánamo has come to symbolize remain. And while repetition of the promise to close Guantánamo is by now wearing thin, the failure to meet this promise has allowed the domestic discourse to be dominated by the politics of fear. This has made the likelihood of human rights principles being recognized and fully respected by the USA even more remote, and fed the possibility that a future president might expressly decide to keep the facility in operation indefinitely. At least four would-be Republican successors to President Obama said in televised debates in November 2011 that they would keep the Guantánamo prison open if they were to become President.¹⁶

The failure to resolve the detentions and to ensure accountability and remedy for past abuses has also allowed the original overseers of the Guantánamo detention facility to claim what they see as the moral high ground. In her 2011 memoirs Condoleezza Rice, National Security Advisor at the time of the facility's conception, recalls that there was "no disagreement" among the Principals of the National Security Council over the decision to establish the prison camp.¹⁷ For his part, former Secretary of Defense Donald Rumsfeld says that President Obama "had pandered to popular misconceptions" by promising to shut the Guantánamo facility down, and that his administration's failure to find "a practical alternative" was one of the signs that "on most of the big questions regarding our enemies, George W. Bush and his administration got it right".¹⁸ And in yet another set of memoirs, former Vice President Dick

**Friday, 11 January 2002 – Washington, DC,
2.10pm Eastern Standard Time. US Department
of Defense News Briefing with Secretary of
Defense Donald Rumsfeld**

Q: Mr Secretary, now that the first planeload of detainees has landed in Cuba, how do you respond to charges from some non-governmental organizations that hooding, shaving, chaining, perhaps even –

Rumsfeld: What are the words?

Q: Hooding, putting hoods on, shaving, chaining, perhaps even tranquilizing some of these people is violating their civil rights?

Rumsfeld: That – that's not correct.

Q: That you've done it or that it violates –

Rumsfeld: That it's a violation of their rights. It simply isn't.

~~

At least 12 of the 171 men still held at Guantánamo in December 2011 were transferred to the base on 11 January 2002. One of them – Yemeni national Ali Hamza Ahmad Suliman al Bahlul – is serving a life sentence after being convicted by military commission in November 2008. None of the other 11 has been charged.

Cheney maintains that “it’s not Guantánamo that does the harm, it is the critics of the facility”, adding he is “happy to note that for President Obama the ‘imperative’ of closing Guantánamo has evolved into the necessity of keeping it open”.¹⁹

Over a year ago, President Obama blamed the failure to close the Guantánamo detention facility within his one-year deadline on the “difficult” politics surrounding “an issue that has generated a lot of political rhetoric” and made people “fearful”.²⁰ Seven months later his Attorney General blamed members of Congress for the administration’s U-turn on the trial of five detainees accused of involvement in the 9/11 attacks who he said would now be prosecuted before military commissions in Guantánamo rather than in federal court in the USA as he had announced 18 months earlier.

Under international law, domestic law and politics may not be invoked to justify failure to comply with treaty obligations.²¹ It is an inadequate response for one branch of government to blame another for a country’s human rights failure. International law demands that solutions be found, not excuses. The US administration is currently telling the world, in effect, “we will resolve the Guantánamo detentions when the domestic political climate is right”. The USA has not been willing to accept such excuses from other governments seeking to justify their systemic human rights failures, and it should not be accepted when it is put forward by the USA.

The acceptance by the Obama administration of certain basic assumptions that have led to 10 years of military detentions at Guantánamo without fair criminal trial – that the USA is engaged in a global, pervasive, and open-ended “war” to which human rights simply does not apply and in which the President (and sometimes Congress) alone make the rules – has also led to the maintenance or even expansion of policies of extrajudicial execution and sweeping invocations of secrecy that prevent both public scrutiny of government actions and any real chance of victims of human rights violations obtaining redress.²²

10 ANTI-HUMAN RIGHTS MESSAGES GUANTÁNAMO STILL SENDS

So, as Americans, we stand for human rights

John Brennan, Assistant to President Obama for counterterrorism²³

The USA speaks the language of human rights fluently on the global stage, but stumbles when it comes to applying human rights standards to itself. The Bush administration promised to put human rights at the centre of its counter-terrorism strategy, but singularly failed to do so. The Obama administration has promised the same thing, but the USA continues to fall short of this commitment, despite what were undoubtedly positive initial steps in the right direction.²⁴

In a key speech in March 2010 on the Obama administration’s relationship to international law, the Department of State’s Legal Advisor suggested that “from administration to administration, there will always be more continuity than change; you simply cannot turn the ship of state 360 degrees from administration to administration every four to eight years, nor should you”.²⁵ While he cited foreign policy, can continuity of failure on human rights be so explained away? Did the Bush administration’s detention policies have such supertanker-like momentum that they are impossible to reverse or remedy? Or is a deeply unsettling degree of acceptance of those human rights-hostile policies across the US political spectrum helping to leave the USA on the wrong side of its international obligations?

Certainly it was always too simplistic to say that the US response to the atrocities of 11

September 2001 was that of a *unique* administration to a *unique* event. As Amnesty International has long stressed, the Bush administration's "war on terror" policies were not cut from new cloth. The choice of Guantánamo as a location for detentions, for example, built on existing US jurisprudence restricting the applicability of the constitution in the case of federal government actions outside the USA concerning foreign nationals. The policy of renditions expanded upon past practice and a 1995 order signed by President Bill Clinton. Declassified CIA interrogation training manuals from the 1960s and 1980s describe "coercive techniques" echoing the "enhanced interrogation techniques" used by the CIA in the secret program authorized by President Bush. The post 9/11 Justice Department memorandums giving legal approval for such techniques drew upon the USA's long-standing selective approach to international law and its conditional treaty ratifications.

Notions of national history and tradition have played their role too. Reviving military commissions in 2009, for example, President Obama emphasised that such tribunals "have a history in the United States dating back to George Washington and the Revolutionary War".²⁶ President Bush had said much the same thing when calling on Congress to pass the Military Commissions Act of 2006,²⁷ the core provisions of which were incompatible with international law. And executions could also be said to be a US "tradition" given their longevity of use in the USA. The pursuit by both the administrations of death sentences against Guantánamo detainees at military commission trials has hardly come as a bolt out of the blue.

In his March 2010 speech at the American Society of International Law, the State Department Legal Advisor said that, while there may be a degree of continuity between the Bush and Obama administrations, the "most important difference between this administration and the last" is "its approach and attitude toward international law." With this in mind, Amnesty International outlines 10 anti-human rights messages that the Guantánamo detentions continue to transmit to the world. If the USA wishes to end these transmissions, and demonstrate its commitment to human rights, it should finally bring about an end to the practice of indefinite detention without criminal trial, disavow its doctrine of global and pervasive war, and embrace international standards, not just in word, but in deed.

~ ANTI-HUMAN RIGHTS MESSAGE 1 ~

THE WHOLE WORLD IS THE BATTLEGROUND IN A GLOBAL WAR IN WHICH HUMAN RIGHTS DON'T APPLY

*Someone had dared attack America. They were going to pay... I turned to Andy and said,
'You're looking at the first war of the twenty-first century'
George W. Bush²⁸*

The Bush administration responded to the attacks of 11 September 2001 by invoking the vision of a global "war" against al-Qa'ida and other groups in which international human rights law would not apply. The Obama administration has broadly adopted this framework, which is indeed now largely accepted within all three branches of the US government. Since the Bush administration "declared" the "war on terror", the USA has backdated this "war" to having begun prior to 9/11.²⁹ The USA has asserted the exclusive right unilaterally to define the "war" and to make up its rules.

On 14 September 2001, Congress passed a joint resolution, Authorization for Use of Military Force (AUMF), by 518 votes to 1. There seemed to be considerable confusion among legislators as to what they were voting for, including whether it amounted to a declaration of war or not. Some referred to bringing those responsible for the attacks to "justice", but with little or no elaboration – and the AUMF itself makes no reference to detention or trials, or

indeed to human rights. Some felt the resolution did not go far enough, others felt it went too far; some opined that the President had all the power he needed without a resolution; others stressed the limiting effect of the resolution. Nevertheless, legislator after legislator voted in favour of it. The resolution stated that it authorized the president to decide who was connected to the 9/11 attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any geographical limits.³⁰ President Bush signed the resolution into law four days later, and his administration would subsequently exploit it to justify a range of human rights violations.³¹

Even with the evidence before it of how its resolution had been used to violate human rights on a systematic and widespread basis, Congress continued to buy into the global war paradigm. Indeed, at the time of writing, it was set to re-affirm the AUMF and the use of indefinite military detention under it. The version of the National Defense Authorization Act for 2012 adopted by the Senate Armed Services Committee on 12 December 2011 stated: “Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons pending disposition under the law of war”. The “covered persons” are broadly defined and the legislation countenances their “detention under the law of war without trial under the end of hostilities authorized by the Authorization for Use of Military Force”.³³

In seeking to distance itself from its predecessor, the Obama administration has asserted that it does not seek to rely on the President’s constitutional authority as Commander-in-Chief of the Armed Forces to justify the detentions at Guantánamo. Instead, it has said that it is basing its detention authority on the AUMF. In fact, the Bush administration had also latterly sought to justify the detentions by reference to the AUMF. In any event, a Justice Department memorandum issued two weeks after the 9/11 attacks held that the AUMF cannot place “any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”³⁴ This memo has not been withdrawn by the Obama administration.

An interagency review of the Guantánamo detentions ordered by President Obama in January

‘November 20, 2001 is the last time I saw my mother and my family.’

On 20 November 2001, Mohamedou Ould Slahi was asked by security officials in his home city of Nouakchott, Mauritania, to come to the Intelligence Bureau, which he did. He has been in detention without charge or trial ever since.

“I stayed in jail in Mauritania for approximately one week. During that time, Mauritanian [redacted] did not question or interrogate me. Eventually, [redacted] told me I was going to be turned over to Jordan. I was shocked and I asked him, ‘Why?’... [Redacted] said it was not his decision and that the Americans had told the Mauritanian government to send me there. I asked him why the Mauritanian government was not protecting me. He said that the Americans would hurt my country if the Mauritanian government did not follow strictly their instructions. I argued that if the Americans have anything on me they should take me to America, [redacted]. At that time (November 2001), there was no Guantánamo Bay.

Thus, on November 20, 2001, I was sent to Jordan. I was imprisoned and interrogated there for eight months... During the eight months I spent in Jordan, I was always in isolation. The prison was horrible... I was never allowed to see the representatives of the International Committee of the Red Cross (ICRC), who were visiting the prison every two weeks...”³²

On 19 July 2002, Mohamedou Slahi was transferred to Bagram, where he has said he was subjected to ill-treatment and threats of torture. On 5 August 2002, he was transferred to Guantánamo where he was held as an “enemy combatant” and subjected to ill-treatment and where he remains today, held under the “law of war”, as unilaterally asserted by the USA.

2009 concluded a year later that there were 48 detainees who could neither be released nor tried by the USA. They were “unanimously approved for continued detention under the AUMF”.³⁵ Forty-six of the 48 remain in detention, as two Afghan nationals who are believed to have been in this category have since died (see text box, page 20).³⁶ The administration has also asserted the right to return detainees acquitted at trial to indefinite detention under the ‘law of war’ (see below). Thus indefinite military detention without criminal trial of detainees has been retained, as a continued sweeping invocation of the international law of armed conflict, to justify measures taken outside of any specific armed conflict and that are fundamentally incompatible with the ordinary systems of criminal justice operating in a framework of international human rights. The now long-term corrosive effect of misapplying the laws of war to matters of an essentially criminal nature only continues to eat away at broader respect for human rights by the USA in its counter-terrorism efforts.

It bears repeating that among those still held in Guantánamo on “law of war” grounds include people taken into custody far from any battleground as traditionally understood, and not in the territory of a state at war with the USA.

- Mauritanian national Mohamedou Ould Slahi was arrested by local authorities in Mauritania in November 2001, transferred to Jordan for eight months, then handed over to US custody in Afghanistan in July 2002 and transferred to Guantánamo on 5 August 2002.
- In January 2002, Algerian national Belkacem Bensayah was handed over to US custody by authorities in Bosnia and Herzegovina. He has been in Guantánamo since 20 January 2002.
- In early 2002, Yemeni national Zakaria al-Baidany, also known as Omar Muhammed Ali al Rammah, was taken into custody in or around Duisi in the Pankisi Gorge area of Georgia. According to a leaked Pentagon document, he was taken into custody by “Georgian authorities”, handcuffed, put in a vehicle, “taken to a parking lot where he was transferred to another car and then taken to a warehouse where he stayed for four days. After the four days, detainee was driven to another location where he was examined and later taken to an airport

Amin al-Bakri is a Yemeni national believed to have been in US custody for nearly nine years without charge or trial. According to an amended habeas corpus petition filed in US District Court in April 2011, he was abducted by US agents in Bangkok on 30 December 2002 when on his way to the airport to fly back to Yemen after a trip to Thailand. His family did not know his whereabouts or whether he was alive or dead until months later when they received a postcard in his handwriting, via the ICRC, from the US detention facility at Bagram airbase in Afghanistan. According to the petition, prior to his transfer to Bagram he had been held for around six months in secret CIA custody at undisclosed locations and subjected to torture and other abuse. Today, Amin al-Bakri is held at the US Detention Facility in Parwan (DFIP) on the Bagram air base.³⁷

The US military has confirmed that “a Yemeni citizen whose name is the same as or reasonably similar to [Amin al-Bakri’s] is being detained at DFIP”. It maintains that his detention has been found lawful by an executive body – the US military Detainee Review Board (DRB).³⁸ The Obama administration argues that even if a DRB recommends a detainee’s release, as has been alleged it did in Amin al-Bakri’s case in August 2010, “the decision whether to accept the DRB’s recommendation is entirely committed to the discretion of the Executive and necessarily involves complex diplomatic, political, and national security considerations... These considerations are not within the province of the judicial branch”.³⁹ As is the case with the Guantánamo detentions, the Obama administration has since January 2010 been operating a moratorium on returns of detainees to Yemen.

The Obama administration is seeking to have Amin al-Bakri’s habeas corpus petition dismissed without review of its merits on the grounds that the District Court does not have jurisdiction to consider it. In 2009, a District Court judge ruled that Amin al-Bakri and two other non-Afghan nationals held on Bagram airbase should have access to the US courts to be able to challenge the lawfulness of their detention. The Obama administration appealed and won a ruling from the Court of Appeals for the DC Circuit in 2010 overturning the decision. Rather than go to the Supreme Court, US lawyers for the detainees returned to the District Court with new information. The Obama administration is arguing that the new information makes no difference and that “the Court of Appeals’ prior conclusion that habeas does not extend to Bagram remains accurate today”.⁴⁰ Litigation is continuing.

and put on a plane. When detainee landed, an American interrogator told him he was in Afghanistan. Detainee was held in the Afghan National Directorate of Security Prison Number Two for one year.” He was transferred to Bagram air base on 9 April 2003 and to Guantánamo on 9 May 2003.

- Yemeni national Tofiq Nasser Awad al Bihani was arrested in late 2001 or early 2002 by Iranian police in a marketplace in Zahedan, Iran. After several weeks in Iranian custody, he was transferred to detention in Afghanistan. He was handed over to US custody in Bagram in December 2002, before being transferred to Guantánamo on 6 February 2003.⁴¹
- Yemeni national Hussain Salem Mohammed Almerfedi was arrested in Tehran, Iran in early 2002, before being transferred in March or April 2002 to custody in Afghanistan. After being held in Afghan custody in Kabul for about 10 weeks, he was transferred to US military custody in Afghanistan on or around July 2002 before being transferred to Guantánamo on 9 May 2003.
- Saudi Arabian national Ahmed al-Darbi was arrested by civilian authorities in Baku, Azerbaijan, in June 2002, handed over to US custody and transported to Guantánamo on 5 August 2002.
- Pakistani national Saifullah Paracha was seized in Bangkok, Thailand, in July 2003 by US agents, hooded, handcuffed, and thrown into the back of a vehicle. He was held for over a year in Bagram before being transferred to Guantánamo on 19 September 2004.
- Fourteen detainees transferred on 4 September 2006 from the CIA's secret detention program to military custody in Guantánamo, where 13 of them remain, had originally been detained in Thailand, United Arab Emirates, Djibouti and Pakistan. Somali national Hassan Ahmed Guleed, for example, was arrested in his home by local authorities in Djibouti in March 2004. Malaysian national Mohammed Farik Bin Amin was arrested in June 2003 as he came out of a bookshop in Bangkok, Thailand. Libyan national Mustafa Faraj al-Azibi was arrested by Pakistan Special Forces in Mardan, Pakistan, on 2 May 2005. He was transferred to US custody on 6 June 2005.
- Kenyan national Mohammed Abdulmalik 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”.⁴² He remains in Guantánamo, without charge or trial, more than four and a half years after he was taken there on 23 March 2007.

While the Obama administration has not itself transferred any detainees to Guantánamo and has said it will not, it not only uses the global war paradigm as the legal framework for existing detentions there, but also beyond.⁴³ Somali national Ahmed Abdulkadir Warsame was detained by US forces in the Gulf of Aden on or about 19 April 2011, for example, and was apparently held in secret detention for at least two weeks and incommunicado for at least six weeks before he was transferred to New York in early July 2011 and charged with terrorism-related offences. The US authorities responded to Amnesty International's concern about his pre-transfer treatment by saying that “the US Government has consistently asserted that it is at war with al Qaida and its associated forces, and that it may take all lawful measures, including detention, to defeat the enemy”.⁴⁴

The Obama administration has said that its authority to detain individuals in Afghanistan is based on the AUMF. In September 2011 about 2,100 detainees were being held in the US Detention Facility in Parwan (DFIP) on the Bagram air base, more than twice as many as were

being held there a year earlier.⁴⁵ The detainees include three non-Afghan nationals for whom US lawyers have filed habeas corpus petitions and whom a District Court judge said in 2009 should have access to the US courts to be able to challenge the lawfulness of their detention. The Obama administration maintained that they should not have such access and won a ruling from the Court of Appeals in 2010 overturning the District Court decision (see box).⁴⁶ In each of the cases, the government has sought to replace judicial review with executive discretion, saying that military Detainee Review Boards in Bagram had determined that the detainee is “lawfully detained pursuant to the Authorization for Use of Military Force, as informed by the law of war”.⁴⁷

The USA’s global war paradigm is an unacceptably unilateral and wholesale departure from the very concept of the international rule of law generally, and the limited scope of application of the law of armed conflict in particular, as it has existed to date. The negative consequences for human rights of the USA’s double-barrelled assault (‘Human Rights do not apply in War’; ‘Everywhere is War’) are immense. The message sent is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it deems the circumstances warrant it. This is entirely inconsistent with the USA’s stated promise “to strengthen our own system of human rights protections and encourage others to strengthen their commitments to human rights”.⁴⁸

~ ANTI-HUMAN RIGHTS MESSAGE 2 ~

HUMANE DETAINEE TREATMENT IS A POLICY CHOICE, NOT A LEGAL REQUIREMENT

Generations of Americans have understood that torture is inconsistent with our values
President Barack Obama, 24 June 2011⁴⁹

At a press conference on 14 November 2011, President Obama was asked for his response to the fact that some of his would-be successors were defending “waterboarding”, a torture technique that is effectively a form of mock execution by interrupted drowning.⁵⁰ During a televised debate between Republican Party presidential contenders the previous evening, Herman Cain had said “I don’t see that as torture, I see it as an enhanced interrogation technique,” while Michelle Bachmann asserted that the technique was “very effective”. Both said that if they became President they would authorize the use of waterboarding.⁵¹ President Obama responded:

“They’re wrong. 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.”⁵²

On one level, President Obama’s response is to be welcomed, not least given that his predecessor had specifically authorized use of this torture technique. On another level, however, it fell short. He failed to acknowledge that torture is a crime and that governments have an obligation to bring anyone responsible for torture to justice. Coupled with the USA’s failure to bring to account those who authorized or used torture and other cruel, inhuman or degrading treatment, including at Guantánamo, his answer left the impression that he agreed that acceptance or rejection of torture, and the decision about what to do with those responsible for it, is ultimately a question of domestic policy, tradition, and ideals alone.

The administration of President George W. Bush took the decision to deny not only human rights protections, but also the basic protections of international humanitarian law (the laws of armed conflict), including under the Geneva Conventions, to detainees in US military custody outside the USA, including in relation to the conflict in Afghanistan. President Bush

suggested in the same policy memorandum of 7 February 2002 that there were detainees who were “not legally entitled” to humane treatment. The Department of Justice advised the CIA that it could use “enhanced interrogation techniques” in its secret detention program operated under presidential authority so long as the program was not conducted in the USA and would not be used “against United States persons”.⁵³ In his 2010 memoirs, former President Bush asserted that he personally approved the use of “enhanced interrogation techniques”, including waterboarding, against detainees in secret custody. “Damn right”, he recalls as his response to the CIA Director’s request in 2003 for such authorization in the case of Khalid Sheikh Mohammed.⁵⁴ At an undisclosed location prior to being brought to Guantánamo, this detainee was subjected, among other things, to some 183 applications of “waterboarding”.⁵⁵

In his 2010 memoirs, former President Bush defended the decision to locate the detention facility at the Guantánamo naval base. Holding “captured terrorists on American soil”, he said, “could [have] activate[d] constitutional protections they would not otherwise receive, such as the right to remain silent”.⁵⁶ The consequence of this policy decision was predictable, indeed deliberate. For example, Mohamed al-Qahtani – held in US military custody in a location, Guantánamo, that was “outside the sovereign territory of the United States”⁵⁷ – was subjected to torture and other ill-treatment when he “remained silent” in the face of standard interrogation methods (see below).

