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UNITED STATES OF AMERICA
Law and executive disorder
President gives green light to secret detention program

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Our critics sometimes paint the United States as a country willing to duck or shrug off international obligations when they prove constraining or inconvenient. That picture is wrong. The United States does believe that international law matters. We help develop it, rely on it, abide by it…

John Bellinger, Legal Adviser, US State Department, 6 June 2007

Summary

On 20 July 2007, President George W. Bush issued an executive order determining that Article 3 common to the four Geneva Conventions of 1949 "shall apply to a program of detention and interrogation operated by the Central Intelligence Agency" (CIA). "I hereby determine", the President stated, that the CIA program "fully complies with the obligations of the United States under Common Article 3", provided that "the conditions of confinement and interrogation practices of the program" remain within the limits set out in the executive order.

Common Article 3 reflects customary international law applicable in armed conflict. Like international human rights law, which is applicable at all times, it requires fair trials and prohibits, among other things, torture and cruel treatment. Common Article 3 also explicitly prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment".

This report provides some background to the development of the secret CIA program and to the issuing of this executive order more than five years later. It concludes that both the executive order and the CIA program itself fail to comply with the USA's international obligations.

Among other things, the executive order:

- Authorizes and endorses secret incommunicado detention, a practice that violates international law, and itself amounts to torture or other cruel, inhuman or degrading treatment (ill-treatment). Such detention can amount to enforced disappearance, a

crime under international law. Most of those who have already been held in the CIA program have become the victims of enforced disappearance;

- Exploits the USA's pick and choose approach to international law, including the reservations attached to its ratification of international human rights treaties limiting the protections against torture and other ill-treatment;
- Attaches to its interpretation of common Article 3 a form of the US constitutional law "shocks the conscience" test. This opens the door to a sliding scale of legality in relation to acts that may amount to torture or other ill-treatment against detainees viewed by the CIA as potential sources of "high-value" intelligence and who may be exposed to "enhanced interrogation techniques";
- Contains additional loopholes that may allow further ill-treatment of detainees held in the CIA program, including in relation to humiliating and degrading treatment;
- Fails to repudiate specific interrogation techniques which have allegedly been used in the CIA secret program and which clearly violate the international prohibition on torture and other ill-treatment. One such technique is "waterboarding", in effect mock execution by drowning;
- Facilitates and entrenches impunity, including for officials and agents who have authorized, condoned or carried out enforced disappearances, abductions, secret detentions, and torture or other ill-treatment;
- Discriminates on the basis of national origin, reserving internationally unlawful measures for use against foreign nationals and denies them access to remedies, in violation of international human rights law;
- Casts a potentially wide net that could lead, for example, to family members of terrorist suspects sought by the USA being subjected to the secret detention program;
- Forms part of the US government's global "war" paradigm, under which parts of international humanitarian law, selectively interpreted, are deemed to apply, and international human rights law is generally disregarded. In this context, this law of war framework is applied regardless of where and in what circumstances the detainee subject to the secret program was taken into custody.

Four and a half years ago, the White House issued its National Strategy for Combating Terrorism. It asserted that the USA was committed to building a world where "values such as human dignity, rule of law, respect for individual liberties" are embraced as standards, not exceptions". This, the administration stated, "will be the best antidote to the spread of terrorism. This is the world we must build today."

Instead what the administration has built is a secret detention, interrogation and rendition program. President Bush's executive order of 20 July 2007 gives the green light for the CIA's secret program to continue. In so doing, it leaves the USA squarely on the wrong side of its international obligations and detainees exposed to torture and other ill-treatment.

Introduction: an executive-driven response to judicial intervention

On 20 July 2007, President George W. Bush issued an executive order that highlights the gulf between international law and the USA's view of its obligations under it.

The executive order determines that Article 3 common to the four Geneva Conventions of 1949 "shall apply" to the CIA's detention and interrogation program operated in the "war on terror". The CIA program will fully comply with the obligations of the United States under common Article 3, according to the executive order, provided that "the conditions of confinement and interrogation practices of the program" remain within the limits set out in it.[1]

Common Article 3 reflects customary international law applicable in all types and situations of armed conflict. Like international human rights law, which is applicable at all times, it requires fair trials and prohibits, among other things, torture and cruel treatment. Common Article 3 also explicitly prohibits "outrages upon personal dignity, in particular, humiliating and degrading treatment". The International Court of Justice has described the rules in common Article 3 as constituting "a minimum yardstick" and reflecting "elementary considerations of humanity".[2]

In a memorandum dated 7 February 2002, issued four months after the US-led invasion of Afghanistan, President Bush stated that common Article 3 would not apply to *al-Qa'ida* or Taleban detainees taken into US custody. This decision remained intact until 29 June 2006 when the US Supreme Court handed down its judgment in the case of Salim Ahmed Hamdan, a Yemeni national taken into US custody in Afghanistan in November 2001, transferred to the US Naval Base in Guantánamo Bay, Cuba, and accused by the US authorities of being linked to *al-Qa'ida*. In *Hamdan v. Rumsfeld*, the Court found that common Article 3 applied.

At a post-*Hamdan* hearing before the Senate Armed Services Committee on 13 July 2006, the witnesses – six former or current members of the Judge Advocate General Corps of the US Army, Navy and Air Force – all agreed that some of the interrogation techniques authorized in the "war on terror" had violated common Article 3. Although any violations of this Article would have constituted war crimes under US law, no prosecutions were brought in respect of such violations.

In a major speech on 6 September 2006, President Bush responded to the Supreme Court's *Hamdan* ruling. He confirmed what had long been reported – that the CIA had been operating a policy of secret detentions and unidentified "alternative" interrogation "procedures".[3] President Bush declined to elaborate on the "specifics of this program, including where these detainees have been held and the details of their confinement". The interrogation techniques are reported to have included methods that violate the prohibition on torture or other cruel,

[1] Executive order: Interpretation of the Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency. 20 July 2007, http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html.

[2] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgment of 27 June 1986, ICJ Rep., para. 218.

[3] President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

inhuman or degrading treatment. According to the government, they have been conducted against detainees in "secret, off-shore facilities… in order to help prevent terrorist attacks".[4]

The Supreme Court, President Bush said, had thrown the future of the secret CIA detention and interrogation program into doubt. He revealed that in response to the *Hamdan* ruling, the administration had worked on draft legislation, the Military Commissions Act (MCA), for Congress to consider. At the same time, President Bush announced the transfer of 14 "high-value" detainees from secret CIA custody in unknown locations, where they had been held for up to four and a half years, to military detention and possible trial in Guantánamo.

In the charged climate of the fifth anniversary of the attacks of 11 September 2001 and the looming mid-term congressional elections, Congress passed the MCA, provisions of which are fundamentally incompatible with international law, including procedures for trials by military commission of "alien unlawful enemy combatants" and the stripping of *habeas corpus* for foreign nationals held in US custody as "enemy combatants". Signing the MCA into law in October 2006, President Bush emphasized – over and above any other aspect of the legislation – that it would allow the secret detention and interrogation program to continue:

> "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders…When I proposed this legislation, I explained that I would have one test for the bill Congress introduced: Will it allow the CIA program to continue? This bill meets that test."[5]

As Justice Kennedy had noted in his concurring opinion in the *Hamdan* ruling, under the USA's War Crimes Act any violations of common Article 3 were prosecutable as war crimes in the United States. The MCA amends the War Crimes Act by defining what would amount to war crimes, and states that "no foreign or international source of law" could be used by the US courts in interpreting these violations listed by the MCA. Conspicuous by its absence is any reference to common Article 3's prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment". What was once a war crime under US law is no longer so.

Under the MCA, President Bush was given the authority to interpret "violations of treaty obligations which are not grave breaches of the Geneva Conventions (i.e., not war crimes), and instructed that he should do so by executive order. The executive order of 20 July 2007, "signed after an extensive interagency process of review and coordination", is the President's response.[6] Like the MCA, it fails to meet the USA's international obligations.

[4] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the United States District Court for the District of Columbia, 26 October 2006.
[5] President Bush signs Military Commissions Act of 2006, 17 October 2006.
[6] President Bush signs executive order. White House news release, 20 July 2007.

Secret detention violates international law

The fundamental flaw of the executive order is that the secret detention it allows to continue *per se* violates international human rights and humanitarian law, encoded in treaties binding on the USA. The CIA program should be shut down, not given the green light.

The US government was told as much by the UN Human Rights Committee and the UN Committee Against Torture after it appeared before them in Geneva last year. These expert bodies – which monitor compliance with, respectively, the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) – were clear in their denunciation of the USA's secret detention program, at that time not yet officially confirmed. The Human Rights Committee stated:

> "The State party should immediately abolish all secret detention and secret detention facilities...It should only detain persons in places in which they can enjoy the full protection of the law."[7]

In similar vein, the Committee Against Torture stated:

> "The State party should ensure that no one is detained in any secret detention facility under its *de facto* effective control. Detaining persons in such conditions constitutes, *per se*, a violation of the Convention... The State party should publicly condemn any policy of secret detention."[8]

Far from any offering any such condemnation, President Bush, within weeks of these UN treaty body reports, confirmed the existence of the secret detention and interrogation program and endorsed its continuation. He was, in effect, admitting to having authorized enforced disappearance, a crime under international law. His executive order compounds the wrongdoing, and if the program receives detainees as before – with their fate and whereabouts concealed – President Bush will have re-authorized the practice of enforced disappearance.

Dozens of people were held in the secret program prior to the *Hamdan* ruling.[9] Most, if not all, of these detainees became the victims of enforced disappearance, a practice prohibited by customary international law, which is binding on all states, including the USA. Enforced disappearances have been recognized as crimes under international law since the judgment of

[7] Human Rights Committee, United States of America: Concluding observations, UN Doc. CCPR/C/USA/Q/3/CRP.4, 27 July 2006.
[8] Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 18 May 2006.
[9] This is separate to the CIA's involvement in large numbers of detentions and interrogations outside of this specific secret program, in Afghanistan, Iraq, Guantánamo and elsewhere. In Iraq, for example, the CIA persuaded military personnel to let the agency hold detainees in Abu Ghraib prison without registering them, known as "ghost detainees". In September 2004, General Paul Kern, who oversaw the Fay investigation into Abu Ghraib, said that the number of "ghost detainees" was "in the dozens, to perhaps up to 100". Major General George Fay also said that he believed "it's probably in the dozens". See *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, October 2004, http://web.amnesty.org/library/index/engamr511452004.

the Nuremberg Tribunal in 1946.[10] International instruments adopted since that date have reiterated that enforced disappearances are crimes under international law.[11]

The UN Declaration on the Protection of All Persons from Enforced Disappearance, adopted by consensus in December 1992 by the community of nations, including the USA, states that enforced disappearance occur when:

> "persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials or different branches or levels of Government,…followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law."

On 6 February 2007, the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by consensus by the UN General Assembly in December 2006, opened for signature. The preamble of this treaty reiterates the "extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity". Fifty-seven countries signed the Convention on 6 February. Under the Convention, enforced disappearance is:

> "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

Individuals were held in the CIA's secret program for up to four and a half years before President Bush confirmed the existence of the program in September 2006. The prior refusal or failure to clarify the fate or whereabouts of the detainees, leaving them outside the protection of the law for a prolonged period, placed them squarely within the above

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

[11] Inter-American Convention on the Forced Disappearance of Persons, Preamble, adopted on 9 June 1994 in Belém do Pará, Brazil, at the 24th regular session of the OAS General Assembly; International Law Commission, entered into force 28 March 1996;1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18 (i); Rome Statute of the International Criminal Court, Article 7 (1)(i) and (2) (i); International Criminal Court, Elements of Crimes, Article 7 (1) (i). When the Elements of Crimes were adopted by the Preparatory Commission for the International Criminal Court, the US delegate, Lieutenant Colonel William Lietzau, stated that the United States was "happy to join consensus in agreeing that this elements of crimes document correctly reflects international law". Christopher Keith Hall, "The first five sessions of the UN Preparatory Commission for the International Criminal Court," 94 *Am. J. Int'l L.* 773, 788 (2000).

definitions of enforced disappearance.[12] While 14 of the detainees held in the program were identified and transferred to Guantánamo in early September 2006, at least three dozen people believed to have been held in the CIA program remain unaccounted for, their fate and whereabouts unknown.[13] It is unknown who, if anyone, is currently held in the program.

In its conclusions and recommendations in 2006 on the USA's compliance with the Convention against Torture, the Committee Against Torture criticized the USA's view that enforced disappearance does not constitute a form of torture, and urged the USA to "adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, *per se*, a violation of the Convention." The executive order of 20 July 2007 is a slap in the face to such international calls.

