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A. INTRODUCTION

In its Common Core Document submitted with its Fourth Periodic Report to the United Nations (UN) Human Rights Committee (the Human Rights Committee or the Committee), the USA asserts that it is a “nation built on the moral truths of the Universal Declaration of Human Rights” and is committed to “the cause of human rights” and to “international human rights law”.¹ The USA was indeed one of the countries instrumental in the drafting and adoption of the Universal Declaration, and its modern history includes examples of remarkable advocacy and progress for human rights.

The USA ratified the International Covenant on Civil and Political Rights (ICCPR) in June 1992. Two decades later, the USA is failing to live up to its human rights obligations on a range of issues. This submission highlights a number of concerns under domestic law and practice, from long-term isolation against prisoners in maximum security prisons, to the treatment of immigrants, to the abuse of electro-shock weapons in law enforcement. Amnesty International has submitted a separate document on the death penalty.²

This submission also addresses certain US counter-terrorism policies and practices. In the past decade, the USA’s response to the crime against humanity committed on 11 September 2001 (9/11) has amounted to an assault on human rights principles. This response was itself built on the USA’s long-standing reluctance to bind its own conduct to international human rights law. This antipathy was present in the USA’s ratification of the ICCPR, which was freighted with numerous limiting conditions, including a reservation to the prohibition of cruel, inhuman or degrading treatment or punishment and a declaration – amounting to a reservation – that “the provisions of articles 1 through 27 of the Covenant are not self-executing”, that is, none of the substantive provisions of the ICCPR would be enforceable in the US courts. The absence of implementing legislation means that this remains the case.³

The USA’s post-9/11 assault on human rights principles continued even after the Human Rights Committee reviewed the USA’s combined Second and Third Periodic Reports in 2006, although some – but not all – of the policies and practices criticized by the Committee were ended by executive order in 2009. Moreover, there has been no real progress since 2006 towards full accountability for crimes under international law committed by US personnel in the counter-terrorism context, particularly in relation to the programme of secret detention operated under presidential authority by the Central Intelligence Agency (CIA) and authorized until 2009. Additionally, US courts have systematically refused to hear the merits of lawsuits seeking redress for egregious human rights violations committed in this programme and the wider counter-terrorism context. The courts have done so at the urging of government lawyers, citing national security secrecy and various forms of immunity under US law.

It is worth recalling how 21 years ago, the US Senate Committee on Foreign Relations met to consider the ICCPR, and voted to recommend ratification. Noting that more than 100 countries had already ratified the treaty, its report of that meeting asserted the following:

“In view of the leading role that the United States plays in the international struggle for human rights, the absence of US ratification of the Covenant is conspicuous and, in the view of many, hypocritical. The Committee believes that ratification will remove doubts about the seriousness of the US commitment to human rights and strengthen the impact of US efforts in the human rights field.”⁴

Each year since 1977, the year that the USA signed the ICCPR, the US Department of State has published an assessment of the human records of other countries, as measured against the provisions of the Universal Declaration, the ICCPR and other international instruments. For example, an entry in the report covering the year 2002 documented that:

“The Government’s human rights record remained poor, and it continued to commit

numerous, serious abuses. The security forces committed many unlawful killings, and they were accused of the disappearances of numerous persons... Security forces frequently tortured, beat, and otherwise abused or humiliated citizens. The Government investigated some of the alleged abuses by the security forces; however, abusers rarely were charged or disciplined... Security forces continued to use arbitrary arrest and detention, and lengthy pretrial detention remained common... Political prisoners held from previous years were released; however, numerous persons during the state of emergency were denied habeas corpus and held indefinitely as 'illegal combatants'..."⁵

When it published this critique of Liberia's human rights record in 2003, the USA was itself using torture and other ill-treatment, enforced disappearance and arbitrary detention against detainees it called "enemy combatants" in what it then called the "war on terror". It was denying habeas corpus to hundreds of detainees held at its naval base in Guantánamo Bay, Cuba and elsewhere and building impunity into its detention and interrogation programs. It had already conducted a "targeted killing" operation by drone in Yemen in what a UN expert concluded had resulted in extrajudicial executions. The double standards continue – for example, the State Department's human rights reports criticize impunity for human rights violations in other countries, even as the USA itself fails to ensure accountability.

In July 2007, a year after the Human Rights Committee's conclusions on the USA's Second and Third Periodic Reports, including condemnation of secret detention and "enhanced" interrogation, the US Department of Justice gave the CIA a classified memorandum, one in a long line of documents relating to the secret detention programme disclosed in recent years. The Department of State, it wrote, had "informed us" that its human rights assessments "are not meant to be legal conclusions, but instead they are public diplomatic statements designed to encourage foreign governments to alter their policies in a manner that would serve United States interests." US public condemnation of torture and of the "coercion of confessions in ordinary criminal cases", it said, "is not inconsistent with the CIA's proposed interrogation practices". The CIA programme, it continued "is designed to subject detainees to no more duress than is justified by the Government's paramount interest in protecting the United States and its interests from further terrorist attacks." As such, the CIA's conduct "fundamentally differs from the conduct condemned in the State Department reports".⁶ The memo gave legal approval for forms of physical assault and prolonged sleep deprivation against detainees already being subjected to enforced disappearance.

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

The Fourth Periodic Report recalls that in 2009, then US Secretary of State Hillary Clinton said that "a commitment to human rights starts with universal standards and with holding everyone accountable to those standards, including ourselves."⁷ In 2010, the State Department Legal Adviser said that the "Obama-Clinton doctrine" meant that the USA would follow "universal standards, not double standards".⁸ Since the Committee last reviewed the US record, there has been progress on ending some practices which concerned it last time. However there is much that remains incompatible with the ICCPR, the result of the USA's failure to recognize and implement its international human rights obligations.

In filing its Periodic Report, the USA states that it "has taken this opportunity to engage in a process of stock-taking and self-examination. The United States hopes to use this process to improve its human rights performance." There is much room for improvement.

B. THE USA'S POSITION ON TREATY RATIFICATION AND IMPLEMENTATION

The USA explains in its Fourth Periodic Report that it has frequently pursued a practice of "compliance before ratification". In the case of the ICCPR, which the USA ratified 15 years after signing it, the USA explains that:

"because the human rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States has taken a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law."⁹

The USA's troubling view of its compliance with the ICCPR is not restricted to this treaty and is set to continue. While the Obama administration has informed the Committee that the USA has no intention of withdrawing its reservations to the ICCPR, it has not added that the USA is set to adopt the same approach to yet another treaty in the event that it ratifies it. The administration has told the Committee that the USA signed the UN Convention on the Rights of Persons with Disabilities in 2009, but has not reported that in July 2012, the US Senate Committee on Foreign Relations recommended that the full Senate consent to ratification of this treaty only if it is conditioned on certain "reservations, understandings and declarations". Among the reservations are the following:

"Article 15 of the Convention memorializes existing prohibitions on torture and other cruel, inhuman, or degrading treatment or punishment contained in Articles 2 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and in Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and further provides that such protections shall be extended on an equal basis with respect to persons with disabilities. To ensure consistency of application, the obligations of the United States of America under Article 15 shall be subject to the same reservations and understandings that apply for the United States of America with respect to Article 16 of the CAT and Article 7 of the ICCPR" (see Section B(3) below).

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

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

For the Obama administration, the Senior Counselor to the Assistant Attorney General for Civil Rights told the Senate Foreign Relations Committee on 12 July 2012:

"ratifying the Disabilities Convention will not require new legislation and will not create any new rights, so long as it moves forward with the recommended Reservations, Understandings, and Declaration (or RUDs)... The proposed non-self-executing Declaration...would make it clear that the Convention could not be directly enforced by US courts and would not give rise to individually enforceable rights. This is consistent with our treaty practice under the ICCPR, CERD, and the Convention Against Torture."¹⁰

The USA should be urged, in the strongest possible terms, to change its approach to its human rights treaty ratifications.

B(1) EXTRATERRITORIALITY (ARTICLE 2)

Article 2(1) of the ICCPR requires the State Party to undertake "to respect and ensure to all

individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”.¹¹ The USA has previously asserted to the Committee that Article 2(1) would only apply to individuals who were both within US territory *and* within US jurisdiction. In its Concluding Observations in 2006 on the USA’s combined Second and Third Periodic Reports, the Committee noted “with concern” the USA’s “restrictive interpretation of its obligations under the Covenant”, and called on the USA to review its approach and “interpret the Covenant in good faith”, and in particular to “acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war”.

In its one-year response to these concluding observations, in 2007 the Bush administration reaffirmed the USA’s “long-standing position that the Covenant does not apply extraterritorially” and “respectfully disagree[d]” with the view to the contrary of the Committee. It noted that “most of the Committee’s requests for information on follow-up to its recommendations concern matters outside of the territory of the United States”, including secret detention, interrogation techniques, investigations into allegations of abuse, and the transfer of detainees to and from facilities outside US territory.

In the Fourth Periodic Report, the USA appears less categorical. The Obama administration notes the position previously articulated by the USA, but does not say whether it agrees with it. It notes that the USA is “mindful” of the Committee’s General Comment 31 (2004), namely that “a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the State Party, even if not situated within the territory of the State Party”.¹² The USA also states that it is “aware of the jurisprudence of the International Court of Justice (ICJ), which has found the ICCPR ‘applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’.”¹³ The Obama administration asserts that in relation to the “interpretation and application” of the ICCPR, the USA “considers the Committee’s view in good faith, and looks forward to further discussions of these issues” at the session in Geneva in October 2013.

The USA must ensure that the ICCPR is fully implemented in US law and applicable to all those subject to its jurisdiction, wherever those individuals may be located.

B(2) COUNTER-TERRORISM AS ‘GLOBAL WAR’

The USA responded to the 9/11 attacks by invoking a “global war on terror” against al-Qa’ida and other groups in which international human rights law would not apply. Although the Obama administration dropped some of its predecessor’s language – such as “war on terror” and “enemy combatant” – it broadly adopted the global war framework, which is indeed now largely accepted within all three branches of government. The USA has asserted the exclusive right to define the “war” and make up its rules.

The Bush administration made its position clear on the non-applicability of the ICCPR in this context, including in relation to the treatment of those it labelled “enemy combatants” held at Guantánamo, Afghanistan, and elsewhere.¹⁴ It also made it clear in relation to the use of lethal force.¹⁵ Despite this, the Fourth Periodic Report that “the United States has not taken the position that the Covenant does not apply ‘in time of war’. Indeed, a time of war does not suspend the operation of the Covenant to matters within its scope of application”.

However, the report then implies that the USA does not necessarily accept that human rights law applies to all or any of “a State’s actions in the actual conduct of an armed conflict”. Given that the USA continues to claim – including in the Fourth Periodic Report and its written responses of 3 July 2013 – that many of the acts it takes in the name of countering terrorism are in fact part of “the actual conduct of an armed conflict” worldwide and within the USA against al-Qa’ida, the continuing failure positively to affirm the applicability of human rights obligations to such measures remains a matter of deep concern.

The domestic legal underpinning for the USA's law of war framework remains the Authorization for Use of Military Force (AUMF), a broadly worded resolution passed by Congress after little substantive debate on 14 September 2001. The resolution authorized the President to decide who was connected to the 9/11 attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any geographical or temporal limits.¹⁶ Four days later, President Bush signed the resolution, which was then exploited to justify a range of human rights violations.¹⁷

In a key national security speech in May 2009, President Obama fully endorsed the flawed theory that the USA had been engaged in a "global war" since the attacks of 11 September 2001.¹⁸ In another such speech delivered four years later, he revisited his administration's framework for US counter-terrorism strategy. In this 23 May 2013 speech, the President raised the prospect of a change in approach to meet what he said was the changing nature of the terrorist threat, from a trans-national al-Qa'ida capacity to more localized affiliates operating within specific countries and regions, as well as the threat posed by "homegrown extremists" in the USA. He asserted that the USA "must define our effort not as a boundless 'global war on terror', but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America".¹⁹

President Obama said that he was looking forward to "engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate". Although such a step is long overdue, the administration could immediately announce that it will from now on fully meet the USA's international human rights obligations under a legal framework consistent with international law, as should have been applied from the outset of the post-9/11 response.