No one has been brought to justice for these and other acts of torture by the USA that have been publicly admitted and documented. So long as that is still the case, the problem of torture remains a festering injustice, with Guantánamo at the centre. Khalid Sheikh Mohammed and Mohamed al-Qahtani are among the detainees remaining in Guantánamo today. There is as little prospect as there has ever been of seeing Khalid Sheikh Mohammed and others brought to justice before ordinary criminal courts for their alleged involvement in the 9/11 or other attacks; instead, they are charged for unfair trial by military commission (see below). Mohamed al-Qahtani – who has been in US military custody since late December 2001 and at Guantánamo since 13 February 2002 – is held indefinitely without any criminal trial after charges against him were dropped in 2008 on the grounds that he had indeed been tortured, as found by the official then in charge of the military commission proceedings at Guantánamo.

The Obama administration has broken from the interrogation policies pursued by the USA during the early Bush years and has made a clear commitment to ending the practice of torture.⁵⁸ But questions remain as to whether this is a permanent break. Just as it was presidential orders that set the policy lead on detainee treatment in the years after 9/11, today also the policy has been set by presidential order. While interrogation policy now more closely approaches international law on detainee treatment, the question as to what happens when a President with a different approach takes office remains an open one. The door to US torture remains far from being firmly closed and bolted shut.

Clearly, the absolute illegality of torture or that a technique such as waterboarding amounts to torture are not accepted facts across the political classes in the USA, as a number of Republican presidential contenders and members of Congress have recently illustrated.⁵⁹ In addition to those already mentioned, for example, would-be Presidents Mitt Romney and Rick Perry have said that they support the use of “enhanced interrogation techniques”, and refused to reject waterboarding outright.⁶⁰ Another candidate, Newt Gingrich, said to an audience in South Carolina on 29 November 2011:

“Waterboarding is by every technical rule not torture. [Applause] ... It’s not — I’m not saying it’s not bad, and it’s not difficult, it’s not frightening. I’m just saying that under

the normal rules internationally it's not torture. I think the right balance is that a prisoner can only be waterboarded at the direction of the president in a circumstance which the information was of such great importance that we thought it was worth the risk of doing it..."⁶¹

Members of the previous administration – including the former President and Vice-President – have also voiced their continuing support for conduct that constitutes torture and enforced disappearance. In the aftermath of the killing of Osama bin Laden by US forces in Pakistan in May 2011, a former US Attorney General from the Bush administration, Michael Mukasey, claimed that “the intelligence that led to bin Laden” began with “a disclosure from Khalid Sheikh Mohammed (KSM), who broke like a dam under the pressure of harsh interrogation techniques that included waterboarding... That regimen of harsh interrogation was used on KSM after another detainee, Abu Zubaydah, was subjected to the same techniques”. Reviving such an interrogation program would be “a fitting way to mark the demise of Osama bin Laden”.⁶² Noting that the USA looks set to resume the use of “enhanced” interrogation techniques “if a Republican assumes the presidency in January 2013”, a former Bush speechwriter has argued that while “it would be illegal for a foreign adversary to waterboard a US soldier” because “American troops are lawful combatants”, this would not be so for “terrorists”. The latter, he says, are “unlawful combatants” whom the USA “may lawfully coerce...to provide information about imminent terrorist attacks.”⁶³

Repetition by former or current officials of the mantra that the USA's use of secret detention and “enhanced” interrogation “saved lives” has undoubtedly been effective in reducing domestic US public and political calls for accountability, but whether or not their claims are true⁶⁴, such rationalizations for these crimes under international law have been expressly and formally rejected by the world community. Whether in times of peace or time of war or threat of war, whether in normal conditions or under a state of emergency that threatens the life of the nation, violations of the prohibitions of enforced disappearance, torture and other ill-treatment are absolutely forbidden.⁶⁵ Whether torture or enforced disappearance are effective or not in obtaining useful information has expressly been made irrelevant to the question of whether they are lawful – they never are – or whether an individual responsible for these crimes is to be investigated or prosecuted.

Former Secretary of Defense Rumsfeld has said that “the way the administration reached decisions on detainee policy was generally consistent with a predisposition to protect the historic powers of the presidency”.⁶⁶ For a former head of the Office of Legal Counsel at the US Department of Justice, “on issue after issue” in “the war on terrorism”, the Bush administration erred “because it was too committed to expanding the President's constitutional powers”.⁶⁷ From Amnesty International's perspective, domestic interpretations of presidential power become a matter for concern if they are incompatible with international law. Under the Bush administration this was the case; the question is, what about today?

In June 2011, President Obama issued a statement to mark the 24th anniversary of the entry into force of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). “As a nation that played a leading role in the effort to bring this treaty into force”, he said, “the United States will remain a leader in the effort to end torture around the world and to address the needs of torture victims... We also remain dedicated to supporting the efforts of other nations, as well as international and nongovernmental organizations, to eradicate torture through human rights training for security forces, improving prison and detention conditions, and encouraging the development and enforcement of strong laws that outlaw this abhorrent practice.”⁶⁸ Notable by its absence was any explicit reference by the President to UNCAT's requirements on accountability for torture and other ill-treatment.

In 2003, 2004 and 2005, President Bush had also issued proclamations to mark the UNCAT anniversary. In the first, he 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”.⁶⁹ In the second, 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”.⁷⁰ In the third, 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.”⁷¹ At the times he issued these statements, the CIA was operating a secret detention program under presidential authorization and President Bush himself had authorized interrogation techniques against detainees held in this program that amounted to torture and other cruel, inhuman or degrading treatment.⁷²

Clearly words are not enough. Nor was ending such ill-treatment the only thing the Obama administration was legally obliged to do upon entering office. Amnesty International would agree with the US lawyer involved in seeking redress for abuses at Guantánamo when he wrote in November 2011:

“What the Bush administration experience showed was not that torture never works, but that the impulse to torture is ever present. Torture is always seen as a sad necessity, imposed with increasing frequency and brutality as panic and frustration increase. The would-be torturer invokes the scenario of the ticking time bomb, but given the power to torture, officials begin to see ticking time bombs everywhere, perhaps especially if they believe they have been right once before...

The Obama administration can’t just say, ‘Trust us.’ Its challenge was not only to stop the American government from torturing detainees, but to institutionalize the legal infrastructure that would prevent the resumption of torture”.⁷³

History repeats itself when its lessons are ignored. President Obama’s missed deadline of 22 January 2010 for closure of the Guantánamo detention facility has passed into history. It has been replaced with no firm date or plan for closure and the prospect of a new US President embracing the Guantánamo detention facility as a permanent fixture now looms. In similar vein, without the necessary investigations, prosecutions, reparations, transparency and legislation, President Obama’s executive order of 22 January 2009 prohibiting long-term secret detention and “enhanced interrogation techniques” may yet come to be seen as no more than a paper obstacle if and when any future US President decides that torture or enforced disappearance are once again expedient for national security.

~ ANTI-HUMAN RIGHTS MESSAGE 3 ~

EVEN DETENTIONS FOUND UNLAWFUL BY THE COURTS CAN CONTINUE INDEFINITELY

The government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more

US Court of Appeals for the DC Circuit, February 2009⁷⁴

Over a year and a half ago, a US federal judge ordered the release of Mohamedou Ould Slahi, a Mauritanian national who by then had been held at Guantánamo without charge or trial for eight years. The District Court judge had just conducted a habeas corpus hearing, a procedure by which courts review the lawfulness of any deprivation of liberty. Mohamedou Ould Slahi’s detention was unlawful, the judge concluded, adding that “a habeas court may not permit a man to be held indefinitely upon suspicion, or because of the government’s

prediction that he may do unlawful acts in the future...”⁷⁵ The Obama administration disagreed and appealed. Today, Mohamedou Slahi remains in Guantánamo, where he has been held since August 2002 after being taken into custody in Mauritania in late 2001 and secretly transferred to detention in Jordan and then Afghanistan before being brought to the US naval base in Cuba.

Under the USA’s global war framework, the Obama administration argued that Mohamedou Slahi’s detention is lawful. There was no requirement under the AUMF, the US Department of Justice lawyers argued, that Slahi had to have “personally engaged in combat” and it was also of “no moment” that he was transferred to US custody “in a location other than Afghanistan”. The President’s detention authority under the AUMF, it continued, “is not limited to persons captured on a ‘battlefield’ in Afghanistan” and to argue otherwise would “cripple the President’s capability to effectively combat al-Qa’ida”.⁷⁷ In November 2010, the Court of Appeals vacated the District Court ruling and sent the case back for further proceedings on the question of whether Mohamedou Slahi was “a part of” *al-Qa’ida* at the time he was taken into custody despite his claim to have by then severed all ties to the group.⁷⁸ A new habeas corpus hearing may be held sometime in 2012. By then Mohamedou Slahi will have been in custody without charge or trial for over a decade.

“Four independent UN experts welcome the announcement by President-elect Barack Obama to close the Guantánamo Bay detention centre... The experts state that ‘The regime applied at Guantánamo Bay neither allowed the guilty to be condemned nor secured that the innocent be released.’ It also opened the door for serious human rights violations. In addition to being illegal, detention there was ineffective in criminal procedure terms... At the same time they urge that in closing the Guantánamo Bay detention centre and secret facilities, the US government fully respect its international human rights obligations...The experts also stressed that those detainees facing criminal charges must be provided fair trials before courts that afford all essential judicial guarantees. They emphatically reject any proposals that Guantánamo detainees could through new legislation be subjected to administrative detention, as this would only prolong their arbitrary detention.”

UN News Release, 22 December 2008⁷⁶

Would the USA accept such treatment of detainees by other governments? In a human rights assessment of Peru published in 2001, for example, the USA criticized the authorities there:

“Detainees have the right to a prompt judicial determination of the legality of their detention and adjudication of habeas corpus petitions; however, according to human rights attorneys, judges continued to deny most requests for such hearings. In Lima and Callao, detainee petitions for habeas corpus are restricted severely, because under a 1998 executive branch decree issued as part of the war on crime, only two judges are able to hear such petitioners, instead of the 40 to 50 judges in previous years, thereby significantly delaying justice.”⁷⁹

The essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate that a clear legal basis exists for their detention. Normally, if the government is unable to do so promptly, the court is to order the individual released.⁸⁰ A court’s power to obtain the immediate release of an unlawfully held individual must be real and effective and not merely formal, advisory, or declaratory.⁸¹ This is the bedrock guarantee against arbitrary detention (reflected in article 9(4) of the ICCPR, for example). If it is not fully respected by the government and courts in every case, the right to liberty and the rule of law are more generally undermined.

Guantánamo was chosen as a location for detentions in order to bypass this principle. By the time that the US Supreme Court ruled, in *Boumediene v. Bush*, that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in habeas

corpus petitions filed in federal court, detainees had been held there, not for a few days, but for *six and a half years*. Three and a half years since the 2008 *Boumediene* ruling, the notion that the detainees can obtain the “prompt” habeas corpus hearing ordered by the Supreme Court has long since evaporated, and in the name of its global “war”, the USA continues to flout the requirement that any deprivation of liberty be subject to effective control by independent courts.

Even now, it can be years before a Guantánamo detainee gets a hearing on the merits of his habeas corpus challenge. Once he does receive a hearing, he will find that domestic law – under a global war paradigm largely accepted by the federal judiciary – has placed substantial obstacles in the way of him winning a court ruling that his detention is unlawful. Even if he meets that obstacle in the District Court in Washington, DC, the government may turn to the Court of Appeals for the DC Circuit, which will not only mean the detention will continue while that court is briefed and its decision awaited, but also likely result in government victory if the record so far is any guide. By early December 2011, the Court of Appeals had issued 16 decisions – ruling against the detainee in 12 cases and sending the other four cases back to the District Court for further proceedings.

Russian national Ravil Mingazov has been held in Guantánamo since 2002, after being taken into custody by Pakistani authorities in Faisalabad earlier that year. In April 2010, four and a half years after a habeas corpus petition was filed on his behalf, a hearing was held in US District Court on the merits of his petition. The judge ruled that his detention was unlawful and ordered his release. A year and a half later, Ravil Mingazov remains in Guantánamo. The Obama administration appealed the ruling to the Court of Appeals for the DC Circuit, and then obtained a stay of that appeal while it returned to the District Court with “new” evidence to try to persuade the Court to overturn its 2010 ruling. Ravil Mingazov’s US habeas lawyer wrote in September 2011:

“The longer Ravil Mingazov and other detainees sit languishing in Guantánamo as their cases gradually make their way through the courts (only to face near inevitable denial of

From Iran to Afghanistan to Guantánamo

December 2001/January 2002 – Yemeni national Hussain Salem Mohammad Almerfedi is arrested by Iranian police in Tehran

March/April 2002 – Transferred to Afghanistan, held in Kabul

July 2002 – Transferred to US custody in Bagram

9 May 2003 – Transferred to Guantánamo

28 June 2004 – US Supreme Court rules in *Rasul v. Bush* that the US courts can consider habeas corpus petitions for Guantánamo detainees

7 July 2004 – Pentagon announces formation of Combatant Status Review Tribunal (CSRT) for Guantánamo detainees to “contest their enemy combatant status”. The CSRTs will comprise panels of three US military officers. The detainee will not have access to a lawyer for this

15 December 2004 – CSRT affirms Almerfedi as “enemy combatant”

16 August 2005 – Habeas corpus petition filed in District Court on behalf of Hussain Salem Mohammed Almerfedi

5 June 2006 – In response, Bush administration files CSRT decision in District Court and argues that Almerfedi is lawfully held under the President’s war powers

12 June 2008 – US Supreme Court rules in *Boumediene v. Bush* that the Guantánamo detainees have right to a “prompt” hearing to challenge the legality of their detention in US District Court

5 January 2010 – A few days after a failed attempt to bomb a commercial airliner over Detroit, and the suspect’s alleged links to extremists in Yemen, President Obama announces a moratorium on all returns of Yemeni nationals held at Guantánamo to Yemen

3/4/5 March 2010 – Hearing on the merits of Almerfedi’s habeas corpus petition held in District Court

8 July 2010 – “After carefully considering the accuracy, reliability, and credibility of all of the evidence presented... in the context of the evidence as a whole, the extensive legal briefs submitted by the parties, and the arguments presented by counsel during the three-day merits hearing”, District Court rules that the government has not shown “by a preponderance of the evidence” that Hussain Almerfedi was a “part of” al-Qa’ida. He rules the detention unlawful, and orders the detainee’s release

3 September 2010 – Obama administration announces it will appeal the District Court ruling

9 November 2010 – Administration files motion asking District Court to stay its order on the government to “take all necessary and appropriate steps to facilitate the release of [Almerfedi] forthwith” while its appeal is pending

4 March 2011 – District Court judge denies the government’s motion

10 June 2011 – US Court of Appeals for DC Circuit reverses District Court’s ruling and rules that Hussain Almerfedi can be detained

5 December 2011 – US Supreme Court grants Hussain Almerfedi’s motion to file under seal a petition asking the court to review his case

the writ from the DC Circuit), the more credibility the US judicial system loses... I wonder how many times I will have to explain to Ravil, that despite the Supreme Court's mandate to promptly process detainees' habeas claims, the president's promise to close the prison and his [Ravil's] own victory in federal court, it is more likely than not that we will meet again in three months in this overly air-conditioned cell on a steamy island very far away from his elderly mother, his loving wife and his growing son that Ravil last saw eight years ago when he was a baby".⁸²

A recent ruling by the DC Circuit Court of Appeals has raised the bar even higher for the Guantánamo detainees seeking to challenge the lawfulness of their detention. The decision came in the case of Yemeni national Adnan Farhan Abdul Latif, who has been in US custody without charge or criminal trial for a decade. He was seized by Pakistani police in December 2001 near Pakistan's border with Afghanistan, handed over to US custody at the end of that month and transferred to Guantánamo on 17 January 2002. He has been held in the base ever since, with his mental and physical health causing considerable concern along the way.

In a meeting with his habeas lawyer in Guantánamo on 10 May 2009, Adnan Abdul Latif cut one of his own wrists. He had previously made a number of suicide attempts. Writing to his lawyer from isolation in Guantánamo's Camp 5 in March 2010, he said that his circumstances make "death more desirable than living". In a meeting with his lawyer on 25 October 2011, he reported suffering from chronic back pain, and complained of headaches, heartburn, and a sore throat. He has been waiting for years for a hearing aid for deafness in his left ear resulting from a car accident in Yemen in 1994.

In June 2010, eight and a half years after Adnan Abdul Latif was taken into custody, and two years after the Supreme Court's *Boumediene* ruling, a District Court judge held a hearing on the merits of his habeas corpus petition (originally filed in 2004). Adnan Abdul Latif maintained that he travelled to Pakistan in August 2001 to seek medical treatment for the injuries he sustained as a teenager in his 1994 car accident, and that he had travelled to Afghanistan in pursuit of this medical care before fleeing the US bombing of Kabul in late 2001. The US government alleged that he was recruited by al Qa'ida to travel to Afghanistan and that he trained and fought with the Taleban. In July 2010, District Court Judge Henry Kennedy ruled that the government had not proved its theory by "a preponderance of the evidence" and held that Adnan Abdul Latif's detention was unlawful.

The Obama administration appealed. The case turned on a classified intelligence report, which Judge Kennedy had found insufficiently reliable to base the detention upon. The government argued that he had failed to properly assess Adnan al Latif's credibility and had been wrong in its assessment of the reliability of the intelligence report. On 14 October 2011 – nearly a decade after Adnan al Latif was taken into custody – a divided panel of the Court of Appeals ruled 2-1 in favour of the government, overturning Judge Kennedy's order.

The majority ruled that "in Guantánamo habeas proceedings a rebuttable presumption of regularity applies to official government records, including intelligence reports like the one at issue here". The dissenting judge accused his two colleagues of "mov[ing] the goal posts" by "imposing this new presumption", and arguing that it "comes perilously close to suggesting that whatever the government says must be treated as true". He noted that the intelligence report in question was "produced in the fog of war by a clandestine method that we know almost nothing about" which was "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes".⁸³

At the meeting with his lawyer in Guantánamo 11 days after the Court of Appeals ruling on

his case, Adnan Abdul Latif said “I am a prisoner of death”.⁸⁴ It remained to be seen at the time of writing whether his case will be taken up by the US Supreme Court to elaborate on its *Boumediene* ruling, which had left it to the District Court in the first instance to decide the scope of habeas corpus in the Guantánamo context, and which the DC Circuit Court of Appeals has arguably gutted. In 2010, the Supreme Court rejected all seven petitions that had been presented to it from Guantánamo habeas corpus cases that had been through the Court of Appeals.

At the time of writing, Yemeni national Musa’ab al Madhwani, who has been held in Guantánamo for over nine years without charge or trial, was seeking review of his case by the US Supreme Court. His habeas corpus petition had been denied by the District Court in January 2010, although the judge said that he was “not convinced” that the detainee was a threat to US national security, given the absence of evidence that he had either “fired a weapon in battle” or “planned, participated in, or knew of any terrorist plots”. Today, he remains in detention under the AUMF, the District Court’s ruling affirmed by the Court of Appeals in May 2011. In October 2011, a petition was filed in the US Supreme Court asking it to take his case. The petition argues that in trying to implement the 2008 *Boumediene* ruling, “the courts (and in particular the District of Columbia Court of Appeals) have resorted to virtually complete deference to Executive discretion... Fundamental questions of national importance pertaining to limits on executive power and application of notions of due process to the detainees at Guantánamo are raised by this and other such cases”.

Some decisions of the DC Circuit Court of Appeals

11 March 2003 – Upholds District Court ruling that it has no jurisdiction to hear habeas corpus petitions from foreign nationals held in Guantánamo. Reversed by Supreme Court in 2004 (*Rasul v. Bush*)

15 July 2005 – Reverses District Court ruling that the Bush military commissions were unlawful. The Court of Appeals rules that Congress authorized the commissions. Reversed by Supreme Court in 2006 (*Hamdan v. Rumsfeld*)

20 February 2007 – Rules that the Military Commissions Act of 2006 has stripped courts of jurisdiction to hear habeas corpus petitions from Guantánamo detainees and that they have no constitutional rights. Reversed by Supreme Court in 2008 (*Boumediene v. Bush*)

18 February 2009 – Reverses District Court ruling ordering the release into the USA of 17 Uighur detainees held in Guantánamo. Rules that “the government has represented that it is continuing diplomatic attempts to find an appropriate country willing to admit petitioners, and we have no reason to doubt that it is doing so. Nor do we have the power to require anything more.” (*Kiyemba v. Obama*)

24 April 2009 – Upholds District Court ruling that claims by former Guantánamo detainees seeking redress for unlawful detention and torture were not based on rights that were “clearly established” at the time they were detained and “the doctrine of qualified immunity shields government officials from civil liability” (*Rasul v. Myers*)

21 May 2010 – Reverses District Court ruling that non-Afghan detainees held in US custody in Bagram, Afghanistan, can challenge the lawfulness of their detention (*Maqaleh v. Gates*)

18 January 2011 – Upholds District Court ruling that specific details of the detention and interrogation in secret CIA custody of 14 detainees transferred in September 2006 to Guantánamo are exempt from disclosure under freedom of information legislation (*ALCU v. DoD*)

14 October 2011 – Vacates District Court ruling that Adnan Abdul Latif’s detention is unlawful. Rules that in Guantánamo habeas cases, there must be a ‘presumption of regularity’ applied to official government records, including the intelligence report the District Court found to be an unreliable basis for Latif’s detention. (*Latif v. Obama*)

Even if the government had decided not to appeal Judge Kennedy’s ruling, Adnan Abdul Latif might still be in Guantánamo today. He is a Yemeni national and the administration is still operating a moratorium on transfers of detainees to Yemen announced by President Obama on 5 January 2010 based on an assessment of the security situation in Yemen. Only one Yemeni has been transferred to Yemen since then; Mohamed Mohamed Hassan Odaini was released from Guantánamo on 13 July 2010, six weeks after a District Court judge made a particularly emphatic ruling that there was “no evidence” that this detainee had any connection to al-Qa’ida. He berated the government for keeping “a young man from Yemen in detention in Cuba from age eighteen to age twenty-six”, which had done “nothing to make the United States more secure”, but simply kept Mohamed Odaini “from his family” and denied him “the opportunity to complete his studies and embark on a career”.⁸⁵

There are 90 Yemenis still in Guantánamo, including one who is serving a life sentence after being convicted by military commission in 2008. The administration has taken the position that 26 of the other 89 should continue to be held indefinitely without charge or trial under the AUMF. Five others have been referred for prosecution. The remaining 58 detainees, the administration asserts, could be released if the security conditions in Yemen improve or an “appropriate” third country option becomes available. About half of these detainees would be prioritized for transfer over the other half, based on differing threat assessments attached to them by the administration.⁸⁶ The administration has not said which Yemenis fall into which group (apart from those facing or convicted under military commission trials), so it is not known which of the categories it has put Adnan Abdul Latif in.