On 26 June 2003, when the world had yet to learn about documents elaborated within his administration discussing how to bypass the prohibition on torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment), President Bush asserted that the USA would lead the global struggle against torture "by example". He said that "notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors."[14] In its annual human rights reports, the US State Department has frequently criticized incommunicado and other

[12] This includes the six detainees who were named in the 9/11 Commission Report and were later among the 14 transferred to Guantánamo in September 2006. By the time of the Report they had been in custody for as long as two years. The Report gave minimal details. Although the 9/11 Commission said that the detainees were "currently in US custody", it did not say when this confirmation by the US government occurred, or where the detainees were or had been held. Nor did it say whether any of the detainees had at any point been transferred between the USA and other countries. The 9/11 Commission was "authorized to identify by name only ten detainees whose custody ha[d] been confirmed officially by the US government." The 10 were: Khalid Sheikh Mohammed (*), Abu Zubaydah (*), Riduan Isamuddin (also known as Hambali)(*), Abd al Rahim al Nashiri (*), Tawfiq bin Attash (also known as Khallad)(*), Ramzi Binalshibh (*), Mohamed al Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul. (* signifies detainees who were transferred to Guantánamo in September 2006). Mohamed al Kahtani was already in Guantánamo, although that was unknown at that time. It later transpired that another detainee, Mohamedou Ould Slahi, named in the 9/11 Commission Report, but not acknowledged as being in custody, was also in Guantánamo, after having been rendered from Mauritania to alleged torture in Jordan, and subsequent transfer to Afghanistan. In Guantánamo, he was denied access to the ICRC for more than a year on the grounds of "military necessity" (see below).

[13] See *Off the Record: US responsibility for enforced disappearances in the 'war on terror'*, AI Index: AMR 51/093/2007, June 2007, http://web.amnesty.org/library/Index/ENGAMR510932007. Jakob Kellenberger, the ICRC's president, said in April 2007 that his organization was still searching for some 50 people believed to have been apprehended by the US, and whose whereabouts remain unknown. Asked by the *Washington Post* if he thought that they were being held in secret US prisons, he replied: "I cannot exclude it, nor can I prove it. There are individuals we cannot find." *ICRC Chief Faults Rights Protection at Guantánamo*, Washington Post, 5 April 2007.

[14] Statement by the President, http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html.

unlawful detention practices. In its most recent entry on China, for example, the State Department reports that "extended, unlawful detention remained a problem… The government used incommunicado detention. The law requires notification of family members within 24 hours of detention, but individuals were often held without notification for significantly longer periods".[15]

In the CIA program, detainees have been held entirely incommunicado, often for years on end, denied access to lawyers, courts, relatives, international human rights monitors and the International Committee of the Red Cross (ICRC). In most cases, the very fact of their detention has been unacknowledged, and in all cases their fate and whereabouts have remained unknown, so the families have no idea where their relative is, and whether he is dead or alive, until the person is released or transferred out of CIA custody. In its 2006 conclusions on the USA's compliance with its ICCPR obligations, the Human Rights Committee noted that in such cases, "the rights of the families of the detained persons have also been violated".[16]

The ICRC has repeatedly sought and been denied access to those held in the CIA's secret detention program. It has made clear its concern "about any type of secret detention as such detention is contrary to a range of safeguards provided for under the relevant international standards."[17] Under President Bush's new executive order, the ICRC will continue to be denied access to detainees held in the CIA program because, according to the administration, this "is not the kind of access that's consistent with the intelligence objectives of a program

[15] Country Reports on Human Rights Practices, 2006, Bureau of Democracy, Human Rights, and Labor, March 2007, http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm.

[16] Human Right Committee, United States of America: Concluding observations, UN Doc. CCPR/C/USA/Q/3/CRP.4, 27 July 2006, para. 12. Note: Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance states: "1. For the purposes of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. 2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard. 3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains. 4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition. 6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights. 7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance."

[17] Developments in US policy and legislation towards detainees: the ICRC position, *op. cit.*

like this".[18] In other words, detainees will be denied access to the ICRC and any other external communications as a part of the methods used to coerce cooperation.

Again, this can be set against the USA's human rights criticisms of other countries. In its 2007 human rights report, for example, the US State Department noted that the Uzbekistan government "did not grant full access to outside monitors to prisons and detention centers…Throughout the year the International Committee of the Red Cross (ICRC) pursued negotiations with the government to secure access to all detained persons consistent with ICRC's usual practices." The State Department noted reports of torture of detainees in Uzbekistan, and that "individuals suspected of extreme Islamist political sympathies" were treated particularly harshly and to "particularly severe interrogation".[19]

A Department of Defense Directive issued in September 2006 states that, in accordance with common Article 3, the ICRC "shall be allowed to offer its services during an armed conflict, however characterized, to which the United States is a party".[20] The 14 detainees who were transferred in September 2006 from secret CIA custody to military detention in Guantánamo have since been visited by the ICRC. The organization's findings remain confidential. According to a recent media report, however, "Congressional and other sources familiar with the [ICRC] report said that it harshly criticized the CIA's practices. One of the sources said that the Red Cross described the agency's detention and interrogation methods as tantamount to torture, and declared that American officials responsible for the abusive treatment could have committed serious crimes. The source said that the report warned that these officials may have committed 'grave breaches' of the Geneva Conventions, and may have violated the US Torture Act".[21]

The US authorities maintain that the CIA program is lawful. In his speech on 6 September 2006, President Bush stated that "this program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws." The Director of the CIA, General Michael Hayden, reiterated this after President Bush signed the MCA into law on 17 October 2006. General Hayden said that the Act "gives CIA the legal clarity and legislative support necessary to continue a program that has been one of our country's most effective tools in the fight against terrorism. The Act ensures that we can detain and interrogate key terrorist figures in the future, if and when the need arises. We can be confident that our program remains – as it always has been – fully compliant with US law,

[18] Transcript of conference call with senior administration officials on the executive order interpreting common Article 3, 20 July 2007, issued by Department of Justice, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-20-2007/0004629772&EDATE.
[19] Country Reports on Human Rights Practices, 2006. Bureau of Democracy, Human Rights, and Labor, US State Department, 6 March 2007, http://www.state.gov/g/drl/rls/hrrpt/2006/78848.htm.
[20] Department of Defense Directive Number 2310.01E, 5 September 2006. Common Article 3 states: "An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".
[21] *The black sites*. By Jane Mayer, The New Yorker, 13 August 2007.

the Constitution, and our international treaty obligations."[22] After President Bush issued the executive order on 20 July 2007, General Hayden said that "the President's action—along with the Military Commissions Act of 2006—gives us the legal clarity we have sought. It gives our officers the assurance that they may conduct their essential work in keeping with the laws of the United States. The Executive Order resolves any ambiguity by setting specific requirements that, when met, represent full compliance with Common Article 3." He repeated that, despite this need for legal clarification in the wake of the *Hamdan* ruling, the CIA program had "always operated in strict accord with American law."[23]

Amnesty International reiterates: the CIA's secret detention program was unlawful at its inception, and remains unlawful today.

Background to the development of an unlawful program

The CIA's detention activities remain shrouded in secrecy, but one can trace the development of the detention program.[24]

Five days after the attacks of 11 September 2001, the Director of the CIA sent a confidential memorandum to his staff headed "We're at war", stating that "All the rules have changed".[25] On the same day, Vice-President Dick Cheney said that in this "war", US agents would have to operate on "the dark side" – the means, he suggested, including working with human rights violators, would justify the ends. He said that "We've got to spend time in the shadows in the intelligence world… it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."[26] The following day, 17 September 2001, President Bush signed a 12-page memorandum to the CIA Director that "pertains to the CIA's authorization to set up detention facilities outside the United States", and "contains specific information relating to the intelligence sources and methods by which the CIA was to implement the clandestine intelligence activity".[27] This memorandum remains classified, with the government refusing

[22] Statement to employees by Central Intelligence Agency Director Gen. Michael V. Hayden on The Military Commissions Act of 2006, 20 October 2006, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2006/pr10202006.htm.
[23] Director's statement on executive order on detentions, interrogations, 20 July 2007, https://www.cia.gov/news-information/press-releases-statements/statement-on-executive-order.html.
[24] See also brief discussion of declassified CIA interrogation training manuals from the 1960s and 1980s regarding coercive techniques that mirror certain "stress and duress" techniques used in the "war on terror". *USA: Human dignity denied, op. cit.*, October 2004.
[25] Memorandum: *We're at war*. 16 September 2001. On 26 September 2001, President Bush told the CIA workforce that this was to be "a war that declares a new declaration, that says if you harbour a terrorist you're just as guilty as the terrorist; if you provide safe haven to a terrorist, you're just as guilty as the terrorist; if you fund a terrorist, you're just as guilty as a terrorist." Remarks available at: https://www.cia.gov/news-information/speeches-testimony/2001/bush_speech_09262001.html.
[26] The Vice President appears on Meet the Press with Tim Russert, 16 September 2001, http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html.
[27] *ACLU et al v. Department of Defense et al*. Sixth Declaration of Marilyn A. Dorn, Information Review Officer, Central Intelligence Agency, US District Court, Southern District of New York, 5 January 2007. In US law, the President has the authority to direct the CIA to conduct covert operations.

to reveal its contents on the grounds that disclosure could result in "extremely grave damage to the national security" and could undermine "the cooperative relationships that the United States has developed with its critical partners in the global war on terrorism".[28]

In Afghanistan, the CIA operated a secret facility made from metal shipping containers in Bagram air base where detainees were allegedly subjected to various interrogation techniques including forced prolonged standing or kneeling, hooding, stress positions and sleep deprivation.[29] In Guantánamo, where detentions began in January 2002, the CIA had a separate facility. The agency 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."[30] Over the years other secret CIA-run detention facilities have been reported to exist or to have existed in Afghanistan (for example, the Salt Pit and the Dark Prison), Iraq, Pakistan, Poland, Romania, and Thailand.

In March 2002, Abu Zubaydah, an alleged leading *al-Qa'ida* member, was taken into custody in Pakistan, and was flown to Thailand. After the CIA took over his interrogation from the FBI, Abu Zubaydah, who was still recovering from life-threatening gunshot wounds sustained at the time of his capture, was allegedly subjected to torture or other ill-treatment including forced nudity, extremes of cold, isolation, and loud music.

The Office of the Director of National Intelligence has explained that "it was clear to his interrogators that Abu Zubaydah possessed a great deal of information about *al-Qa'ida*; however, he soon stopped all cooperation. Over the ensuing months, the CIA designed a new interrogation program that would be safe, effective, and legal".[31] The interrogation "procedures", cleared by the Justice Department, "proved to be highly effective".[32] The government claims, for example, that the information Abu Zubaydah gave led to the detention in Pakistan in September 2002 of alleged *al-Qa'ida* operative Ramzi bin al-Shibh, who then himself was reportedly taken to the CIA's Thailand "black site", a facility which included underground interrogation cells.[33] Ramzi bin al-Shibh was held in secret custody for four years before being transferred in September 2006 to Guantánamo where he remains almost a year later virtually incommunicado.

Concern about the legality of the methods used against Abu Zubaydah reportedly led to a CIA request for legal protections for its interrogators and to a now notorious memorandum on

[28] *Ibid*.
[29] *US decries abuse but defends interrogations*, Washington Post, 26 December 2002.
[30] Testimony of LTG Randall Schmidt, taken by the Department of the Army Inspector General, Investigations Division, 24 August 2005.
[31] Summary of the high value terrorist detainee program. Office of the Director of National Intelligence, undated, http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.
[32] *Ibid*. This claim about effectiveness is disputed, with the FBI reportedly claiming that its rapport-building interrogation techniques employed on Abu Zubaydah prior to the CIA's intervention had proved more successful. *At a secret interrogation, dispute flared over tactics*. New York Times, 10 September 2006. See also *Rorschach and awe*, Vanity Fair, 17 July 2007.
[33] *CIA holds terror suspects in secret prisons*. Washington Post, 2 November 2005.

torture, dated 1 August 2002, written in the Justice Department and sent to the White House.[34] The memorandum, leaked after the Abu Ghraib torture revelations, concluded that "under the current circumstances, necessity or self-defense may justify interrogation methods that might violate [the US statute prohibiting torture by US agents outside the USA]". It also stated that interrogators could cause a great deal of pain before crossing the threshold to torture; that there was a wide array of interrogation techniques that while qualifying as cruel, inhuman or degrading treatment would not rise to the level of torture and thus not qualify for prosecution under this law, and that in any case the US President's authority as Commander-in-Chief could override the prohibition on torture. That memorandum, which then White House Counsel Alberto Gonzales "accepted" as a "good-faith effort", represented the position of the executive branch until it was withdrawn in late June 2004 following the Abu Ghraib torture revelations. [35]

An 18-page Justice Department memorandum of the same date, 1 August 2002, advised the CIA on the legality of "alternative interrogation methods".[36] This memorandum remains classified, on the grounds that "disclosure of information regarding potential interrogation methods and the context in which their use was contemplated reasonably could be expected to cause exceptionally grave damage to the national security by revealing to the public – including avowed enemies of the United States during an ongoing war against global terrorism – alternative interrogation methods by which the CIA seeks to collect critical foreign intelligence to disrupt terrorist attacks against the United States and its citizens and interests worldwide". To this justification is added that disclosing the CIA's interrogation methods "could allow a captured al Qaeda operative to resist cooperation".[37]

In early 2004, the CIA's Inspector General reportedly concluded that interrogation techniques authorized in 2002 for use by the agency could violate the international prohibition on cruel, inhuman or degrading treatment or punishment.[38] The report, which remains classified, made 10 recommendations to change the agency's treatment of detainees. In February 2005, the then CIA Director, Porter Goss, told the US Senate Select Committee on Intelligence that he believed that eight of the 10 recommendations had been implemented. However, the Office of the Inspector General informed the Committee that only five had been implemented. The Committee expressed its concern at this failure and urged the Director of the CIA to

[34] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A. Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.
[35] "That memo represented the position of the executive branch at the time it was issued"; "It represented the administrative branch position"; "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.
[36] *ACLU v. Department of Defense*. Sixth Declaration of Marilyn Dorn, 5 January 2007, op.cit.
[37] *Ibid*.
[38] *Report warned CIA on tactics in interrogation*. New York Times, 9 November 2005.