The USA's global war paradigm is an unacceptably unilateral and wholesale departure from the very concept of the international rule of law generally, and the limited scope of application of the law of armed conflict in particular. The USA should cease to invoke, and should publicly disavow, the "global war" doctrine, and fully recognize and affirm the applicability of international human rights obligations to all US counter-terrorism measures. This is so whether those measures are taken in the context of specific geographically-circumscribed non-international armed conflicts or away from any armed conflict, and whether on the ordinary territory of the USA or elsewhere. In taking these steps, the USA would simply be joining the opinion of the vast majority of the international community, as expressed in resolutions of the UN General Assembly, judgments of the ICJ, UN and regional human rights bodies established by treaties and inter-governmental organizations, and international legal experts.²⁰

B(3) RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

The USA has failed to withdraw the limiting reservations, declarations and understandings attached to its ratification of the ICCPR, the effect of which is to ensure that the treaty offers no greater protection than already exists under US law.²¹ On 3 July 2013, in its pre-session answers on the Fourth Periodic Report, the administration defended the US reservations:

"At the time it became a Party to the ICCPR, the United States carefully evaluated the treaty to ensure that it could fully implement all of the obligations it would assume. The reservations taken by the United States to a few provisions of the ICCPR were crafted in close collaboration with the US Senate to ensure that the United States could fulfil its international obligations under the ICCPR. We have no current plans to review or withdraw these reservations."

Since the USA's Second and Third Periodic Reports in 2006, much more has come to light about US policy and practice on detainees in the counter-terrorism context. This shows that the reservations to article 7 of the ICCPR and the identical reservation to article 16 of the UN

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) featured in legal memorandums produced by US government lawyers, as part of the flawed legal arguments used to justify conduct that amounted to torture or other ill-treatment, enforced disappearance and other violations of international law.

The minutes of a meeting between various government lawyers and others which took place at Guantánamo on 2 October 2002 (which were made public in late 2008), recorded that the chief legal counsel to the CIA's Counterterrorism Center, the agency managing the CIA's secret detention programme, advised that while torture was prohibited under UNCAT, US domestic law implementing the treaty was "written vaguely". He said that the USA "did not sign up to" the prohibition of cruel, inhuman or degrading treatment, thereby giving it "more license to use more controversial techniques". He described waterboarding, and suggested that it was "effective to identify phobias" and use them against the detainee. Death threats, he said, should be "handled on a case by case basis".²²

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

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

The memorandum recommended approval of stress positions, prolonged isolation, deprivation of light and auditory stimuli, hooding, "removal of clothing", exploitation of detainee phobias (such as fear of dogs), "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family", exposure to cold weather or water, and "use of a wet towel and dripping water to induce the misperception of suffocation".²³ The last three techniques listed were not authorized by the Secretary of Defense on this occasion (the others were), but this was not because they were considered unlawful. The Pentagon's General Counsel held that all were "legally available".²⁴

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

"the United States is within its international law obligations even if it uses interrogation methods that might constitute cruel, inhuman, or degrading treatment or punishment... In its instrument of ratification to the Torture Convention, the United States expressly defined the term 'cruel, inhuman, or degrading treatment or punishment' for purposes of Article 16 of the Convention. The reservation limited 'cruel, inhuman, or degrading treatment or punishment' to the conduct prohibited under the Fifth, Fourteenth and Eighth Amendments... The United States took the same reservation with respect to a provision in the International Covenant on Civil and Political Rights that prohibited cruel, inhuman, or degrading treatment or punishment".²⁵

The US reservations also featured in Department of Justice memorandums giving legal clearance for the CIA to use interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment against detainees who were being subjected to years of enforced disappearance in incommunicado solitary confinement. Among

the methods approved were prolonged sleep deprivation, confinement in a box, stress position, and “water-boarding” (effectively mock execution by interrupted drowning).

As late as July 2007 – that is, a year after the Human Rights Committee had reviewed the USA’s Second and Third Periodic Reports – the Department of Justice advised the CIA that six “enhanced interrogation techniques”, singly or in combination, would not violate the War Crimes Act (as amended by the Military Commissions Act of 2006), Common Article 3 of the Geneva Conventions, or the Detainee Treatment Act (DTA) of 2005.²⁶ The DTA, the memorandum explained, incorporated the USA’s reservation on cruel, inhuman or degrading treatment or punishment. And while the reservation purportedly binds the USA only to the constitutional standards under the Fifth, Eighth and Fourteenth Amendments, “only the Fifth Amendment is directly relevant here”, as the Fourteenth Amendment “does not apply to actions taken by the federal Government”, and the Eighth Amendment “applies only after an individual is convicted of a crime”. The memo pointed out that “none of the high value detainees on whom the CIA might use enhanced interrogation techniques has been convicted of any crime in the United States”. Under constitutional precedent, the Fifth Amendment would protect against “interrogation practices that shock the conscience”. The proposed techniques used against detainees in secret detention outside the USA would not constitute cruel, inhuman or degrading treatment “within the meaning of the DTA” – that is, they would not “shock the [domestic] conscience” – because their use would be furthering a government interest (i.e. intelligence gathering and prevention of terrorism), the memo asserted.²⁷

As the USA’s Fourth Periodic Report points out, in January 2009, President Obama issued an executive order that revoked the Department of Justice memorandums.²⁸ However, while these particular memos have been withdrawn, the reservations, understandings and declarations have not. In its 3 July 2013 written responses to the Committee’s question whether the USA now views “enhanced interrogation techniques” as violations of article 7 of the ICCPR, the administration was careful to remind the Committee of the US reservation.²⁹

Since US constitutional and statutory law remains open to interpretations incompatible with, among other things, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the USA should withdraw all of its reservations to the ICCPR, and the understandings and declarations which may amount to reservations, and fully implement the treaty in national law.

C. RIGHT TO AN EFFECTIVE REMEDY (ARTICLE 2)

The right to an effective remedy is recognized in all major international and regional human rights treaties, including article 2.3 of the ICCPR. International law requires that remedies not only be available in theory, but accessible and effective in practice.³⁰ The right to an effective remedy can never be derogated from. Even in a state of emergency, “the state party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.”³¹ Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.³² Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³³ Further, under article 9.5 of the ICCPR, anyone who has been subjected to unlawful detention must be provided with “an enforceable right to compensation”.

The USA’s Fourth Periodic Report states that “United States law provides a variety of avenues for seeking compensation and redress for alleged discrimination and denial of constitutional and related statutory rights”. While US domestic law does indeed provide for a range of remedies for victims of violations, including the right to seek compensation or injunctive relief in the courts, not all victims are able to avail themselves of such remedies in practice. Few states have independent external monitoring bodies authorized to conduct

regular inspections of jails or prisons and to report on conditions and investigate abuses. Some police oversight bodies also lack scope, independence or resources. While the US Department of Justice can seek injunctions to change practices through the Civil Rights of Institutionalized Persons Act and “pattern and practice” lawsuits against police departments, these focus on individual jurisdictions and cannot cover every institution. Individual or class-action litigation brought by or on behalf of the victims of abuses is often the most effective remedy, but such actions are costly and may take years to reach conclusion. The Prison Litigation Reform Act (PLRA) passed in 1996, although not preventing such litigation, imposed restrictions making it more difficult for prisoners to file lawsuits and reducing the compensation for attorneys who represent inmates in civil rights cases.

A “*Bivens*” remedy is one of the avenues the USA points to in its Fourth Periodic Report, as in previous reports. This refers to a 1971 US Supreme Court decision establishing that victims of constitutional violations have a right to recover damages in federal court even in the absence of a statutory route to remedy passed by Congress.³⁴ In 2007 the Supreme Court set out a two-step process in *Bivens* cases, while stating that the courts must pay “particular heed to any special factors counselling hesitation before authorizing a new kind of federal litigation”.³⁵ This notion of “special factors”, which appeared in the original *Bivens* ruling, has been successfully used by both the Bush and Obama administrations to persuade courts not to provide a judicial remedy for abuses alleged by detainees and former detainees in the post 9/11 context. “Special factors” asserted by the government have included national security, intelligence gathering, waging war, and foreign relations. Under US law, even in the absence of a finding of “special factors”, the court may find the officials in question to be entitled to “qualified immunity” which will also block the lawsuit.³⁶

On 7 November 2012, in *Vance v. Rumsfeld*, the US Court of Appeals for the Seventh Circuit blocked a lawsuit brought by two men seeking remedy for their alleged unlawful detention and torture in US military custody in Iraq in 2006. The majority acknowledged that the conduct alleged by the two men “appears to violate the Detainee Treatment Act and may violate one or more treaties”. However it said that “civilian courts should not interfere with the military chain of command – not, that is, without statutory authority”. Pointing to, among other things, the DTA and the Military Commissions Act (MCA) of 2006, the court stated that “the political branches have not been indifferent to detainees’ interests”. From a human rights perspective, any suggestion that Congress has fully met its obligations on detainee issues is wholly inaccurate. While there have been some efforts within the legislature to restrain executive excess and inquire into detainee treatment – the report in November 2008 of the Senate Armed Services Committee (cited by the USA in its 3 July 2013 responses to the Human Rights Committee) was a high point in this regard³⁷ – its legislative efforts have fallen short in numerous ways.³⁸

Judge Wood issued a separate opinion concurring in the *Vance* judgment, but asserting that the alleged treatment of the two plaintiffs “easily” qualified as torture, adding that “this shameful fact should not be minimized by using euphemisms such as the term ‘harsh interrogation techniques’.” Three of the 10 judges dissented, arguing that the lawsuit should have been allowed to proceed. The dissent accused the majority of failing in the “judiciary’s responsibility to protect individual rights under the Constitution, including a right so basic as not to be tortured by our government”.³⁹ On 10 June 2013, the US Supreme Court declined to take the case, leaving the plaintiffs without judicial remedy in the USA.

A year earlier, on 11 June 2012, the Supreme Court had refused to review the January 2012 *Lebron v. Rumsfeld* decision of the Fourth Circuit Court of Appeals which blocked the lawsuit brought by former “enemy combatant” detainee José Padilla. In light of the Supreme Court’s decision not to intervene, Padilla decided not to seek further review of the May 2012 *Padilla v. Yoo* decision of the Ninth Circuit which had blocked another lawsuit brought by Padilla, this one against John Yoo, who served as Deputy Assistant Attorney General at the Office of

Legal Counsel (OLC) of the Department of Justice from 2001 to 2003. During this time Yoo worked on numerous legal opinions, including one that gave OLC approval for interrogation techniques that amounted to torture or other ill-treatment under international law for use against detainees held in secret custody at undisclosed locations.

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

An unusual aspect of the above lawsuits was that the plaintiffs were all US citizens. In that regard, they could be said to be the exceptions to the more general rule – namely that the vast majority of those subjected by US forces to these types of abuses have been foreign nationals. As with the US citizen lawsuits, efforts by foreign nationals to obtain redress and accountability have been systematically blocked, in breach of the USA’s international legal obligations.⁴⁰

In 2006, in *Rasul v. Myers*, a District Court Judge granted the Bush administration’s motion to dismiss a lawsuit brought by four UK nationals, who were held without charge or trial in Guantánamo from 2002 to 2004 after being transferred there from Afghanistan.⁴¹ The four were seeking damages for prolonged arbitrary detention and alleged torture and other ill-treatment.⁴² The judge ruled that the defendants had been acting, “at least in part, to further the interests of their employer, the United States”. Under US law, once individual government officials are deemed to have been acting within the scope of their employment, the US government is substituted as the defendant in their place. The judge ruled that this had the effect of granting the individual defendants absolute immunity from civil liability in US courts for violations of international law. Because of the “unsettled nature” of the detainees’ constitutional rights in US courts at that time, he ruled, the officials were “entitled to qualified immunity” under US law. In 2008 the Court of Appeals upheld the ruling. Even the 2008 *Boumediene* decision did not change the outcome, the Court of Appeals ruled in 2009, as the claims raised were not based on rights that were “clearly established” at the time they were held and “the doctrine of qualified immunity shields government officials from civil liability” under such circumstances. On 14 December 2009, the US Supreme Court announced that it would not take the *Rasul v. Myers* case.