Today, Abu Zubaydah would appear to be one of the 48 Guantánamo detainees whom the administration said in 2010 it intends to hold indefinitely without criminal trial. However, this has not been confirmed, and even Abu Zubaydah’s habeas corpus lawyers – who have top secret security clearance – have not been told whether their client is one of the four dozen.⁸⁷ No date has been set for a hearing on the merits of his challenge to the lawfulness of his detention, and numerous motions brought by his lawyers since the *Boumediene* ruling remain unadjudicated. Abu Zubaydah’s habeas corpus petition was filed over three years ago and it is now almost a decade since he was taken into US custody and subjected to systematic human rights violations, including the crimes under international law of torture and enforced disappearance, for which no one has been held to account (see below).

It might be considered unlikely that Abu Zubaydah’s habeas corpus challenge will ultimately be successful, given the detention authority claimed by the administration and endorsed by the courts in other cases. But even if his challenge were to be successful, where would he go? He is a stateless Palestinian. The Obama administration has shown itself willing to continue indefinitely holding at Guantánamo individuals whose detention has been ruled unlawful by the courts but for whom no “diplomatic” arrangement for their release has been found. It has found support for this from the Court of Appeals for the DC Circuit. The latter has ruled that in the case of a Guantánamo detainee who wins a ruling that his detention is unlawful, the District Court cannot compel the government to release him as long as it is making good faith “diplomatic attempts to find an appropriate country” willing to admit him.⁸⁹ That country will never be the USA itself, given continuing US government policy – endorsed by the Court of Appeals – not to do what it asks other countries to, namely to receive released detainees (see message 10 below).

"[T]he primary purpose of the habeas corpus writ is the physical production of the person concerned before the court... [W]hile it is important not to be seduced by romantic notions or purple prose, it remains the fact that habeas corpus has been described as 'perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all case of illegal restraint or confinement', and as 'the most efficient protection yet developed for the liberty of the subject'."

Lord Neuberger of Abbotsbury, Master of the Rolls, England and Wales Court of Appeal (Civil Division), in the case of a detainee held in US custody at Bagram.

Pakistani national Yunus Ramatullah was taken into custody by UK forces in Iraq in February 2004, handed over to US custody, and transferred to Afghanistan. He has been held in Bagram since June 2004.⁸⁸

In his order of 21 July 2010 in Adnan Abdul Latif’s case, for example, Judge Kennedy had ordered the government to “take all necessary and appropriate diplomatic steps to facilitate Latif’s release forthwith”. The record from previous such rulings, and the administration’s response to them, show that this amounts to a request to the executive, not an order. Even when courts have ruled a Guantánamo detainee’s detention unlawful and the government has not appealed, release has neither been prompt nor guaranteed.

An executive order signed by President Obama on 7 March 2011 explicitly envisages the possibility of continued detention for months if not years after such a ruling. Under the order, an executive review body is to conduct an *annual* review of “the status of transfer efforts for any detainee whose petition for a writ of habeas corpus has been granted by a US Federal court with no pending appeal and who has not been transferred”.⁹⁰ President Obama’s order can only have yet further corrosive effect on the fundamental role the fairness protections of the criminal justice system play in upholding the right to liberty.

~ ANTI-HUMAN RIGHTS MESSAGE 4 ~

THE RIGHT TO A FAIR TRIAL DEPENDS ON WHERE YOU COME FROM AND THE DOMESTIC POLITICAL TEMPERATURE SURROUNDING YOUR CASE

Quite frankly, when we were here almost two years ago in this case, we weren't going to be here in two years because this place, the detention facility, was going to be closed down. Now we are here.

Military judge, Guantánamo Bay, 9 November 2011⁹¹

Asked about how he saw his role in ensuring a fair trial in the case before him, a military judge presiding over a pre-trial military commission hearing conducted at Guantánamo on 9 November 2011, US Army Colonel James Pohl, noted that “one might say there may be certain gaps that are not present in other more developed systems”.⁹²

If the use of coercive interrogations conducted out of sight of independent judicial scrutiny, legal counsel and other fundamental safeguards for detainees was at the heart of the USA’s detention experiment conducted at Guantánamo and beyond, trials by military commission were conceived as part of the experiment, even before the detentions began at Guantánamo. A forum for trials was developed that was vulnerable to political interference and could minimize independent external scrutiny of detainee treatment. Further, contrary to international guarantees of equality before the courts and to equal protection of the law, the system was applied on prohibited discriminatory grounds: US nationals accused of identical conduct would continue to receive the full fair trial protections of the ordinary US criminal justice system while non-nationals could be deprived of those protections on the basis of their national origin alone.

In a speech on 21 May 2009, former Vice President Cheney recalled that after Pakistani national Khalid Sheikh Mohammed was arrested in Pakistan in March 2003, “American personnel were not there to commence an elaborate legal proceeding, but to extract information from him”.⁹³ By “elaborate legal proceeding”, the former Vice President apparently meant an ordinary criminal trial. The detainee was not brought to trial in a US federal court (where he had previously been indicted), but instead put into secret CIA custody for the next three and a half years during which time he was subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment, including 183 applications of “waterboarding” in March 2003.⁹⁴

The US Supreme Court *Hamdan v. Rumsfeld* ruling in 2006 overturning President Bush’s system of military commissions was seen by the administration as a threat to the CIA’s secret detention program and the wall of impunity built around. The administration moved Khalid Sheikh Mohammed and 13 other CIA detainees to Guantánamo and exploited their cases to obtain passage of the Military Commissions Act of 2006. Legislate for military commissions, President Bush told Congress, and the USA can bring the perpetrators of the 9/11 attacks to justice.⁹⁵ Congress passed the Act, authorizing military commissions that were a very close relative to the ones blocked by the *Hamdan* ruling a few months earlier.

Over five years later, Khalid Sheikh Mohammed and four other detainees whom the USA has charged with involvement in the 9/11 conspiracy – all of whom have been in US custody for more than eight years – have still not been brought to trial. Domestic politics have intervened to deny them “the elaborate legal proceeding”, the fair trial, they are due under international law. Now, despite a change to an administration claiming a new approach to international law, they still face unfair trial by military commission.

There were, briefly, indications that the Obama administration would bring the men to a fair trial in a regular criminal court. On 13 November 2009, Attorney General Holder announced that the five detainees – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz and Mustafa al Hawsawi – would be transferred from Guantánamo for prosecution in ordinary federal court, “before an impartial jury under long-established rules and procedures”. Since then nothing has changed with the federal courts. They remain open for business and with the capacity and experience to conduct such trials. What has changed is the domestic political temperature.

Attorney General Holder’s announcement served to test the political waters, which were found to be hot. In the absence of a prompt and decisive move to actually implement the transfer of the men to the USA, the plan to use the civilian courts for their prosecution became the subject of fierce political controversy in the USA. The Obama administration hesitated – for month after month – and then backtracked. On 14 April 2010, the Attorney General told the Senate Judiciary Committee that the administration was reviewing the question of where to prosecute the five detainees, with a decision expected in a “number of weeks”.

A year rather than weeks later, on 4 April 2011, Attorney General Holder announced that the five men would be charged for trial by military commission. He had previously noted that the

A third of a life spent in US military custody

21 July 2002 – During a night raid in Milani, Khost province, US forces take Afghan national Obaydullah, then aged about 20, from his home on suspicion of being a member of an *al-Qa’ida* bomb cell after mines were found outside the family compound. He is taken for interrogation at Chapman Airfield in Khost. After 36 hours he is transferred to Bagram airbase

28 October 2002 – Transferred to Guantánamo

September 2004 – Affirmed as an “enemy combatant” by CSRT. He tells CSRT that after his arrest, US forces “put a knife to my throat, tied my hands and put sandbags on my arms. At the airport in Khost I was walked around all night with the sandbags on my arms. They took me to Bagram where the interrogation and punishment increased”, allegedly including beatings, stress positions, sleep deprivation, and threats.

12 June 2008 – US Supreme Court rules that the Guantánamo detainees have right to a “prompt” hearing to challenge the legality of their detention in US District Court

7 July 2008 – Obaydullah’s *abeas corpus* petition filed in District Court

9 September 2008 – Obaydullah charged for trial by military commission

12 November 2008 – Government moves to have Obaydullah’s *abeas corpus* petition dismissed or stayed until after his trial and any appeals

2 December 2008 – District Court stays of *abeas corpus* proceedings

20 January 2009 – Obama administration takes office, and obtains 120-day stay of military commission cases, to review Guantánamo detentions

24 February 2009 – Lawyers seek to have the *abeas corpus* stay lifted

13 March 2009 – Obama administration opposes defence motion, arguing that “although military commission proceedings are currently not moving forward”, the charges against Obaydullah “remain pending”

22 April 2009 – District Court denies defence motion to lift stay

15 May 2009 – President Obama announces that military commissions further delayed as administration seeks to reform the commission system

9 July 2009 – Obaydullah’s lawyers renew their motion to have the stay on *abeas corpus* proceedings lifted. Administration opposes the motion

6 August 2009 – District Court refuses to lift stay. Case appealed

6 January 2010 – Obama administration tells Court of Appeals for DC Circuit that “the Attorney General has determined that prosecution in a military commissions is appropriate” for Obaydullah

18 June 2010 – Court of Appeals sees “no reason sufficient to justify denying Obaydullah the ‘prompt *abeas corpus* hearing’ he is entitled to

17 August 2010 – Defence file motion in District Court seeking government information on the source, credibility, and nature of intelligence that led to the raid on Obaydullah’s home eight years earlier. The administration opposes the motion, and the District Court denies it.

30 September/1 October 2010 – *Abeas corpus* merits hearing held.

19 October 2010 – District Court rules that Obaydullah’s detention is lawful under the AUMF. In a classified memorandum issued a month later, the judge notes that the “Government’s case in large part rests on the pre-raid intelligence reports that link Obaydullah to an *al Qaeda* bomb cell”, and that the government “has not disclosed the source” of this intelligence. The judge ruled that there was enough evidence to warrant a finding that “more likely than not” the detainee had been part of an *al-Qa’ida* bomb cell.

7 June 2011 – The military commission charges sworn against Obaydullah on 9 September 2008 are dismissed without prejudice

21 October 2011 – Unclassified version of Obaydullah’s petition to Court of Appeals seeking reversal of the District Court’s denial of *abeas corpus* filed

military commissions did not have the same “time-tested track record of civilian courts.”⁹⁶ Why then, would the US authorities risk prosecuting anyone, let alone in one of the highest profile cases in decades, in an essentially untested tribunal the international reputation of which was so tainted, which lacked the institutional independence of the ordinary federal judiciary, and which by any measure failed to include the full range of fair trial procedural guarantees recognized as necessary in trials before the ordinary courts?

The UN Human Rights Committee has stated, on the right to a fair trial under article 14 of the ICCPR, that the trial of civilians (anyone who is not a member of a state’s armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.⁹⁷ The US government cannot point to any such rationale. It can only point to domestic politics.

The military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice. Further, especially given the continuing failure of the USA to meet its obligations of independent investigation, accountability, justice, and effective remedy, for the now well-documented allegations of torture and other ill-treatment, enforced disappearance, and other similar human rights violations against the individuals selected for trial by military commission, the military commissions cannot be divorced from the unlawful detention and interrogation regime for which they were developed.

Former Secretary of Defense Rumsfeld, responsible under President Bush’s military order of 13 November 2001 to find a location to hold detainees and set up military commissions to try a selection of them has written that, “after flirting with trying captured terrorists in civilian courts of law”, the Obama administration had “changed course in response to a growing public outcry”. Today, he says, “military commissions – patterned on those established under the Bush administration – continue to be used to try terrorists”.⁹⁸

The current incarnation of the military commissions are indeed modelled on the Bush version, and although some improvements were made under the revised MCA passed in

Guantánamo: Ten years, eight deaths, six convictions

November 2001 – President Bush orders his Secretary of Defense to find an “appropriate location” to hold detainees and to establish military commissions to try some of them

January 2002 – First detainees transferred to US Naval Base at Guantánamo Bay in Cuba

June 2006 – Three detainees, two Saudi Arabians and one Yemeni, die at Guantánamo, reportedly by suicide

June 2006 – US Supreme Court overturns Bush military commission system. System revived under Military Commissions Act (MCA) signed into law by President Bush in October 2006

April 2007 – Having pled guilty, Australian national David Hicks is sentenced to seven years in prison, six years and three months of which is suspended under the terms of a pre-trial agreement which sees him transferred to Australia

May 2007 – Saudi Arabian detainee dies, reportedly by suicide

December 2007 – Afghan detainee dies, reportedly of cancer

August 2008 – Yemeni detainee Salim Ahmed Hamdan is sentenced to 66 months in prison, all but five of which suspended. He is transferred to Yemen in late 2008

November 2008 – Yemeni detainee Ali Hamza al Bahlul sentenced to life imprisonment under the MCA of 2006

June 2009 – Yemeni detainee dies, reportedly by suicide

October 2009 – President Obama signs Military Commissions Act of 2009, with provisions for revised military commissions

August 2010 – Sudanese national Ibrahim al Qosi sentenced to 14 years under MCA of 2009. In exchange for his guilty plea, all but two years of his sentence suspended

October 2010 – Canadian national Omar Khadr sentenced to 40 years in prison, limited to eight years under a pre-trial plea arrangement, and possible return to Canada after a year. He was 15 when taken into US military custody in Afghanistan in 2002

February 2011 – An Afghan detainee dies, reportedly of natural causes

February 2011 – Sudanese detainee Noor Uthman Muhammed sentenced to 14 years in prison under the MCA 2009, all but 34 months suspended under the terms of a guilty plea and promise to cooperate in future proceedings

May 2011 – An Afghan detainee dies, reportedly by suicide.

2009, they do not meet international fair trial standards.

The Obama administration has been in office for three years. It has brought only one Guantánamo detainee for trial in federal court (albeit one more than occurred under the Bush administration).⁹⁹ Regardless of the failings of the previous administration, the USA's failure to ensure within a reasonable time fair trials or release of other detainees is unacceptable, and violates the right to trial without undue delay. A fully functioning civilian judicial system, with the experience, capacity and procedures to deal with complex terrorism prosecutions, was available from day one.

The commissions, like Guantánamo, send the message that the USA is not committed to universal human rights, and that international fair trial standards can be jettisoned on the basis of the national origin of the defendant, the USA's global war framework, or the domestic political temperature generated by any particular case.

~ ANTI-HUMAN RIGHTS MESSAGE 5 ~

JUSTICE CAN BE MANIPULATED TO ENSURE THE GOVERNMENT ALWAYS WINS

Those whom we have good evidence against will get fair trials; those we have weak evidence against we'll give less fair trials; those we have no evidence against, we'll just keep them locked up in preventive detention without any trial at all. In other words, we'll fit the process to the result and in effect have kangaroo justice

Chairman of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, 2009¹⁰⁰

The Obama administration's decision to retain military commissions is part of a continuing approach that seems aimed at keeping the government's thumb firmly placed on its side of the scales of justice, with decisions made on detainees taken according to which avenue is deemed most likely to achieve government "success", or minimize domestic political fallout, rather than adhering to principles of equality, due process and human rights.

- "Whenever feasible", the Guantánamo detainees whom the administration decides it cannot release or transfer to the custody of other governments will be tried in federal court on the US mainland (although, many in Congress are trying to eliminate this option altogether);¹⁰¹
- Where the administration deems this not feasible – it currently considers this to be the case across the board as a result of Congress blocking the transfer of detainees to the US mainland – it will turn to military commissions at Guantánamo with institutions and procedures that fall far short on respect for fair trial rights;
- In the case of acquittal by military commission (or presumably after a sentence has been served by a detainee convicted by such tribunals), the administration reserves the right to return the detainee to indefinite detention under the "law of war". It has recently indicated that it also reserves the right to do this after an acquittal in federal District Court in the USA.¹⁰²
- Where no trial is deemed possible – which the administration concluded in 2010 was the case for 48 Guantánamo detainees – indefinite detention without any prospect of criminal trial in any form is the order of the day.¹⁰³
- Detainees have access to habeas corpus, but if a judge orders release on the grounds that the detention is unlawful, this can still mean indefinite detention,

possibly for years, if the government says it is unable to find any country willing to take the detainee (because the USA continues to refuse to allow any Guantánamo detainee to be released into the USA).

In March 2009, President Obama said that some of the detainees held at Guantánamo “will be difficult to try...because of the manner in which evidence was obtained. So there’s a clean-up operation that has to take place, and that’s complicated”.¹⁰⁴ A few weeks later, he referred to the “messy situation” of the Guantánamo detentions: “We’ve got a lot of people there who we should have tried early, but we didn’t. In some cases, evidence against them has been compromised. They may be dangerous, in which case we can’t release them.”¹⁰⁵

The Obama administration undoubtedly faced the serious consequences of unlawful policies pursued by its predecessor. Whatever measures the administration takes, however, detainees should not pay for the error of the USA’s ways. Any “clean-up” should not amount to a cover-up of any human rights violations that have been committed. Neither should it place any obstacle in the way of remedy for detainees unlawfully treated, or release of detainees unlawfully held whom the USA does not intend promptly to charge.

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. The human rights violations of the past cannot provide any valid excuse for further disregard of human rights in the present. Clearly among the detainees still held at Guantánamo there are individuals who should face prosecution – indeed who should have been charged and brought to trial years ago. Any Guantánamo detainee who cannot be brought to fair trial should be released. This is true 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. If a person is released and subsequent surveillance and investigation generates sufficient evidence that the person is then engaging in criminal activity, he can still be brought to justice in a fair trial.

16 January 2002 – Washington, DC, US Department of Defense News Briefing with Secretary of Defense Donald Rumsfeld

Rumsfeld: We are also currently holding 50 detainees in Guantánamo Bay, Cuba, and we expect a third plane of 30 detainees to arrive there later this afternoon.

Q: Have you begun questioning yet the detainees in Gitmo, and are you close to charging any of them?

Rumsfeld: I'm trying to think who's there now. It keeps changing. We've been sending 10, 20 or 30 in periodically. I do not believe that formal interrogation has continued in Guantánamo Bay. The preliminary interrogations took place in the locations where the detainees had previously been in custody, essentially Kandahar and Bagram, but also some other places. And I don't believe they've started down there. And we have not made any decisions with respect to disposition of the ones that are currently in Guantánamo, to my knowledge.

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Nine of the 171 men still held at Guantánamo in December 2011 were transferred to the base on 16 January 2002. By December 2011, none of these nine had been charged.

~ ANTI-HUMAN RIGHTS MESSAGE 6 ~

EXECUTION IS ACCEPTABLE – EVEN AFTER AN UNFAIR TRIAL

I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him

President Obama, November 2009

When Attorney General Holder announced in November 2009 that five Guantánamo

detainees accused of involvement in the attacks of 11 September 2001 would be transferred to the US mainland and prosecuted in federal court there rather than by military commission in Guantánamo, he said he wanted “to assure the American people” of something in particular – namely that the government would still seek to have the men executed. “I fully expect to direct prosecutors to seek the death penalty against each of the alleged 9/11 conspirators”, he said.¹⁰⁶ Not long afterwards, asked about the views of those offended by the prospect of the trial of Khalid Sheikh Mohammed being conducted in federal court where the constitutional protections afforded to US citizens would apply, rather than before a military commission, where they would not, President Obama responded: “I don’t think it will be offensive at all when he’s convicted and when the death penalty is applied to him”.¹⁰⁷

Since then, the Obama administration has done a U-turn on the trial forum, but is maintaining an unbending inclination for the death penalty in these cases. As if the human rights violations committed at and beyond Guantánamo over the past decade were not bad enough, another violation of international law is now on the cards in relation to the Guantánamo detentions – execution after unfair trial by military commission.

The UN Human Rights Committee has emphasised that fair trial guarantees are particularly important in cases leading to death sentences, and that any trial not meeting international fair trial standards that results in a death sentence would constitute a violation of the right to life under the ICCPR. Military commissions do not meet these standards.

It comes as no surprise that the USA intends to seek the death penalty in these Guantánamo trials, not only because judicial killing remains a part of the US policy and legal landscape, but also because the notion of “justice” has taken many rights-violating forms in what the Bush administration dubbed the “war on terror”.