"complete the remaining actions…without further delay".[39] Amnesty International does not know what the Inspector General's recommendations were and if the remaining five were implemented.

On 30 December 2004, shortly before Alberto Gonzales was to come before the Senate Judiciary Committee to face questioning on his nomination to the post of US Attorney General, the Justice Department issued a replacement for the leaked 1 August 2002 memorandum. The new document did not repudiate its predecessor's position that the President could override the prohibition on torture, merely stating that discussion of that issue was "unnecessary" as the President had made it clear that the USA would not engage in torture. The new memorandum was silent on the question of cruel, inhuman or degrading treatment or punishment. In a footnote, it stated that "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[40]

In March 2005, the CIA issued a statement asserting that "All approved interrogation techniques, both past and present, are lawful and do not constitute torture. The truth is exactly what Director Goss said it was: 'We don't do torture.' CIA policies on interrogation have always followed legal guidance from the Department of Justice." [41] Like the Justice Department's December 2004 memorandum, the CIA's statement made no reference to cruel, inhuman or degrading treatment.

In May 2006, it was reported that a former CIA officer who had served as the agency's deputy inspector general and had investigated allegations of abuse of detainees by CIA personnel or its contractors in Iraq and Afghanistan, had said that the claim made by a senior CIA official to Senators in a closed hearing in June 2005 that the CIA had not violated or sought to bypass the international prohibition on torture or other cruel, inhuman or degrading treatment was false.[42] The former CIA officer had been fired from the agency in April 2006 for allegedly sharing classified information with journalists, including a *Washington Post* reporter who has

[39] Report of US Senate Select Committee on Intelligence to accompany Fiscal Year 2006 Intelligence Authorization.
[40] Legal standards applicable under 18 U.S.C. §§ 2340-2340A. Memorandum opinion for the Deputy Attorney General, 30 December 2004, http://www.usdoj.gov/olc/18usc23402340a2.htm#N_27_. Also, "The August 2002 opinion was withdrawn not because it purported to change the definition of torture but rather because it addressed questions that were not necessary to address". Written responses of the US Government to the UN Committee Against Torture, Geneva, May 2006.
[41] Statement by CIA Director of Public Affairs Jennifer Millerwise, 18 March 2005 https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2005/pr03182005.html
[42] *Fired officer believed CIA lied to Congress.* Washington Post, 14 May 2006.

written a number of ground-breaking articles on the USA's "war on terror" detentions, including in relation to the CIA.[43]

The CIA's secret detention program was only made possible by another unlawful operation. "Renditions" had been used since the mid-1990s to bring suspected terrorists captured on foreign soil to the USA, with or without the cooperation of the state where they had been captured, by means that bypassed due process.[44] After September 2001, rendition practice shifted dramatically; instead of being brought to trial, suspects were handed over to foreign governments for interrogation, or kept in US custody on foreign sites. Once the CIA had been given "authorization to detain terrorists" by President Bush following the 9/11 attacks,[45] rendition became the ideal means to move them from site to site, sometimes in and out of US custody, in secret. Rendition enabled the CIA and other agencies to "filter" suspects, to bring them to particular locations for initial interrogation before transferring them to secret detention centres, Guantánamo or to further interrogation by other states. Some people have been rendered in and out of US custody several times, but they have not been charged, they have not had any evidence produced against them, and they have not had the opportunity to challenge the legality of their detention before a court.

The CIA is an independent agency responsible to the President through its Director and accountable to the country through Congress. The existence of the CIA secret detention program has caused some concern in Congress and has divided opinion among legislators on how to respond. The US Senate Select Committee on Intelligence noted in May 2007 that, while its Chairman and Vice-Chairman were "briefed from the outset" on the CIA program, "the Administration's decision to withhold the program's existence from the full Committee membership for five years [until President Bush's speech of 6 September 2006] was unfortunate in that it necessarily hindered congressional oversight of the program".[46]

Section 314 of the Intelligence Authorization Act for Fiscal Year 2007 would require the Director of National Intelligence to submit a classified report to the congressional intelligence committees providing "a full accounting on, any clandestine prison or detention facility currently or formerly operated by the United States Government, regardless of location, where detainees in the global war on terrorism are or were being held." Details to be included are "(a) The location and size of such prison or facility; (b) If such prison or facility is no longer being operated by the United States Government, the disposition of such prison or facility; (c) The number of detainees currently held or formerly held, as the case may be, at such prison or

[43] Including: *US decries abuse but defends interrogations*, 26 December 2002; *At Guantánamo, a prison within a prison*, 17 December 2004; *CIA avoids scrutiny of detainee treatment*, 3 March 2005; *CIA holds terror suspects in secret prisons*, 2 November 2005.
[44] "By 11 September [2001], CIA (in many cases with the FBI) had rendered 70 terrorists to justice around the world". Written Statement for the record of the Director of Central Intelligence Before the Joint Inquiry Committee, 17 October 2002, https://www.cia.gov/news-information/speeches-testimony/2002/dci_testimony_10172002.html.
[45] *ACLU v. Department of Defense*. Sixth Declaration of Marilyn Dorn, 5 January 2007, *op. cit*.
[46] Report 110-75, to accompany S.1538, Intelligence Authorization Act for Fiscal Year 2008, 31 May 2007.

facility; (d) Any plans for the ultimate disposition of any detainees currently held at such prison or facility; (e) A description of the interrogation procedures used or formerly used on detainees at such prison or facility and a determination, in coordination with other appropriate officials, on whether such procedures are or were in compliance with United States obligations under the Geneva Conventions and the Convention Against Torture."[47]

In the Senate Select Committee on Intelligence's report accompanying the proposed legislation, four members of the Committee filed their dissenting view that the administration had already "met its obligations to keep the Committee full and currently informed about these clandestine detention facilities by briefing all of the Committee Members on the program". To do more, as Section 314 of the proposed legislation would require, "creates another unnecessary source of conflict between the Executive and Legislative branches. The level of detail required by the report, to include all locations of current and formerly operated sites, is simply not necessary for effective oversight, and will likely be resisted by the Executive branch. Moreover, such disclosure to Congress could have a negative impact on current and future relationships with certain allied foreign intelligence services and governments who have cooperated in this program with the understanding that their assistance would remain completely confidential".[48]

In its 31 May 2007 report to accompany the proposed Intelligence Authorization Act for Fiscal Year 2008, the Senate Select Committee on Intelligence noted that:

> "significant legal issues about the CIA detention and interrogation program remain unresolved. The Department of Justice has not produced a review of aspects of the program since the Supreme Court's *Hamdan* decision and the passage into law of the Detainee Treatment Act in 2005 and the Military Commissions Act of 2006. The Committee urges prompt completion of such a legal review as soon as possible, regardless of whether the program is currently being used.[49] The Committee expects that such review will be provided to the Committee as a part of its ongoing oversight of the program… Both Congress and the Administration must continue to evaluate whether having a separate detention program that operates under different interrogation rules than those applicable to military and law enforcement officers is necessary, lawful, and in the best interests of the United States."[50]

One of the Committee members, Senator Feingold, filed a separate view noting that he opposed the program on "moral, legal and national security grounds", and so disagreed with the Committee's position that there needed to be continuing evaluation of whether to continue with the program.

[47] Senate Bill 372, § 314.
[48] Report 110-2. to accompany S. 372, Intelligence Authorization Act for Fiscal Year 2007, 24 January 2007, Supplemental views of Vice Chairman Bond, and Senators Warner, Chambliss, and Burr.
[49] It apparently was being used around this time, given that a "high-value" detainee was transferred from CIA custody to Guantánamo in late April 2007 (see below).
[50] Report 110-75, to accompany S.1538, *op. cit.*.

In July 2007, prompted by other proposed legislation, the administration stated that "if a bill were presented to the President with provisions preventing him from bringing enemy combatants to justice, detaining enemy combatants, or collecting from them in accordance with current law intelligence necessary to safeguard and protect the national security of the United States, the President's senior advisors would recommend that he veto the bill".[51]

The CIA secret program violates international law and should be terminated. Secret detention contravenes the USA's treaty obligations, as the UN Human Rights Committee has made clear to the US government. In its authoritative interpretation of any state party's obligations under the ICCPR, the Committee said in 2004 that

> "All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level… are in a position to engage the responsibility of the State Party… This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'."[52]

A global 'war' paradigm; undermining international law

President Bush's executive order of 20 July 2007 opens by stating that "the United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces…These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere". This is the administration's global war paradigm that it has constructed for the "war on terror" under which parts of international humanitarian law, selectively interpreted, are deemed to apply, and international human rights law is generally disregarded, with the administration repeatedly claiming that it does not apply in armed conflict. In contrast, it is widely agreed by international experts that "the two bodies of law, far from being mutually exclusive, are complementary."[53] The International Court of Justice (ICJ) has stated that:

> "The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[54]

[51] Statement of Administration Policy. S.1547 – National Defense Authorization Act for Fiscal Year 2008. Executive Office of the President, 10 July 2007.
[52] General Comment 31 (Nature of the General Legal Obligation Imposed on States Parties to the Covenant). UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[53] UN Doc. A/HRC/4/20, 29 January 2007. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. The UN Human Rights Committee has itself stated that the ICCPR "applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive." General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004).
[54] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25, http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm.

More recently, the ICJ has reiterated that:

> "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation…"[55]

The USA has made no such derogation, and even if it had, a number of fundamental human rights provisions are explicitly non-derogable. For example, under Article 4.2 of the ICCPR, states cannot derogate from Article 7, the prohibition on torture or other cruel, inhuman or degrading treatment or punishment, even in a time of public emergency which threatens the life of the nation. In its General Comment on Article 4 of the ICCPR issued in 2001, the UN Human Rights Committee also noted that the prohibition against unacknowledged detention is non-derogable. The absolute nature of this prohibition, the Committee stated, even in times of emergency, reflects its status as a norm of general international law.[56] Both the UN Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance state that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked to justify enforced disappearance.

The USA's stated legal justifications for its detention policies in the "war on terror" have been criticized by numerous international bodies, including the Human Rights Committee, the Committee Against Torture, the Working Group on Arbitrary Detention, and various other UN experts, as well as regional bodies including the Inter-American Commission on Human Rights. The ICRC, the authoritative interpreter of the Geneva Conventions and other international humanitarian law (IHL), does "not believe that IHL is the overarching legal framework" applicable to the "war on terror", in contrast to the USA's position.[57] After meeting senior members of the US administration in April 2007, the president of the ICRC "stressed that the detention of persons captured or arrested in connection with the fight against terrorism must take place within an appropriate legal framework. In particular, he insisted on the need for more robust procedural safeguards, especially in Guantánamo Bay and in Bagram, Afghanistan."[58]

The executive order of 20 July 2007 thus forms part of the government's selective application of a law of war framework regardless of where and in what circumstances the detainee subject to the secret program was taken into custody. For example, Riduan bin Isomuddin (Hambali), Mohammed Nazir bin Lep (Lillie) and Mohd Farik bin Amin (Zubair) were taken into custody in Thailand – far from any battlefield – in the summer of 2003. They were put into

[55] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106. http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.
[56] General Comment (Article 4; States of Emergency). UN Doc. CCPR/C/21/Rev. 1/Add.11, para 13(b).
[57] Developments in US policy and legislation towards detainees: the ICRC position. 19 October 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006.
[58] ICRC president completes talks with senior members of US administration. ICRC news release, 5 April 2007, http://www.icrc.org/Web/Eng/siteeng0.nsf/html/washington-news-050407!OpenDocument.

the secret CIA program for the next three years, held incommunicado at unknown locations before being transferred to Guantánamo in September 2006 where they remain virtually incommunicado without access to relatives, lawyers or to *habeas corpus* review. From the outset, such individuals should have been treated as criminal suspects, and therefore subject to international human rights law and principles of criminal law, including the rights to legal counsel and to be able to challenge the lawfulness of their detention in a court of law and to release if the detention is unlawful.