In *Ali v. Rumsfeld* in 2007, the Chief Judge on the District Court for DC dismissed a lawsuit brought by nine former detainees alleging torture and other abuse while held by the US military in Afghanistan and Iraq, including at Bagram air base and Abu Ghraib prison.⁴³ The judge described the allegations as “horrifying”,⁴⁴ but concluded that “no matter how appealing it might be to infer a *Bivens* remedy to vindicate injuries caused by federal officials committing abuses as severe as those alleged here”, the reach of the US Constitution “is not so expansive that it encompasses these non-resident aliens who were injured extraterritorially while detained by the military in foreign countries where the United States is engaged in wars”. Also, “special factors” required judicial restraint – to allow the lawsuit to proceed would “place the Court in the position of inquiring into the propriety of specific interrogation techniques and detention practices employed by the military”. Moreover, “there being no violation of clearly established constitutional rights in this case, the defendants are entitled to qualified immunity”. As to claims that their rights under international law were violated the court held that the defendants were “entitled to absolute immunity” under US law.⁴⁵ In 2011, the US Court of Appeals affirmed the ruling.

In 2007, in *Saleh v. Titan Corporation*, a District Court judge granted a motion to summarily dismiss a lawsuit brought against Titan Corporation by Iraqi nationals alleging the involvement in torture or other ill-treatment of interpreters provided to the US military by

Titan. He denied a motion to summarily dismiss a lawsuit brought by Iraqi nationals against CACI International, a contractor that supplied interrogators to the US military in Iraq. In 2009, the Court of Appeals affirmed the District Court's summary dismissal of the lawsuit against Titan and reversed its denial of summary dismissal of lawsuit against CACI.⁴⁶ On 27 June 2011, the US Supreme Court announced that it would not review the case.

A year earlier, on 14 June 2010, the Supreme Court had refused to take the case of **Arar v. Ashcroft**, leaving the plaintiff without judicial remedy in the USA. Dual Syrian/Canadian national Maher Arar had been arrested at New York airport in 2002 and sent, via Jordan, to Syria, where he was held for a year, including 10 months in a small underground cell, and subjected to torture and other ill-treatment before being released to Canada. The lawsuit alleged that he had been removed to Syria to undergo interrogation under torture and other ill-treatment. In 2009 the Second Circuit Court of Appeals ruled that "special factors" counselled judicial hesitation: "it is for the Executive in the first instance to decide how to implement extraordinary rendition, and for the elected members of Congress – and not for us as judges – to decide whether an individual may seek compensation..." Four judges dissented against what they said was a "miscarriage of justice".⁴⁷

In April 2011, the Obama administration filed a brief in the US Supreme Court in **Mohamed v. Jeppesen**, urging the Court not to hear the case of five men who claim they were subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment as part of the USA's rendition programme. The administration got what it had requested when the Supreme Court dismissed the case entirely without comment on 16 May 2011, leaving in place a lower court decision upholding the administration's invocation of the "state secrets privilege" as justification for dismissing the lawsuit without any review of its merits.⁴⁸ The decision exhausted the final legal route for the five plaintiffs, whose cases remain unheard.

Earlier, the Bush administration had successfully invoked the "state secrets privilege" in the case of **El-Masri v. Tenet**, concerning Khaled El-Masri, who was subjected to CIA rendition from Macedonia to secret US custody in Afghanistan in 2004. On 13 December 2012, the European Court handed down a landmark ruling in his case, finding Macedonia responsible for complicity in the torture and enforced disappearance to which Khaled El-Masri was subjected in US custody.⁴⁹ The ruling served to highlight the shocking absence of accountability and remedy in the USA. The European Court noted that "the concept of 'State secrets' has often been invoked to obstruct the search for the truth".⁵⁰

The UN has recognized "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", referring in part to "the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred".⁵¹ The blocking of remedy at every turn, by way of "special factors", state secrets or qualified immunity, has deprived victims, and the general public, of this right.

The Committee against Torture has emphasised that "under no circumstances may arguments of national security be used to deny redress for victims."⁵² It has also underlined that "granting immunity in violation of international law, to any State or its agents or to non-state actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims."⁵³ Remedy and accountability are two sides of the same coin.⁵⁴

The USA's less than accurate treaty reporting on the issue of remedy was raised in the *Vance v. Rumsfeld* case. One judge pointed out that in 2005 the USA had cited *Bivens* in seeking to persuade the UN Committee against Torture that the USA was in compliance with its obligations under UNCAT.⁵⁵ Another wondered whether the USA would be returning to that Committee to inform it that the government had been wrong to cite *Bivens* in the way.⁵⁶ The

same question could be posed in relation to US reporting to the Human Rights Committee. The USA's initial report to the Committee said: "Federal officials may be sued directly under provisions of the Constitution, subject only to doctrines of immunity. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)". The USA pointed the Committee to this paragraph in the USA's second and third periodic reports, as it has in the fourth.

In its questions to the USA on the Fourth Periodic Report, the Committee specifically asked whether remedies have been offered to victims of the interrogation abuses under the Bush administration. The Obama administration failed to answer the question. It has not told the Committee of the USA's systematic invocation of state secrecy or various forms of immunity under US law to have courts block access to remedy of victims of human rights violations committed in the rendition, detention and interrogation programmes.

The USA must amend its laws and practices to fully implement its international law obligations on the right of access to remedy for victims of human rights violations. Its treaty reporting on this issue must be more comprehensive and accurate.

C(1) THE RESPONSE TO *HAMDAN* AND §7.2 OF THE MILITARY COMMISSIONS ACT

In its July 2006 Concluding Observations on the USA, the Human Rights Committee asked for information on implementation of the Supreme Court's 29 June 2006 *Hamdan v. Rumsfeld* ruling. In its response, the USA responded that President Bush had signed into law the Military Commissions Act (MCA) 2006, the purpose of which was to "establish procedures – consistent with the *Hamdan* decision – governing the use of military commissions to try alien enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses". The USA did not tell the Committee of the President's own stated main reason for supporting the MCA, namely that it would allow the CIA secret detention programme to continue with impunity, a programme in which the CIA used enforced disappearance, torture and other cruel, inhuman or degrading treatment under presidential authority.⁵⁷ The following chronology provides some of the information not contained in the USA's response to the Committee in 2007 or in its Fourth Periodic Report:

30 June 2006 – The CIA asked for advice from the Office of Legal Counsel (OLC) at the Department of Justice in light of *Hamdan*. According to the OLC, the ruling meant that Common Article 3 "now applies, as a matter of treaty law, to detainees held by the CIA in the Global War on Terror". CIA is orally told by OLC – one day after the ruling – that detention conditions in CIA secret detention facilities "are permitted by common Article 3".⁵⁸

31 August 2006 – The OLC responded to the CIA's request as to whether six standard conditions of confinement in CIA secret facilities – blindfolding, forced shaving, incommunicado detention in solitary confinement, white noise, 24-hour-a-day lighting, and shackling – complied with the Detainee Treatment Act. The OLC advised that whether applied singly or in combination, the conditions were compatible with the DTA.⁵⁹

31 August 2006 – In a letter to the CIA, OLC "memorializes and elaborates" on its earlier oral advice that conditions of confinement in the CIA's detention facilities complied with common Article 3. Even years of incommunicado detention in solitary confinement, the letter asserted, did not constitute prohibited treatment.⁶⁰

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

Late September 2006 – Congress passed the MCA.⁶¹ In addition to §7 (see below) it amended the War Crimes Act (WCA) so as to decriminalize in US law certain violations of common Article 3 ("outrages upon personal dignity, in particular humiliating and degrading treatment"). It granted "retroactive immunity to CIA interrogators by providing that it would be effective as of November 26, 1997, the date the War Crimes Act was enacted".⁶² The MCA retroactively (to 11 September 2001) applied Section 1004 of the DTA providing a "good

faith” defence for US personnel relying on authorized techniques. It prohibited federal courts from consulting any “foreign or international source of law” in interpreting the prohibitions of Common Article 3 and the WCA.

17 October 2006 – President Bush signed the MCA into law, stating that it would allow the CIA secret detention programme to continue, and that this was his primary test for whether he favoured the Act. The OLC later justified continued CIA use of “enhanced interrogation techniques”, in part, by pointing to the fact that the passage of the MCA could be seen as an indicator of “support within contemporary community standards for the CIA interrogation program”. Indeed, the OLC will argue, the MCA “was proposed, debated, and enacted in no small part on the assumption that it would allow the CIA program to go forward”.⁶³

In its Fourth Periodic Report, the Obama administration responded to the Committee’s request for information on implementation of the *Hamdan* ruling by repeating the bare fact that Congress passed the MCA of 2006 “authorizing the use of military commissions by the Executive Branch”. It added that the MCA of 2009 “made many significant changes to the system of military commissions”. Elsewhere in the report, the USA reported how the *Boumediene v. Bush* ruling of June 2008 struck down §7 of the MCA that “denied federal courts habeas corpus jurisdiction over claims of aliens detained at Guantánamo”.

Nowhere, however, does the USA report on its continuing reliance on §7.2 of the MCA of 2006 to prevent judicial review and remedy for claims deemed as falling outside of straight lawfulness of detention challenges brought by Guantánamo detainees. §7.2 states:

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

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

C(1)(A) TORTURE OR OTHER ILL-TREATMENT AND MCA §7.2

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

In December 2011, the US District Court for DC granted the Obama administration’s motion to dismiss a lawsuit brought by former Guantánamo detainee **Abdul Rahim Abdul Razak al Janko**, a Syrian national of Kurdish origin who was held in US military custody without charge or trial for over seven years. He was seeking damages for physical and psychological injuries suffered as a result of abuse in US custody. He has alleged among other things that when in US custody in Afghanistan he was subjected to “abusive interrogation techniques”, including “striking his forehead; threatening to remove his fingernails; sleep deprivation; exposure to very cold temperatures; humiliation; and rough treatment” and in Guantánamo that he was tied, shackled, force-fed, had his Koran desecrated, was subjected to “extreme sleep deprivation” in solitary confinement, and to “severe beatings and threats against himself and his family”. He alleged that as a result of the abuse, he attempted suicide 17 times. The District Court granted the government’s motion to dismiss, citing §7.2 of the MCA, which he said stripped jurisdiction of the court to consider such claims.⁶⁴ The Department of Justice asserted in the Court of Appeals in March 2013 that “All of plaintiff’s claims are jurisdictionally barred” by §7.2.⁶⁵ On 28 June the administration filed a copy of the decision in *Ameur v. Gates* (see below) with the Court of Appeals arguing that the decision in that case was “consistent with arguments we have asserted in this [*al Janko v. Gates*] case. The al Janko case was pending before the Court of Appeals in September 2013.