Nine years ago, in November 2002, ‘Abd Al Rahim al-Nashiri was handed over to US custody by authorities in the United Arab Emirates where he had been arrested a few weeks earlier. President Bush – asked about the significance of the arrest – responded that “we did bring to justice a killer”.¹⁰⁸ He subsequently added: “We’re making progress on this war against terror. Sometimes you’ll see the progress, and sometimes you won’t. It’s a different kind of war. The other day, we hauled a guy in named al-Nashiri.”¹⁰⁹ “He’s not a problem anymore. [Laughter] One by one, we’re bringing them to justice.”¹¹⁰ A few days earlier, on or around 27 November 2002, 12 days into his interrogation in secret CIA custody at an undisclosed location, ‘Abd al-Nashiri was subjected to “waterboarding”. His “enhanced” interrogation continued until 4 December 2002, the day after President Bush spoke of having brought him to “justice”.¹¹¹

In the same month that ‘Abd al-Nashiri was being tortured in secret CIA custody, an alleged senior member of *al-Qa’ida*, Abu Al al-Harithi, and five other men were killed in a car in Yemen by a CIA-controlled Predator drone missile strike. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions described the incident as constituting “a clear case of extrajudicial killing”.¹¹² The US government disagreed, arguing that the killings were lawful under the law of armed conflict and that the Special Rapporteur’s mandate did not extend to military actions conducted during “the course of an armed conflict with al Qa’ida”.¹¹³ A few weeks after the killings, President Bush asserted that “you can’t hide from the United States of America. You may hide for a brief period of time, but pretty soon we’re going to put the spotlight on you, and we’ll bring you to justice”, adding that some people “were now answering questions at Guantánamo Bay”, while others had “met their fate by sudden justice”, that is, had been killed.¹¹⁴

Eight years later, in his announcement that a team of US Special Forces had entered Pakistan and killed Osama bin Laden, President Obama said that “justice has been done”.¹¹⁵

He repeated this in a television interview two days later.¹¹⁶ That “justice” was done by killing Osama bin Laden on sight was the common refrain from various US officials.

Since the attacks of 11 September 2001, Amnesty International has called for those responsible for this crime against humanity to be brought to justice, in accordance with international human rights and humanitarian law, and for retaliatory injustices to be resisted.¹¹⁷ For Amnesty International, this has always explicitly meant bringing the perpetrators before properly constituted independent and impartial courts for criminal trial in fair proceedings, without recourse to the death penalty, a punishment the organization unconditionally opposes in every case and every country. The limited explanations to date by US authorities, to the media and in response to written queries from Amnesty International, about the killing of Osama bin Laden and the legal framework under which it was conducted, and the refusal of US authorities to conduct an independent investigation into the death, leave little option but to conclude that the killing was a violation of international law in which the opportunity to bring Osama bin Laden to justice before courts of law was thereby extinguished.¹¹⁸

‘Abd al Rahim al-Nashiri, taken into custody rather than being subjected to what President Bush dubbed “sudden justice”, was transferred to Guantánamo in September 2006 after nearly four years in secret detention. In 2008, the Bush administration charged him for trial by military commission and was intending to seek the death penalty against him. The trial had not happened by the time President Bush left office, but the Obama administration has revived its predecessor’s lethal pursuit, re-charging ‘Abd al Rahim al-Nashiri in April 2011 for trial by military commission, with the convening authority in September 2011 authorizing the death penalty as a sentencing option if the prosecution obtains a conviction at the trial. That trial is currently due to begin in late 2012, by which time ‘Abd al-Nashiri will have been in US custody for a decade.

For much of the world, the death penalty is incompatible with fundamental notions of justice. Today, 139 countries are abolitionist in law or practice. The Obama administration has responded to calls from such countries for the USA to join them in abandoning the death penalty as merely indicative of policy difference.¹²¹

While it is true that international human rights law, including article 6 of the ICCPR, recognizes that some countries retain the death penalty, this acknowledgment of present reality should not be invoked “to delay or to prevent the abolition of capital punishment”, in the words of article 6.6 of the ICCPR. The UN Human Rights Committee, the expert body established under the ICCPR to monitor its

22 January 2002 – Washington, DC, US Department of Defense News Briefing with Secretary of Defense Donald Rumsfeld

“And let there be no doubt, the treatment of the detainees in Guantanamo Bay is proper, it’s humane, it’s appropriate, and it is fully consistent with international conventions. No detainee has been harmed, no detainee has been mistreated in any way. And the numerous articles, statements, questions, allegations, and breathless reports on television are undoubtedly by people who are either uninformed, misinformed or poorly informed.”

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At least 32 of the 171 men still held at Guantánamo in December 2011 were transferred to the base before 22 January 2002.

On 2 December 2002, Secretary Rumsfeld approved, “as a matter of policy”, a number of “counter-resistance” techniques for use in interrogating detainees at Guantánamo, including stress positions, sensory deprivation, prolonged isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and “using detainees individual phobias (such as fear of dogs) to induce stress”.¹¹⁹

Over 200 FBI agents who served at Guantánamo between 2002 and 2004 subsequently told the US Department of Justice Office of Inspector General that they had “observed or heard about various rough or aggressive treatment of detainees, primarily by military interrogators. The most frequently reported techniques included sleep deprivation or sleep disruption, prolonged shackling, stress positions, isolation, and the use of bright lights and loud music”.¹²⁰

implementation, has said that article 6 “refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life”.¹²² Dozens of countries have abolished the death penalty since this General Comment was issued in 1982. More than 1,250 men and women have been put to death across the USA during this time.

The message sent to the world by the USA’s use of the death penalty generally is that the USA is way behind the times on an issue of fundamental human rights. Its pursuit of the death penalty after unfair trials at Guantánamo sends the additional message that, far from working towards abolition as human rights law expects of it, the US government is willing to open a new chapter in the country’s ugly history of judicial killing, not turn over a new leaf.

~ ANTI-HUMAN RIGHTS MESSAGE 7 ~

VICTIMS OF HUMAN RIGHTS VIOLATIONS CAN BE LEFT WITHOUT REMEDY

Although mechanisms for remedies are available through US courts, we cannot make commitments regarding their outcome

US government, to UN Human Rights Council, 2011¹²³

It is a fundamental rule of international law that any person whose human rights have been violated shall have access to an effective remedy. Like its predecessor, the Obama administration has systematically blocked access to remedy for current or former detainees in the counter-terrorism context.

In October 2004 four UK nationals, Shafiq Rasul, Asif Iqbal, Rihel Ahmed and Jamal al-Harith, who were held without charge or trial in Guantánamo for two years from 2002 after being transferred there from Afghanistan, filed a lawsuit in US federal court seeking damages for prolonged arbitrary detention, as well as torture and other cruel, inhuman or degrading treatment.

In February 2006, the District Court noted that the lawsuit alleged “various forms of torture, which include hooding, forced nakedness, housing in cages, deprivation of food, forced body cavity searches, subjection to extremes of heat and cold, harassment in the practice of their religion, forced shaving of religious beards, placing the Koran in the toilet, placement in stress positions, beatings with rifle butts, and the use of unmuzzled dogs for intimidation.” What was “most disturbing”, he wrote, was the claim that “executive members of the United States government are directly responsible for the depraved conduct the plaintiffs suffered over the course of their detention”.

Judge Ricardo Urbina found that the AUMF had authorized the military to carry out the detentions and interrogations, and that the alleged torture, though “reprehensible”, was a “foreseeable consequence of the military’s detention of suspected enemy combatants”. The “heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists”, he wrote, “would naturally lead to a greater desire to procure information and, therefore more aggressive techniques for interrogations”. This, he suggested, lay behind Secretary of Defense Rumsfeld’s authorization in December 2002 of stress positions, stripping, prolonged isolation, hooding, sensory deprivation, exploitation of detainee phobias and other techniques for use in Guantánamo.

Judge Urbina wrote that there was no evidence that the alleged torture and other ill-treatment “had any motive divorced from the policy of the United States to quash terrorism around the world”. He ruled that the individual officials named as defendants in the lawsuit 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. Judge Urbina ruled that such a "substitution" in the *Rasul* case had the effect of granting the individual defendants absolute immunity from civil liability in US courts for violations of international law. Judge Urbina granted the government's motion to dismiss the lawsuit.

At the time of Judge Urbina's consideration of the case, the question of what constitutional protections the Guantánamo detainees were entitled to was pending before the federal courts. Because of the "unsettled nature" of their rights in US courts at that time, Judge Urbina ruled, the officials "cannot be said to have been plainly incompetent or to have knowingly violated the law", and therefore, he ruled, "are entitled to qualified immunity" under US law. This decision was appealed to the Court of Appeals which, on 11 January 2008, upheld Judge Urbina's ruling, concluding that "Guantánamo detainees lack constitutional rights because they are aliens without property or presence in the United States". Even if they did have constitutional rights, the panel wrote, this was not clearly established at the time of their detention and the officials were entitled to qualified immunity under US law.

Following the Supreme Court's *Boumediene* ruling in 2008 finding that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in US court, the Supreme Court remanded the *Rasul* lawsuit case to the Court of Appeals to consider the effect of the *Boumediene* decision on it. There was then a change in US administrations following the November 2008 presidential election.

Secrecy blocks accountability: continuity or change?
"Information such as certain details about the conditions of confinement, circumstances of capture, location of detention facilities, assistance of foreign entities, and sensitive intelligence collected from detainees has not been disclosed... Operational details regarding the CIA's former interrogation program – that is, information about regarding how the program was actually implemented – also remains classified, as do descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used"
Declaration of CIA Director Leon Panetta, September 2009¹²⁴

Anyone hoping for a policy change was disappointed. The new administration argued to the Court of Appeals that it would be "unfair" to subject government employees to financial damages when the constitutional rights being asserted "were not clearly established at the time of the alleged acts in question here". In April 2009, the Court decided in the government's favour, ruling that the *Boumediene* decision did not change the outcome of its own January 2008 decision on the *Rasul* lawsuit. The claims raised by the former detainees were not based on rights that were "clearly established" at the time they were detained and "the doctrine of qualified immunity shields government officials from civil liability" under such circumstances.

Lawyers for the four UK nationals petitioned the US Supreme Court to take the case. The administration urged the Court not to take the case, arguing that the post-*Boumediene* decision by the Court of Appeals in the *Rasul* lawsuit was correct and should be allowed to stand. It was "not clearly established at the time petitioners were detained at Guantánamo Bay that they had the constitutional rights they claim were violated", the administration argued. On 14 December 2009 the Supreme Court announced that it was not taking the case, thereby allowing the Court of Appeals ruling to stand and leaving the former detainees without access to judicial remedy in the USA.

The Obama administration's November 2009 brief in the *Rasul* lawsuit asserted that "torture is illegal under federal law, and the United States government repudiates it". The administration said much the same thing in seeking dismissal of another lawsuit filed in the

US Supreme Court in 2011. The lawsuit had been brought by five men – who between them alleged that they were “rendered” to secret detention in Morocco, Egypt and Afghanistan and subjected to enforced disappearance and torture or other ill-treatment at the hands of US personnel and agents of other governments in the context of the CIA rendition program. In a footnote, the US administration said: “This case does not concern the propriety of torture. Torture is illegal and the government has repudiated it in the strongest possible terms”.

The US government does not just have a moral duty to “repudiate” torture and other human rights violations, but to ensure that those who were subjected to such abuse have access to effective remedy. Among the five plaintiffs in the *Jeppesen* case is Ethiopian national Binyam Mohamed released from Guantánamo to the United Kingdom in February 2009. Taken into custody in Pakistan in April 2002, subjected to rendition to and 18 months detention in Morocco, transfer to the CIA-run “Dark Prison” in Afghanistan, then Bagram and then Guantánamo, a US federal judge has written:

“Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence...

[E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to Special Agent [redacted], there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay...”¹²⁵

The political branches of the US government refuse to ensure accountability for such human rights violations, even in the face of such judicial comment, and the executive continues to actively block remedy. Again, on 16 May 2011, the Obama administration got what it wanted when the Supreme Court, without comment, dismissed the *Jeppesen* case, leaving in place a divided decision of the Court of Appeals upholding the US administration’s invocation of the “state secrets privilege” as justification for dismissing the lawsuit without any review of its merits.¹²⁶

~ ANTI-HUMAN RIGHTS MESSAGE 8 ~

**LOOKING FORWARD MEANS TURNING A BLIND EYE TO TRUTH AND ACCOUNTABILITY, EVEN IN THE CASE OF
CRIMES UNDER INTERNATIONAL LAW**

The US supports recommendations calling for prohibition and vigorous investigation and prosecution of any serious violations of international law, as consistent with existing US law, policy and practice...We investigate allegations of torture, and prosecute where appropriate
US government, to UN Human Rights Council, 2011¹²⁷

The Obama administration has maintained that “with limited exceptions, the specific details of the capture, detention, and interrogation of particular enemy combatants remains highly classified”.¹²⁸ This use of secrecy, by effect if not design, continues to obscure human rights violations committed in the CIA’s secret detention program, including against those who were

held in that program and remain today in Guantánamo.

On 18 January 2011, the US Court of Appeals for the DC Circuit upheld the CIA's invocation of Freedom of Information Act (FOIA) exemptions to withhold details of the locations and treatment in secret detention of the 14 detainees transferred from CIA custody to Guantánamo on 4 September 2006.¹²⁹ The American Civil Liberties Union (ACLU) had filed a FOIA request with the CIA and Pentagon in 2007 seeking unredacted records relating to the hearings of the 14 detainees before Combatant Status Review Tribunals (CSRTs), the military panels set up by the Bush administration in 2004 to review the "enemy combatant" status attached to detainees at Guantánamo. In the versions of the CSRT transcripts published by the Pentagon, allegations by the detainees of how they were treated in CIA custody and where they were held were blacked out.

In October 2008, Chief Judge Royce Lamberth on the District Court for DC ruled against the ACLU in a summary judgment, concluding that the CIA had provided adequate explanation for its invocation of the FOIA exemptions. The case was subsequently sent back to the District Court to review the case in light of President Obama's three executive orders of 22 January 2009, which had included the order on the CIA to stop its use of long-term secret detention and "enhanced" interrogation, and the release on 16 April 2009 of four Justice Department memorandums from 2002 and 2005 that discussed the legality of "enhanced interrogation techniques" by the CIA.¹³⁰ In October 2009, Judge Lamberth again ruled against disclosure of the CSRT records, deferring to the declaration filed by the CIA that to publish the information about the detainees would harm national security. Judge Lamberth declined even to conduct an *in camera* review of the withheld information.

The case was appealed to the DC Circuit Court of Appeals. The Obama administration urged it to uphold the District Court's ruling. Far from being critical of the CIA detention program, the administration's brief reiterated President Bush's words that the CIA's "terrorist detention and interrogation program" had "provided the US Government with one of the most useful tools in combating terrorist threats to the national security" and had "played a vital role in the capture and questioning of additional senior al Qaeda operatives" and in thereby assisting the USA in learning about *al-Qa'ida*. The brief noted that in the cases of 'Abd al Nashiri, Abu Zubaydah, Khaled Sheikh Mohammed, Hambali and Majid Khan, the withheld information included details about their detention conditions in CIA custody, where they were held, and in each case "the interrogation methods that he claims to have experienced". The administration argued that "the potential for harm from the disclosure of these interrogation methods is not lessened by the fact that the documents contain detainees' descriptions of their own interrogations. These detainees are in a position to provide accurate and detailed information about some aspects of the CIA's former detention and interrogation program, which remains classified." Among other things, the administration stated that "the present prohibition against using these interrogation methods does not render their past use illegal"¹³¹

If these detainees have knowledge about detention conditions or interrogation techniques that violate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, it is only because the US government itself forced that knowledge on them in the course of carrying out such violations of their rights. Allowing a government to, in effect, indefinitely and unilaterally keep secret the details of allegations of such human rights violations – indeed it has gone so far as to physically censor the voices of those who claim to have suffered the violations – in a manner that by purpose or effect deprives the person of access to an effective remedy and preserve the impunity of the perpetrators, is fundamentally inconsistent with international law.¹³²

The Obama administration had also argued to the Court of Appeals that to disclose, for example, “whether a particular foreign country assisted the United States in detaining or interrogating a terrorism suspect, or allowed the United States to detain people on its soil” would harm the CIA’s relations with such governments. Clearly the USA’s use of secret rendition and detention could not have operated without the cooperation of other countries. Indeed among the reasons given by the CIA – under both the Bush and the Obama administrations – for keeping secret the contents of the presidential directive of 17 September 2001 which authorized the CIA to establish a secret detention program and other documents relating to that program is a claim that disclosure of such information would reveal the location of secret CIA facilities and the identities of countries that cooperated with the USA in this regard.¹³³

Those held in Guantánamo have between them been subjected to a range of human rights violations by US forces, including the crimes under international law of torture and enforced disappearance, for which there has been little or no accountability. They include individuals still held there, among whom are the following:

Mohamed al Qahtani

This Saudi Arabian national was taken into custody by Pakistani forces when trying to enter Pakistan from Afghanistan on 15 December 2001. He was handed over to US forces 11 days later and transferred to Guantánamo on 13 February 2002. In mid-2002, the US came to suspect him of having “high value” intelligence, and to consider him resistant to standard military interrogation techniques. On 8 August 2002 Mohamed al-Qahtani (detainee number 063) was taken to an isolation facility. He was held in isolation there until at least 15 January 2003, some 160 days later. A FBI memorandum dated 14 July 2004 recalled that “in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).”¹³⁴

On 2 December 2002, Secretary Rumsfeld approved, “as a matter of policy”, a number of “counter-resistance” techniques for use in interrogating detainees at Guantánamo, including stress positions, sensory deprivation, prolonged isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and “using detainees individual phobias (such as fear of dogs) to induce stress”.¹³⁵

After three months in isolation, Mohamed al-Qahtani was for the next eight weeks – 23 November 2002 to around 15 January 2003 – subjected to interrogation under a Special Interrogation Plan. Lieutenant General Randall M. Schmidt, who led a military investigation into FBI allegations of detainee abuse at Guantánamo said of the treatment of Mohamed al-Qahtani: “...for at least 54 days, this guy was getting 20 hours a day interrogation in the white cell. In the white room for four hours and then back out.” He elaborated that for the four hours a day that Mohamed al-Qahtani was not under

President George W. Bush, Letter to Congressional leaders, 20 September 2002

“We currently hold approximately 550 enemy combatants at Guantánamo. All are being treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949”

~~

More than 120 of the 171 men still held at Guantánamo in December 2011 were transferred to the base before September 2002. Among them are Mohamed al-Qahtani who in August 2002 was moved to an isolation facility at the base and subsequently subjected to torture and other ill-treatment in incommunicado detention (see text).

interrogation, “he was taken to a white room... with all the lights and stuff going on and everything...”¹³⁶ During interrogation, Mohamed al-Qahtani – always in shackles – was variously forced to wear a woman’s bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number of dog tricks; was forced to dance with a male interrogator while made to wear a towel on his head “like a burka”; was forced to wear a mask made from a box with a “smiley face” on it, dubbed the “happy Mohammed” mask by the interrogators; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of “swimsuit models” hung round his neck; was subjected to hooding, loud music for up to hours on end, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.¹³⁷ Dogs were used to induce fear in him. On at least two occasions, a dog was “brought into the interrogation room and directed to growl, bark, and show his teeth” at the detainee. Lt. Gen. Schmidt said: “[H]ere’s this guy manacled, chained down, dogs brought in, put his face [sic], told to growl, show teeth, and that kind of stuff. And you can imagine the fear kind of thing.”¹³⁸

In May 2008, Susan Crawford, then convening authority for the military commissions at Guantánamo, dismissed charges against Mohamed al-Qahtani, then facing a death penalty trial by military commission. In January 2009, she explained: “We tortured Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case”.¹³⁹ Mohamed al-Qahtani remains in detention at Guantánamo without charge or criminal trial.

A decade in US military custody without trial, remedy, accountability

13 November 2001 - President Bush orders his Secretary of Defense to find an “appropriate location” to hold detainees and to establish military commissions to try some of them

27 December 2001 – Saudi Arabian national Mohamed al-Qahtani handed over to US forces in Afghanistan after 11 days in Pakistani custody

7 February 2002 – President Bush signs memorandum that common Article 3 to the Geneva Conventions will not apply to Taleban or al-Qa’ida detainees, adding that “our values as a nation... call for us to treat detainees humanely, including those who are not legally entitled to such treatment”.

13 February 2002 – Mohamed al-Qahtani transferred to Camp X-Ray at Guantánamo

April/May 2002 – Mohamed al-Qahtani and other detainees moved to the newly constructed Camp Delta

Mid-July 2002 – Evidence of Mohamed al-Qahtani’s possible link to the 9/11 attacks emerges, with US authorities suspecting him of being a possible ‘20th hijacker’. President Bush and Attorney General Ashcroft are briefed about the case. The administration’s response is that there is “no interest in prosecuting Al Qahtani in a US court at that time”. Indeed, a determination is apparently made that “not one single detainee will see the inside of a courtroom in the United States”.¹⁴⁰

27 July 2002 – Mohamed al-Qahtani moved to the Maximum Security Facility at Camp Delta

8 August 2002 – Mohamed al-Qahtani moved by military ambulance to isolation in the Navy Brig at Guantánamo, a detention facility separate from Camp Delta. He will later say that he was removed from his Camp Delta cell by force, and that the Brig was “the worst place I was taken to”. He will recall that his cell window was covered, he could not tell what time of day it was, he never saw sunlight for the six months he was held there, the lights on his cell were lit 24 hours a day, his cell was very cold, he was allowed no recreation, the guards covered their faces when in his presence, and while he sometimes had a mattress this would be taken away if his interrogators did not like his answers. The FBI conducted interrogations for the first 30 days, after which the military took over.

2 October 2002 – A meeting on interrogations is convened at Guantánamo at which various military personnel as well as the chief legal counsel to the CIA Counterterrorist Center are present. The latter advises that while torture is prohibited under the UN Convention against Torture, US domestic law implementing the treaty is “written vaguely”. He also points out that the USA did not “sign up” to the international prohibition of cruel, inhuman or degrading treatment which “gives us more licence to use more controversial techniques”. The meeting discusses the case of Mohamed al-Qahtani, including “how he has responded to certain types of deprivation and psychological stressors”.