The executive order explicitly reaffirms President Bush's decision included in a 7 February 2002 memorandum that no member of *al-Qa'ida* or the Taleban would qualify for prisoner of war (POW) status under the Third Geneva Convention, and the order extends this to "associated forces". Such individuals, the executive order affirms, are "unlawful enemy combatants".[59] The 2002 memorandum had also determined that Article 3 common to the Geneva Conventions would not apply to such detainees. This in turn had followed advice from then White House counsel, now Attorney General, Alberto Gonzales, that this "new war places a high premium on…the ability to quickly obtain information from captured terrorists and their sponsors" and "renders obsolete Geneva's strict limitations on questioning of enemy prisoners". A "positive" aspect of not applying Geneva Convention protections, according to this advice, would be to "substantially reduce the threat of domestic criminal prosecution" of US agents under the USA's War Crimes Act.[60]

The MCA amended the War Crimes Act so that violations of common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment", and violations of its fair trial requirement, are no longer prosecutable as war crimes in the USA.[61] The ICRC has expressed its concern that "this distinction between the different violations disrupts the integrity of common Article 3". The organization emphasised that common Article 3 has become "a baseline from which no departure, under any circumstances, is allowed."[62]

The 7 February 2002 presidential memorandum suggested that there are detainees "who are not legally entitled to [humane] treatment". Humane treatment, according to this memorandum, would be "a matter of policy", not law. Although the Director of the CIA was

[59] A previously classified Pentagon report on interrogations in the "war on terror" noted that "arguments may be made by other nations that the protections of the Geneva Conventions are comprehensive and apply to unlawful combatants" and "the United States may face the argument from other nations that the President may not place these detainees in an intermediate status, outside the law, and then arguably subject them to torture". Working Group report on detainee interrogations in the global war on terrorism, 4 April 2003.

[60] Memorandum for the President from Alberto R. Gonzales. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Draft 25 January 2002.

[61] The MCA provides for trials by military commission under procedures which fail to meet international fair trial standards. See *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, http://web.amnesty.org/library/Index/ENGAMR510442007.

[62] Developments in US policy and legislation towards detainees: the ICRC position. 19 October 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006?opendocument.

among the memorandum's recipients, the stated policy to treat detainees "humanely" expressly applied only to the "United States Armed Forces".[63]

President Bush's 7 February 2002 memorandum asserted that there needed to be "new thinking in the law of war" for the "new paradigm – ushered in not by us, but by terrorists". Four and a half years later, the US State Department Legal Adviser, John Bellinger, explained to an audience in The Hague "the difficulty we faced after September 11, when we captured or took into custody suspected members of Al Qaida and the Taliban. We were confronted by a dilemma: What legal rules to apply to them?" He asserted that nevertheless "this Administration has worked hard to identify and implement international rules applicable to these terrorist suspects. We have not ignored, changed, or re-interpreted existing international law."[64] The President's 20 July 2007 executive order is the latest in the administration's efforts in this regard, and allows a detention program that violates international law to continue.

The USA ratified the four Geneva Conventions in 1955 without reservation to common Article 3, and indeed declared upon ratification of each of the four treaties that "the government of the United States fully supports the objectives of this Convention". The USA's disintegration of common Article 3 norms and prohibitions, and the executive order's reaffirmation of the blanket denial of POW status to any detainee captured in the international armed conflict in Afghanistan in 2001 and 2002, suggests that this is no longer the case. It also defies a growing worldwide consensus at a time when the Geneva Conventions, have become the first treaties "in modern history to achieve universal acceptance: they have now been formally accepted by all 194 States in the world".[65]

Shocks the conscience? Detainees as receptacles of information

For more than the first four years of detentions and interrogations in the "war on terror", the administration considered that "under Article 16 there is no legal obligation under the [Convention Against Torture] on cruel, inhuman or degrading treatment with respect to aliens overseas".[66] Then in December 2005 Congress passed the Detainee Treatment Act (DTA) which, over the administration's objections, made the prohibition on cruel, inhuman or degrading treatment applicable to detainees held in CIA custody abroad, albeit under a restricted US interpretation and with an impunity clause for past abuses (see below). In a statement on the day he signed the DTA into law, President Bush stated that his administration's "policy" until then had been "not to use cruel, inhuman or degrading

[63] Memorandum re: Humane treatment of al Qaeda and Taliban detainees. President George W. Bush, 7 February 2002.
[64] The United States and international law. John B. Bellinger III, Legal Adviser. Remarks at The Hague, The Netherlands, 6 June 2007, http://www.state.gov/s/l/rls/86123.htm.
[65] A milestone for international humanitarian law, ICRC, 22 September 2006, statement available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-statement-220906?opendocument.
[66] Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein. January 2005.

treatment, at home or abroad." The international prohibition on such treatment allows no such policy discretion; torture and other ill-treatment are prohibited in all circumstances as a matter of law.

Signing the DTA into law, President Bush said that the executive branch would interpret the prohibition "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in…protecting the American people from further terrorist attacks." Given the manner in which the administration's view of presidential power has been expressed over the years, this leaves cause for concern that policy could still trump the law, not least in relation to the secret detention program.[67]

The executive order of 20 July 2007 defines torture and other cruel, inhuman or degrading treatment by US rather than international standards, reflecting reservations and understandings attached by the USA to its ratification of the ICCPR and the CAT. The Human Rights Committee and the Committee Against Torture have called on the USA to withdraw the reservations it attached to its ratification of these two human rights treaties. Reservations to treaty ratifications that are "incompatible with the object and purpose of the treaty" are void under international law.[68] Irrespective of any reservations lodged with the treaties, the prohibitions on torture and other cruel, inhuman or degrading treatment or punishment, and on enforced disappearance, are principles of customary international law, binding on all states, whether or not they are parties to treaties which expressly contain the prohibition, and are non-derogable.[69] Governments cannot opt out of their obligations in this area.

The executive order prohibits detention conditions and interrogation practices in the CIA program which amount to torture, as defined in US law.[70] The UN Committee Against Torture has expressed concern at the USA's definition of torture. In May 2006, it called on the USA to "ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the [US] understandings lodged at the time of

[67] For example, after 9/11 the Justice Department advised the White House that there were essentially no limits on the President's authority to respond to terrorist threats; the "method, timing, and nature of the response" was his to determine and did not have to be limited to "those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon". The President's constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, Deputy Counsel to the President, from John Yoo, Deputy Assistant Attorney General, US Department of Justice, 25 September 2001. The 1 August 2002 Justice Department memorandum on torture concluded that application of the USA's anti-torture statute to "interrogations undertaken pursuant to the President's Commander-in-Chief powers may be unconstitutional". Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, *op. cit*.

[68] Article 19(c), Vienna Convention on the Law of Treaties.

[69] The Human Rights Committee, for example, has said that the prohibition on torture and cruel, inhuman or degrading treatment is a peremptory norm of international law, non-derogable and binding on all states. General Comment 29 (States of Emergency, Article 4).

[70] United States Code, Section 2340, title 18.

ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or duration".[71]

Consistent with the DTA, the executive order prohibits cruel, inhuman or degrading treatment or punishment against those held in the CIA detention program. As the order itself asserts, however, the term "cruel, inhuman, or degrading treatment or punishment" means "the cruel, unusual, and inhumane treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States".[72] In other words, the USA's reservations to the CAT and the ICCPR mean that it only considers itself bound by the prohibition on cruel, inhuman or degrading treatment to the extent that it matches existing US law. Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience", but conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".[73] Secret detention and enforced disappearance should be condemned wherever and whenever they occur.

[71] The USA attached the following "understanding" to its ratification of the CAT: "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

[72] See Responses of Alberto R. Gonzales, January 2005, *op. cit.*: "The only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself. The Senate's reservation, however, limited Article 16 to requiring the United States to prevent conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment [right to equality before the law] does not apply to the federal government, but rather to the States. The Eighth Amendment [prohibition on cruel and unusual punishments] has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. Finally, the Supreme Court has squarely held that the Fifth Amendment [right to due process] does not provide rights for aliens unconnected to the United States who are overseas."

[73] *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis*, 523 U.S. 833 (1998). See also, for example, *Culombe v. Connecticut*, 367 U.S. 568 (1961), in which the Supreme Court ruled that while judicial determination of whether a confession was coerced can turn on the facts of the particular case, cases involving "physical brutality, threats of physical brutality, and such convincingly terror-arousing…incidents of interrogation as the removal of prisoners from jail to jail, at distances from their homes, for questioning in secluded places, the keeping of prisoners unclothed and standing on their feet for long periods during questioning [and] deprivation of sleep…used to sap the prisoner's sleep", did not fall into any such ambiguous category. Detainees in the CIA program have kept in secret custody, transferred in secret between different facilities, and allegedly subjected to forced nudity, isolation, sensory and sleep deprivation, among other techniques.

The executive order appears to have imported a form of the US constitutional law "shocks the conscience" test to common Article 3's prohibition on "outrages upon personal dignity, particularly humiliating and degrading treatment". As noted below, the order expressly provides for consideration of "the circumstances" in the assessment of whether acts of humiliation and degradation against detainees go "beyond the bounds of human decency". Questioned in a Senate Judiciary Committee hearing a few days after the executive order was issued, Attorney General Gonzales noted that the DTA's prohibition on cruel, inhuman or degrading treatment was "tied to our constitutional standards on shocking the conscience", and in relation to what was prohibited under the executive order, said that "again, it would depend on circumstances, quite frankly".[74]

Thus, in contrast to the unequivocal and absolute international prohibition on torture or other ill-treatment, the door is opened to a sliding scale of legality in relation to acts that amount to such treatment against detainees viewed by their US captors first and foremost as potential sources of intelligence. Under this paradigm, the higher the value that is placed on the information a detainee is claimed to possess, the more "enhanced" can be the interrogation techniques used against that individual, and the less "conscience-shocking" the treatment will be held to be. As the Chairman of the House Homeland Security Committee, Representative Peter King, was quoted as saying in September 2006, "If we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that".[75]

Detainees considered to have "high-value" information and subjected to torture or other cruel, inhuman or degrading treatment in order to extract it has been a recurring theme in the USA's actions since 11 September 2001. "High-value detainees" in US custody in Iraq, for example, faced systematic ill-treatment, some of it "tantamount to torture", according to the ICRC.[76] Detainees in Guantánamo considered to have "high value" were singled out for "special interrogation plans" under which they were subjected to torture and other ill-treatment (see cases of Mohamed al-Qahtani and Mohamedou Ould Slahi below). A previously classified Pentagon report on interrogations in the "war on terror" noted that "whether conduct is conscience-shocking turns in part on whether it is without any justification, i.e., it is inspired

[74] Transcript of Senator Dick Durbin and Attorney General Alberto Gonzales. Senate Judiciary Committee Hearing, 24 July 2007.
[75] *An unexpected collision over detainees*, New York Times, 15 September 2006.
[76] A leaked ICRC report found that "ill-treatment during interrogation was not systematic, except with regard to persons arrested in connection with suspected security offences or deemed to have an 'intelligence' value." In these cases, the ICRC found, detainees were "at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators". The ICRC raised particular concern about the "high value detainees" held in Baghdad International Airport, who had been detained incommunicado in solitary confinement for months in small concrete cells devoid of daylight, in "serious violation" of the Third and Fourth Geneva Conventions. Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq during arrest, internment and interrogation, February 2004.

by malice of sadism", and "if the interrogation methods were undertaken solely to produce severe mental suffering, they might shock the conscience". However, the report further stated that "although unlawful enemy combatants may not pose a threat to others in the classic sense..., the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks."[77] Thus the flipside of "high value" becomes "high risk" – of torture or other ill-treatment, a factor made all the more possible by secret incommunicado detention (itself a form of ill-treatment).

The name the government has given to the CIA's secret detention program, in which "alternative" interrogation "procedures" are employed, is the "High Value Terrorist Detainee Program". No one is supposed to be put into this program who is not believed to be in possession of high-value information. According to President Bush's executive order of 20 July 2007, for a detainee to qualify for detention in the program the Director of the CIA must determine that he or she is "likely to be in possession of information that could assist in detecting, mitigating, or preventing terrorist attacks" or "could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces".

No indication is given of how the CIA Director is meant to make this determination as to who is to be held in secret custody. For example, will information coerced from one detainee under torture or other ill-treatment be used as the basis for pulling another detainee into the CIA program?[78] An individual with such intimate and detailed knowledge may be prosecutable in the federal courts under US law, as long as the authorities do not jeopardize such prosecutions by unlawful custodial conduct. Justice, in the sense of due process and fair trials, has been all too absent in the USA's "war on terror", however.

When Khalid Sheikh Mohammed, described by the US government as the "mastermind" behind the attacks of 11 September 2001 was arrested in Pakistan in March 2003, he was not brought to trial (although he had previously been indicted in US federal court) but instead put into secret CIA custody for the next three and a half years. Three days after his arrest, the US Attorney General said that "the Department of Justice's overriding priority is preventing future terrorism, not just prosecuting past crime. Khalid Sheikh Mohammed's capture is first and foremost an intelligence opportunity…"[79] Khalid Sheikh Mohammed became a victim of enforced disappearance and was allegedly subjected to torture in CIA custody (see below).