In 2012 a “Bivens” action was filed in the District Court for the Eastern District of Virginia on behalf of **Mammar Ameur**, an Algerian national who was held in US custody for more than

six years without charge or trial. The complaint against more than 20 officials sought compensation for enforced disappearance, arbitrary detention, ill-treatment, and other abuses. It alleged that he was seized at his apartment in Peshawar in Pakistan on 18 July 2002, and held in Pakistani custody before being handed over to US custody and held in Bagram for about two months in early 2003 before being transferred to Guantánamo in mid-March 2003. He was held there before being transferred to Algeria in October 2008. He has alleged that in US military custody he was subjected to a range of torture or other ill-treatment, including prolonged incommunicado detention, forced standing, sleep deprivation, stress positions, prolonged isolation, beatings, and humiliation.⁶⁶

The Obama administration substituted itself for the defendants in the case – former officials under the Bush administration. It then argued that MCA §7.2 meant that the court lacked jurisdiction over “all of Plaintiff’s claims”.⁶⁷ On 20 June 2013, the District Court ruled that §7.2 “remains in force”, leaving Ameer’s claims “beyond the jurisdiction of the Court”.⁶⁸

C(1)(B) HUNGER STRIKES AND MCA §7.2

During recent hunger strikes at Guantánamo, the Obama administration has also turned to MCA §7.2 to seek to have lawsuits brought by detainees in this context blocked. Concern is heightened by the fact US policies and practices on the hunger strikes fall short of international standards on medical ethics.⁶⁹ Moreover, whatever an individual detainee’s reasons for going on hunger strike, the unavoidable backdrop is US human rights violations.

Even when US judges, in the context of habeas corpus proceedings, have made findings on torture and other human rights violations, there have been no moves to ensure accountability and remedy.⁷⁰ The case of **Musa’ab al Madhwani** is illustrative. This Yemeni national has been in US custody for 11 years without charge or trial. He is one of the 48 detainees whom the Obama administration decided during 2009 could neither be tried nor released by the USA, but would continue to be held under the AUMF. The administration has recently successfully invoked MCA §7.2 in seeing off an emergency motion on his behalf during a hunger strike in which he was participating.

In 2010, a US federal judge found “credible” Musa’ab al Madhwani’s detailed allegations of torture and other ill-treatment following his arrest in Pakistan in September 2002.⁷¹ After five days in Pakistani custody he was handed over to US custody and flown to Afghanistan. He says he was taken to the “Dark Prison”, a secret CIA-operated facility in or near Kabul, where he was held for about a month. There “he suffered the worst period of torture and interrogation, treatment so terrible that it made him miss his time with the Pakistani forces”. He was allegedly held for 30-40 days “in darkness so complete that he could not see his hand in front of his face”; “not allowed to sleep for more than a few minutes at a time”; “was fed only about every 2½ days, in very small portions”; and “twenty-four hours a day, obnoxious music blared at a deafening volume”.⁷²

Musa’ab al Madhwani was transferred to Bagram where he was held for another five days. There he has alleged that: “I was forced to stand the entire time until my feet swelled and I was exhausted. I was dragged by the neck to interrogation, where dogs would bark in my face.” He was transferred to Guantánamo in late October 2002, held in isolation and subjected to further interrogations. In 2010, the habeas judge noted that there was “no evidence in the record” that al Madhwani’s allegations were inaccurate and in fact that they were corroborated by “uncontested government medical records describing his debilitating physical and medical condition during those approximately 40 days in Pakistan and Afghanistan, confirming his claims of these coercive conditions.” The judge emphasised al Madhwani’s “credible” testimony that the USA “was involved in the prisons where he was held, and believed to have orchestrated the interrogation techniques, the harsh ones to which he was subject”. No investigations ensued, as far as Amnesty International is aware.

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

A doctor retained by al Madhwani’s lawyers signed a statement on 13 April 2013 in which, among other things, he expressed concern that a deterioration of conditions of confinement “could trigger in Mr Al Madhwani the symptoms of post-traumatic stress disorder linked to the effects of his torture”. The re-traumatization or the re-experiencing of trauma by torture victims is well documented. The UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol) describes how “distress at exposure to cues that symbolize or resemble the trauma is frequently manifested by a lack of trust and fear of persons in authority, including physicians and psychologists.”⁷³ Any of those detained at Guantánamo and previously subjected to torture may in any event already be experiencing re-traumatization as a result of the detention regime they are subjected to. The authorities are under an obligation to provide rehabilitation to any victims who have suffered torture or other ill-treatment by US officials.⁷⁴

On 11 April 2013, the Department of Justice urged the District Court to summarily dismiss the emergency motion for lack of jurisdiction under §7.2 of the MCA.⁷⁵ On 15 April, the judge dismissed the emergency motion on these grounds.

On 3 July 2013, in a case brought on behalf of four Guantánamo detainees seeking to end the use of force-feeding against them, the administration again moved to have the lawsuit rejected.⁷⁶ On 16 July, the Court ruled that it was “without jurisdiction here” as MCA §7.2 “expressly deprives federal courts of jurisdiction to consider actions regarding the treatment of Guantánamo detainees or their conditions of confinement”.⁷⁷

C(1)(C) SEARCH PROCEDURES, ACCESS TO LEGAL COUNSEL AND MCA §7.2

The Bush administration had argued in post-*Rasul* (June 2004) litigation that while it would allow detainees to meet with lawyers, they had no right to counsel under US or international law. This notion of discretionary executive granting of access to lawyers was rejected by the courts. As a District Court judge wrote in October 2004:

“To say that [the detainees’] ability to investigate the circumstances surrounding their capture and detention is ‘seriously impaired’ is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect [the detainees] to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. [They] face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system.”⁷⁸

Nine years later, in July 2013, the Chief Judge of the District Court for DC referred back to the above paragraph. In his ruling, Judge Royce Lamberth was highly critical of the administration’s past and continuing approach to access to lawyers. It came in the case of several detainees seeking habeas relief who were asserting that new search procedures adopted by the Guantánamo authorities in April 2013 were impairing access to their lawyers.

Judge Lamberth ruled that the Court had jurisdiction because the issue was central to the right of detainees to challenge the lawfulness of their detention, and so jurisdiction fell outside of that obliterated by MCA §7.2. He noted that “the government is a recidivist when it comes to denying counsel access”, and that it “seemingly at every turn, has acted to deny

or to restrict Guantánamo detainees' access to counsel".⁷⁹ He was familiar with this record as it had been he who had presided over litigation brought in 2012 after the Obama administration moved to replace the Court with the executive as the branch determining counsel access to Guantánamo detainees who currently had no habeas corpus petition pending. He found that the administration's proposed "memorandum of understanding" by which it sought to control detainee access to legal counsel was "so one-sided" – giving the administration the power to unilaterally modify its provisions – that it rendered "any rights" provided by the document "meaningless and illusory".⁸⁰

In his 2012 ruling, Judge Lamberth provided examples of the government's prior attempts to interfere in detainees' access to their lawyers, including by exploiting the inability of a detainee to speak English, withholding medical records from a detainee who was allegedly suffering severe mental illness as a result of the conditions of detention, and in cases of detainees allegedly being mistreated during force-feeding. Judge Lamberth said he was "unimpressed with the Government's 'trust us' argument" and "the Government's actions thus far demonstrate that it cannot be trusted with such power". This disturbing record could not now be ignored in the context of the claims about the new search procedures, he said.

Under the new search procedures, detainees wishing to consult with their lawyers are transported from their cell block in Camps 5 and 6 to Camp Delta (for telephone calls) or Camp Echo (for meetings). Any detainee being so transported was now required to be searched both before and after the visit, and under the new protocol the search method was revised to include searches of the detainee's groin area and buttocks. According to the detainees, they had been searched four times – upon leaving their cells, upon arrival at the other facility, prior to leaving that facility and once more upon arrival back at the cell block. The transportation under the revised procedures is carried out in new vans which the detainees complained had lower ceilings than the vehicles previously used and which forced them, secured in a five point harness, to sit in painful positions during the ride.

In their petition, the detainees complained that what they considered degrading search and transport procedures were inhibiting their access to counsel. Indeed some detainees had chosen not to meet or speak by telephone with their lawyers in order to avoid being subjected to these procedures.⁸¹ In his ruling, Judge Lamberth wrote:

"The relationship between the searches and [the detainees'] choices to refuse phone calls and counsel meetings is clear and predictable....That this relationship is so clear and predictable makes it easy for the government to exploit. Given that detainees are already shackled and under guard whenever they are moved, the added value of the new genital search procedure vis-à-vis the prior search procedure [which did not involve such contact] is reduced. In this context, the court finds searching the genitals of [the detainees] up to four times for every phone call or attorney-client meeting... to be excessive. Searching detainees up to four times in this manner for every movement, meeting, or phone call belies any legitimate interest in security given the clear and predictable effects of the new searches... The motivation for the searches is not to enhance security but to deter counsel access".

Judge Lamberth rejected the various justifications that the administration had given for the new search procedures, and ordered the government to amend the search procedures. The Obama administration successfully moved for an immediate stay of the order, arguing that it was likely to prevail on appeal.⁸² It described MCA §7.2 as "a clear directive from Congress that courts do not have jurisdiction to entertain detainees' claims regarding conditions of confinement".⁸³ The case was pending before the DC Circuit Court of Appeals in early September 2013.

The USA should repeal Section 7 of the Military Commissions Act, as well as Sections 5, 6 and 8, and Section 1004 of the Detainee Treatment Act 2005.⁸⁴

D. RIGHT TO LIFE (ARTICLE 6)

See also Section E(2) on electro-shock devices (deaths in Taser cases).

D(1) THE DEATH PENALTY

There have been over 1,000 executions in the USA since the Human Rights Committee issued its conclusions on the USA's Initial Report, and almost 300 since the 2006 conclusions.

Recognition under international law of the existence of the death penalty should not be invoked "to delay or to prevent the abolition of capital punishment", in the words of article 6.6 of the ICCPR. More than 30 years have passed since the Committee issued General Comment No. 6 on Article 6 on the desirability of abolition.⁸⁵

Amnesty International considers that the USA has provided a falsely benign picture of the death penalty in its Fourth Periodic Report. For this reason, Amnesty International is submitting a separate submission on this issue.

D(2) 'TARGETED KILLING'

In its 3 July 2013 answers to the Committee on the question of "targeted killings", the USA has responded that "the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces" and that its "targeted killing" strikes "are conducted in a manner that is consistent with all applicable domestic and international law".

Amnesty International nevertheless remains concerned about US policies and practices on the deliberate killing of terrorism suspects, including far from any recognized battlefield, and particularly through the use of unmanned aerial vehicles (popularly known as drones). It points the Committee to two of its reports outlining this concern in greater detail.⁸⁶

While some of the killings in question, if conducted in the context of specific armed conflicts, for instance in Afghanistan or at some times in some parts of Pakistan, Yemen or Somalia, may not violate international human rights or international humanitarian law, the USA's policy also appears to permit extrajudicial executions in violation of international human rights law, virtually anywhere in the world. Amnesty International's concerns include:

- the administration's continued reliance on the USA's "global war" legal theory that treats the entire world as a battlefield between the USA and armed groups, on which lethal force may apparently be used without regard to human rights standards;
- the administration's invocation of the right to use force in self-defence to justify the deliberate killing of virtually anyone suspected of involvement of any kind in relation to a range of armed groups and/or terrorism against the USA, particularly through the adoption of a radical re-interpretation of the concept of "imminence";
- that key factual and legal details of the killing programme remain shrouded in secrecy.

The USA should (a) disclose further legal and factual details about US policy and practices for so-called "targeted killings", "signature strikes", and "Terrorist Attack Disruption Strikes"; (b) end claims that the USA is authorized by international law to use lethal force anywhere in the world under the theory that it is involved in a "global war" against al-Qa'ida and other armed groups and individuals; (c) recognize the application of international human rights law to all US counter-terrorism operations including those outside US territory; (d) bring US policies and practices in line with the USA's international human rights obligations. The latter should be achieved particularly by ensuring that (i) any use of lethal force outside of specific recognized zones of armed conflict complies fully with the USA's obligations under international human rights law, including by limiting the use of force in accordance

with law enforcement standards; (ii) any use of lethal force within specific recognized zones of armed conflict complies fully with the USA's obligations under international human rights and humanitarian law; (iii) independent and impartial investigations are carried out in all cases of alleged extrajudicial executions or other unlawful killings, the rights of family members of those killed are respected, and effective redress and remedy is provided where killings are found to have been unlawful.