8 October 2002 – An FBI agent who has observed the military interrogations of Mohamed al-Qahtani sends an email describing techniques being used on Mohamed al-Qahtani, including sleep deprivation, loud music, bright lights

and “body placement discomfort”. In an interrogation three days earlier, a dog had been brought into the room and had “barked, growled, and snarled at Al-Qahtani in very close proximity to him”. The use of dogs as an interrogation tool is based on the understanding within the military that Arabs fear dogs

11 October 2002 – Major General Michael Dunlavey, Commander of Joint Task Force 170 at Guantánamo asks the Commander of US Southern Command, General James Hill, to approve “counter-resistance” interrogation techniques that go beyond the US Army Field Manual. This eventually goes to the Secretary of Defense, via Deputy Secretary of Defense Paul Wolfowitz, Undersecretary of Defense for Policy Douglas Feith, Chairman of the Joint Chiefs of Staff, General Richard Myers, and the Pentagon’s General Counsel William Haynes. In the context of the interrogation of Mohamed al-Qahtani, according to a psychiatrist involved at the time, “we were routinely told that the interrogation strategy was approved up to the Secretary of Defense level”.

12 November 2002 – General Hill orally approves use of “counter-resistance” techniques for use on Mohamed al-Qahtani, including stress positions, deprivation of light and auditory stimuli, hooding, 20-hour interrogations, forced shaving, exploitation of detainee phobias (such as dogs) to “induce stress”, and removal of clothing

13 November 2002 – General Hill approves an interrogation plan for Mohamed al-Qahtani over FBI objections. Under phase 4 of the interrogation plan, if implemented, Mohamed al-Qahtani would be sent “off island” either temporarily or permanently to Egypt, Jordan or another third country for interrogation

23 November 2002 – After receiving approval from Major General Geoffrey Miller, commander of the Guantánamo detentions, interrogations of Mohamed al-Qahtani under the special interrogation plan begin. He is taken to Camp X-Ray for interrogations, apparently “to scare him”. A psychiatrist involved will later say that just before the interrogations began, Mohamed al-Qahtani was “made to believe he was sent to a hostile country which advocated torture” and “led to believe he himself might be killed if he did not cooperate with questioning”. For the next two months Mohamed al-Qahtani is interrogated by a “special projects” team of US military intelligence personnel. During this period, Mohamed al-Qahtani is subjected among other things, to stress positions, stripping, 20-hour interrogations, sleep deprivation, fear of dogs, water poured repeatedly on head, forced shaving, sexual humiliation, being treated like an animal, and forced physical training

2 December 2002 – Secretary of Defense Rumsfeld, “as a matter of policy”, authorizes the Commander of US Southern Command, “in his discretion”, to use a variety of “counter-resistance” techniques “to aid in the interrogation of detainees” (plural) at Guantánamo. The techniques include stress positions, deprivation of light and auditory stimuli, hooding, 20-hour interrogations, forced shaving, exploitation of detainee phobias (such as dogs) to “induce stress”, and “removal of clothing”.

15/16 January 2003 – Mohamed al-Qahtani’s interrogation under special interrogation plan ends and at some point he is returned to Camp Delta after six months of isolation

28 June 2004 – US Supreme Court rules in *Rasul v. Bush* that the US courts can consider habeas corpus petitions for Guantánamo detainees

5 October 2005 – Habeas corpus petition filed in District Court on behalf of Mohamed al-Qahtani

11 February 2008 – Mohamed al-Qahtani charged for death penalty trial by military commission

13 May 2008 – Pentagon announces that the charges against Mohamed al-Qahtani have been dismissed. The Convening Authority will later reveal that her decision not to refer the case for trial was because “We tortured Qahtani. His treatment met the legal definition of torture.”

12 June 2008 – US Supreme Court rules in *Boumediene v. Bush* that the Guantánamo detainees have right to challenge the legality of their detention in US District Court

20 November 2008 – The US Senate Committee on Armed Services concludes that President Bush’s decision in February 2002 “to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in US custody”. It finds among other things that Secretary Rumsfeld’s 2 December 2002 authorization “continued to influence interrogation policies”, including in Afghanistan and later Iraq.

12 December 2011 – Mohamed al-Qahtani remains in Guantánamo without charge or trial. To date there has been no ruling on the lawfulness of his detention

Since leaving office, Donald Rumsfeld has confirmed his involvement in approving interrogation techniques for use against Mohamed al-Qahtani after being advised that this detainee “had information that could save American lives”.¹⁴¹ He claimed that he had “understood that the techniques I authorized were intended for use with only one key individual”, that is Mohamed al-Qahtani, although in the same memoirs he notes that the Guantánamo military authorities under him were seeking the additional “counter-resistance techniques” because “some detainees” (plural) had “resisted our current interrogation methods”.¹⁴²

Mohamedou Ould Slahi

This Mauritanian national was arrested in Mauritania in November 2001 “at the request of the United States”.¹⁴³ After a week he was subjected to rendition to Jordan, “at the direction of the US” according to his lawyers.¹⁴⁴ After eight months in Jordan, he was transferred to Afghanistan, possibly aboard a CIA-leased jet that made that journey on 19 July 2002, taken to Bagram and thereafter transferred to Guantánamo on 4 August 2002. In addition to being subjected to enforced disappearance, Mohamedou Slahi was allegedly subjected to torture or other cruel, inhuman or degrading treatment in Jordan, in Bagram, and in Guantánamo, as well as during his transfers.¹⁴⁵ In Guantánamo, during 2003, he was allegedly deprived of sleep for some 70 days straight, subjected to strobe lighting and continuous loud heavy metal music, threats against him and his family, intimidation by dog, cold temperatures, dousing with cold water, physical assaults, and food deprivation.

In April 2010, a federal judge noted that there is “ample evidence” that Mohamedou Slahi was subjected to “extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003”. This was the period that this detainee had been labelled by his US military captors as having “Special Projects Status” and subjected to a 90-day “special interrogation plan” requested by the Defense Intelligence Agency and approved by the commander of the Guantánamo detentions, General Geoffrey Miller on 1 July 2003, by Deputy Secretary of Defense Paul Wolfowitz on 28 July 2003, and by Secretary of Defense Donald Rumsfeld on 13 August 2003.¹⁴⁶

The original interrogation plan approved by Secretary Rumsfeld had, among other things, Mohamedou Slahi being hooded and put aboard a helicopter and flown off Guantánamo for one or two hours to convince him that he was being rendered to a location where “the rules have changed”. In practice, this fake rendition was amended and a boat was used instead of a helicopter. Three weeks after being told to “use his imagination to think up the worst possible scenario he could end up in”, that “beatings and physical pain are not the worst thing in the world”, and that unless he cooperated he would “disappear down a dark hole”, Mohamedou Slahi was taken from his cell, fitted with blacked out goggles, dragged into a truck, and taken to a boat with individuals purporting to be Egyptian and Jordanian interrogators who argued within the hearing of Mohamedou Slahi about who would get to interrogate him. He was held for three and a half hours on the boat, during which time he says he was beaten. He was eventually taken to a cell on land, apparently at Camp Echo.¹⁴⁷ According to an appeal brief filed in the US Court of Appeals in June 2010,

“Salahi was the only prisoner in the new building in which he was kept. Consistent with the ‘special interrogation plan’, his cell was ‘modified in such a way as to reduce as much outside stimuli as possible. The doors will be sealed to a point that allows no light to enter the room’. The guards assigned to him wore face masks. It was not until a year later – in July 2004 – that Salahi was allowed out during sunlight hours...It was not until June or July 2004 that the guards assigned to Salahi’s cell removed their masks. In addition, on July 30, 2004, Salahi was finally told that he had not been ‘disappeared’ to a new country but

Justifying abuse: continuity or change?

“The United States justifiably opted to initially treat the defendant as an intelligence asset – to obtain from him whatever information it could concerning terrorists and terrorist plots. This was done, simply put, to save lives. And when significant intelligence had been collected from the defendant, the United States made the entirely reasonable decision to continue holding him as an alien enemy combatant pursuant to the laws of war and to prosecute him in a military commission for his many violations of those laws.”

Obama administration, December 2009, in case of Tanzanian national subjected to enforced disappearance for two years before transfer to Guantánamo in 2006¹⁴⁸

was still in Guantánamo...”¹⁴⁹

In his memoirs published in 2011, Donald Rumsfeld noted that he had “approved interrogation techniques beyond the traditional Army Field Manual” for use against Mohamedou Ould Slahi after he had “tenaciously resisted questioning”.¹⁵⁰

Musa’ab Omar al Madhwani

After five days in Pakistani custody following his arrest on 11 September 2002 in an apartment in Karachi, this Yemeni national 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, his lawyers allege, “he suffered the worst period of torture and interrogation, treatment so terrible that it made him miss his time with the Pakistani forces”.¹⁵¹ 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”. In a declaration signed in 2008, Musa’ab al-Madhwani said:

“Raucous music blared continuously, except that screams of other prisoners could be heard when the tapes were changed. I was beaten, kicked, sprayed with cold water, deprived of food and sleep, and subjected to extreme cold, stress positions, and other forms of torture. I was partially suspended by the left hand for the entire time at the prison, so that I could not sit and was forced to rest all my weight on one leg. This resulted in permanent nerve damage to my leg... The Americans sprayed me with cold water and dumped water on my head until I got seizures and collapsed. The pain was so extreme that I would pass out repeatedly. Then I was freezing and sweating at the same time. An Arabic-speaking interrogator told me that I was in a place the bull flies cannot find. He said no one could find me in that place, not even the International Committee of the Red Cross”

Musa’ab al Madhwani was transferred to the US air base at Bagram where he was held for another five days, before being transferred to Guantánamo on 28 October 2002. In a habeas corpus hearing in US District Court more than seven years later, the judge noted that the US government had “made no attempt” to refute Al Madhwani’s torture allegations, and that there was “no evidence in the record” that they were inaccurate. To the contrary, he added, the allegations were corroborated by “uncontested government medical records”, and “classified testimony about his conditions of confinement, which I find to be credible, the United States 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”.¹⁵²

Zayn al Abidin Muhammad Husayn (Abu Zubaydah)

It is now nearly five years since the International Committee of the Red Cross (ICRC) transmitted to the US authorities its findings relating to the CIA’s secret program after interviewing 14 detainees at Guantánamo in late 2006. The 14 men had been held by the CIA at undisclosed locations prior to their transfer to military custody at Guantánamo on 4 September 2006. Abu Zubaydah was one of the 14, and had been held in secret detention for the longest of any of them – four and a half years. Among other things, the ICRC had concluded that US agents were responsible for enforced disappearance, torture and other cruel, inhuman or degrading treatment and called on the US authorities to bring the perpetrators of the abuses to justice.¹⁵³ Interrogation techniques listed in the ICRC report included prolonged “stress standing” position with arms extended and chained above the head, physical assaults, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, threats of ill-treatment, deprivation or restriction of solid food, and

water-boarding. According to the ICRC, not all of the methods it listed in the report had been used on all of the detainees – except for one of them, Abu Zubaydah.

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, 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”. In fact, it was the CIA’s Office of Inspector General’s review of the tapes in 2003 that revealed Abu Zubaydah being subjected to “eighty-three applications of the waterboard”, a detail not made public until 2009.¹⁵⁴

Those who destroyed the tapes were, it would seem, thereby also destroying evidence of torture and enforced disappearance, crimes under international law. Wilfully concealing or destroying evidence of a crime can constitute complicity in the crime. Articles 4, 6 and 7 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) requires that not only the direct perpetrators of torture, but also those complicit in it, be brought to justice.

“The Attorney General has informed me that, with limited exceptions, the Department of Justice inquiries concerning the [Central Intelligence] Agency’s former rendition, detention, and interrogation program have been completed and are now closed... We are now finally about to close this chapter of our Agency’s history. As Director, I have always believed that our primary responsibility is not to the past, but to the present...”

CIA Director, now US Secretary of Defence, Leon Panetta, June 2011¹⁵⁵

The prosecutor assigned to look into the matter, however, declined to initiate any criminal proceedings against anyone in relation to the destruction of the interrogation tapes. On 9 November 2010, the US Department of Justice announced, without further explanation, that no one would face criminal charges in relation to this issue.¹⁵⁶ Then in June 2011, the US Attorney General announced that, except for criminal investigations into two deaths in custody allegedly involving the CIA – one in Afghanistan in 2002 and one in Iraq in 2003 – all other investigations relating to the CIA secret detention and interrogation program would be closed.¹⁵⁷

Closing the Guantánamo detention facility would be an important step. But that alone will not result in closure for the abuses it symbolizes – for this there must be accountability, remedy and truth.

~ ANTI-HUMAN RIGHTS MESSAGE 9 ~

RESPECT FOR UNIVERSAL HUMAN RIGHTS CAN BE DISCARDED IF THEY CONFLICT WITH ‘DOMESTIC VALUES’

Critics of our policies are given to lecturing on the theme of being consistent with American values. But no moral value held dear by the American people obliges public servants ever to sacrifice innocent lives to spare a captured terrorist from unpleasant things

Former Vice President Richard Cheney, May 2009¹⁵⁸

From early on in the “war on terror”, the White House issued assurances that “as Americans, the way we treat people is a reflection of America’s values..., based upon the dignity of every individual”.¹⁵⁹ This particular statement was issued in February 2002. The following month, Abu Zubaydah was arrested in Pakistan and within weeks would be subjected to waterboarding 83 times in a single month as part of the torture and other cruel, inhuman and degrading treatment he endured during four and a half years in solitary incommunicado

confinement in undisclosed locations. No one is known to have been brought to justice for these human rights violations.

Defending his decisions on detentions in “the new war”, including the decision to hold detainees at Guantánamo upon Justice Department advice that there they would have “no right of access to the US criminal justice system”, former President Bush asserted in his memoirs that “maintaining our values was critical to our position in the world”.¹⁶⁷ By way of example, he asserted that his decision to establish military commissions met this criterion. Military commissions for foreign nationals were repeatedly justified by senior members of his administration in terms of national values and history, not by reference to international standards. On 8 December 2001, for example, Secretary of Defense Rumsfeld said that the development of the military commissions would be done in “a careful and measured way that will be respectful of American values”.¹⁶⁸ On 21 March 2002, the day the Pentagon released the commission rules, Deputy Secretary of Defense Paul Wolfowitz insisted that the system “truly does meet American standards and American values”.¹⁶⁹ Internationally, the Bush military commission system was roundly condemned for disregarding international law even before the US Supreme Court ruled it unlawful in 2006.

In her memoirs published in 2011, former National Security Advisor and Secretary of State Condoleezza Rice wrote that the Combatant Status Review Tribunals – which the Bush administration improvised in 2004 in an attempt to minimize judicial review of the Guantánamo detentions – were “in keeping with our legal traditions and values”.¹⁷⁰ President Bush “and his top advisors”, she wrote, “well understood that national security decision-making inevitably requires doing what is legal and necessary to protect the country while remaining true to the values at the core of our nation”. At the

17 September 2001 – President Bush authorizes the CIA “to set up terrorist detention facilities outside the United States”.¹⁶⁰ A decade later, John Rizzo, chief legal counsel to the CIA during the Bush administration, will write that “A few days after the attacks, President Bush signed a top-secret directive to CIA authorizing an unprecedented array of covert actions against Al Qaeda and its leadership... [T]he White House directed that details about the most ambitious, sensitive and potentially explosive new program authorized by the President – the capture, incommunicado detention and aggressive interrogation of senior Al Qaeda operatives – could only be shared with the leaders of the House and Senate, plus the chair and ranking member of the two intelligence committees.”¹⁶¹

23 June 2004 – CIA Inspector General John Helgerson transmits copies of his review of the CIA’s secret detention and interrogation program to the Chairs and Ranking members of the House and Senate Select Committees on Intelligence.¹⁶² The report reveals, among other things, that Abu Zubaydah and Khalid Sheikh Mohammed were between them subjected to more than 250 applications of water-boarding.¹⁶³

5 March 2009 – US Senators Dianne Feinstein and Kit Bond, Chair and Vice Chair of the US Senate Select Committee on Intelligence, announce that the Committee “will review the CIA’s detention and interrogation program”. The review will include “how the CIA created, operated, and maintained its detention and interrogation program” and “whether the CIA implemented the program in compliance with official guidance, including covert action findings, Office of Legal Counsel opinions, and CIA policy”. The review is expected to take about a year.¹⁶⁴

5 and 16 March 2009 – CIA Director Leon Panetta states that the Chair and Vice Chair of the Senate Select Committee on Intelligence have assured him that the goal of their review of the secret detention program is not accountability for the past but to inform “future policy decisions”, rather than “to punish those who followed guidance from the Department of Justice.”¹⁶⁵

1 December 2011 – During a debate in the Senate, Senator Feinstein says, “As chairman of the Select Committee on Intelligence, I can say that we are nearing the completion a comprehensive review of the CIA’s former interrogation and detention program, and I can assure the Senate and the Nation that coercive and abusive treatment of detainees in US custody went beyond a few isolated incidents at Abu Ghraib. Moreover, the abuse stemmed not from the isolated acts of a few bad apples but from fact that the line was blurred between what is permissible and impermissible conduct, putting US personnel in an untenable position with their superiors and the law.”¹⁶⁶

same time, however, Dr Rice seems to concede that domestic values can depend on context rather than core, and that conduct which is consistent with domestic values for one person is another person's betrayal of them. In the Bush first term, secret detention was deemed consistent with domestic values as well as legal, but "early in his second term the President decided that the time was right to revisit these decisions in light of the progress we had made in the war on terrorism". For her part, Dr Rice "felt strongly that the time had come to acknowledge that we were holding Khalid Sheikh Mohammed and other notorious terrorists. We couldn't allow them to remain 'disappeared' and outside the reach of the justice system... Not everyone agreed, however, and this issue would turn out to be one of the most contentious between the Vice President and me".¹⁷¹

In his own memoirs, published a few months earlier, former Vice President Cheney returned to the subject of a speech he had made in May 2009, re-asserting his view that "American values" had been upheld throughout the Bush administration's response to the attacks of 11 September 2001: "I also challenged the whole assumption that American values were abandoned, or even compromised, in the fight against terrorists. For all that we've lost in this conflict, the United States has never lost its moral bearings". In that 2009 speech, the Vice President had defended, among other things, "water-boarding" and its use against three detainees then being subjected to enforced disappearance by the CIA, and now held in Guantánamo.¹⁷² His remarks illustrated how the concept of "American values" can be a malleable and subjective notion, indeed twisted to imply that full respect for universal human rights cannot also be an "American value".

In a speech on the same day as the former Vice-President's, President Obama invoked US values in explaining his decisions to close the Guantánamo detention facility and end "enhanced interrogation techniques", but also to support military commissions and indefinite detention without criminal trial. President Obama said that the previous administration had failed to rely upon "our deeply held values and traditions". If instead of, or in addition to, his invocation of domestic values and tradition, President Obama, together with Congress, had fully recognized the USA's failure to live up to its human rights obligations and insisted upon the fullest respect for such standards (indeed as constituting *itself* a fundamental national value), we might not be where we are now, with indefinite military detention at Guantánamo, the resuscitation of the military commissions, and the blocking of accountability and remedy.

Appeals to national values and tradition is a part of political debate in every country, and reference to domestic values and history can facilitate a country's constructive self-criticism as much as it can feed unhelpful myth-building and self-satisfaction over domestic laws and institutions. Embracing universal human rights values as a key part of national values can contribute to respect for the rights of all persons within a state's territory or otherwise under its control. The message that too often continues to emanate from Guantánamo is that the answers lies in national values, *to the exclusion of* international human rights standards.

~ ANTI-HUMAN RIGHTS MESSAGE 10 ~

DOUBLE STANDARDS, NOT UNIVERSAL STANDARDS, ARE THE ORDER OF THE DAY

The American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to these values makes us stronger and safer. This also means following universal standards, not double standards

Harold Hongju Koh, US Department of State Legal Adviser, March 2010¹⁷³

What would the USA say if another country was trying US nationals by military tribunals, using such courts for political reasons while the ordinary courts were sidestepped? Or was

intending to execute detainees convicted by such tribunals applying lesser standards of justice than its ordinary courts? Or asserting the right to hold detainees indefinitely after their acquittal? Or holding detainees for months after judges had ruled their detention unlawful? Or morphing the notion of a “prompt” habeas corpus hearing into one that takes place after years rather than days of detention? Or systematically blocking remedy and accountability for past human rights violations, including the crimes under international law of torture and enforced disappearance? What would the USA say if it was another country running the Guantánamo detention facility?

We can make an educated guess as to what it would say. Each year, the USA publishes its assessment of the human records of other countries, as measured against the provisions of the Universal Declaration of Human Rights (UDHR), the ICCPR and other international instruments. Consider the following, for example:

“The Government’s human rights record remained poor, and it continued to commit numerous, serious abuses. The security forces committed many unlawful killings, and they were accused of the disappearances of numerous persons... Security forces frequently tortured, beat, and otherwise abused or humiliated citizens. The Government investigated some of the alleged abuses by the security forces; however, abusers rarely were charged or disciplined... Security forces continued to use arbitrary arrest and detention, and lengthy pretrial detention remained common... Political prisoners held from previous years were released; however, numerous persons during the state of emergency were denied habeas corpus and held indefinitely as ‘illegal combatants’...”¹⁷⁴

At the time it published this critique of Liberia’s human rights record in March 2003, the USA was using torture and other ill-treatment, enforced disappearance and arbitrary detention against detainees in what it then called the “war on terror”. It was denying habeas corpus to hundreds of detainees held at Guantánamo and elsewhere and building impunity into its detention and interrogation programs.

In 2004, in a then secret report on the USA’s secret detention program, the CIA Inspector General, John Helgerson, accused the government of double standards. The “enhanced” interrogation techniques used in the program, he said, were “inconsistent with the public policy positions that the United States has taken regarding human rights”. He noted that the State Department’s annual assessments of human rights in other countries condemned such techniques when used by other governments. He noted that President Bush – under whose authority the CIA program was operating – had in June 2003 made a public proclamation that “torture anywhere is an affront to human dignity everywhere” and that the USA was “committed to building a world where human rights are respected and protected by the rule of law”. A matter of weeks earlier, Khalid Sheik Mohammed had been subjected to 183 applications of waterboarding, one of the “enhanced” interrogation techniques carried out, according to the former President, with his express authorization.