The treatment of Saudi national Mohamed al-Qahtani, although he was not held in the CIA program, is instructive in this regard. This Guantánamo detainee was considered by the US

[77] Working Group report on detainee interrogations in the global war on terrorism, 4 April 2003.
[78] For example, the torture or other ill-treatment of Mohamedou Ould Slahi in Guantánamo, possibly in Defense Intelligence Agency custody while denied access to the ICRC for more than a year on grounds of "military necessity", reportedly followed the naming of Slahi during the interrogation of Ramzi bin al-Shibh in secret CIA detention at an unknown location. See *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AI Index: AMR 51/149/2006, September 2006, http://web.amnesty.org/library/Index/ENGAMR511492006.
[79] Prepared Remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing: "The Terrorist Threat: Working Together to Protect America", 4 March 2003. http://www.usdoj.gov/archive/ag/testimony/2003/030403senatejudiciaryhearing.htm.

authorities to be a "high value" detainee, and a "special interrogation plan" was authorized by former Secretary of Defense Donald Rumsfeld. Some military prosecutors have reportedly said that the interrogation techniques used against Mohamed al-Qahtani have irretrievably tainted the evidence against him and that this has made him "unprosecutable".[80] According to leaked official documents, Mohamed al-Qahtani was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days. He was subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, and to extremes of heat and cold through manipulation of air conditioning.[81] FBI agents observed Mohamed al-Qahtani evidencing behaviour "consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours)." Nevertheless, a military investigation in 2005 concluded that his treatment "did not rise to the level of prohibited inhumane treatment". In 2005, the Pentagon described Mohamed al-Qahtani's interrogation as having been guided by the "strict" and "unequivocal" standard of "humane treatment for all detainees" in military custody. [82]

After the *Hamdan* ruling in June 2006, the Deputy Secretary of Defense stated that it was his understanding that, apart from the military commission procedures that the Supreme Court had ruled unlawful, the Pentagon's existing "orders, policies, directives, execute orders [sic] and doctrine comply with the standards of common Article 3".[83] Given the Pentagon's affirmation of Mohamed al-Qahtani's interrogation, numerous aspects of which clearly violated international law, this would suggest, worryingly, that the authorities considered that his treatment – and the treatment of all those in Guantánamo – has complied with common Article 3.

Nevertheless, in September 2006, the Pentagon released its new Army Field Manual, which it said "incorporates lessons learned".[84] The Manual prohibits torture and other cruel, inhuman or degrading treatment, albeit as defined under US rather than international law. It expressly prohibits certain interrogation methods, including some of the sort used against Mohamed al-Qahtani.[85] Thus today, if the interrogators were military personnel, there would perhaps not

[80] *Can the '20th highjacker' of Sept. 11 ever stand trial?* MSNBC News, 26 October 2006 http://www.msnbc.msn.com/id/15361462/.
[81] See *Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, June 2006, http://web.amnesty.org/library/Index/ENGAMR510932006.
[82] Guantanamo provides valuable intelligence information. Department of Defense news release, 12 June 2005, http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583.
[83] Memorandum: Application of Common Article 3 of the Geneva Conventions to the treatment of detainees in the Department of Defense, Office of the Secretary of Defense, 7 July 2006, http://www.defenselink.mil/news/Aug2006/d20060814comm3.pdf.
[84] Army releases new interrogation manual. Army News Service, 6 September 2006, http://www4.army.mil/ocpa/read.php?story_id_key=9525.
[85] The manual prohibits, "if used in conjunction with interrogations", the following: "Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee; using duct tape over the eyes; applying beatings, electric shock, burns, or other forms of physical pain; "Waterboarding"; using military working dogs; inducing hypothermia or heat

be a repeat of at least some of the acts of torture and other ill-treatment to which Mohammed al-Qahtani was subjected.[86] Amnesty International is less confident that, if the interrogators were CIA personnel operating in the secret program and guided by President Bush's executive order of 20 July 2007, such an interrogation would be prevented.

According to the Pentagon in 2005, Mohamed al-Qahtani's interrogation had been "guided by a very detailed plan and conducted by trained professionals motivated by a desire to gain actionable intelligence, to include information that might prevent additional attacks on America". His interrogation was conducted in a "controlled environment, with active supervision and oversight."[87] An example of the medical oversight that Mohamed al-Qahtani received during his interrogation period came after he was found to be suffering from bradycardia (an overly slow heart rate). He was hospitalized and put under observation overnight. Within 24 hours he had been medically cleared for further interrogation, hooded, shackled and "restrained in a litter" for transport back to interrogation.

So it is under the executive order. CIA personnel engaged in the detention program must have "appropriate training".[88] An "approved plan of interrogation tailored for each detainee in the program to be interrogated" must be developed. Interrogation techniques must be "safe for use with each detainee with whom they are used" and this determination must be "based upon professional advice". The "safety" of those in the program must be effectively monitored, "including with respect to medical matters".

This is supposed to reassure. It does not. As the case of Mohamed al-Qahtani demonstrated, training and oversight does not prevent torture or other ill-treatment if the program itself or the interrogation techniques and detention conditions being authorized constitute torture or other ill-treatment under international law. Medical monitoring does not make the unlawful lawful. It merely implicates health professionals in the abuse.

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injury; conducting mock executions; depriving the detainee of necessary food, water, or medical care." The manual also states that "the following actions will not be approved and cannot be condoned in any circumstances: forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior; intentionally damaging or destroying an individual's religious articles" It states that all Department of Defense "procedures for treatment of prisoners and detainees have been reviewed and are consistent with these standards, as well as our obligations under international law as interpreted by the United States. FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations. Department of the Army, September 2006.

[86] Amnesty International has some concerns relating to the Army Field Manual. For example, Appendix M 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.

[87] Guantanamo provides valuable intelligence information. Department of Defense news release, 12 June 2005, http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583.

[88] The Director of National Intelligence has stated that interrogators in the program "must complete more than 250 hours of specialized training before they are allowed to come face-to-face with a terrorist". Summary of the High Value Terrorist Detainee Program, *op. cit.*

An executive order with loopholes

It has been repeatedly demonstrated during the "war on terror" that claims by US officials that detainees held in secret or incommunicado detention are being treated humanely are not to be trusted. And, despite the CIA Director's claim that President Bush's executive order of 20 July 2007 provides the CIA with the "legal clarity" it had sought and "resolves any ambiguity by setting specific requirements that, when met, represent full compliance with Common Article 3", the order is not without loopholes.

Under the executive order, detainees in the CIA program are to "receive the basic necessities of life", including "necessary clothing" and "protection from extremes of heat and cold". Given the USA's past record in the "war on terror", the question arises as to whether this provision prohibits forced nudity or near nudity if clothing is not deemed "necessary" during interrogation and stripping is not done, ultimately, to humiliate but to obtain information. A senior administration official stated that "the term like 'extremes of heat and cold' I think would be given a reasonable interpretation *based on circumstances*" (emphasis added).[89] Again, if the circumstances are that the detainee is believed to have "high-value" information (as all detainees in the CIA program are assumed to possess), this could allow interrogators to raise or lower the temperature of a cell further towards one of the extremes, perhaps coupled with removal of clothing deemed "unnecessary" in such circumstances.[90]

The senior administration official added that "I think it's intended to be clear that we're not talking about forcibly induced hypothermia or any use of extreme temperatures as a practice in a program like this".[91] Even if this official's stated belief is correct, it leaves open the question as to whether "protection from extremes of heat and cold" prohibits the use of "environmental manipulation" via air conditioners, as has been authorized previously, or if is this will be allowed so long as the temperatures are not deemed "extreme" and the detainee is protected from life-threatening hypothermia or heat exhaustion by medical monitoring.

Such determinations will presumably be made by the CIA Director who, based upon "professional advice", is given the authority under the executive order to approve interrogation policies for use with individual detainees.

As already noted, the executive order sets out the administration's interpretation of common Article 3's prohibition on "outrages upon personal dignity, in particular, humiliating and

[89] Transcript of conference call with senior administration officials, *op. cit.*

[90] In a transcript released under the Freedom of Information Act in August 2007, Major General George Fay recalled the use of isolation of detainees in US custody in Abu Ghraib: "What was actually being done at Abu Ghraib was they were placing people in their cells naked and they were – those cells they were placing them in, in many instances, were unlit. No light whatsoever. And they were like a refrigerator in the wintertime and an oven in the summertime…So, what they thought was just isolation was actually abuse because it's – actually in some instances, it was torturous. Because they were putting a naked person into an oven or a naked person into a refrigerator. That qualifies in my opinion as torture. Not just abuse." Testimony of Major General George R. Fay taken on 13 September 2004 at the Pentagon, by Department of the Army Inspector General. see http://www.aclu.org/safefree/torture/31305prs20070815.html.

[91] *Ibid.*

degrading treatment" in relation to the CIA's secret program. In this regard, the order prohibits conditions of confinement and interrogation practices that constitute "wilful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency". In a possible indicator that the administration is primarily concerned to assuage public concern that the CIA program will not include practices of the sort revealed in the Abu Ghraib photographs, the examples of humiliating or degrading acts suggested by the order are almost all of a sexual nature.[92] In a possible response to the widespread reports of religious intolerance against detainees in US custody, the order also prohibits acts "intended to denigrate the religion, religious practices, or religious objects of the individual".[93]

The loopholes in this language are clear, especially if the administration considers that US law tolerates a sliding scale of legality in relation to ill-treatment depending on the "circumstances", as already noted. For example, the above construction of common Article 3 could result in proscribing only those acts where humiliation or degradation are ends in themselves, but not when they are undertaken as a means of extracting information. Similarly, acts whose ultimate end is not to denigrate the detainee's religious sensitivities may be prohibited, but not those where the goal is to obtain intelligence. To put it another way, if the "circumstances" for the "reasonable person" to "consider" include the interrogator's assertion that the detainee has "high value" information about terrorist activities, humiliation and degradation may be tolerated against that detainee which would not be permitted against an individual not considered to be in possession of such intelligence.

The administration had shown itself willing to adopt such an approach in the August 2002 Justice Department memorandum written following a reported CIA request for legal cover for its interrogators. This leaked memorandum suggested that for an agent to be guilty of torture, the infliction of "severe pain and suffering" must be his "precise objective". If the interrogator only acted "knowing that severe pain or suffering was reasonably likely to result from his actions, but no more, he would have acted only with general intent". At the same time, the memorandum advised, the defence of "necessity" could be available to an interrogator who committed torture in order to obtain information about terrorist attack plans.[94] Although a replacement memorandum issued in December 2004 did "not reiterate" the "specific intent" test of its predecessor, or indeed repudiate it, it did take an otherwise stronger line against torture.[95] It was, however, silent on the question of cruel, inhuman or degrading treatment,

[92] "Sexual or sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or to pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield".

[93] See for example, Part one, Section II of *USA: Human dignity denied, op. cit.*

[94] Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, *op. cit.*

[95] The 2004 memorandum stated that "we do not believe it is useful to try to define the precise meaning of 'specific intent'", but added that there is "no exception under the statute permitting torture to be used for a 'good reason'. Thus, an [interrogator's] motive (to protect national security, for example) is not relevant to the question whether he has acted with the requisite specific intent under the statute." Legal

which is at issue here. As already noted, the August 2002 memorandum had advised that there were "a significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture", and the December 2004 memorandum noted that "While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."[96]

The executive order suggests that the test of whether any particular acts undertaken as part of the secret program comply with the common Article 3 prohibition on "outrages on personal dignity, in particular, humiliating and degrading treatment" is whether "any reasonable person, considering the circumstances, would deem the acts beyond the bounds of human decency". The necessary external independent assessment is impossible, however. The interrogation techniques and detention conditions remain classified at the highest level of secrecy. The detainee held in secret custody has no access to relatives, legal counsel, the courts, independent doctors, human rights monitors, or the ICRC, possibly for years. This makes the reach and effectiveness of the executive order impossible for either the interrogators implementing the order or, indeed, the outside world to assess.

At the same time, irrespective of the interrogation procedures, prolonged secret incommunicado detention in and of itself constitutes cruel, inhuman or degrading treatment and may amount to torture.[97] In the case of many of those held in the CIA's program for months and years, their detention in such conditions constituted torture.

Failure to repudiate torture techniques

If this secret detention program was the policy or practice of another government, it would likely feature in the US State Department's annual report on human rights violations. The entry on Iran in the report issued in 2007, for example, criticizes the "series of 'unofficial' secret prisons and detention centers outside the national prison system" in Iran. [98]

Torture has occurred in these secret Iranian facilities, the State Department notes, including "prolonged solitary confinement with sensory deprivation" and "sleep deprivation". So, too, in the CIA program. Detainees previously held in the program, but not subjected to "enhanced

standards applicable under 18 U.S.C. §§ 2340-2340A. Memorandum opinion for the Deputy Attorney General, 30 December 2004, http://www.usdoj.gov/olc/18usc23402340a2.htm#N_27_.

[96] Legal standards applicable under 18 U.S.C. §§ 2340-2340A, *op. cit.*

[97] For example, in the case of a person held in secret incommunicado detention in Libya for more than three years until he was allowed a visit by his wife, and subsequently returned to incommunicado detention in a secret location for a further period, the UN Human Rights Committee stated that, "by being subjected to prolonged incommunicado detention in an unknown location, [he was] the victim of torture and cruel and inhuman treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant." *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, UN Doc. CCPR/C/50/D/440/1990 (1994), para. 2.2.