D(3) BORDER DEATHS AND EXCESSIVE FORCE BY BORDER PATROL AGENTS

US border control policies intentionally divert migrants attempting to enter the USA without permission into treacherous routes, increasing the risk of injury or death in the desert along the border.⁸⁷ Thousands of migrants have died crossing the US-Mexico border in the past decade. According to the US Customs and Border Protection (CBP), 3,557 people died while attempting to cross the border into the USA between 1998 through 2008. However, this is likely to be an underestimate. For example, CBP figures do not include deaths that occur on the Mexican side of the border, and not all deaths are reported to Border Patrol by local law enforcement officials.

A review by the Government Accountability Office (GAO) found that inconsistent data collection and coordination between agencies meant that CBP statistics may understate the scale of the problem by as much as 43 per cent in a given year. Data from other sources including NGOs and the Mexico Secretariat of Foreign Relations suggest that the number of deaths for that 10-year period may actually be as high as 5,287. Adequate data collection is vital in order to have a full and comprehensive analysis of the factors that contribute to these deaths. The lack of such data is a serious barrier to determining the steps that need to be taken to mitigate the prevalence of migrant deaths along the border.

Since January 2010 at least 15 people have died at the hands of CBP agents along the Southwest border with Mexico. More than half were Mexican nationals, some of them teenagers shot during alleged rock-throwing incidents. A number of deaths occurred in disturbing circumstances and raise serious concerns about federal policies on lethal force, as well as impunity. No officer has been charged in any investigations completed to date.

For example, 15-year-old **Sergio Hernández Güereca**, died after being shot in the head by a CBP agent in June 2010 when the agent fired several shots across the border, reportedly after coming under attack from rock throwers. According to video footage, Hernandez Güereca was some distance away on the Mexican side and did not appear to present a serious threat when he was shot. An investigation found insufficient evidence to prosecute the agent, with the US Department of Justice stating in a press release in April 2012 that “the agent did not act inconsistently with CBP policy or training regarding the use of force”.

Nineteen-year-old **Carlos LaMadrid**, a suspected drug smuggler, died in March 2011, after he was shot in the back while scaling a fence to go back into Mexico; the Department of Justice said that, at the time he was shot, LaMadrid was in the line of fire between a rock-throwing male and the agent. 17-year-old Ramses Barron-Torres was shot dead in June 2011, after CBP agents said he ignored commands to stop throwing rocks at them from the Mexican side of the border in Nogales, Arizona. In both cases federal investigations found insufficient evidence to disprove that the agents were acting in self-defence. Investigations were pending in another incident in October 2012, in which a CBP agent fired across the border, killing a 16-year-old who was reportedly struck 11 times, seven times in the back.

Amnesty International recognizes the potential injuries that can be caused to agents by rock throwing. However, use of firearms in these and other reported cases appears to violate international standards which provide that law enforcement officials shall not use firearms except in self-defence or the defence of others against the imminent threat of death or serious injury, and that, in any event, “intentional lethal use of firearms may only be made

when strictly unavoidable in order to protect life”.⁸⁸ In the above cases, it would appear that the officers’ response was grossly disproportionate in the circumstances and that they had reasonable alternatives to avoid resort to lethal force. The cases raise concern that the USA has engaged in arbitrary deprivation of life in violation of Article 6 of the Convention.

In November 2012, the Department of Homeland Security’s Office of Inspector General (OIG) was reported to be reviewing CPB use-of-force policies following concerns raised by some US Congress members about cases of alleged excessive force, including CBP shootings and other force. Cases of concern included that of **Anastasio Hernández Rojas**, an undocumented migrant who died in May 2010 after CBP officers beat him and shocked him with a Taser as they tried to deport him; a video recording, captured on a cell-phone, showed him lying on the ground and begging for mercy as bystanders expressed concern to officers about the force used. The findings of the OIG review had not been made public at the time of writing.

The USA should ensure that all federal law enforcement policies and training on the use of force and firearms fully conform to international standards, including those set out in the UN Code of Conduct for Law Enforcement Officers and the Basic Principles on the Use of Force and Firearms, and that no-one is subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment. All cases of alleged excessive force should be subject to rigorous, impartial investigation, with officers responsible for abuses held to account.

D(4) ACCOUNTABILITY AND ACCESS TO REMEDY FOR DEATHS IN CUSTODY

The Human Rights Committee has underlined that “a death of any type in custody should be regarded as prima facie a summary or arbitrary execution and there should be a thorough, prompt and impartial investigation to confirm or rebut the presumption.”⁸⁹ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has also stated that “when an individual dies in State custody, there is a presumption of State responsibility. The obligation of the State is not only to prohibit and prosecute killings by guards or other officials, but also to prevent deaths and to respond effectively to the causes of the deaths.”⁹⁰ Further that “one consequence of this presumption is that the State must affirmatively provide evidence that it lacks responsibility to avoid that inference.”

D(4)(A) DEATHS IN CIA CUSTODY

In its Fourth Periodic Report, the USA has highlighted its prosecution of David Passaro, a civilian contracted by the CIA who was convicted of assault in the case of Abdul Wali, an Afghan detainee who died in US military custody in Afghanistan in 2003.⁹¹ Indeed, not only does it highlight it in the report itself, but it twice cites the Passaro prosecution in its 3 July 2013 written responses to the Committee’s questions about whether the USA has taken steps to prosecute US perpetrators. There is little else the USA can point to. The prosecution of David Passaro – who was released in 2011 after serving just over four years in prison – remains the exception to the more general rule of impunity for CIA personnel or contractors, despite the agency’s undoubted involvement in crimes under international law.

No one has been found criminally responsible for the death of **Manadel al-Jamadi** in US custody in Abu Ghraib prison in Iraq on 4 November 2003. This Iraqi national was a CIA “ghost detainee”, who had just been brought into the prison by Navy Seals and the CIA but kept off the prison register by the CIA. Eight Navy Seals and a sailor were later given administrative punishments for assaulting Manadel al-Jamadi and other detainees. The only person brought to trial by court-martial, a Lieutenant accused of hitting al-Jamadi and of failing to restrain the men in his unit, was acquitted of all charges.⁹² In 2009, the Office of Inspector General at the Department of Justice said it was “not aware of any charges or any other discipline having been brought against any CIA agent involved in the interrogation of this detainee”.⁹³

According to a military investigation, Manadel al-Jamadi was arrested at his home in

Baghdad by members of Navy Seals Team Seven (ST-7), and initially taken to a forward operating base where he was “repeatedly kicked punched and struck with weapons by ST-7 members”. He was taken to a facility at Baghdad International Airport, interrogated there by the CIA and then transported to Abu Ghraib. When brought into the prison, he was still naked from the waist down, his legs were shackled and he was hooded with a plastic sack. His hands were cuffed behind his back with flexi-cuffs secured so tightly that a guard would later reportedly have “trouble cutting them off”. He was initially put in a holding cell, where the guards reported hearing the CIA interrogator and interpreter “yelling” at the detainee. One guard reported that he saw the detainee “in the corner of the cell in a seated position like a scared child with the translator and interrogator leaning over him yelling at him” The CIA personnel then ordered the guards to take the detainee to “tier one” in the prison. Manadel al-Jamadi was taken to a shower room for interrogation, and on the orders of the CIA interrogator, who “did not want the prisoner to sit down”, was secured to the window bars with “leg irons”.⁹⁴ The CIA personnel then resumed the interrogation.

Later a guard was called down by the CIA and found al-Jamadi “slouched in the corner on his knees”, still shackled to the window, with no pulse. Removal of the hood revealed the detainee had a very swollen eye, and when his head tipped forward, “a large amount” of blood poured out. A guard told military investigators that both of the CIA personnel “appeared to be excited about what to do”, and that the “short fat” CIA “guy” said, “No one’s ever died on me before when I interrogated them”. The cause of death was “homicide”, according to the autopsy report.⁹⁵

In 2011, the US Attorney General announced that a preliminary review then being conducted into some interrogations of some detainees by the CIA was at an end, and that a full criminal investigation was not warranted, except into the cases of the deaths in custody of two individuals.⁹⁶ One was **Gul Rahman**, an Afghan national taken into custody in Pakistan who died in a secret CIA facility north of Kabul in Afghanistan in November 2002, reportedly after being stripped, assaulted, and left in a cold cell without blankets. The other was Manadel al-Jamadi. On 30 August 2012, the Attorney General announced that there would be no criminal charges brought against CIA personnel in relation to either of the two deaths.⁹⁷

D(4)(B) GUANTÁNAMO DEATHS

In 2004, the International Committee of the Red Cross said it had “observed a worrying deterioration in the psychological health of a large number” of the Guantánamo detainees.⁹⁸ In 2006, the Committee against Torture said that indefinite detention was *per se* a breach of UNCAT.⁹⁹ In 2013, the UN Special Rapporteur on torture said: “At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment.” There have been nine detainee deaths at Guantánamo, in most cases the official cause of death has been suicide:

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

Adnan Farhan Abdul Latif had repeatedly expressed despair at his indefinite detention. By 8 September 2012, three months after the US Supreme Court refused to take his appeal

against denial of his habeas corpus petition, Adnan Latif was dead.¹⁰⁰ The military authorities determined that his death was the result of suicide by overdosing on medication.¹⁰¹ The Guantánamo Review Task Force had approved him for “transfer to a country outside the United States that will implement appropriate security measures, taking into account any necessary mental health treatment”.¹⁰² This “final disposition” was dated 22 January 2010 – more than two and a half years before this detainee killed himself – yet the USA continued to subject him to the cruelty of indefinite detention.

In 2009, the parents of Yasser Al-Zahrani and Salah Ali Abdullah Ahmed Al-Salami, two of the three men who died in 2006 in Guantánamo, brought a lawsuit seeking compensation and other redress “on behalf of their sons for the prolonged arbitrary detention, torture and cruel treatment” they had suffered in US custody. The lawsuit sought compensation and punitive damages for physical, psychological, and emotional injuries; loss of earnings and earning capacity; loss of interfamilial relations; and medical expenses.¹⁰³

The defendants – former Bush administration officials – moved to have the District Court dismiss the claims on the grounds that the Court lacked jurisdiction to hear the claims under MCA §7.2, that “special factors” precluded a “*Bivens*” remedy, and even if *Bivens* could be invoked, the defendants were entitled to qualified immunity. On 16 February 2010 the judge granted the Obama administration’s motion to dismiss (the administration had moved to substitute itself for the defendants). The judge dismissed the lawsuit on the *Bivens* angle.¹⁰⁴ The case went to the Court of Appeals, where the Obama administration argued that the District Court had lacked jurisdiction under MCA §7.2.¹⁰⁵ The Court agreed, ruling that “this ends the litigation and requires that we affirm the dismissal of the action”.¹⁰⁶

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

E. PROHIBITION OF TORTURE AND OTHER ILL-TREATMENT (ARTICLE 7)

The Human Rights Committee asked the USA whether it considers “enhanced interrogation techniques” compatible with article 7 of the ICCPR. The response of 3 July 2013 repeats the USA’s position that prohibited conduct is that which breaches article 7 *as defined by US constitutional standards*, due to the US reservation described in Section 2.3 above.