The Department of Justice sought to address the question of double standards, albeit in secret. In a classified memorandum in 2005, the Justice Department wrote in a memo to the CIA: “Each year, in the State Department’s Country Reports on Human Rights Practices, the United States condemns coercive interrogation techniques and other practices employed by other countries. Certain of the techniques the United States has condemned appear to bear some resemblance to some of the CIA interrogation techniques... nudity, water dousing, sleep deprivation, and food deprivation... We recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that may in some respects resemble conduct in which the United States might in some circumstances engage, covertly or otherwise”¹⁷⁵

Two years after that, the tendentious line taken by the Justice Department continued in another secret memorandum. The Department of State, it wrote, had “informed us” that its annual 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.” The USA’s 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”. The CIA program, it continued “is designed to subject detainees to no more duress than is justified by the Government’s paramount interest in protecting the United States and its interests from further terrorist attacks.” As such, it concluded, the CIA’s conduct “fundamentally differs from the conduct condemned in the State Department reports”.¹⁷⁶

A reluctance to acknowledge the equal application of international human rights standards to the USA has been described as a form of “American exceptionalism”. Such exceptionalism may be based in part on an assumption that universal human rights rules or values are somehow inferior to or less worthy than the constitutional and other laws and values of the USA. As outlined in the previous section, the grave dangers of reliance on any such assumption was 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.

It remains to be seen how future Presidents will act. Rick Perry, for example, was at the time of writing one of those seeking to become the next President of the USA. “Perry believes in American exceptionalism”, asserts his presidential bid website.¹⁷⁸ Among other things, he has said that he would consider the use of “enhanced interrogation techniques” in the counter-terrorism context, including “waterboarding”, and that he would keep the Guantánamo detention facility open, if he were to become President. Newt Gingrich “advocates sound policies to keep Americans safe based on timeless American principles”.¹⁷⁹ As noted above, he has suggested that “by every technical rule” and “under the normal rules internationally”, waterboarding is “not torture”.

In 2003, 2004 and 2005, the entry on Bosnia and Herzegovina in the US State Department’s annual human rights assessment, under the heading ‘arbitrary arrest, detention or exile’, reported the case of ‘six Algerian terrorism suspects’ who had been transferred ‘to the custody of a foreign government’ in January 2002. The transfer had bypassed the courts and an order of the Human Rights Chamber of Bosnia and Herzegovina, and violated international law. The US Department of State reported that in 2002 and 2003, the Human Rights Chamber had ruled that the treatment of the men had violated their treaty-based human rights, including the right not to be arbitrarily deported in the absence of a fair procedure.

What the State Department failed to point out was that the mysterious “foreign government” in question was that of the USA. It failed to report that the men in question, extrajudicially removed from the sovereign territory of Bosnia and Herzegovina, were and continued to be detained virtually incommunicado, without charge or trial, in the US Naval Base at Guantánamo. It failed to mention that USA was holding the men as “enemy combatants” in a war defined by the USA, although they had not been captured on any battlefield, but arrested by civilian police on territory of an allied government far from any armed conflict. It did not report that the authorities there had handed them over to US military forces, fearing negative diplomatic and other consequences, including to the country’s peace process, if it refused to do so.¹⁷⁷

It was not until the US Supreme Court ruled in June 2008 that the Guantánamo detainees had the right to challenge the lawfulness of their detention that the men obtained rulings on their habeas corpus petitions. The decision came nearly seven years after these six men were transferred to Guantánamo. The federal judge ruled that five of them were unlawfully held, even under the broad “war” detention powers claimed by the government. The five have since been released. The sixth, Algerian national Belkacem Bensayah, remains in Guantánamo today, without charge or criminal trial, nearly a decade after he was first taken to the base.

For its part, the Obama administration has promised an end to double standards. In 2009, it articulated its approach:

“The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected. As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations.”¹⁸⁰

According to Secretary of State Hillary Clinton later in 2009: “A commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves... When injustice anywhere is ignored, justice everywhere is denied. Acknowledging and remedying mistakes does not make us weaker, it reaffirms the strengths of our principles and institutions.”¹⁸¹ The US Department of State’s Legal Adviser has since pointed to an emerging “Obama-Clinton Doctrine” under which the USA would follow “universal standards, not double standards”.¹⁸²

The USA does not conduct the same assessment of itself that it does of other countries in its yearly State Department reports. However, it has at least now recognized this gap, a very positive step, and said that subjecting itself to the Universal Periodic Review (UPR) process at the United Nations Human Rights Council has filled it.¹⁸³ It remains to be seen to what extent the USA will change its approach to respect for international standards, in practice and not just in theory, as a result of the scrutiny applied to it under the UPR.

In its 2010 UPR report to the UN Human Rights Council, the USA asserted: “From the UDHR to the ensuing Covenants and beyond, the United States has played a central role in the internationalization of human rights law and institutions”.¹⁸⁴ While the USA indeed played a key role in the development of many of the relevant international standards, for which it can rightly be proud, the track record on its own compliance with those standards, particularly in the field of counter-terrorism measures, is far less worthy of celebration. The Bush administration’s approach to “war on terror” detentions, interrogations and trials proceeded as if the UDHR and the International Covenant on Civil and Political Rights had never happened. The USA’s failure to end the detentions at Guantánamo, and to ensure fair trials, accountability, and remedy, as well as the continuing resistance by officials of the administration to acknowledge that these same human rights instruments have any application at all to its counter-terrorism measures, particularly outside ordinary US territory, are a continuing insult to the Universal Declaration and the international human rights framework as a whole.

There is a further stark double standard being applied by the USA to the question of how to go about ending the detentions at Guantánamo. The USA expects other countries to do what it itself refuses to – namely to receive released detainees who cannot be returned to their home countries for fear of the human rights violations they would face there. The USA created the Guantánamo detention facility, committed systematic human rights violations against detainees held and transferred there, and yet has never allowed a single detainee to be released in US territory, even when their detention has been ruled by the judiciary to have been baseless and unlawful.

Five of the detainees remaining in Guantánamo today are Uighurs from China. It is now over three years since their detention was ruled unlawful by the US District Court.

Of the nearly 800 detainees the US authorities say have been taken to Guantánamo since January 2002 when the detention facility began operating, 22 were Uighurs, most of them detained in Pakistan in late 2001 and handed over to the USA in January 2002. Their plight came to illustrate the detrimental impact on human rights of the USA's global "war" theory, particularly with respect to detentions.

Between the US Supreme Court's 2004 *Rasul v. Bush* ruling that the District Courts had jurisdiction to consider habeas corpus petitions filed on behalf of detainees held at Guantánamo and its *Boumediene v. Bush* ruling four years later that the detainees had the constitutional right to challenge the lawfulness of their detention, the only cases reviewed on the merits by the District Court occurred in the case of two Uighur detainees whose "enemy combatant" status had been rejected by the Combatant Status Review Tribunals (CSRTs), set up by the Bush administration to seek to minimize judicial review of the Guantánamo detentions after the US Supreme Court's *Rasul* ruling in 2004.

The Bush administration asserted that the District Court did not have the authority to order the Uighur detainees to be produced at a habeas corpus hearing in Washington, DC, arguing that "the power to admit aliens into the United States lies solely with the Executive Branch". Moreover, to order the detainees into the USA for such a hearing "would interfere with the Executive's power, inherent in its authority to engage in war and detain suspected enemy combatants, to wind up such detentions in an orderly fashion and to engage in foreign diplomacy to achieve appropriate solutions with respect to individuals who cannot be sent back to their home country".¹⁸⁵

On 22 December 2005 a federal judge ruled that the continued indefinite detention of Abu Bakker Qassim and Adel Abdul Hakim at Guantánamo was unlawful. He ruled that even if their initial detention was lawful ("the government's use of the Kafka-esque term 'no longer enemy combatants' deliberately begs the question of whether these petitioners ever were enemy combatants"), the fact that more than six months had passed since the CSRT decisions in their cases meant that their detention had become indefinite and was therefore unlawful. However, the judge ruled that he could not order their release into the USA – the only current option given that they could not be returned to China due to the risks they would face there at the hands of Chinese authorities, and no third country had been found – and to do so would have "national security and diplomatic implications beyond the competence or authority of this Court". He added that he believed that the law did not give him "the power to do what I believe justice requires."¹⁸⁶

The case was scheduled to be argued in the DC Circuit Court of Appeals at 9.30am on Monday 8 May 2006. At 4.30pm on Friday 5 May 2006, the detainees' lawyers received a telephone call from the US Department of Justice informing them that their clients, along with three other Uighur detainees, had been transported to Albania. At 4.39pm on 5 May 2006, the administration filed an emergency motion that the appeal should be dismissed as moot because the detainees were now in Albania. The government's motion was granted.

This left 17 Uighur detainees still held in Guantánamo, most of whom had been cleared for release since 2003. On 7 October 2008, a US District Court judge ruled that their detention was unlawful as "the Constitution prohibits indefinite detention without just cause". Noting that the government was unable to point to any security risk posed by the Uighurs, and had been unable to find a third country solution in years of trying, he ordered the government to release the 17 into the USA and to bring them before the court at 10am on 10 October. The Uighurs were then to be released, with the assistance of members of the local Uighur community, religious groups and refugee settlement agencies who had offered their support to help the detainees adjust to their lives outside Guantánamo. The government appealed.

On 18 February 2009, the US Court of Appeals for the DC Circuit overturned the District Court ruling. The Court of Appeals said that “it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien”. In the case of the 17 Uighurs, it continued, “the Executive Branch has determined not to allow them to enter the United States”. It said that it had no reason to doubt that the government was continuing diplomatic efforts to find third country solutions, “nor do we have the power to require anything more”.

Even if as a matter of domestic US law, the courts concluded they could not order the government to release the Uighurs in US territory, no law prevented the executive government from doing so of its own free will following the court’s rulings. For political reasons, however, the Bush administration refused to countenance the release of the Uighurs into the USA. The Obama administration failed to break from this indefensible stance. The USA continued to turn to other countries to do what it would not. Four of the Uighur men were transferred to Bermuda in June 2009, six to Palau in October 2009, and two to Switzerland in March 2010.

The five Uighurs who remained in Guantánamo were offered transfer to Palau but rejected it. The case came back to the Court of Appeals in 2010, and a three-judge panel of the court affirmed its earlier decision saying that even if the five detainees “had good reason to reject the offers they would have no right to be released into the United States”. Moreover, the court continued, “it is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement”. It further noted that in the period since it first ruled on the case in 2009, “the Legislative Branch has spoken”, explicitly to prohibit the “expenditure of any funds to bring any Guantánamo to the United States”. Dismissing the claim that the congressional actions violated the US Constitution, the Court of Appeals concluded that because the detainees never had a constitutional right to be brought to the USA and released, the statutes passed by Congress “suspend nothing” and “deprive petitioners of no right they already possessed”.¹⁹⁰

In its assessment of China’s human rights record in 2002, the USA reported, among other things, “torture and mistreatment of prisoners, forced confessions, arbitrary arrest and detention, lengthy incommunicado detention, and denial of due process. Conditions at most prisons remained harsh.” It also noted evidence of the Chinese government’s “use of the international war on terror as a justification for cracking down harshly on suspected Uighur separatists expressing peaceful political dissent”¹⁸⁷

In May 2004, Amnesty International reported that agents of the Chinese government had apparently been in Guantánamo in 2002 and had participated in the ill-treatment of Uighur detainees, including by sleep deprivation, threats and environmental manipulation.¹⁸⁸ The US government never directly responded to the organization’s written concerns to it on this matter, but a May 2008 report of the Office of the Inspector General at the US Department of Justice revealed that an FBI agent had reported that “several Uighur detainees were subjected to sleep deprivation or disruption while being interrogated at Camp X-Ray by Chinese officials prior to April 2002”. The agent stated that he had understood that this ill-treatment had been “either carried out by the Chinese interrogators or was carried out by US military personnel at the behest of the Chinese interrogators”. One of the detainees had alleged that “the night before his interrogation by Chinese officials, he was awakened at 15-minute intervals the entire night and into the next day”. The Inspector General’s report stated that “some Chinese officials visited GTMO and were granted access to these detainees for interrogation purposes”.¹⁸⁹

The Uighurs continued to seek judicial relief and to be allowed to pursue litigation to show that they were “still detained and are not ‘volunteers’ at Guantánamo merely because they did not volunteer to resettle in another remote island” (i.e., Palau). If the detainees were to be offered “resettlement in Antarctica”, the lawyers for the Uighurs argued in July 2010, “a court would have no trouble concluding that rejection of the offer does not demonstrate that Petitioners are volunteers who prefer Guantánamo to release. Palau is not Antarctica, but the question is one of degree, and necessarily of fact: whether the facts show that rejecting the offer rises to the level of volunteering to live at Guantánamo.” That determination could not

be made without the development of a factual record, which the courts had now precluded by deferring to the executive.

Their appeal presented a question of “exceptional importance”, namely about whether the judiciary has the power to grant relief in such cases. The ruling by the Court of Appeals went well beyond the cases of the five Uighurs, the appeal argued, “because it bars a district judge from ever exercising the judicial power to direct release for a successful Guantánamo petitioner”. The “courts have not merely lost the judicial power”, it continued, but the Court of Appeals had “cede[d] it to the Executive Branch. This is inimical to an independent judiciary”.¹⁹¹

By seven votes to two, the Court of Appeals refused to reconsider the panel ruling, sitting as a whole court. On 18 April 2011, the US Supreme Court refused to intervene. This ruling leaves the USA in continuing violation of its obligations under the ICCPR, article 9(4) of which explicitly states: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention *and order his release if the detention is not lawful*” [emphasis added]. The five Uighur detainees remain in Guantánamo where they have been held since various dates in 2002.

In a key speech in September 2006, confirming that his administration had been using secret detention and was transferring a number of detainees held at undisclosed locations to Guantánamo, then President Bush blamed refusals by others to receive former detainees, but not the refusal of the USA to do so, for the fact that the Guantánamo detention facility remained in operation:

“America has no interest in being the world’s jailer. But one of the reasons we have not been able to close Guantánamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated or they will not return to the battlefield, as more than a dozen people released from Guantánamo already have. We will continue working to transfer individuals held at Guantánamo and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantánamo Bay.”¹⁹²

The US political branches continue to block the release of any Guantánamo detainee into the USA. While the administration continues to blame Congress for the unmet promise to close the facility, President Obama’s March 2011 order on annual executive review of Guantánamo detentions, including in those cases where a judge has ruled the detention unlawful but where the detainee has not been released, states that “nothing in this order, and no determination made under this order, shall be construed as grounds for release of detainees covered by this order into the United States.”¹⁹³

CONCLUSION – A DECADE AND COUNTING (THE COST TO HUMAN RIGHTS)

I knew when I ordered Guantánamo closed that it would be difficult and complex. We're cleaning up something that is, quite simply, a mess – a misguided experiment

President Barack Obama, May 2009¹⁹⁴

In 2002 the Guantánamo detention facility was dubbed by a senior US army official as “America’s Battle Lab” in the global “war on terror”, and he recommended an environment there “conducive to extracting information by exploiting the detainees’ vulnerabilities”.¹⁹⁵

Two commanders in charge of the detentions subsequently adopted the “Battle Lab” label and were among those officials who sought approval for, or approved, interrogation methods that violated the prohibition of torture and other ill-treatment.¹⁹⁶ In 2008, the Senate Armed Services Committee found that interrogation policies approved for use in Guantánamo migrated to Afghanistan and Iraq where they contributed to abuses against detainees.¹⁹⁷

Today interrogations are believed to have all but ended at Guantánamo. With no new detainees being transferred to the detention facility for nearly four years – the last arrival was in March 2008 – Guantánamo has continued as a location for indefinite military incarceration and occasional military commission trials, rather than intelligence-gathering. If the prison’s original status as a strategic interrogation facility has essentially been mothballed, its continued existence has become a political football, with any prospect of the detentions being addressed by the USA within a human rights framework kicked into the long grass. Three years after President Obama signed an executive order to close the Guantánamo detention facility, his administration’s failure to meet this commitment has encouraged a number of his would-be successors to make campaign promises to keep the prison open or even to expand it.

In addition, although the Obama administration has attempted to draw a line under the CIA’s program of long-term secret detention and use of “enhanced” interrogation techniques, it cannot do so because the injustices committed in that program continue to fester. Not only should the US authorities immediately set about identifying and bringing to justice those responsible for crimes under international law committed in the CIA program, including against a number of men who remain in Guantánamo today, they should also finally confirm, among other things, whether or not the base was itself the location for a CIA “black site” for so-called “high-value” detainees. Four of the 14 men transferred to Guantánamo from secret CIA detention at undisclosed locations on 4 September 2006 said that they had been held at the naval base for periods ranging from a week to a year during 2003/2004.¹⁹⁸ The alleged commission of crimes under international law at Guantánamo was not limited to the CIA. The torture and other ill-treatment of Mohamed al-Qahtani and Mohamedou Slahi at the base in 2002 and 2003, for example, were carried out by military personnel for which there has been no criminal accountability either. A former FBI interrogator has recently revealed another possible case of secret detention at the base. He has written that in 2004, Abdul Aziz al-Matrafi, a Saudi Arabian national held in Guantánamo from February 2002 to late 2007, was taken by a “specialized military team to a black site (a secret location) and interrogated.”¹⁹⁹ It is not clear whether the detainee was taken out of Guantánamo entirely or simply transferred to a secret site at the base, as apparently occurred in the case of Mohamedou Slahi described above.

The Bush administration’s decision to locate a “war on terror” detention facility at Guantánamo was motivated by its desire to keep the detainees away from the ordinary courts and the legal protections they provide. Locating secret CIA “black sites” outside the USA was similarly motivated – keeping the detainees off “American soil” was used to allow aggressive interrogation, prolonged incommunicado detention and solitary confinement. Gradually, legal challenges brought the judiciary into the equation, but to this day the damage done to rules of ordinary criminal justice by Guantánamo and the wider detention regime run by the USA is being cemented into a permanent part of the US legal and policy landscape rather than being remedied.

The CIA’s use of Guantánamo as a “black site” is believed to have ended shortly after oral argument in late April 2004 in the Supreme Court in the *Rasul v. Bush* case. This was followed two months later by the ruling that the US federal courts could consider habeas corpus petitions filed for Guantánamo detainees. After the Supreme Court ruled in *Hamdan v.*

Rumsfeld in June 2006 that Article 3 common to the Geneva Conventions was applicable to US detentions in the “war on terror”, Guantánamo became integral to the Bush administration’s efforts to protect the CIA’s secret program and reinforce the wall of impunity it had attempted to build around it. In a major speech on 6 September 2006, two days after his administration moved 14 of the detainees held in the CIA program to Guantánamo, President Bush exploited their cases to seek passage of the Military Commissions Act (MCA). In the charged climate of looming congressional elections, Congress failed in its duty to bring the USA into line with its human rights obligations on detentions, trials and accountability. The MCA amended the War Crimes Act, resuscitated the military commissions struck down by *Hamdan*, and sought to strip the courts of habeas corpus jurisdiction in the case of Guantánamo and other detainees held as “enemy combatants”. Signing the MCA into law on 17 October 2006, President Bush emphasised that it would “allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders” and the administration to “prosecute captured terrorists for war crimes through a full and fair trial.”²⁰⁰

It took another two years for the *Boumediene v. Bush* case to reach the US Supreme Court and for the court’s subsequent ruling that the Guantánamo detainees had the right to challenge the lawfulness of their detention before a judge. By the time the decision came, the global “war” paradigm had taken root, including within substantial parts of the federal judiciary. Today, for detainees held at Guantánamo, a “prompt” habeas corpus hearing means one that is conducted years after arrest – and perhaps years after the *Boumediene* ruling itself – and a judicial order for the government to release an unlawfully held detainee has effectively become a request.

Meanwhile – after a decade of detentions at Guantánamo – only one detainee has been transferred to the USA for prosecution in ordinary federal court. Clearly among the detainees still held at the base there are individuals who should be brought to justice – in the sense of being brought before the ordinary courts for fair criminal trial – on charges of responsibility in relation to the 11 September 2001 attacks. Indeed, from the perspective of respect for the rights of the victims of the attacks, those individuals should have been charged and brought to fair trial years ago. Currently, however, those accused of involvement in the 9/11 attacks and other serious crimes face capital trial at Guantánamo before military commissions that do not meet international fair trial standards.

A month before the 10th anniversary of the Guantánamo detentions, two retired US Marine generals characterized the detention facility as a “morally and financially expensive symbol of detainee abuse”.²⁰¹ It is not just a symbol of past abuse, however, but of a continuing assault by the USA on human rights principles. Two and a half years ago, President Obama said that the Guantánamo detentions were a “misguided experiment”, but his administration has kept the laboratory operating. Also in 2009, Attorney General Eric Holder said that he and President Obama were in agreement that “Guantánamo has come to represent a time and an approach that we want to put behind us”.²⁰² How much longer does the world have to wait until the USA steps into a future without the Guantánamo detention facility, and adopts an approach to countering terrorism that incorporates full respect for its international human rights obligations?

¹ George W. Bush. *Decision Points*, Virgin Books (2010), page 166.

² Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001. According to former Secretary Rumsfeld, among other locations discussed were Alcatraz Island; the US army facility at Fort Leavenworth, Kansas; US island military bases in the Pacific and Indian Oceans and a ship permanently stationed in the Arabian sea. Donald Rumsfeld, *Known and*

unknown: A memoir. Sentinel Books (2011), page 566.

³ Detainees were first held in a facility known as Camp X-Ray, with wire-mesh cells. Construction began on Camp Delta, a facility with multiple cell blocks, and detainees were moved there from April 2002.