[98] US Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2006: Iran, 6 March 2007, available at http://www.state.gov/g/drl/rls/hrrpt/2006/78852.htm.

interrogation techniques", have described a regime of prolonged solitary confinement and extreme sensory deprivation.[99] Sleep deprivation has also allegedly been used in the CIA program.[100] Asked why President Bush's executive order did not make reference to sleep as one of the "basic necessities of life" protected under the order, a senior administration official explained that sleep is "not something that's traditionally enumerated in the Geneva Convention provisions".[101]

What is missing from the executive order is the long-awaited repudiation of interrogation techniques allegedly used in the CIA program that clearly amount to cruel, inhuman or degrading treatment, and some of which (including through combination and prolonged infliction) amount to torture. A leaked November 2002 memorandum from the General Counsel of the Pentagon suggested that interrogation techniques such as "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family"; "exposure to cold weather or water"; and "use of a wet towel and dripping water to induce the misperception of suffocation" ["waterboarding"] were "legally available".[102] An accompanying military document noted that these and other techniques were used by "other US government agencies", a term usually used to mean the CIA, and suggested that they could be "utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees".[103]

As recently as October 2006, Vice-President Cheney appeared to publicly endorse the interrogation technique of "water-boarding".[104] Specifically asked if "waterboarding" – in

[99] *Secret detention in CIA 'black sites'*, AI Index: AMR 51/177/2005, November 2005, available at http://web.amnesty.org/library/Index/ENGAMR511772005.

[100] CIA's harsh interrogation techniques described. ABC News, 18 November 2005, http://abcnews.go.com/WNT/Investigation/story?id=1322866. (listing techniques including: *"Long Time Standing*: …Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions… *The Cold Cell*: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water… *Water Boarding*: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.").

[101] Transcript of conference call with senior administration officials, *op. cit.*

[102] Counter-resistance techniques. Action memo from William J. Haynes, General Counsel of the Department of Defense, 27 November 2002.

[103] Request for approval of counter-resistance strategies. From Jerald Phifer, LTC, USA, Director J2. Memorandum for Commander, Joint Task Force 170, Guantánamo Bay, Cuba, 11 October 2002. This memorandum also noted that such techniques were used in "US military interrogation resistance training". See also *Rorschach and awe*, Vanity Fair, 17 July 2007, on the reported role in the development of the post-9/11 CIA interrogation program of two psychologists who "reverse-engineered the tactics inflicted on SERE trainees for use on detainees in the global war on terror". SERE (Survival, Evasion, Resistance, Escape) is the US military program for training personnel on avoiding or enduring captivity in enemy hands.

[104] Interviewer: "And I've had people call and say, please, let the Vice President know that if it takes dunking a terrorist in water, we're all for it, if it saves American lives. Again, this debate seems a little

effect mock execution by drowning – would be prohibited under President Bush's executive order of 20 July 2007, a senior administration official declined to "talk about any specific interrogation practices", "I can't talk about practices in the program, past, present".[105] The official stated that "for a program that remains a classified program of secret detention and interrogation for these, the most dangerous terrorists with vital intelligence, it's determined that it's not consistent with the intelligence value of the program to publicize for those terrorists what techniques are approved for the program and what specific techniques are prohibited for the program."[106] To do so, the explanation goes, would be "to allow *al-Qa'ida* to train against" those interrogation techniques that were known to be usable by the CIA.

This line of argument, repeated by the administration and the CIA elsewhere, makes little sense unless the administration has an ulterior motive for making it. The US government says that it does not authorize or condone torture. Waterboarding is torture. For the government to publicly announce that the CIA will not use waterboarding therefore provides the "terrorists" with no additional information. To refuse to make such an announcement would suggest either that the government does not consider that waterboarding constitutes torture, or that it remains in the armoury of the CIA's "enhanced interrogation techniques", or that the US administration is refusing to label it as torture in order not to admit criminal liability for past use. In any event, the administration's refusal to repudiate this technique is unacceptable.

The sexual and religious abuse that, as noted above, are the only acts specifically outlined in the executive order as examples of prohibited treatment represent "some red lines which I think we can all agree are beyond the pale" and which would violate common Article 3, according to a senior administration official.[107] Under this reasoning, the absence of an explicit prohibition against waterboarding in the executive order could indicate an official view that there is no consensus that such a technique would be "beyond the pale". The same goes for other techniques, such as sleep deprivation, prolonged isolation, and sensory deprivation, which have reportedly formed a part of the CIA program to date.

Waterboarding was one of the interrogation techniques expressly prohibited in the new Army Field Manual released last year. Explaining the difference between the Army Field Manual and the executive order on the CIA program, the above administration official described the army manual as "the gold standard in terms of how prisoners and detainees will be treated", "far above the baseline standard set by common Article 3".[108] Attorney General Alberto Gonzales has repeated this view. At the Senate Judiciary Committee hearing on 24 July, Senator Dick Durbin informed the Attorney General that he had just received responses to his question about specific interrogation techniques from the "highest-ranking attorneys in each

silly given the threat we face, would you agree?" Vice President: "I do agree…" Interviewer: "Would you agree a dunk in water is a no-brainer if it can save lives? Vice President: "It's a no-brainer for me…" Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, 24 October 2006, http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html.

[105] Transcript of conference call with senior administration officials, *op.cit.*

[106] *Ibid*.

[107] *Ibid*.

[108] *Ibid*.

of the four military services – Army, Navy, Air Force and Marines – the judge advocates general". Senator Durbin revealed that these military lawyers were unanimous in their view of the techniques in question, agreeing that "painful stress positions, threatening detainees with dogs, forced nudity, waterboarding and mock execution" violate common Article 3.[109]

Senator Durbin asked Attorney General Gonzales if he agreed with this assessment. The Attorney General replied, "Senator, I'm not going to get in a public discussion here about possible techniques that may be used by the CIA to protect our country." He added that "those in the military are subject to the Army Field Manual. It's a standard of conduct that's way above common Article 3. And so they come at it from a different perspective, quite frankly, Senator".[110] The continuing refusal of the US government's highest law enforcement officer, and head of the Justice Department whose legal advice clears the CIA's policies, to repudiate interrogation techniques that violate international law is a matter for deep concern.[111]

In its 2006 concluding observations regarding the USA's compliance with the ICCPR, the Human Rights Committee welcomed assurances given to it by the US government that a number of interrogation techniques would now be prohibited under the new Army Field Manual for use by *military* personnel or on *military* premises. Nevertheless, the Committee expressed its concern that the USA had not acknowledged that such techniques violated the international ban on torture and other cruel, inhuman or degrading treatment, that no-one had been brought to justice for previously authorizing such techniques, and that the techniques "may still be authorized or used by other agencies, including intelligence agencies", operating outside of military facilities. A year later, this remains a serious concern, including in relation to the CIA secret detention program.

For its part, the Committee against Torture called on the USA to rescind any interrogation technique that constitutes torture or cruel, inhuman or degrading treatment or punishment, "in all places of detention under its *de facto* effective control, in order to comply with its obligations under the Convention [against Torture]." President Bush's executive order is another missed opportunity in this regard and fuels concern that the CIA continues to operate internationally unlawful techniques.

Secrecy breeds abuse. This is a principal reason why secret detention is prohibited – because it facilitates torture and other ill-treatment, as well as amounting to such treatment in and of itself. As the UN Working Group on Arbitrary Detention stated recently in its severe criticism of the CIA program, such detention

[109] Amnesty International has copies of these responses.
[110] Transcript of Senator Dick Durbin and Attorney General Alberto Gonzales. Senate Judiciary Committee Hearing, 24 July 2007.
[111] Senator Durbin wrote to Attorney General Gonzales on 2 August 2007 to seek clarification of his testimony which had raised "serious questions regarding whether that Executive Order complies with the law and would prohibit illegal and abusive interrogation techniques". Senator Durbin asked for a response by 9 August 2007. According to Senator Durbin's office in Washington, DC, no reply had been received from the Attorney General by 14 August.

"falls outside of all national and international legal regimes pertaining to the safeguards against arbitrary detention. In addition the secrecy surrounding the detention and the interstate transfer of suspected terrorists may expose the persons affected to torture, forced disappearance, extra judicial killing and in case they are prosecuted against, to the lack of the guarantees of a fair trial."[112]

The 14 detainees transferred from the secret CIA program to Guantánamo in September 2006, and the 15th transferred in April 2007 (see below), may yet face trials by military commission with the power to admit coerced information and hand down death sentences. The government may introduce evidence while keeping secret the methods used to obtain it, if the methods are classified. The CIA's interrogation techniques are classified at "top secret" level, and according to the administration, will remain so in the future.[114]

> "*The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.*" US Supreme Court, 1944[113]

The executive order further facilitates impunity

If there are doubts about whether the executive order will protect detainees held in secret CIA custody from specific abuse over and above the human rights violation that secret detention constitutes, it is clear that it does nothing to resolve the accountability gap that persists in relation to past abuses. Indeed, another way of looking at the executive order is that it represents the latest in a series of measures taken by the authorities to ensure a lack of accountability for human rights violations committed by US forces in the "war on terror". Inadequate investigations, high-level impunity and leniency in this context have drawn the concern, among others, of the UN Committee against Torture and the Human Rights Committee.

Early in the "war on terror", the USA rejected the jurisdiction of the International Criminal Court (ICC). In May 2002, at around the time the CIA's program of "enhanced interrogation techniques" was getting underway, the Bush administration informed the UN Secretary

[112] Opinion No. 29/2006 (United States of America), Concerning: the case of Mr. Ibn Al-Shaykh al-Libi and 25 other persons, adopted 1 September 2006, para. 21.
[113] *Ashcraft v. State of Tennessee*, 322 U.S. 143 (1944).
[114] For instance, "Any procedures that the CIA would use in the future, of course, would be classified". Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, USA, 7 September 2006, http://www.state.gov/s/l/rls/71939.htm

General that the USA would not ratify the Rome Statute of the ICC and therefore does not consider itself bound under international law not to undermine its object and purpose.[115]

The then White House Counsel, Alberto Gonzales, asked the Justice Department whether interrogation methods used against *al-Qa'ida* suspects that (according to the administration) did not constitute torture under the USA's anti-torture statute could create the basis for a prosecution by the ICC. In a letter with the same date, 1 August 2002, as two Justice Department memorandums apparently written to give legal cover to CIA interrogators (see above), the Justice Department responded that the ICC "cannot take action based on such interrogations" because "the Rome Statute makes torture a crime subject to the ICC's jurisdiction in only two contexts", namely when the torture amounts to a crime against humanity or a war crime. The Justice Department advice continued: "Even if certain interrogation methods being contemplated amounted to torture", the ICC would not have jurisdiction because it would neither amount to a crime against humanity committed against a civilian population ("if anything, the interrogations are taking place to elicit information that could prevent attacks on civilian populations"), nor would it amount to a war crime because of President Bush's determination that the Geneva Conventions would not apply to the detainees taken into US custody ("interrogations of al Qaeda members, therefore, cannot constitute a war crime because Article 8 of the Rome Statute applies only to those protected by the Geneva Conventions").[116]

At the time that the USA informed the UN that it would not ratify the Rome Statute, Secretary of Defense Donald Rumsfeld stated that the ICC's "flaws… are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction of US service members, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow".[117] Seven months later, Secretary Rumsfeld authorized interrogation techniques for use in Guantánamo which violated international standards, including stress positions, sensory deprivation, removal of clothing, and exploiting individual phobias of detainees, such as fear of dogs. Such techniques were also used in Afghanistan, the government of which is one of several that have entered into impunity agreements with the USA. Such agreements provide that a government will not surrender or transfer US nationals accused of genocide, crimes against humanity or war crimes to the ICC, if requested by the Court. In the case of Afghanistan, the Status of Forces

[115] In 2002, the USA also attempted to block the adoption of the Optional Protocol to CAT, the aim of which was to establish a system of both regular visits to places of detention by an international body of experts, and sustained regular visits conducted by national visiting bodies. The Optional Protocol was nevertheless formally adopted by the UN General Assembly on 18 December 2002. By early August 2007, 34 countries had become parties to the Protocol and a further 31 had signed it. The USA was not among them.

[116] Letter from Deputy Assistant Attorney General John Yoo to Alberto Gonzales, Counsel to the President, 1 August 2002. Giving a flavour of the administration's view of the ICC, the letter warned that "it would be impossible to control the actions of a rogue prosecutor or judge" and "we cannot predict the political actions of international institutions".

[117] Secretary Rumsfeld statement on the ICC treaty. US Department of Defense news release, 6 May 2002, http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=3337.

Agreement between the two countries also holds that no US personnel may be transferred to an international tribunal.