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

Clearly, the absolute illegality of torture or that a technique such as waterboarding amounts to torture are not accepted facts across the political classes in the USA. In 2011, for example, then presidential contenders Mitt Romney and Rick Perry both said that they supported the use of “enhanced interrogation techniques”, and refused to reject waterboarding outright.¹⁰⁷ Another candidate, Newt Gingrich, told an audience in 2011:

“Waterboarding is by every technical rule not torture... I’m just saying that under the normal rules internationally it’s not torture. I think the right balance is that a prisoner can only be waterboarded at the direction of the President in a circumstance which the information was of such great importance that we thought it was worth the risk of doing it”¹⁰⁸

Members of the previous administration – including former President Bush and Vice-

President Cheney in their memoirs and elsewhere – have also voiced their continuing support for conduct that constitutes torture and enforced disappearance. The continuing impunity enjoyed by those who authorized and carried out these acts has encouraged this situation.

As long as such attitudes prevail, and without the necessary investigations, prosecutions, reparations, transparency, and law-making, President Obama's executive order of 22 January 2009 prohibiting long-term secret detention and "enhanced interrogation techniques" may yet be no more than a paper obstacle if any future President decides that torture or enforced disappearance are once again expedient for national security.

E(1) PRISON ISOLATION UNITS

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

Prisoners in isolation facilities are typically confined alone, or sometimes with one other prisoner, in small cells for 22-24 hours a day, with no work, educational or rehabilitation programmes or association with other inmates.¹⁰⁹ Some facilities are designed to further reduce environmental stimulation by obstructing vision or access to natural light.¹¹⁰ Out-of-cell exercise is limited to between five and 10 hours a week and often takes place in bare, high-walled concrete yards providing no view to the outside. Within the units, contact between inmates and prison staff is kept to a minimum, with cell doors remotely controlled and prisoners placed in heavy restraints when escorted outside their cells. Even consultations with medical or psychological staff typically take place behind barriers. Contact with the outside world is also more restricted than for other prisoners, with visits taking place behind a glass screen in most states; in California, prisoners in Security Housing Units (SHUs) are not allowed phone calls to their families, despite the distant location of some facilities meaning many prisoners rarely receive visits.¹¹¹

Amnesty International recognizes that it may be necessary at times to segregate prisoners for security or disciplinary purposes. However, conditions such as those described above breach minimum international standards for the treatment of prisoners, including those set out under the UN Standard Minimum Rules, and can amount to torture or other cruel, inhuman or degrading treatment especially if imposed for prolonged periods. Failure to provide meaningful social contact, educational or other programmes to prisoners in long-term segregation units is also contrary to article 10(3) of the ICCPR on rehabilitation.

A significant body of evidence indicates that isolating people, even for relatively short periods, causes serious psychological harm. In the USA thousands of prisoners continue to spend months or years in solitary or isolation cells, sometimes for repeated minor disciplinary infractions or because they are alleged associates of prison gangs. In California, hundreds of prisoners have spent more than 10 years, and many more than 20 years, confined alone for 22 to 24 hours a day in windowless cells in Pelican Bay SHU. While general population prisoners in the federal Administrative Maximum (ADX) "supermax" facility in Florence, Colorado, may progress to less restrictive conditions through a step-down programme after a minimum of one year, many ADX inmates spend years in isolation, confined to solitary cells in conditions that breach international standards for humane treatment.¹¹²

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

difficult to meet or to challenge due to the restrictive nature of the conditions and lack of activities where prisoners' behaviour can be measured.

The UN Special Rapporteur on Torture, reviewing the findings of UN treaty bodies, regional human rights organizations and other human rights experts, as well as studies on the severe negative psychological and physical effects of solitary confinement, has called on states to limit their use of solitary confinement, applying it "only in exceptional circumstances and for the shortest possible period of time".¹¹³ He has called for the absolute prohibition of solitary confinement for under-18-year-olds and people with mental disabilities, on the ground that its imposition in such cases, for any duration, is cruel, inhuman or degrading treatment.

Although US courts have found that isolating people who are seriously mentally ill in "super-maximum security" facilities is incompatible with the constitutional prohibition of "cruel and unusual punishment", **prisoners with mental illness** continue to be held in such facilities. Even where policies prohibit the practice, mental health monitoring of prisoners in isolation is often inadequate. According to an ongoing lawsuit, prisoners with serious mental illness have been confined in the federal ADX prison without adequate monitoring or treatment.¹¹⁴

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

Prisoners in pre-trial detention in the federal system have also been held in cruel conditions of solitary confinement. For example, detainees in the Special Housing Unit of the federal Metropolitan Correctional Center (MCC) in New York City have been confined for 23-24 hours a day to small solitary cells with the windows painted over and little access to natural light or fresh air. **Syed Fahad Hashmi** spent nearly three years in the unit before pleading guilty to one count of conspiring to provide material support to terrorists. Amnesty International has condemned conditions in the unit as amounting to cruel, inhuman or degrading treatment and incompatible with the presumption of innocence in the case of untried prisoners whose detention should not be a form of punishment. The conditions may also impair a defendant's right to assist in his or her defence and thus the right to a fair trial.¹¹⁵ **Chelsea (formerly Bradley) Manning**, the former US army analyst charged for leaking classified documents to Wikileaks, was held for nine months in isolation in US military custody following her arrest in 2010 in conditions condemned by the UN Special Rapporteur on torture as "cruel, inhuman and degrading" treatment.

US courts provide only a limited remedy for prisoners held in isolation, generally deferring to prison administrators in deciding what restrictions are necessary on security grounds. The US Supreme Court has not ruled that solitary confinement, even when imposed indefinitely, is *per se* a violation of the Constitution. The courts have set a high threshold for deciding when prison conditions violate the prohibition of "cruel and unusual" punishments. They have held that conditions must be so severe as to deprive inmates of a "basic necessity of life" – interpreted to mean the physical requirements of food, clothing, shelter, medical care and personal safety – and that the authorities must have shown "deliberate indifference" to a risk of harm.¹¹⁶ Courts have been less willing to consider psychological pain or suffering as sufficient to render conditions unconstitutional, a situation compounded by the 1995 Prison Litigation Reform Act, which provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury" (42 U.S.C. §1997 e (e)).

As noted above, the USA has sought to limit the application of international human rights law in its conduct by entering reservations or declarations amounting to reservations to key articles under international treaties, including article 7 of the ICCPR. In its initial report to the Human Rights Committee, the USA explained its reservations by stating that certain US practices had withstood judicial review in the US courts under constitutional provisions which were arguably narrower than the scope of Article 7; it noted in this regard that the Committee

had indicated that the prohibition against cruel, inhuman or degrading treatment under Article 7 may extend to practices such as “corporal punishment and solitary confinement”.¹¹⁷

Some prisoners have spent years in solitary confinement within the ordinary prison system. **Albert Woodfox** and **Herman Wallace** have spent most of the past 40 years confined to solitary cells in Louisiana prisons for 23 hours a day, with no access to work, education or rehabilitation programmes, no association with other prisoners and only limited exercise. They have been denied any meaningful review of the reasons for their isolation, despite neither having committed any serious disciplinary infractions for decades. Their solitary confinement continued, despite a 2007 ruling by a federal magistrate that the conditions had taken a serious toll on their health.¹¹⁸

The USA should impose strict limits on the use of solitary confinement of prisoners in the federal system, as well as nationwide, so that prisoners are isolated only when strictly necessary and for the shortest possible time. The practice should be abolished for children (anyone under the age of 18) and prisoners with serious mental illness. Segregated prisoners should be provided with adequate exercise and out-of-cell time, with opportunities for some social interaction even in the most restricted stages.

E(2) INADEQUATE REGULATION OF ELECTRO-MUSCULAR DISRUPTION DEVICES

Thousands of police departments, as well as local jails, some state prisons and the military, use Tasers, the most common form of Electro-Muscular Disruption device in the USA. Authorities deploying Tasers claim they cause fewer injuries than conventional impact weapons, such as batons, and can save lives by preventing an escalation to deadly force in situations involving combative subjects. However, Amnesty International is concerned by the low threshold at which Tasers are deployed in US law enforcement and by a lack of stringent national standards governing their use. Such weapons are particularly open to abuse, as they are portable and easy to use, can inflict severe pain at the push of a button without leaving substantial marks and can be used to apply repeated shocks.¹¹⁹ As well as firing darts designed to bring down subjects at a distance, they can be used close-up as stun guns against individuals already in custody. The organization’s research has shown that Tasers are also potentially lethal and have been implicated in dozens of deaths in recent years.¹²⁰

Most US law enforcement agencies allow use of Tasers at far below the threshold for deadly force. Many authorize them as an “intermediate” force tool where they may be applied to avoid the use of impact weapons or even hands-on force. Police have used Tasers against unarmed individuals who resist arrest or who fail to comply immediately with commands; uncooperative suspects being booked into jails; mentally disabled or intoxicated individuals who are disturbed but not apparently dangerous; suspects fleeing minor crime scenes, and even schoolchildren. For example, in September 2011 a police officer in Pennsylvania fired a Taser at a **14-year-old schoolgirl**, striking her in the groin as she stood against a police car allegedly resisting arrest; police officials said the use of the Taser was justified, and no charges or disciplinary proceedings were brought against the officer responsible. In August 2013, **Israel Hernandez**, an unarmed 18-year-old graffiti artist who had been paint-spraying an abandoned building, died when Miami police officers chased him and shot him in the chest with a Taser; police said the Taser was used “to avoid a physical incident”. In such cases Taser use appears to have violated the prohibition of cruel, inhuman or degrading treatment, as well as international standards requiring law enforcement officials to use force only to the extent strictly necessary, in a manner designed to minimise damage or injury.

Since 2001, there have been more than 60 deaths in which medical examiners have listed Tasers as cause or contributing factor; there are other cases where cause of death was undetermined but where the Taser may have played a role.¹²¹ More than 550 people altogether have died after being shocked by Tasers during arrest or while in jail. Most of the deaths have been attributed to other causes, such as drug intoxication or heart disease. Some

medical experts and studies have found that shocks from Tasers or similar weapons can exacerbate the effects of drug intoxication or underlying medical conditions, and a 2012 study published in the American Heart Foundation journal, *Circulation*, found that Taser shocks can have a direct fatal effect on the human heart.¹²² While deaths may be relatively rare compared to the number of Taser deployments, adverse effects can happen quickly and be impossible to reverse. This underscores the need for strict limits to be placed on their use.

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

Tasers and similar devices should be authorised only where officers are faced with an imminent threat of death or serious injury to themselves or others, where they can be appropriately deployed to avoid recourse to firearms, and where lesser options are unavailable

The USA should introduce strict national guidelines limiting police, military or other use of Tasers and similar devices to situations in which their use is necessary in order to protect life or prevent serious injury, and where lesser alternatives are unavailable.

E(3) SHACKLING OF DETAINED PREGNANT WOMEN

In 32 states it is still legal to shackle pregnant women prisoners, including during labour, delivery and post-partum recovery; a cruel and degrading practice which can endanger the health of the mother and her baby. In some states the practice is restricted under state prison regulations, but this does not apply to local jails which set their own standards in the absence of state law and binding state-wide standards. Eighteen US states have introduced laws to restrict the shackling of detained pregnant women, particularly during labour and delivery.¹²³ However, few ban the practice at all stages of pregnancy and post-partum recovery except in rare circumstances where the woman is an extreme escape or security risk.¹²⁴ Although there are no recent reliable statistics, around six percent of women entering US prisons or jails are believed to be pregnant.

In its written response to questions from the Human Rights Committee, the USA states that both the BOP and the Department of Homeland Security/Immigration and Customs Enforcement (DHS/ICE) prohibit use of restraints on pregnant women and in post-delivery recuperation, except in rare circumstances where the woman is an extreme escape risk. However, pregnant immigrant women may still be shackled in local jails, including when they are held under a "detainer" request by ICE while the agency decides on whether to instigate deportation proceedings. For example, **Juana Villegas** was arrested in 2008 for a traffic offence and taken to a jail in Tennessee when she was nine months pregnant. Once in detention she was found to be an irregular migrant and was being held at the jail under a federal detainer when she went into labour. She was transported to hospital with her wrists and legs shackled. The shackles were removed for the delivery itself, but she was chained to a bed afterwards, despite a nurse complaining to an officer of the risk of blood clots.