⁴ Decision points, *op. cit.*, page 180.

⁵ According to the Obama administration, a total of 779 individuals have been detained at Guantánamo since detention operations began there on 11 January 2002. See Final Report of the Guantánamo Task Force, 22 January 2010, page 1. <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>. Almost 80 per cent of the 779 detainees were transferred there during 2002. The annual detainee transfer totals were: 2002 – 632; 2003 – 117; 2004 – 10; 2005 – zero; 2006 – 14; 2007 – five; 2008 – one. No detainee has been transferred to the base under the Obama administration. Given the evidence that prior to 2004 the CIA may have operated a “black site” at Guantánamo, it is not known if the total of 779 includes any detainee who was held exclusively “outside the wire” (the reported US military parlance for where the alleged CIA secret detention facility at Guantánamo was located), without subsequent transfer to military detention at the base.

⁶ Executive Order – Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities. President Barack Obama, 22 January 2009, <http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities>

⁷ Remarks by the President on National Security, National Archives, Washington, DC, 21 May 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>

⁸ By early December 2011, there were 171 men held at Guantánamo, four of whom (one Yemeni, one Canadian, and two Sudanese nationals) were serving sentences after being convicted by military commission (three as a result of guilty pleas in return for reduced sentences). The remaining 167 detainees were men of some 21 nationalities: Afghan, Algerian, Chinese (Uighur), Egyptian, Indonesian, Kenyan, Kuwaiti, Libyan, Malaysian, Mauritanian, Moroccan, Pakistani, Palestinian, Russian, Saudi Arabian, Somali, Sudanese, Syrian, Tajikistani, Tunisian, UAE, and Yemeni. See Who’s still being held at Guantánamo, Miami Herald, at <http://www.miamiherald.com/2011/04/29/v-fullstory/2192896/who-is-still-at-guantanamo.html>

⁹ “You have also asked us about the potential legal exposure if a detainee successfully convinces a federal district court to exercise habeas jurisdiction. There is little doubt that such a result could interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens. First, a habeas petition would allow a detainee to challenge the legality of his status and treatment under international treaties, such as the Geneva Conventions and the International Covenant on Civil and Political Rights...” Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, From Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, 28 December 2001.

¹⁰ A March 2003 US Department of Justice memorandum on the interrogations of foreign nationals held outside the USA, including at Guantánamo, advised the Pentagon that the UN Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), which the USA ratified in 1994, “places no legal obligations under domestic law on the Executive Branch, nor can it create any cause of action in federal court. Similarly, customary international law lacks domestic legal effect, and in any event can be overridden by the President at his discretion”. UNCAT, the memo advised, did not preclude “justification” of cruel, inhuman or degrading treatment or punishment in “exigent circumstances”. Interrogation methods that constituted such ill-treatment could be justified by “self-defense or necessity”. The memo entirely ignored the fact that under the ICCPR, even “in time of public emergency which threatens the life of the nation”, there can be no derogation from the prohibition of cruel, inhuman or degrading treatment or punishment (articles 4 and 7). Because the memo considered the 1949 Geneva Conventions to be entirely inapplicable to members of al Qaeda and the Taliban, it also

did not mention that common article 3 to the Geneva Conventions expressly lists “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular, humiliating and degrading treatment” as being among those acts that “are and shall remain prohibited at any time and in any place whatsoever” with respect to all detainees. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, Re: Military interrogation of alien unlawful combatants held outside the United States. From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003, pages 33-34, 47.

¹¹ See, for example, United States responses to selected recommendations of the Human Rights Committee 10, October 2007, <http://2001-2009.state.gov/documents/organization/100845.pdf> (“The United States takes this opportunity to reaffirm its long-standing position that the Covenant does not apply extraterritorially... Since the time that US delegate Eleanor Roosevelt successfully proposed the language that was adopted as part of Article 2 providing that the Covenant does not apply outside the territory of a State Party, the United States has interpreted the treaty in that manner”).

¹² “The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.” UN Doc.: CCPR/C/USA/CO/3/Rev.1, 18 December 2006, Concluding observations of the Human Rights Committee: United States of America, para. 10.

¹³ Opening statement to the UN Human Rights Committee, Matthew Waxman, Head of US Delegation and Principal Deputy Director of Policy Planning, US Department of State, 17 July 2006, Geneva, Switzerland, <http://2001-2009.state.gov/g/drl/rls/70392.htm>

¹⁴ 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>

¹⁵ Remarks by Assistant to the President for Homeland Security and Counterterrorism John Brennan at CSIS, ‘Securing the Homeland by Renewing American Strength, Resilience and Values’, 26 May 2010, <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi> (“We must not forget what military leaders and national security experts from across the political spectrum have said for years, that the detention facility at Guantánamo has served as a powerful recruiting tool for our enemies and must be closed.”) Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Harvard Law School, ‘Strengthening our security by adhering to our values and laws’, 16 September 2011, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>

¹⁶ For example, see ‘GOP hopefuls would keep Guantánamo camps’. Miami Herald, 13 November 2011. See also, Republican presidential candidates on terror. Associated Press, 6 December 2011.

¹⁷ Condoleezza Rice, No Higher Honor, Crown Publishers (New York, 2011), page 106-107.

¹⁸ Donald Rumsfeld, Known and Unknown: A memoir, op. cit., pages 573, 608-9.

¹⁹ Dick Cheney, In my time, Threshold Editions (2011), pages 356 and 523.

²⁰ Press conference by President Obama, 10 September 2010, transcript available at <http://www.whitehouse.gov/the-press-office/2010/09/10/press-conference-president-obama>

²¹ This general rule is reflected, for example, in Article 27 of the Vienna Convention on the Law of Treaties: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

²² See, for example, USA: A reflection on justice, 16 May 2011, <http://www.amnesty.org/en/library/info/AMR51/038/2011/en> and 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>

²³ Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, on Ensuring al-Qa’ida’s Demise – As Prepared for Delivery. Paul H. Nitze School of Advanced International Studies, Washington, DC, 29 June 2011, <http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter>

²⁴ See, for example, 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>.

²⁵ The Obama administration and international law. Harold Hongju Koh, Legal Adviser, US Department of State, 25 March 2010, <http://www.state.gov/s//releases/remarks/139119.htm>

²⁶ Remarks by the President on National Security, 21 May 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/

²⁷ “Military commissions have been used by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military...The procedures in the bill I am sending Congress today reflect the reality that we are a nation at war”. President Bush, 6 September 2006.

²⁸ Decision points, *op. cit.*, pages 127 and 137. Andy Card was President Bush’s Chief of Staff at the time of the 9/11 attacks.

²⁹ See, for example, §948d of the Military Commissions Act of 2009 (“A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter..., or the law of war, whether such offense was committed before, on, or after September 11, 2001...”). ‘Abd al Rahim al-Nashiri, for example, is currently charged with alleged war crimes committed prior to 11 September 2001. See 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>

³⁰ The AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

³¹ USA: Doctrine of pervasive ‘war’ continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>

³² *Slahi v. Obama*. Amended declaration of Mohamedou Ould Slahi. In the US District Court for DC. Amnesty International quotes from unclassified materials, which contains redactions. In this brief, the date of his arrest in Mauritania, the country to which he was transferred, and the dates of his transfer to Bagram and Guantánamo are redacted. However, this information is available in other official documents in the public domain, including that the prison in Jordan was in Amman.

³³ Section 1021. A “covered person” is (1) “a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for the attacks” or (2) “a person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed an a belligerent act or has directly supported such hostilities in aid of such enemy forces”. The “requirement to detain a person in military custody under this section does not extend to citizens of the United States” or to a “lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States”.

³⁴ The President’s constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001, <http://www.justice.gov/olc/warpowers925.htm> (“In light of the text, plan, and history of the Constitution, its interpretation by both past Administrations and the courts, the longstanding practice of the executive branch, and the express affirmation of the President’s constitutional authorities by Congress, we think it beyond question that the President has the plenary constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas. In both the War Powers Resolution and the Joint Resolution, Congress has recognized the President’s authority to use force in circumstances such as those created by the September 11 incidents. Neither statute, however, can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”)

³⁵ Final report, Guantánamo Review Task Force, 22 January 2010, *op. cit.*

³⁶ See Why Obama can’t close Guantánamo, Carol Rosenberg, Foreign Affairs, 14 December 2011.

³⁷ The DFIP replaced the Bagram Theater Internment Facility in late 2009.

³⁸ *Al Maqaleh et al v. Gates et al*, Declaration of Vice Admiral Robert S. Harward, in the US District Court for DC, 13 May 2011.

³⁹ *Al Maqaleh et al v. Gates et al*, Respondents’ opposition to petitioners’ motion to file supplemental materials in further support of petitioners’s opposition to motion to dismiss, In the US District Court for DC, 12 August 2011.

⁴⁰ *Al Maqaleh et al v. Gates et al*, Respondents’ motion to dismiss amended petitions for writs of habeas corpus, in the US District Court for DC, 19 May 2011.

⁴¹ Tofiq al Bihani had been in Afghanistan before leaving the country after the US invasion. In 2010, the US District Court ruled that Tofiq al Bihani was lawfully detained under the AUMF. The judge noted that “even assuming the catalyst behind the petitioner’s travel to Afghanistan was to prepare for battle in Chechnya, and not against the United States, this fact has no material effect on whether the government can detain the petitioner. Nothing in the AUMF, as construed by this Court and the District of Columbia Circuit, requires an individual to be ‘part of’ al-Qaeda and to have engaged in hostile aggression, or to have desired to engage in such conduct, against the United States in order to be rendered detainable” (emphasis in original). *Al-Bihani v. Obama*, Memorandum Opinion, US District Court for DC, 22 September 2010. On appeal to the Court of Appeals to the DC Circuit in January 2011, the government

and Tofiq al-Bihani jointly moved for summary affirmation of the District Court's ruling. His lawyers explained that "Because Mr al-Bihani contends that he did not participate actively and directly in hostile acts against the United States, and did not intend to engage in hostile acts against the United States, in his view he cannot be lawfully detained under the Authorization for Use of Military Force (AUMF), or the laws of armed conflict". They explained that his reason for joining the joint motion was out of recognition of the futility of pursuing the challenge in the Court of Appeals because his arguments had been foreclosed by DC Circuit precedent. He therefore wished to seek Supreme Court review of the District Court ruling "in the most efficient manner possible". The Court of Appeals granted the motion on 10 February 2011. Tofiq al-Bihani's petition seeking Supreme Court review was filed in that court in May 2011 and was due to be considered on 6 January 2012.

⁴² *Abdulmalik v. Obama*, Declaration by Mohammed Abdulmalik, In the US District Court for the District of Columbia, 13 October 2010.

⁴³ The administration has also cited the AUMF as the domestic law underpinning the USA's use of targeted killing in its "armed conflict with al-Qaeda, as well as the Taliban and associated forces". The Obama administration and international law, 25 March 2010, op. cit.

⁴⁴ Letter from William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, 23 August 2011. In its letter of 20 July 2011, Amnesty International wrote: "Amnesty International welcomes the decision to charge Ahmed Warsame for trial in ordinary federal court, and recognises the fortitude the administration has shown in doing so in the face of Congressional opposition. We urge the administration to remind members of Congress, as well as its own officials, of how important it is that the USA fulfil the international human rights obligations it has entered into with the international community, including the requirement to ensure criminal suspects receive full and fair trials within a reasonable time in independent and impartial courts, without discrimination, including on the basis of nationality. However, the very fact that Amnesty International should find itself welcoming a decision by the USA to use its own ordinary courts to prosecute international terrorism suspects, a course of action that only a decade ago was seen as routine – indeed, was recognised to be the only legitimate forum for such a criminal trial – illustrates how far the USA has strayed from its commitment to respect for human rights during that time and how much work remains to be done to change course."

⁴⁵ The DFIP replaced the Bagram Theater Internment Facility in late 2009. Most of the detainees held in DFIP are Afghan nationals, taken into custody by coalition forces in southern and eastern Afghanistan, according to the International Committee of the Red Cross. According to the Pentagon, the process of "transitioning detention operations at the DFIP" to the Afghan government began in January 2011, when one detainee housing unit was handed over to the Afghan Ministry of Defense. This unit has Afghan guards "with the support" of US personnel. Once the DFIP is transferred to Afghan control, it is expected to become "part of a larger Afghan Justice Center in Parwan (JCIP)". According to the Pentagon, by May 2011 more than 130 trials had been conducted by Afghan authorities at the JCIP and DFIP and more than 550 additional prosecution cases were in preparation. *Maqaleh et al v. Gates et al*. Declaration of William K. Lietzau, 19 May 2011. In the US District Court for DC.

⁴⁶ After the Court of Appeals refused to reconsider its decision in July 2010, US lawyers for the detainees returned to the District Court to pursue the litigation, which is continuing.

⁴⁷ *Maqaleh et al v. Gates et al*. Declaration of Vice Admiral Robert S. Harward, 13 May 2011, in the US District Court for DC.

⁴⁸ UN Doc. A/HRC/WG.6/9/USA/1 (23 August 2010). National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1. United States of America, para 5.

⁴⁹ Statement by the President on the International Day in Support of Victims of Torture, 24 June 2011, <http://www.whitehouse.gov/the-press-office/2011/06/24/statement-president-international-day-support-victims-torture>

⁵⁰ See Evan Wallach, 'Drop by drop: Forgetting the history of water torture in US courts', Columbia Journal of Transnational Law, Volume 45 (2006-2007), pages 468 to 506. See also, for example, US 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. My Justice Department will not justify it, rationalize it, or condone it. The sanction of torture is at odds with the history of American jurisprudence and American principles."). (See also, for instance, statement to UK Parliament by then-UK Foreign Secretary David Miliband "I consider that water-boarding amounts to torture", HC Deb, 21 April 2008, col 1726W; statement to the 63rd Session of the UN General Assembly, by the Special Rapporteur on Torture, Manfred Nowak, Thursday, 23 October 2008, paragraph 3; Committee against Torture, Concluding Observations on USA, UN Doc CAT/C/USA/CO/2 (25 July 2006), para 24; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/HRC/13/39/Add.5 (5 February 2010), para 74; Interview with Special Rapporteur on torture, Juan Mendez (12 November 2010), <http://www.abc.net.au/pm/content/2010/s3065204.htm>; Judgment of the International Military Tribunal for the Far East (1948). Part B, Chapter VIII, p. 1059. Judgment of the 26 July 2010, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") in the case against Kiang Guek Eav (alias 'Duch') ("Case 001"), <http://www.eccc.gov.kh/en/documents/court/judgement-case-001> paragraphs 241 and 360.

⁵¹ In early December 2011, Herman Cain suspended his presidential campaign.

⁵² 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>

⁵³ 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.

⁵⁴ George W. Bush, Decision points, *op. cit.*, pages 168-180.

⁵⁵ 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, 30 May 2005, *op. cit.* Khalid Sheikh Mohammed was allegedly "always kept naked" during this torture and female interrogators were present, "increasing the humiliation aspect". ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007, page 6. Khalid Sheikh Mohammed was held in various undisclosed locations. In his third place of detention, when he was not in interrogation, he has alleged that he was shackled in the "prolonged stress standing position" for a month, with his wrists shackled to a bar or hook in the ceiling above his head. He has also said that he was kept naked for a month in secret detention in Afghanistan, and during one period was kept shackled continuously for 19 months, even when inside his cell.

⁵⁶ Decision points, *op. cit.*, page 166.

⁵⁷ Possible habeas jurisdiction over aliens held in Guantánamo Bay, Cuba. Memorandum for William J. Haynes, 28 December 2001, *op. cit.*

⁵⁸ This is not to say that Amnesty International does not have concerns about US interrogation policy. For example, the organization has questions relating to the Army Field Manual which generally governs interrogations. Appendix M of the Manual, for example, 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, meaning that such limited sleep could become a part of the 30-day separation regime, and extendable indefinitely. See Appendix M of FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations. Department of the Army, September 2006.

⁵⁹ See, for example, Civil rights groups oppose expanded interrogation, *The Sacramento Bee*, 22 November 2011.

⁶⁰ See, generally, The torture candidates, Editorial, *The New York Times*, 14 November 2011.

⁶¹ Video clip available at <http://thinkprogress.org/security/2011/11/29/377907/gingrich-waterboarding-not-torture/>

⁶² The waterboarding trail to bin Laden. By Michael Mukasey (US Attorney General 20007 to 2009), *The Wall Street Journal*, 6 May 2011. See also, for example, Cheney praises Obama for bin Laden's death, but bemoans use of harsh tactics, *FoxNews.com*, 7 May 2011.

⁶³ Marc Thiessen, On waterboarding: Let's stick to the facts. *Washington Post*, 15 November 2011, http://www.washingtonpost.com/blogs/post-partisan/post/on-waterboarding-lets-stick-to-the-facts/2011/11/15/gIQAHHiiON_blog.html

⁶⁴ For another view, see Chapter 22 of Ali H. Soufan, *The black banners: The inside story of 9/11 and the war against al-Qaeda*. W.W. Norton (2011). Ali Soufan was an FBI interrogator who, among other things, interrogated Abu Zubaydah prior to the CIA employing "enhanced interrogation techniques".

⁶⁵ See also, for example, UN Human Rights Committee General Comment 20 (1992) on article 7 of the International Covenant on Civil and Political Rights which prohibits the use of torture or other cruel, inhuman or degrading treatment or punishment (para 3: "The text of article 7 allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.") Common article 3 to the 1949 Geneva Conventions expressly lists "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular, humiliating and degrading treatment" as being among those acts that "are and shall remain prohibited at any time and in any place whatsoever" with respect to all detainees. Article 2(2) of the UN Convention against Torture provides, "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

⁶⁶ Donald Rumsfeld. *Known and Unknown: A memoir*, op. cit., page 603.

⁶⁷ Jack Goldsmith, *The Terror Presidency: Law and judgment inside the Bush Administration*, W.W. Norton and Company, 2007, page 102.

⁶⁸ Statement by the President on the International Day in Support of Victims of Torture, 24 June 2011.

⁶⁹ Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2003.

⁷⁰ Statement on the United Nations International Day in Support of Victims of Torture, 26 June 2004.

⁷¹ Statement on United Nations International Day in Support of Victims of Torture, 26 June 2005.

⁷² See, generally, Joint study on global practices in relation to secret detention in the context of countering terrorism, by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the UN Working Group on Arbitrary Detention, and the Working Group on Enforced and Involuntary Disappearances, UN Doc A/HRC/13/42, 20 May 2010.

⁷³ Eric Lewis, Torture's future, *New York Times*, 21 November 2011,

<http://campaignstops.blogs.nytimes.com/2011/11/21/tortures-future/>.

⁷⁴ *Kiyemba v. Obama*, US Court of Appeals for the DC Circuit, 18 February 2009.

⁷⁵ *Salahi v. Obama*, Memorandum Order, US District Court for DC, 9 April 2010.

⁷⁶ UN experts welcome the announcement by President-elect Obama to close the Guantánamo Bay detention facility, 22 December 2008. The four UN experts were the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

⁷⁷ *Salahi v. Obama*, Reply brief for respondents-appellants, In the US Court of Appeals for DC Circuit, June 2010.

⁷⁸ *Salahi v. Obama*, US Court of Appeals for the DC Circuit, 5 November 2010.

⁷⁹ Peru. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 2000, US Department of State, 23 February 2001, <http://www.state.gov/g/drl/rls/hrrpt/2000/wha/827.htm>

⁸⁰ General Comment no 8, para 2 (1982) (...“delays must not exceed a few days”).

⁸¹ See e.g. Human Rights Committee, *A v Australia*, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997), para 9.5

⁸² Allison M. Lefrak. Justice denied at Guantánamo. National Law Journal, 19 September 2011.

⁸³ *Latif v. Obama*, US Court of Appeals for the DC Circuit, 14 October 2001, Judge Tatel dissenting.

⁸⁴ From lawyer’s declassified notes.

⁸⁵ *Abdah et al v. Obama et al*, Memorandum opinion, US District Court for DC, 26 May 2010.

⁸⁶ Final report, Guantánamo Review Task Force, 22 January 2010, *op. cit.*

⁸⁷ Final Report, Guantánamo Review Task Force, 22 January 2010, *op. cit.*

⁸⁸ In the case of *Yunus Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence*, 14 December 2011, ([2011] EWCA Civ 1540), <http://www.bailii.org/ew/cases/EWCA/Civ/2011/1540.html>, paragraphs 26 & 43.

⁸⁹ *Kiyemba v. Obama*, US Court of Appeals for the DC Circuit, 18 February 2009. This case involved Uighurs who were seeking release into the USA in the absence of third country solutions.

⁹⁰ Executive Order – Periodic review of individuals detained at Guantánamo Bay Naval Station pursuant to the Authorization for Use of Military Force, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>

⁹¹ Arraignment hearing for ‘Abd al Rahim al-Nashiri. From the “unofficial/unauthenticated” transcript issued by the Pentagon.

⁹² *Ibid.*

⁹³ Remarks by Richard B. Cheney, as prepared for delivery, American Enterprise Institute, 21 May 2009, <http://www.aei.org/speech/foreign-and-defense-policy/regional/india-pakistan-afghanistan/remarks-by-richard-b-cheney/>

⁹⁴ 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, 30 May 2005, *op. cit.* He was “always kept naked” during this torture and female interrogators were present,

“increasing the humiliation aspect”. ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody, International Committee of the Red Cross, February 2007, page 6. He was held in various undisclosed locations. In his third place of detention, when he was not in interrogation, he has alleged that he was shackled in the “prolonged stress standing position” for a month, with his wrists shackled to a bar or hook in the ceiling above his head. He has also said that he was kept naked for a month in secret detention in Afghanistan, and during one period was kept shackled continuously for 19 months, even when inside his cell.