In May 2005, President Bush said of the ICC, "we're not going to join it. And there's a reason why we're not going to join it: We don't want our soldiers being brought up in front of unelected judges. But that doesn't mean that we're not going to hold people to account, which we're doing now in America."[119] To date, as far as Amnesty International can ascertain, no CIA personnel have been brought to justice in relation to acts of torture or other ill-treatment – whether in the context of the secret CIA program or in the wider US detention regime – despite agency personnel allegedly being involved in a number of deaths in custody in Iraq and Afghanistan.[120] In the case of Manadel al-Jamadi who died in CIA and Navy SEAL custody in Abu Ghraib on 4 November 2003, for example, nine members of the Navy SEAL team were given "non-judicial punishment" by their commanding officer. None of the CIA personnel allegedly involved has been charged or prosecuted, despite being a case in which the CIA Inspector General found a "possibility of criminality".[121]

General Paul Kern: "*In telling somebody to take all their clothes off and be naked while you're interrogating them or to put them into isolation with no – and deprive them of all their senses is also – both of these are violation[s] of law… And [US soldiers in Iraq] knew that. When you asked them after the fact. You say, 'Did you really think about that?' 'Well, yeah. I guess it was'.*"

Investigator: "*What techniques did they think they were using when they were stripping the detainees? Did that even fall into one of the categories?*"

General Kern: "*No. That is a – no, something that I think fell out of Special Operations Afghan CIA. It sort of migrates its way into the soldiers.*"[118]

While the military investigation into intelligence activities at Abu Ghraib in Iraq concluded that "the CIA's detention and interrogation practices contributed to a loss of accountability and abuse" at the prison,[122] neither this nor other investigations conducted outside of the CIA

[118] Testimony of General Paul Kern, who oversaw the Fay investigation into Abu Ghraib, to Department of the Army Inspector General, 24 November 2004, released under Freedom of Information Act, August 2007, see http://www.aclu.org/safefree/torture/31305prs20070815.html.

[119] Interview of the President by Dutch TV, 5 May 2005, http://www.whitehouse.gov/news/releases/2005/05/20050505-18.html.

[120] David Passaro, a CIA contractor, was convicted in 2006 for assault in the case of an Afghan national who died in US custody Afghanistan in 2003. The CIA Director responded to the conviction by stating that "Passaro's actions were unlawful, reprehensible, and neither authorized nor condoned by the Agency… As abhorrent as this situation was, it is a fact that we, as an Agency, did not sweep it under a rug. We addressed it head-on and dealt with it swiftly." Statement to the CIA workforce by Director Hayden on the conviction of former CIA contractor David Passaro, 17 August 2006, https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2006/pr08172006.htm.

[121] Statement by Senator Patrick Leahy, US Senate Committee on the Judiciary, on the nomination of Paul McNulty to the position of Deputy Attorney General, 2 February 2006.

[122] As already noted, the CIA kept certain detainees off registers ("ghost detainees"). The Fay investigation into Abu Ghraib found that "this separate grouping of OGA [other government agency, a term here referring "almost exclusively" to the CIA] detainees added to the confusion over proper

Inspector General's office have had the scope to examine the CIA's secret program.[123] The Office of the Director of National Intelligence has stated that the CIA program "has been investigated and audited by the CIA's Office of the Inspector General (OIG), which was given full and complete access to all aspects of the program."[124] No details or findings relating to any such investigations have been made public. International standards require that investigations into torture and other cruel, inhuman or degrading treatment be prompt and effective, carried out by independent, competent and impartial investigators, and that their findings be made public.[125]

Prosecutors in Italy and Germany have made efforts to hold CIA operatives to account for abductions and other crimes carried out on their territory or against their nationals, although their initiatives have not received the unqualified support of their governments. On 8 June 2007, the trial opened in Milan, Italy of 25 CIA operatives, one US Air Force officer and seven members of the Italian security services, accused of the abduction and rendition of Hassan Mustafa Osama Nasr (Abu Omar) in 2003. For over a year, Italian prosecutors had been asking their government to request the extradition of the US operatives, but the Italian government had not agreed to do so, and the trial opened without any of the US defendants present. The trial was then suspended because the Italian government petitioned the court to drop the charges on the grounds that prosecutors had violated state secrecy laws in gathering evidence against the security services, including by using wiretaps and classified documents. The Constitutional Court will hear arguments on this petition, and is expected to rule in October 2007. If they rule in favour of the prosecutors, the case is scheduled to reopen on 24 October.

German authorities, meanwhile, issued arrest warrants in January 2007 against 13 CIA operatives – 10 agents and three pilots from Aero Contractors – implicated in the rendition of German national Khaled el-Masri in 2004.[126] Prosecutors want the 11 men and two women to be extradited to Germany to stand trial, although as of 1 August 2007, the German government had not decided whether to make a formal extradition request to the US. US

treatment of detainees and created a perception that OGA techniques and practices were suitable and authorized for [Department of Defense] operations". AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade, 2004.

[123] The global review conducted by the Naval Inspector General, for example, noted that "the CIA cooperated with our investigation, but provided information only on activities in Iraq." Vice Admiral Albert Church's report added that "it was beyond the scope of our tasking to investigate the existence, location or policies governing detention facilities that may be exclusively operated by [other government agencies], rather than the [Department of Defense]" Unclassified executive summary of the Church Report, March 2005. The "independent" Schlesinger Panel global report similarly stated that "we are aware of the issue of unregistered detainees, but the Panel did not have sufficient access to CIA information to make any determinations in this regard".

[124] Summary of the High Value Terrorist Detainee Program, *op. cit.*

[125] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[126] Amnesty International interviewed Khaled el-Masri after his release and wrote to the CIA in August 2004, but has never received a response.

officials have made emphatically clear that if asked, they would refuse to extradite their nationals to stand trial in either Italy or Germany.

In its March 2005 statement asserting that its agents "do not torture" (while remaining silent on whether or not they engage in cruel, inhuman or degrading treatment), the CIA noted that "CIA policies on interrogation have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable".[127] The absence of prosecutions of CIA personnel suggests either that the policy remains out of compliance with international law, or indeed that the detention policy goes hand in hand with one of immunity from prosecution.

The Detainee Treatment Act provides a type of 'good faith' defence against criminal and civil liability for interrogators who had engaged in torture or other ill-treatment using officially sanctioned interrogation techniques.[128] Signing the DTA into law, President Bush emphasized that the legislation does "not create or authorize any right for terrorists to sue anyone, including our men and women on the front lines in the war on terror… Far from authorizing such suits, this law provides additional liability protection for those engaged in properly authorized detention or interrogation of terrorists. I am pleased that the law also makes provision for providing legal counsel to and compensating our service members and other US Government personnel for legal expenses in the event a terrorist attempts to sue them, in our courts or in foreign courts." [129]

In 2006, Congress passed the Military Commissions Act, the legislative response to the Supreme Court's *Hamdan v. Rumsfeld* ruling. This Act further facilitates impunity for US officials for human rights violations. It strips the US courts of the jurisdiction to hear *habeas corpus* appeals, a fundamental safeguard against abuse, from foreign nationals held as "enemy combatants". As the Inter-American Court of Human Rights has stated, even in times of public emergency,

> "In order for *habeas corpus* to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his

[127] Statement by CIA Director of Public Affairs Jennifer Millerwise, 18 March 2005, *op.cit.*

[128] Section 1004 of the DTA provides that in any civil or criminal case against any US agent "engaging in specific operational practices, that involved detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted", such an agent can offer as a defence that they "did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."

[129] President's statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006**.** 30 December 2005, http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html**.**

> whereabouts secret and in protecting him against torture or other cruel, inhuman, or degrading treatment or punishment".[130]

The UN Human Rights Committee, in an authoritative interpretation of countries' obligations under the ICCPR, has emphasized, that even in a state of emergency, "in order to protect non-derogable rights", such as the right to be free from unacknowledged detention and from torture or other cruel, inhuman or degrading treatment, "the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished…"[131]

Apart from allowing detainees only limited judicial review of the administrative tribunal decision labelling them as "enemy combatants", the MCA holds that

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

The MCA also states that

> "No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories".

In other words, while the executive order is supposed to protect detainees against violations of common Article 3, if such violations occur, the detainee has no recourse to remedy. The MCA protects the violator instead. [132] The executive order itself compounds this with a clause stating that the order does not create any rights enforceable in law against US agents or officials.[133]

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[130] Advisory Opinion OC-8/87, *Habeas corpus* in emergency situations (Arts 27(2) and 7(6) of the American Convention on Human Rights), 30 January 1987, para. 35.

[131] Human Rights Committee, General Comment 29, CCPR/C/21/Rev.1/Add. 11 (2001), para. 11.

[132] A senior administration official nevertheless asserted that there is the "potential for criminal prosecution for violations of any of the criminal provisions" under the executive order. The official also stated that the executive order "does have the force of law", although only "in the sense that it will be administratively enforced". Transcript of conference call with senior administration officials, *op. cit.*

[133] The executive order states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its departments, agencies or other entities, its officers or employees, or any other person". This has become standard language by which the administration has sought to insulate government action from legal attack – for example, the same disclaimer was included in President Bush's Military Order of 13 November 2001 on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, which authorized military commissions and detention without charge or trial, and in the Deputy Secretary of Defense's 7 July 2004 order establishing Combatant Status Review Tribunals at Guantánamo.

Detainees in the CIA program are held in secret executive detention, denied access to effective remedies for human rights violations, including enforced disappearance, in violation of international law.[134]

The executive order is discriminatory

The executive order states that the secret program is to be used for "alien" detainees fulfilling the criteria for subjection to such custody. In other words, as is the case with the Military Commissions Act, it reserves certain unlawful practices for use against foreign nationals.

While not all differential treatment on the basis of nationality violates international law, states must ensure and respect human rights without distinction as to national origin.[135] The UN Human Rights Committee, for example, in its authoritative interpretation of the ICCPR in relation to aliens who come within the jurisdiction of the state party, has stated:

> "Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment... Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person.… Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights."[136]

[134] ICCPR, article 2.3. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus by the UN General Assembly in December 2005, spell out the obligations of remedy in some detail (GA RES. 60/147 16 December 2005). States are obliged, among other things, to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law (Principle 3(b)). They are also required to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice…" and to "provide effective remedies to victims, including reparation" (Principle 3(c and d)). These reparations should take the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" (Principle 18). The Basic Principles and Guidelines must be applied an interpreted "without any discrimination of any kind or on any ground, without exception" (Principle 25).

[135] Thus, for example, "the [Human Rights] Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]. General Comment 18, *Non-discrimination* (1989), para. 13. See also General Comment 23 (1994), "a State party is required under [article 2.1 of the ICCPR] to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25.

[136] General Comment 15, *The position of aliens under the Covenant* (1986).

Secret detention violates the right not to be subjected to torture or other cruel, inhuman or degrading treatment, the right of all detainees to be treated with humanity and respect for the inherent dignity of their person, and the right to judicial review of the lawfulness of detention.

As a state party to Convention on the Elimination of All Forms of Racial Discrimination, the USA must "assure to everyone within [its] jurisdiction effective protection and remedies" against discrimination, including on the basis of national origin, as well as the right to seek "adequate reparation or satisfaction for any damage suffered as a result of such discrimination" (Article 6).

Article 2.1 of the ICCPR requires the state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind" including on the basis of national origin. Two of the rights recognized in the ICCPR are the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court and the right to an effective remedy for violations of rights under the treaty. Secret detention is the antithesis of such rights, and itself amounts to torture or other ill-treatment and possibly to enforced disappearance, in violation of principles of international law from which there can be no derogation.

Under the terms of the executive order, no US citizen could be placed in the CIA secret detention program. Foreign nationals should not be placed in it either.

Casting a potentially wide net

In his statement on President Bush's executive order, the Director of the CIA, General Hayden, asserted that "fewer than 100 hardened terrorists have been placed in the program, and just a fraction of those – well under half – have ever required any sort of enhanced interrogation measures".[137] The executive order is nevertheless worded in such a way as to potentially cast a broader net than General Hayden suggests. Under the order, a detainee in the CIA program must be a foreign national who the Director of the CIA determines is a "member or part of or supporting al Qaeda, the Taliban, or associated organizations" and "likely to be in possession of information" that "could assist in detecting, mitigating, or preventing terrorist attacks" or "could assist in locating the senior leadership of al Qaeda, the Taliban, or associated forces". This could arguably draw in, for example, family members of individuals sought by the USA if such relatives are deemed by the CIA Director to be "supporting" one of the named organizations or "associated forces" and to have knowledge of the wanted person's whereabouts.[138]

[137] As noted above, the CIA has been involved in far more detentions and interrogations – in Iraq, Afghanistan, Guantánamo and elsewhere – than those specifically coming under this program.

[138] Amnesty International has had contact with at least six people who have been released after having been transferred out of the CIA program (the true number of such releases is probably higher), indicating that either the US has allowed a significant number of "hardened terrorists" to be put back on the streets, or that they have made a lot of mistakes in deciding who to bring into the program in the first place. See also 11 December 2002 address by CIA Director George Tenet at Nixon Center Distinguished Service Award Banquet , https://www.cia.gov/news-information/speeches-

Several detainees released from secret CIA detention have told Amnesty International that they were made to look at thousands of photographs, suggesting a broad information-fishing exercise, rather than a targeted attempt to prevent specific attacks or locate high-level leaders.