An amendment to a comprehensive immigration reform bill currently before Congress would place a federal ban on shackling pregnant women who are in immigration detention, except in extraordinary circumstances.

The USA should take concrete steps to discourage the shackling of pregnant detainees in any US facilities, except in rare and specified circumstances, and to ensure that the practice is immediately discontinued in the case of immigrant women held on immigration charges or ICE "detainers" in local jails.

E(4) APPENDIX M OF THE ARMY FIELD MANUAL

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

On 13 April 2006, the OLC at the Department of Justice produced a secret “memorandum for the files” explaining its conclusions relating to DoD draft documents on the treatment and interrogation of detainees, including Appendix M of a revised Army Field Manual. At this stage, Appendix M guided the use of six “restricted interrogation techniques” not otherwise authorized under the manual (believed to include isolation, dietary manipulation, environmental manipulation and sleep adjustment). The OLC gave legal approval for all six techniques (including under the DTA), as long as they would be restricted to the interrogation of “enemy combatants believed to possess important intelligence that may help safeguard US forces and protect US interests” and not to anyone protected by the Geneva Conventions.¹²⁵

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

Appendix M, however, provides for an interrogation method described as “physical separation” (i.e. solitary confinement), initially for 30 days, but with provisions for unlimited extensions. At the same time, the Manual states that the use of separation must “not preclude the detainee getting four hours of continuous sleep every 24 hours.” Again there are no limitations placed on this, apparently meaning that such limited sleep could become a part of the 30-day separation regime, and extendable indefinitely.¹²⁶

As noted above, a year after the Human Rights Committee called on the USA to end secret detention and ensure “any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant”, the OLC gave the CIA legal approval for the use of six “enhanced interrogation techniques”, including prolonged sleep deprivation used against detainees held incommunicado in solitary confinement. The CIA had told the OLC that the agency particularly favoured the use of sleep deprivation, used to bring the detainee to a “baseline state”. The detainee would be kept awake by being shackled in a position that would prevent him from falling asleep, either in a standing position with hands shackled around shoulder height, or in a sitting position on a small stool of “insufficient width for him to keep his balance during rest”. Sleep deprivation would frequently be combined with “diapering” – the detainee made to wear a diaper “because releasing a detainee from the shackles to utilize toilet facilities would... interfere with the effectiveness of the technique.”

At that point, the Army Field Manual governed procedures for military interrogators, not the CIA. However, the 20 July 2007 OLC memorandum considered the Manual in its assessment. It noted that “while none of the six enhanced techniques proposed by the CIA is expressly prohibited under the current Manual, two of the proposed techniques – ‘dietary manipulation’ and ‘sleep deprivation’ – were prohibited in an unspecified form by the prior Manual”. This earlier Manual, it noted, “was designed for traditional armed conflicts” rather than the “war on terror”. It noted that Appendix M, authorizing “an additional interrogation technique for persons who are unlawful combatants and who are ‘likely to possess important intelligence’”, “reinforces the traditional executive understanding that certain interrogation techniques are appropriate for unlawful enemy combatants that should not be used with prisoners of war”.¹²⁷ Further OLC authorizations on this issue occurred through the remainder of 2007.

The Department of Justice memos were withdrawn pursuant to President Obama’s executive order on interrogations, signed on 22 January 2009. Under this order, the CIA is limited to

using interrogation techniques authorized in the Army Field Manual, including Appendix M. The CIA is thereby, as the Obama administration notes in its written answers of 3 July 2013, currently prohibited from using “water-boarding”, as it is specifically prohibited in this version of the Manual. It bears repeating, however, that no-one has been prosecuted for previous CIA use of this and other techniques, and that one executive order can be overturned by another.

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

The USA should establish a single set of interrogation rules for all detainees in the main body of the Army Field Manual, and revoke Appendix M. Any preserved elements of Appendix M – which must neither be inconsistent with international human rights law nor sow ambiguity about detainee treatment – should be located in the main body of the Manual.

E(5) SECRECY AND IMPUNITY ON CRIMES UNDER INTERNATIONAL LAW

On 30 August 2012, the US Attorney General announced the closure of criminal investigations into the deaths of two men held in CIA custody. This ended all announced investigations into the CIA secret rendition, interrogation and detention programmes, with no criminal charges brought against anyone for the crimes under international law that were committed.¹²⁸ The lack of accountability in these cases stands in stark contrast to the USA’s condemnation of other countries that fail to live up to international obligations. For the past two years, for instance, the Iraq entry in the State Department’s annual human rights report has noted: “A culture of impunity has largely protected members of the security services, as well as those elsewhere in the government, from investigation and successful prosecution of human rights violations”. Yet Iraq is one of the locations where human rights violations by US forces, including secret detention at the hands of the CIA and other US agents, has resulted in little accountability, and none at all in the case of any high level officials. Another is Afghanistan. In relation to Afghanistan, the State Department reports that “official impunity for those who committed human rights abuses” is a “serious” problem.

Torture and enforced disappearances are crimes under international law.¹²⁹ Since the USA’s Second and Third Periodic reports in 2006, it has been confirmed that it resorted to such conduct, and indeed that it continued even after the Human Rights Committee called on it to bring its conduct into compliance with the ICCPR.

Not only did the USA resort to torture, former President Bush has confirmed in his memoirs and on primetime television since leaving office that he authorized conduct – “water-boarding” – that constituted torture against named detainees known to have been subjected to this technique. The current US President and Attorney General have each acknowledged that water-boarding constitutes torture.¹³⁰ Nevertheless, the President who authorized the torture (as well as the enforced disappearance of those who were tortured) continues to enjoy impunity, as do numerous other officials who authorized, condoned, or carried out the torture and enforced disappearance.

Publication of George W. Bush’s memoirs in late 2010 prompted Amnesty International to call for him to be the subject of a criminal investigation.¹³¹ In his book, he recalled the case of **Abu Zubaydah**, taken into custody in Pakistan in 2002 and transferred to secret US custody. Abu Zubaydah was resisting interrogation, recalled the former President; “CIA experts” drew up a list of “enhanced interrogation techniques”; “I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning... I approved the use of the interrogation techniques”.¹³² **Khalid Sheikh Mohammed** was arrested in Pakistan in 2003 and also transferred to secret CIA custody. The Bush memoirs recalled:

“[CIA Director] George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed.... ‘Damn right,’ I said.”¹³³ Declassified documents point to Zubaydah having been subjected to more than 80 “applications” of water-boarding, and Khalid Sheikh Mohammed to more than 180.

Just as no criminal investigation followed former President Bush’s assertion that he personally authorized conduct that amounted to torture, none followed the statement by an administration official in 2008 that “we tortured” a Saudi Arabian national in Guantánamo. Nor did any investigation follow Donald Rumsfeld’s confirmation in his 2011 memoirs that he had authorized “counter-resistance” techniques against this specific detainee.¹³⁴

In November 2010, the US Department of Justice announced, without further elaboration, that no one would be prosecuted for the “destruction by CIA personnel of videotapes of detainee interrogations”.¹³⁵ In December 2007, to pre-empt a report that was about to be published in the media, General Michael Hayden, then Director of the CIA, had confirmed that videotapes of interrogations during 2002 had been destroyed by the CIA in 2005. In the course of litigation in federal court in 2009, the CIA revealed that 92 videotapes of interrogations of Abu Zubaydah (90) and ‘Abd al-Nashiri (2) recorded between April and December 2002 had been destroyed. Twelve of the tapes depicted use of “enhanced interrogation techniques”, including “water-boarding”.¹³⁶

The memoirs of José Rodríguez were published in 2012. From late 2005, he had become head of the CIA’s newly-established National Clandestine Service and before that, from Spring 2002, he was director of the Counterterrorist Center, the branch of the CIA delegated to run the secret detention programme.¹³⁷ In his memoirs, José Rodríguez asserted that “I was responsible for helping develop and implement the Agency’s techniques for capturing the world’s most dangerous terrorists and collecting intelligence from them, including the use of highly controversial ‘enhanced interrogation techniques’.”¹³⁸ In his memoirs, Rodríguez confirmed that it was he who approved the destruction in November 2005 of videotapes of CIA interrogations.¹³⁹ The destruction of the tapes may have concealed crimes by state agents. Concealing evidence of a crime may constitute criminal complicity. Complicity in torture is expressly recognised as a crime under international law.

In 2010, however, the Department of Justice announced that no-one would be prosecuted for the destruction of the tapes.¹⁴⁰ Nevertheless, Rodríguez’s own admissions of his role in a programme in which detainees were subjected to enforced disappearance and interrogation techniques and conditions of detention that violated the prohibition of torture and other ill-treatment, and his admission that he ordered the destruction of the interrogation tapes, warrant the opening by the US authorities of a criminal investigation into his involvement.

On 5 March 2009, it was announced that the Senate Committee on Intelligence would “review the CIA’s detention and interrogation program”, including “how the CIA created, operated, and maintained its detention and interrogation program”.¹⁴¹ A few days later, the CIA Director announced that he had been assured that the goal of the review was to inform “future policy decisions”, rather than “to punish those who followed guidance from the Department of Justice.”¹⁴² On 13 December 2012, the Intelligence Committee voted to approve the report of its review which, according to the Committee’s Chairperson, runs to more than 6,000 pages, with 35,000 footnotes, and “uncovers startling details” of the CIA programme. It is “a comprehensive review of the CIA’s detention program that includes details of each detainee in CIA custody, the conditions under which they were detained, how they were interrogated”. The report was provided to the administration for “review and comment.”¹⁴³ As of September 2013, the report remained classified.

The operational details of the CIA programme remain classified at the highest level of secrecy, blocking accountability.¹⁴⁴ On 21 September 2009, the CIA Director signed a declaration in support of the agency’s withholding from public disclosure of information relating to the

secret detention programme, including “details about the conditions of confinement” and the “locations of detention facilities”. Disclosure of such information would damage national security, he asserted. He added that “operational details regarding the CIA’s former interrogation program – that is, information regarding how the program was actually implemented – also remains classified, as to descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used (excepting such general information that has been released to date on these topics)”.¹⁴⁵

Attempts at disclosure of allegations made by detainees (still held by the USA) have been unsuccessful. On 16 October 2009, for example, the District Court in DC ruled against disclosure of the details in the transcripts of the Combatant Status Review Tribunals held for 14 detainees transferred to Guantánamo from secret CIA custody in 2006.¹⁴⁶ In 2010, the administration urged the Court of Appeals to uphold this ruling, arguing that the detainees “are in a position to provide accurate and detailed information about some aspects of the CIA’s former detention and interrogation program”.¹⁴⁷ In 2011, the Court of Appeals upheld the District Court’s ruling.¹⁴⁸

Effective and impartial investigations should be commenced into every instance where there is reasonable ground to believe an act of torture or other ill-treatment, unlawful detention, or enforced disappearance, has been committed. Every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution before an ordinary civilian court.¹⁴⁹

Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who knew or disregarded information that indicated that subordinates were committing violations, yet failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or was potentially complicit or participated in the acts, including by knowingly providing assistance.¹⁵⁰ ***The USA may not relieve those responsible from personal responsibility through amnesties, legal immunities or indemnities or other similar measures that prevent the emergence of truth, a final judicial determination of guilt or innocence and full reparation to victims and their families. Impediments such as immunities arising from official statutes, defences of obedience to superior orders and any statutory limitation for crimes under international law or grave human rights violations must be removed.***¹⁵¹

Where investigations or prosecutions are undertaken by foreign authorities into torture or other ill-treatment or enforced disappearance, the USA must assist the proceedings, including by supplying all necessary evidence at its disposal and extraditing any alleged perpetrators who it is unwilling or unable itself to prosecute.¹⁵²

The USA should declassify all government documents providing authorization or legal clearance or discussion of secret detention, rendition, and enhanced interrogation by the CIA or other agencies. It should make public the Senate Intelligence Committee report into the CIA secret detention programme.¹⁵³

F. PROHIBITION OF ARBITRARY DETENTION (ARTICLE 9)

A seemingly permanent system of indefinite military detention without charge or trial is just one of the many purposes for which the USA has used its doctrine of global war, and the US naval base at Guantánamo is just one place where such a regime has been applied. President Obama ordered the Guantánamo detention facility closed “consistent with the national security and foreign policy interests of the United States and the interests of justice”. The ingredient that was missing, and has been missing from the outset of these detentions, is application of international human rights principles to the detentions.