⁹⁵ Remarks on the war on terror. President G. W. Bush, 6 September 2006 (“As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice”). The President’s News Conference, 15 September 2006 (“This debate is occurring because of the Supreme Court’s ruling that said that we must conduct ourselves under the Common Article Three of the Geneva Convention. And that Common Article Three says that there will be no outrages upon human dignity. It’s very vague. What does that mean, “outrages upon human dignity”? That’s a statement that is wide open to interpretation... Now, this idea that somehow we’ve got to live under international treaties, you know – and that’s fine, we do, but oftentimes the United States Government passes law to clarify obligations under international treaty. And what I’m concerned about is, if we don’t do that, then it’s very conceivable our professionals could be held to account based upon court decisions in other countries. And I don’t believe Americans want that. I believe Americans want us to protect the country, to have clear standards for our law enforcement, intelligence officers, and give them the tools necessary to protect us within the law... So Congress has got a decision to make: Do you want the program to go forward or not?”)

⁹⁶ Attorney General Eric Holder speaks at the US Constitution Project Awards Dinner, 15 April 2010, <http://www.justice.gov/ag/speeches/2010/ag-speech-1004152.html>

⁹⁷ UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc CCPR/C/GG/32, 23 August 2007, para. 22.

⁹⁸ Known and unknown, *op. cit.*, page 608.

⁹⁹ Ahmed Khalfan Ghailani, a Tanzanian national charged for trial by military commission by the Bush administration, was convicted in US District Court in New York in 2010 and sentenced to life imprisonment in January 2011.

¹⁰⁰ Representative Jerrold Nadler, at Hearing on Legal issues surrounding the military commissions system, House of Representatives, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Committee on the Judiciary, 8 July 2009.

¹⁰¹ Remarks by the President on National Security, 21 May 2009, *op. cit.*

¹⁰² At the military commission arraignment at Guantánamo on 9 November 2011, the following dialogue occurred between the military judge and a prosecutor from the US Department of Justice, Assistant US Attorney Anthony Mattivi. Military Judge, Colonel Pohl: “If the accused were acquitted today, there is no legal prohibition from the government to take him under the Authorization for Use of Military Force straight back to the cell he came from? Today.” US Attorney Mattivi: “Today, just as if the same thing had happened to Mr [Ahmed Khalfan] Ghailani in the Southern District in the Article III case, that’s absolutely correct”. Ahmed Ghailani is the only Guantánamo detainee to have been transferred to the US mainland for prosecution. He was convicted in 2010 and sentenced to life imprisonment in 2011.

¹⁰³ Final report, Guantánamo Review Task Force, 22 January 2010, *op. cit.*

¹⁰⁴ Obama’s Interview aboard Air Force One, New York Times transcript, 7 March 2009.

¹⁰⁵ Interview on 22 May 2009 with Steve Scully, Political Editor, C-SPAN, aired on 23 May 2009.

- ¹⁰⁶ Attorney General announces forum decisions for Guantánamo detainees, 13 November 2009, <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.
- ¹⁰⁷ See Obama on terror trials: KSM will die. Politico.com, 18 November 2009, <http://www.politico.com/news/stories/1109/29661.html>
- ¹⁰⁸ President George W. Bush, Remarks Following Discussions With President Vladimir Putin of Russia and an Exchange With Reporters in St. Petersburg, Russia, 22 November 2002.
- ¹⁰⁹ President George W. Bush, Remarks in Shreveport, Louisiana, 3 December 2002.
- ¹¹⁰ President George W. Bush, Remarks at a Luncheon for Senatorial Candidate Suzanne Haik Terrell in New Orleans, Louisiana, 3 December 2002.
- ¹¹¹ Special Review. Counterterrorism detention and interrogation activities (September 2001 – October 2003), CIA Office of Inspector General, 7 May 2004, paras. 36 and 224. Information released into the public domain indicates ‘Abd al Rahim al-Nashiri was also subjected to shackling, hooding and nudity as well as to a number of “unauthorized” techniques, including being threatened with a handgun and a electric power drill, “potentially injurious stress positions” and the use “of a stiff brush [used in bathing] that was intended to induce pain”, and “standing on al-Nashiri’s shackles, which resulted in cuts and bruises”.
- ¹¹² UN Doc.: E/CN.4/2003.3, 13 January 2003. Report of the Special Rapporteur, Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2002/36, paras. 37-39. See also Yemen/USA: government must not sanction extra-judicial executions, 8 November 2002, <http://www.amnesty.org/en/library/info/AMR51/168/2002/en>
- ¹¹³ UN Doc.: E/CN.4/2003/G/80, 22 April 2003. Letter dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights.
- ¹¹⁴ President George W. Bush. Remarks to the troops at Ford Hood in Killeen, Texas, 3 January 2003. Weekly compilation of Presidential documents.
- ¹¹⁵ Remarks by the President on Osama bin Laden, White House, 2 May 2011, <http://www.whitehouse.gov/the-press-office/2011/05/02/remarks-president-osama-bin-laden>
- ¹¹⁶ CBS 60 minutes, Interview of President Barack Obama by Steve Kroft, broadcast 8 May 2011.
- ¹¹⁷ See USA: Amnesty International appalled at devastating attacks against civilians, 11 September 2001, <http://www.amnesty.org/en/library/info/AMR51/134/2001/en>; USA: Justice, not revenge, must prevail, 13 September 2001, <http://www.amnesty.org/en/library/info/AMR51/140/2001/en>; Open letter to the UN Security Council, 17 September 2001, <http://www.amnesty.org/en/library/info/ACT30/020/2001/en>; A joint civil society statement on the tragedy in the United States, 21 September 2001, <http://www.amnesty.org/en/library/info/ACT30/021/2001/en>; Letter to President George W. Bush, 21 September 2001, <http://www.amnesty.org/en/library/info/AMR51/144/2001/en>;
- ¹¹⁸ On 4 May 2011, a spokesperson for the US administration explained: “The team had the authority to kill Osama bin Laden unless he offered to surrender; in which case the team was required to accept his surrender if the team could do so safely. The operation was conducted in a manner fully consistent with the laws of war. The operation was planned so that the team was prepared and had the means to take bin Laden into custody. ...consistent with the laws of war, bin Laden’s surrender would have been accepted if feasible” (Press Briefing by Press Secretary Jay Carney, 4 May 2011, <http://www.whitehouse.gov/the-pressoffice/2011/05/04/press-briefing-press-secretary-jay-carney-542011>). Initially, the administration had asserted: “It was a firefight. He, therefore, was killed in that firefight and that’s when the remains were removed” (Press Briefing by Press Secretary Jay Carney and Assistant to the President for

Homeland Security and Counterterrorism John Brennan, White House, 2 May 2011, <http://www.whitehouse.gov/the-pressoffice/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homela>). Officials subsequently clarified that Osama bin Laden was in fact unarmed when he was shot in the head during the raid (See, for example, White House corrects information on bin Laden raid. American Forces Press Service, 3 May 2011, <http://www.defense.gov/News/NewsArticle.aspx?ID=63803>). The US Attorney General told the Senate Judiciary Committee, “If he had surrendered, attempted to surrender, I think we should obviously have accepted that, but there was no indication that he wanted to do that and therefore his killing was appropriate” (<http://www.bbc.co.uk/news/world-us-canada-13286312>). Administration officials were, however, subsequently reported to have admitted that no real opportunity for surrender was planned for or in fact provided (LA Times, “Osama bin Laden's surrender wasn't a likely outcome in raid, officials say”, 3 May 2011, <http://articles.latimes.com/2011/may/03/world/la-fg-bin-laden-us-20110504>). Amnesty International wrote to US officials on 4 May 2011 seeking further information. In a reply dated 31 May 2011, the US administration made it clear that the raid was conducted under the USA's theory of a global armed conflict between the USA and al-Qa'ida. In a response dated 22 July 2011, Amnesty International wrote: “To permit any state to claim that it can act in contravention of human rights standards virtually anywhere in the world at any time simply by invoking the concept of a ‘global war’ against a diffuse network of non-state actors, a ‘war’ that is without prospect of a clearly recognizable end, would seriously undermine the very foundations of international human rights law. Such a claim further finds no explicit basis in the various sources of international humanitarian law itself.” The organization wrote that if the legal justification referenced in the administration's letter of 31 May 2011 “represents the USA's final word on this matter, then we are left with little choice but to conclude that the killings in question were committed without a proper legal basis, were carried out in accordance with instructions that failed to implement the applicable human rights standards, and were therefore inconsistent with due respect for the right to life.” Relevant in this regard would be the right not to be arbitrarily deprived of life as provided for under article 6 of the International Covenant on Civil and Political Rights (ICCPR), and specifically the requirements of prior warning and effective opportunity to comply, and necessity, as reflected for instance in the UN Code of Conduct for Law Enforcement Officials, adopted by General Assembly resolution 34/169 of 17 December 1979, and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990. The organization also called on the US administration to conduct an investigation, in accordance with international human rights standards into the killings in Abbottabad operation, as required under the ICCPR, and as reflected in the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Economic and Social Council resolution 1989/65 of 24 May 1989. By early December 2011, the organization had received no further communication on this matter from the US authorities, few details were subsequently provided publicly, and no independent investigation is known to have taken place. See also Amnesty International, USA: A reflection on justice, 16 May 2011, <http://amnesty.org/en/library/info/AMR51/038/2011/en>.

¹¹⁹ Action memo, Counter-resistance techniques. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002. See also Memorandum for Commander, Joint Task Force 170, Legal brief on proposed counter-resistance strategies, 11 October 2002.

¹²⁰ A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan and Iraq, US Department of Justice, Office of Inspector General, October 2009 (revised) (hereinafter FBI Inspector General Report).

¹²¹ See USA: An embarrassment of hitches: Reflections on the death penalty, 35 years after Gregg v. Georgia, as states scramble for lethal injection drugs, 1 July 2011, <http://www.amnesty.org/en/library/info/AMR51/058/2011/en>

¹²² CCPR General Comment No. 6, The right to life (Article 6), 1982.

¹²³ UN Doc.: A/HRC/16/11/Add.1, Report of the Working Group on the Universal Periodic Review: United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 8 March 2011.

¹²⁴ *ACLU et al v. Department of Defense et al*, Declaration of Leon E. Panetta, Director, Central Intelligence Agency, US District Court for the Southern District of New York, 22 September 2009.

¹²⁵ *Mohammed v. Obama*, Memorandum opinion, US District Court for DC, 19 November 2009.

¹²⁶ In November 2011, the plaintiffs in the Jeppesen lawsuit took their case to the Inter-American Commission on Human Rights.

¹²⁷ UN Doc.: A/HRC/16/11/Add.1, Report of the Working Group on the Universal Periodic Review: United States of America. Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 8 March 2011.

¹²⁸ *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

¹²⁹ *ALCU v. Department of Defense and Central Intelligence Agency*, US Court of Appeals for the DC Circuit, 18 January 2011.

¹³⁰ See USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 17 April 2009, <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>

¹³¹ *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

¹³² See 'A little knowledge is a dangerous thing', In appendix 1 of USA: Detainees continue to bear costs of delay and lack of remedy. Minimal judicial review for Guantánamo detainees 10 months after *Boumediene*, 9 April 2009, <http://www.amnesty.org/en/library/info/AMR51/050/2009/en>

¹³³ See, e.g., *ACLU et al v. Department of Defense et al*. Sixth Declaration of Marilyn A. Dorn, Information Review Officer, CIA, US District Court, Southern District of New York, 5 January 2007 (disclosure of the information "could be expected to impair the foreign relations and foreign activities of the United States by undermining the cooperative relationships that the United States has developed with its critical partners in the global war on terrorism"), and Declaration of Leon A. Panetta, CIA Director, 8 June 2009 (disclosure of the information "would disclose the locations of covert CIA facilities and the identities of foreign countries cooperating with the CIA in counterterrorism operations").

¹³⁴ Re: suspected mistreatment of detainees. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.

¹³⁵ Action memo, Counter-resistance techniques. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002. See also Memorandum for Commander, Joint Task Force 170, Legal brief on proposed counter-resistance strategies, 11 October 2002.

¹³⁶ Testimony of LTG Randall M. Schmidt. Taken 24 August 2005 at Davis Mountain Air Force Base, Arizona. Department of the Army Inspector General, Investigations Division.

¹³⁷ FBI Inspector General Report, *op. cit.*, pages 102-103. See also USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, Amnesty International, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/042/2008/en>.

¹³⁸ Testimony of LTG Randall M. Schmidt. Taken 24 August 2005, *op. cit.*

¹³⁹ Detainee tortured, says US official. Bob Woodward, Washington Post, 14 January 2009. See also, A

case to answer: the torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, Amnesty International, June 2006, <http://www.amnesty.org/en/library/info/AMR51/093/2006/en>

¹⁴⁰ Quotes and other details in this text box come from FBI Inspector General Report, *op. cit.*; Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate (SASC Report), 20 November 2008; and 24 October 2002 email between DOD CITF personnel, Subject: FW: Counter Resistance Strategy Meeting Minutes (from SASC report supporting documents). See also: 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>

¹⁴¹ Donald Rumsfeld. Known and unknown: a memoir, *op. cit.*, page 580.

¹⁴² *Ibid.*, citing Memorandum for Chairman of the Joint Chiefs of Staff. Subject: Counter-resistance techniques. From US Army General James T. Hill, 25 October 2002.

¹⁴³ FBI Inspector General Report, *op. cit.* As a transliteration, both Mohammedou Salahi and Mohamedou Slahi have been used for this detainee in court and other documents in English.

¹⁴⁴ *Salahi v. Obama*. Brief for appellee, In the US Court of Appeals for the DC Circuit, 9 June 2010. The US government has never publicly admitted that it rendered Mohamedou Ould Slahi to Jordan.

¹⁴⁵ *Ibid.*, also see USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi, 20 September 2006, <http://www.amnesty.org/en/library/info/AMR51/149/2006/en>.

¹⁴⁶ See SASC Report, *op. cit.*, pages 135-141. See also FBI Inspector General Report, *op. cit.*

¹⁴⁷ SASC Report, *op. cit.*, page 137.

¹⁴⁸ *USA v. Ghailani*, Memorandum of law in opposition to Defendant Ahmed Khalfan Ghailani's motion to dismiss the indictment due to the denial of his constitutional right to a speedy trial. In the US District Court for Southern District of New York, 18 December 2009.

¹⁴⁹ *Salahi v. Obama*, Brief for appellee, In the US Court of Appeals for DC Circuit, June 2010.

¹⁵⁰ Known and unknown, *op. cit.* page 580 (note).

¹⁵¹ *Al-Madhwani v. Obama*, Brief for petitioner-appellant Musa'ab Al-Madhwani, In the US Court of Appeals for the DC Circuit, 15 November 2010.

¹⁵² 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>

¹⁵³ ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, *op. cit.*

¹⁵⁴ *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.

¹⁵⁵ Message from the Director: DoJ Investigations Moving Toward Closure. Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on DoJ Investigations Moving Toward Closure, 30 June 2011, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>

¹⁵⁶ Department of Justice statement on the investigation into the destruction of videotapes by CIA Personnel, 9 November 2010, <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>

¹⁵⁷ 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>

¹⁵⁸ Remarks by Richard B. Cheney, American Enterprise Institute, 21 May 2009, *op. cit.*

¹⁵⁹ Statement by the White House Press Secretary on the Geneva Conventions, 7 February 2002.

¹⁶⁰ *ACLU et al v. Department of Defense et al.* US District Court for the Southern District of New York, Ninth Declaration of Marilyn A. Dorn, Deputy Chief, Policy and Community Action Staff, National Clandestine Service, Central Intelligence Agency, 7 June 2007.

¹⁶¹ John Rizzo, 9/11: Three major mistakes. Hoover Institution, 8 September 2011, <http://www.hoover.org/publications/defining-ideas/article/91992>. John Rizzo was the CIA's chief legal counsel from 2001 to 2002 and from 2004 to 2009.

¹⁶² 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, Office of Professional Responsibility, US Department of Justice, page 117.

¹⁶³ Special Review of counterterrorism detention and interrogation activities (September 2001 – October 2003). Office of Inspector General, Central Intelligence Agency, 7 May 2004.

¹⁶⁴ Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009.

¹⁶⁵ 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>

¹⁶⁶ S8130, Congressional Record – Senate, 1 December 2011.

¹⁶⁷ Decision Points, *op. cit.*, pages 166-168.

¹⁶⁸ Stakeout on Capitol Hill with Secretary Rumsfeld and Gen. Pace, US Department of Defense transcript, 8 December 2001.

¹⁶⁹ Wolfowitz Interview with Jim Lehrer, News Hour, PBS TV. US Department of Defense transcript, 21 March 2002.

¹⁷⁰ Condoleezza Rice. No Higher Honor, *op. cit.*, page 276.

¹⁷¹ Condoleezza Rice. No Higher Honor, *op. cit.*, page 502.

¹⁷² Remarks at the American Enterprise Institute, 21 May 2009, *op. cit.*

¹⁷³ The Obama Administration and International Law, 25 March 2010, *op. cit.*

¹⁷⁴ Liberia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 2002. Published 31 March 2003, <http://www.state.gov/g/drl/rls/hrrpt/2002/18211.htm>

¹⁷⁵ 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, 30 May 2005, *op. cit.*, including note 30.

¹⁷⁶ 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.

¹⁷⁷ USA: Federal judge orders release of five of six Guantánamo detainees seized in Bosnia in 2002, 20 November 2008, <http://www.amnesty.org/en/library/info/AMR51/141/2008/en>

¹⁷⁸ Rick Perry for President, <http://www.rickperry.org/issues/national-security/>

¹⁷⁹ Newt 2012 (presidential bid website), <http://www.newt.org/solutions/tell-truth-about-national-security>

¹⁸⁰ United States of America: US human rights commitments and pledges. 27 April 2009, US Department of State, Bureau of International Organization Affairs, <http://www.state.gov/documents/organization/122476.pdf>.

¹⁸¹ Remarks on the Human Rights Agenda for the 21st Century. Hillary Rodham Clinton, Secretary of State, Georgetown University's Gaston Hall, Washington DC, 14 December 2009.

¹⁸² The Obama administration and international law, *op. cit.*, 25 March 2010.

¹⁸³ See Introduction to 2010 Country Reports on Human Rights Practices, US Department of State, April 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/frontmatter/154329.htm> (“The reports do not cover human rights in the United States, although this Administration has made a commitment to take a close and critical look at our own performance on these issues even as we cast a spotlight on the practices of other countries. In November, the United States presented its first report on human rights in the United States to the UN Human Rights Council (UNHRC) in Geneva through the Universal Periodic Review.”)

¹⁸⁴ UN Doc. A/HRC/WG.6/9/USA/1 (23 August 2010). National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1. United States of America, para 4.

¹⁸⁵ *Qassim v. Bush*, Respondents' supplemental memorandum pursuant to the Court's invitation at the August 1, 2005 hearing. In the US District Court for DC, 8 August 2005.

¹⁸⁶ *Qassim v. Bush*, US District Court for the District of Columbia, Memorandum of 22 December 2005. Shortly before this judgment was due to be appealed in a higher court, these and three other Uighur detainees were transferred from Guantánamo by the US authorities and released in Albania.

¹⁸⁷ China, 2002 Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 31 March 2003, <http://www.state.gov/g/drl/rls/hrrpt/2002/18239.htm>

¹⁸⁸ See Urgent Action <http://www.amnesty.org/en/library/info/AMR51/090/2004/en>.

¹⁸⁹ FBI Inspector General report, *op. cit.*

¹⁹⁰ *Kiyemba v. Obama*, On remand from the US Supreme Court, US Court of Appeals for the DC Circuit, 28 May 2010.

¹⁹¹ *Kiyemba v. Obama*, Petition for rehearing en banc. In the US Court of Appeals for the DC Circuit, 12 July 2010.

¹⁹² Remarks on the war on terror. President George W. Bush, 6 September 2006. It may also be noted that the practice of relying on “assurances against mistreatment” as a means of justifying transfers to risks of torture or other human rights violations, which would otherwise clearly be prohibited, is in itself of serious concern from a human rights perspective: see for instance Amnesty International, Dangerous Deals: Europe's reliance on 'diplomatic Assurances' against torture, 12 April 2010, <http://www.amnesty.org/en/library/info/EUR01/012/2010>.

¹⁹³ Executive Order--Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, *op. cit.*

¹⁹⁴ Remarks by the President on National Security, 21 May 2009, *op.cit.*

¹⁹⁵ Colonel John Custer, CJCS external review of Guantánamo Bay Intelligence Operations, cited SASC report, November 2008, *op. cit.*, pp. 42-43; p. xxvii-xxviii, and pp. 73-91.

¹⁹⁶ SASC report, *op. cit.*, November 2008, p. xxvii-xxviii, and pp. 73-91. See also Counter-resistance strategies. Memorandum for Commander, United States Southern Command, 11 October 2002. Signed

by Major General Dunlavy.

¹⁹⁷ SASC report, *op.cit.*

¹⁹⁸ ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, *op. cit.*, February 2007, page 7. According to a military investigative interview conducted in 2005 and subsequently leaked, the CIA had "unfettered access to people they wanted to have and they had their own area. They didn't use [military] interrogation facilities because they had their own trailer operation" at Guantánamo. Testimony of LTG Randall Schmidt, taken by the Department of the Army Inspector General, Investigations Division, 24 August 2005.

¹⁹⁹ Ali H. Soufan, *The black banners*, *op. cit.*, page 482.

²⁰⁰ Remarks on signing the Military Commissions Act of 2006, President G.W. Bush, 17 October 2006.

²⁰¹ Guantánamo forever? By Charles C. Krulak and Joseph P. Hoar. *New York Times*, 12 December 2011.

²⁰² Attorney General Eric Holder delivers remarks on the closing of Guantánamo Bay, at the Hans Arnhold Center of the American Academy of Berlin, Germany, 29 April 2009.