Torture alleged, no investigations revealed, questions remain

If the CIA, General Hayden suggested in his statement on 20 July 2007, "had not stepped forward to hold and interrogate people like Abu Zubaydah and Khalid Shaykh Muhammad, the American people would be right to ask why". Amnesty International believes that what responsible officials should be asking is what investigations have been conducted into the alleged torture of these two men and others, for the findings to be made public and for anyone responsible to be brought to justice. They should also be asking why individuals whom the US authorities assert have been involved in serious crimes have not been called to account in a court of law, whether

"…many detainees were then kept naked for several weeks…. Detainees went through months of solitary confinement and extreme sensory deprivation in cramped cells, shackled and handcuffed at all times…. A common feature for many detainees was the four-month isolation regime. During this period of over 120 days, absolutely no human contact was granted with anyone but masked, silent guards…The air in many cells emanated from a ventilation hole in the ceiling, which was often controlled to produce extremes of temperature: sometimes so hot one would gasp for breath, sometimes freezing cold… Many detainees described air conditioning for deliberate discomfort… Detainees were exposed at times to over-heating in the cell; at other times drafts of freezing breeze…. Detainees never experienced natural light or natural darkness, although most were blindfolded many times so they could see nothing… There was a shackling ring in the wall of the cell, about half a metre up off the floor. Detainees' hands and feet were clamped in handcuffs and leg irons. Bodies were regularly forced into contorted shapes and chained to this ring for long, painful periods…. The sound most commonly heard in cells was a constant, low-level hum of white noise from loudspeakers… The constant noise was punctuated by blasts of loud Western music – rock music, rap music and thumping beats, or distorted verses from the Koran, or irritating noises – thunder, planes taking off, cackling laughter, the screams of women and children… Detainees subjected to relentless noise and disturbance were deprived of the chance to sleep… The torture music was turned on, or at least made much louder, as punishment for perceived infractions like raising one's voice, calling out, or not waving quickly enough when guards demanded a response from you… The gradual escalation of applied physical and psychological exertion, combined in some cases with more concentrated pressure periods for the purposes of interrogation, is said to have caused many of those held by the CIA to develop enduring psychiatric and mental problems."

Reported conditions in CIA secret detention, extracts from Council of Europe report, June 2007 [139]

testimony/2002/dci_speech_12112002.html. ("Since September 2001, more than 3000 al-Qa'ida operatives or associates have been detained in over 100 countries. Don't get stuck on this number. Not everyone arrested was a terrorist. Some have been released.")

[139] Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Dick Marty, 11 June 2007, http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf.

their treatment to date will affect the USA's ability to provide them with a fair trial, as is its obligation, and when victims of such crimes will be able to see justice done.

After, respectively, four and a half and three and a half years in secret custody, Abu Zubaydah and Khalid Sheikh Mohammed were transferred to military detention in Guantánamo in September 2006 along with twelve others previously held in the secret program. A 15th "high-value" detainee was transferred to Guantánamo from CIA custody in April 2007. Today they are still being denied access to legal representation on the grounds that because of their "involvement in the high-value terrorist detainee program, it is highly likely [they] will possess, and may be able to transmit to counsel, information that would be classified at the TOP SECRET//SCI [Sensitive Compartmented Information] level".[140] The information that these detainees possess includes details of interrogation techniques, detention conditions and facilities in the CIA's secret program. The US government's treatment of them over the years has transformed them from individuals with allegedly high intelligence value to detainees with information about possible government crimes.

At his Combatant Status Review Tribunal (CSRT) hearing in Guantánamo on 27 March 2007, it was revealed that Abu Zubaydah referred to "months of torture" carried out during his time in secret custody. Details he provided to the CSRT about the torture are redacted from the unclassified transcript of the hearing.[141] He has reportedly said that as well as being subjected to "waterboarding", he was also kept for a prolonged period in a cage known as a "dog box", in which there was not enough room to stand.[142] Since being transferred to Guantánamo, Khaled Sheikh Mohammed has also alleged that he was tortured in CIA custody, but the details of his allegations have similarly not been made public by the authorities. Prior to his transfer, there were reports that he had been subjected to "waterboarding". He is also reported to have alleged that he was kept naked in a cell for several days, suspended from the ceiling by his arms with his toes barely touching the ground, and to have been chained naked to a metal ring in his cell in a painful crouching position for prolonged periods.[143]

'Abd al-Rahim al-Nashiri was arrested in November 2002 in the United Arab Emirates – again, far from any battlefield. Rather than being brought to trial – he was named on an indictment in US federal court in New York only months after his arrest – he was hidden away in secret CIA custody until he was transferred to Guantánamo in September 2006.[144] At his CSRT hearing on 14 March 2007, he alleged that he had been tortured in CIA custody. Through a translator, he claimed that: "From the time I was arrested five years ago, they have

[140] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the US District Court for the District of Columbia, 26 October 2006.
[141] Transcript available at http://www.defenselink.mil/news/transcript_ISN10016.pdf.
[142] *The black sites*. By Jane Mayer, The New Yorker, 13 August 2007.
[143] *Ibid*.
[144] In May 2003, *after* his arrest, the USA charged two Yemeni nationals – who were not in US custody – in connection with the *USS Cole* bombing in Yemen in October 2000. In the indictment, 'Abd al-Nashiri was named as an "un-indicted co-conspirator". See *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, *op.cit.*

been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way." The following exchange between the CSRT President and 'Abd al-Nashiri then took place, according to the unclassified version of the transcript:

> President: Please describe the methods that were used.
>
> Detainee: [Redacted]. What else do I want to say? [Redacted]. Many things happened. They were doing so many things. What else did they did? [Redacted]. They do so many things. So so many things. What else did they did? [Redacted]. After that another method of torture began [Redacted].[145]

On 9 August 2007, the Pentagon announced that the CSRTs had determined that all 14 detainees transferred from CIA custody to Guantánamo in September 2006 met the criteria for designation as "enemy combatants".[146] The announcement made no reference to the torture allegations, what investigation, if any, had been ordered or carried out into the allegations, or whether the CSRT had relied upon allegedly coerced testimony in making its determinations.[147]

According to the US authorities, Abu Zubaydah, Khalid Sheikh Mohammed and the other detainees who had been held in the CIA secret detention program are suspected of serious crimes, including involvement in the attacks of 11 September 2001. If so, they should be tried in a proper court, in proceedings which meet international standards of fairness, and without the imposition of the death penalty, which Amnesty International opposes in all circumstances. However, this does not alter the fact that many of these men were also the victims of enforced disappearance and possibly torture under interrogation, as well as in terms of the conditions of their confinement. Torture and enforced disappearance are both crimes under international law.

In his 6 September 2006 speech confirming the existence of the secret detention program, President Bush said that at that time there was no-one being held in the program, but emphasized that the secret detention program would "continue to be crucial". That the CIA was still engaged in detentions was once again highlighted on 27 April 2007, three months before the executive order was issued, when the Pentagon announced that a 15th "high value" detainee, 'Abd al-Hadi al-Iraqi, had been transferred to the Guantánamo detention facility.

[145] Transcript available at http://www.defenselink.mil/news/transcript_ISN10015.pdf.
[146] Guantanamo High-Value Detainees Combatant Status Review Tribunals completed. US Department of Defence, 9 August 2007, http://www.defenselink.mil/releases/release.aspx?releaseid=11218.
[147] "In making a determination regarding the status of any detainee, the CSRT shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement." Implementation of Combatant Status Review Tribunal procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba, Department of Defense, 14 July 2006, Enclosure 10, §B.

The Pentagon did not reveal when or where he was detained, only that "prior to his arrival at Guantánamo Bay, he was held in CIA custody".[148]

Four and a half years ago, the White House issued its National Strategy for Combating Terrorism. It asserted that the USA was committed to building a world where "values such as human dignity, rule of law, respect for individual liberties" are embraced as standards, not exceptions". This, the administration stated, "will be the best antidote to the spread of terrorism. This is the world we must build today."[149]

Instead what the administration has built is a secret detention, interrogation and rendition program. President Bush's executive order of 20 July 2007 gives the green light for the CIA's secret program to continue. In so doing, it leaves the USA squarely on the wrong side of its international obligations and detainees exposed to torture and other ill-treatment.

Recommendations

Amnesty International urges the US administration to:

- Bring an immediate end to any and all secret, incommunicado, and unacknowledged detentions, permanently close the CIA's secret detention program, and ensure that all agencies of government are aware of and adhere to a strict policy of registering and acknowledging all detentions;
- Ensure immediate access by the International Committee of the Red Cross (ICRC) and to United Nations and other international human rights monitors to any detainee held in secret detention, either in direct US custody or in the custody of another government to whom US agents have access;
- Provide all detainees with access to lawyers and enforce their right to be able to challenge the lawfulness of their detention in a court of law, and to release if their detention is ruled by the court to be unlawful;
- Provide all detainees with access to independent medical care, and to meaningful and ongoing communication with their families, and respect their right to seek consular assistance in accordance with international law;
- Charge detainees with recognizable criminal offences and bring them to trial within a reasonable time in independent courts, with full adherence to international fair trial standards, or else release them. There should be no recourse to the death penalty;
- Ensure that all allegations of enforced disappearance, torture and other ill-treatment carried out in the context of the CIA program are fully and independently investigated, and the findings made public. Anyone responsible for such human rights violations should be brought to justice;

[148] Defense Department takes custody of a high-value detainee, Department of Defense news release, 27 April 2007, http://www.defenselink.mil/releases/release.aspx?releaseid=10792.
[149] National Strategy for Combating Terrorism, February 2003

- Make public the precise number of detainees who have been held in secret detention by the USA since 11 September 2001; where and when they were arrested and where and for what period they were held in US custody; the date of their release or transfer out of secret custody if applicable, and provide a full list of the names of all such detainees, at least to the ICRC and to others with a legitimate interest in this information;
- explicitly prohibit all interrogation techniques that violate the international prohibition on torture and other cruel, inhuman or degrading treatment and give clear guidance that anyone responsible for using or ordering the use of such techniques will be prosecuted;
- Declassify all government documents providing authorization or legal clearance or discussion of secret detention, rendition, and enhanced interrogation by the CIA or other agencies;
- Withdraw the 7 February 2002 presidential memorandum which suggests that humane treatment is "a matter of policy" rather than law and which excluded the CIA even from that policy, and withdraw the presidential signing statement to the Detainee Treatment Act, thereby making clear that the USA will, as a matter of its legal obligation, fully comply with the international prohibition on torture or other cruel, inhuman or degrading treatment;
- Ensure that all those who have been subjected to enforced disappearance, secret detention, torture or other cruel, inhuman or degrading treatment are provided access to effective remedy, including compensation;
- Withdraw all requests or demands to foreign governments for the continued detention of persons transferred from US custody, including the CIA program.

Amnesty International urges Congress to:

- Legislate to restore *habeas corpus* to all detainees held in US custody;
- Hold hearings into the establishment and operation of the CIA's secret detention program, including examining the decision-making process by which detainees were included in the program and their interrogation and treatment, and to establish the identity, fate and whereabouts of everyone who has been or is being held in secret detention;
- Legislate to make the human rights violation of enforced disappearance as defined in international law a criminal offence punishable by appropriate penalties which take into account its extreme seriousness;
- Legislate to ensure that the CIA secret detention program is ended, and that no similar program can be established in future;
- Ensure that no further enforced disappearances are carried out by any government agency, and that all secret detention facilities under US control are shut down;

- Pass legislation ensuring that no interrogation techniques or detention conditions which would violate international law can be used by any US agent against anyone held anywhere;
- Establish sufficient oversight of the CIA and other US intelligence agencies to ensure that none of their activities are carried out in violation of US or international law, and that "state secrecy" provisions cannot be used to shield unlawful activities from Congressional scrutiny;
- Ensure that no foreign governments are being asked by the US to hold anyone who has been subject to enforced disappearance;
- Provide Senate advice and consent to the President to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance, without reservations;
- Provide Senate advice and consent to the President to sign and ratify the Optional Protocol to the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other ill-treatment;
- Provide Senate advice and consent to the President to withdraw all reservations and other limiting conditions to the USA's ratification of the International Covenant on Civil and Political Rights and the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Provide Senate advice and consent to the President to reverse the government's decision not to ratify the Rome Statute of the International Criminal Court;
- Legislate to ensure that the definitions in US legislation of human rights violations and international crimes, including torture, cruel, inhuman or degrading treatment or punishment and enforced disappearances, are compatible with those of relevant international treaties, and rescind provisions foreclosing recourse by US courts to international treaties and jurisprudence.

Amnesty International urges all other governments to:

- End any cooperation or facilitation of any kind with secret detention: no government should assist or cooperate in secret detention operations, and all governments should disclose information about such operations that comes into their possession;
- Desist from expelling, returning, surrendering, or extraditing a person to US custody where there are substantial grounds for believing that he or she would be in danger of being subjected to secret detention or enforced disappearance, torture or other cruel, inhuman or degrading treatment or punishment;
- Ensure that anyone transferred from US custody is held in a recognized place of detention, that their family is notified and allowed visits and other communications with the detainee, that any such detainees are given access to the ICRC and to legal

counsel, and that they are released promptly, unless they are charged with a recognizably criminal offence, and a court has determined that they should be kept in custody;

- Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance, without reservations;
- Sign and ratify the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

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