F(1) SECRET DETENTION

As the USA has reported in its Fourth Periodic Report, on 22 January 2009, President Obama revoked the executive order signed by President George W. Bush on 20 July 2007 which had authorized the CIA to continue the secret detention program begun in 2001 or 2002.¹⁵⁴ President Obama ordered the CIA to “close as expeditiously as possible any detention facilities that it currently operates” and prohibited it from operating “any such detention facility in the future”. The Fourth Periodic Report states that “consistent with the Executive Order, CIA does not operate detention facilities”. However, whether this order prevents the CIA from involving itself in secret detentions altogether is unclear, as it does not cover facilities “used only to hold people on a short-term, transitory basis”. By its wording, the order also does not appear to prevent the CIA from using foreign-controlled secret detention facilities to conduct detentions or interrogations of individuals held there.

While the Obama administration has not itself transferred any detainees to Guantánamo and has said it will not, it not only uses the global war paradigm as the legal framework for existing detentions there, but also beyond. Somali national **Ahmed Abdulkadir Warsame** was detained by US forces in the Gulf of Aden on or about 19 April 2011, for example, and was apparently held in secret detention for at least two weeks and incommunicado for at least six weeks before he was transferred to New York in early July 2011 and charged with terrorism-related offences. The US authorities responded to Amnesty International’s concern about his pre-transfer treatment by saying that “the US Government has consistently asserted that it is at war with al Qaida and its associated forces, and that it may take all lawful measures, including detention, to defeat the enemy”.¹⁵⁵

F(2) GUANTÁNAMO

In an executive order on 22 January 2009, President Obama committed his administration to closing the Guantánamo detention facilities by 22 January 2010 at the latest. The transfer of two Guantánamo detainees to Algeria on 29 August 2013 left 164 men still held there.¹⁵⁶ This was the first transfer of a live detainee out of the base for nearly a year.¹⁵⁷

The US administration blames Congress for the failure to close the facility, and Congress has indeed tried to place a variety of obstacles in the way of closure. This is no excuse. Any attempt by the US authorities to invoke domestic political and legislative obstacles as justification for its failure to meet its international law obligations should be rejected as illegitimate under Article 27 of the Vienna Convention on the Law of Treaties, which reflects customary international law.¹⁵⁸

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

In January 2010, the Guantánamo Review Task Force established under President Obama’s 2009 order revealed that it had decided that there were some four dozen detainees who could neither be tried nor released by the USA, and were “approved for continued detention under the AUMF”.¹⁵⁹ Forty-six of the 48 remain in detention today, as two Afghan nationals in this category have since died (Awal Gul and Inayatollah).¹⁶⁰

Among the 46 detainees is Kenyan national **Mohammed Abdulmalik**. Illustrating the scope of the USA’s global war framework, he was arrested in February 2007 by police in Kenya before being handed over “to the Americans, who took me to Djibouti, Bagram, Kabul and Guantánamo Bay”.¹⁶¹ He remains in Guantánamo, without charge or trial, six and a half

years after he was taken there on 23 March 2007. Another is Somali national **Hassan Ahmed Guleed**, who was arrested in March 2004 in his home in Djibouti by local authorities. He was transferred to CIA custody and subjected to enforced disappearance for two and a half years before being transferred on 4 September 2006 to Guantánamo where he remains without charge or trial and no currently stated intention on the part of the USA to change that status.

The Obama administration has emphasised to the Committee that “no detainees currently at Guantánamo have been ‘cleared for release’ – seeking to clarify that under the Task Force labelling, detainees not among the 46 or those “referred for prosecution” are “eligible for potential transfer subject to appropriate security measures by the receiving governments”. Whatever the USA’s categorization, however, the vast majority of detainees have been held in indefinite detention without charge, not knowing if or when they will be brought to trial or released. This includes those who have been “approved for transfer” (for at least the past three and a half years) and those “referred for prosecution” but who have not been charged in those same three and a half years since the Task Force report.

Among the latter, for example, is **Saifullah Paracha**, a 66-year-old Pakistan national who was seized by US agents believed to be with the CIA, in Bangkok, Thailand in July 2003. He was taken to Afghanistan, and held for over a year in Bagram before being transferred to Guantánamo on 19 September 2004. He has been held without charge for a decade. Another detainee in this “referred for prosecution” category is **Zayn al Abidin Muhammad Husayn** (more commonly known as **Abu Zubaydah**). This stateless Palestinian man has been in US custody for more than 11 years without charge or trial. During that time he has been subjected to four and a half years of enforced disappearance in CIA custody, followed by more than seven years in US military custody at Guantánamo. He has yet to have a ruling on the habeas corpus petition filed on his behalf in 2008.

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

In May 2013, President Obama referred to those detainees who “cannot be prosecuted”, including “because the evidence against them has been compromised or is inadmissible in a court of law”.¹⁶² He said that “history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it. Imagine a future – 10 years from now or 20 years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not part of our country.” At the same time, however, the Obama administration has taken to asserting that no one is being held in indefinite detention at Guantánamo, an assertion that defies reality. At the Inter-American Commission on Human Rights in 2013, for example, the USA said that there was no “indefinite detention” at the base.¹⁶³ It has now effectively repeated this in its 3 July 2013 written responses to the Human Rights Committee in which the administration asserts that “No detainees are ‘scheduled for indefinite detention’.”

It seems to be basing this untenable statement on its claim that it aims to transfer detainees even before it is legally obliged to, under the rules of the global war made up by the USA itself: “the United States has legal authority to hold detainees until the end of hostilities, but, as a policy matter, has elected to ensure that it holds detainees no longer than is absolutely necessary”. When considering its assertions that this means no-one is held in indefinite detention, then, it might be recalled that the Bush administration said the same thing *more than a decade ago*. For example, in 2002, the Pentagon’s General Counsel said:

“I believe that disquiet about indefinite detention is misplaced for two reasons. First, the

concern is premature. In prior wars combatants...have been legally detained for years. We have not yet approached that point in the current conflict. And second, the government has no interest in detaining enemy combatants any longer than necessary, and is reviewing the requirement for their continued detention on a case-by-case basis.”¹⁶⁴

When the Bush administration said this, Mauritanian national **Mohamedou Ould Slahi** had already been deprived of his liberty for nearly a year. He had been arrested in Mauritania in November 2001, rendered to Jordan for eight months, taken to Bagram in July 2002 and then transferred to Guantánamo on 5 August 2002. He remains in Guantánamo today, over 11 years after he was first sent there. Mohamedou Ould Slahi’s “final disposition” as determined by the Guantánamo Review Task Force was “referred for prosecution”. Nevertheless, in the three and a half years since then, he has not been charged, let alone brought to trial, and to assert that he is not held in indefinite detention is a falsehood, whether viewed from the detainee’s perspective, that of his family, or the outside world. While the Bush administration had slated Slahi for trial by military commission, a military prosecutor assigned to the case withdrew from it because he reached the conclusion that “what had been done to Slahi amounted to torture.”¹⁶⁵ In his memoirs published in 2011, Donald Rumsfeld confirmed that he had approved “interrogation techniques beyond the traditional Army Field Manual” in August 2003 for use against Mohamedou Ould Slahi.¹⁶⁶

Saudi Arabian national **Mohamed al Qahtani** is also in his 12th year at Guantánamo, having been transferred there from Afghanistan in February 2002 after being taken into custody by Pakistan agents and handed over to US custody in December 2001. In his memoirs, Donald Rumsfeld confirmed that in late 2002, he had authorized “counter-resistance” techniques for use by military interrogators against al Qahtani.¹⁶⁷ These techniques included sleep deprivation (in the form of 20-hour interrogations), prolonged isolation, removal of clothing, stress positions, exploitation of detainee phobias such as fear of dogs, and deprivation of light and auditory stimuli. In the Task Force “final dispositions”, Mohamed al Qahtani is “referred for prosecution”. It is now over five years since the Convening Authority for military commissions dismissed charges against him because “we tortured” him.¹⁶⁸ For all but about three months of his almost 12 years in detention, then, al Qahtani has been held without charge. There is no indication of when, if ever, he will be brought to fair trial or released. That is indefinite detention.

F(2)(A) PERIODIC REVIEW BOARDS

In making the assertion that “no detainees are scheduled for indefinite detention”, the USA informed the Committee on 3 July 2013 that the administration “remains committed” to implementing the Periodic Review Board (PRB) process “as soon as practicable”. So, like its predecessor did with its Combatant Status Review Tribunal and Administrative Review Board,¹⁶⁹ the Obama administration appears to be using the executive PRB process announced by President Obama more than two years ago, and yet to get up and running, as an illustration of why it is wrong to say that the detainees are in indefinite detention.

President Obama signed an executive order establishing the PRB in March 2011.¹⁷⁰ On 21 July 2013, the Department of Defense announced that preparations were underway for holding PRB hearings for 71 of the 166 Guantánamo detainees to determine whether as a matter of executive determination they should continue to be held under the “law of war”. This process is not aimed at determining lawfulness of detention, an issue which – albeit under the flawed AUMF framework – remains one for the federal courts to determine in habeas corpus proceedings brought since the US Supreme Court ruled in 2008 that the Guantánamo detainees had the right to a “prompt” determination of the lawfulness of their detention. Under the USA’s law of war framework, the word “prompt” can now apparently mean many years of delay before such a determination is made.

The PRB applies to those detainees whom the Guantánamo Review Task Force had

designated for “law of war detention” or “referred for prosecution” (except those against whom charges are pending or who have been convicted). The figure of 71 is apparently made up of 46 detainees slated by the Task Force for “law of war” detention under the AUMF and 25 who were listed as “referred for prosecution” and who have neither been convicted nor have charges currently pending against them. Mohamedou Ould Slahi and Mohamed al Qahtani, for example, would currently appear to fall into this latter category.

Under the Pentagon’s 2012 guidelines for the PRB, the detainee is not provided assigned counsel for this discretionary executive process, but a “personal representative” who is a US military officer (although private US lawyers operating at no expense to the government and with the necessary security clearance and who have agreed to “appropriate conditions” may assist personal representatives).¹⁷¹ A decision (by consensus of the interagency PRB)¹⁷² to recommend “transfer” of the detainee would not necessarily mean release, or immediate transfer out of US military custody.¹⁷³ It would only require the Secretaries of State and Defense to ensure “vigorous efforts are undertaken to identify a suitable transfer location for the detainee, outside of the United States”.¹⁷⁴

As noted above, in May 2013, President Obama raised the prospect of, at some yet to be determined point in the future, discussing with Congress the matter of “ultimately” repealing the already nearly 12-year-old AUMF.¹⁷⁵ Meanwhile, the AUMF remains fully operational as far as the administration is concerned, both in terms of defending Guantánamo detentions in habeas corpus litigation, and also for framing the PRB process: “For the purpose of these implementing guidelines”, the Pentagon’s 2012 memorandum on this periodic review asserts, “law of war detention means detention authorized by the Congress under [the AUMF]”.¹⁷⁶ This repeats what President Obama signed off on in his executive order of 7 March 2011.¹⁷⁷ As has become routine, any mention of international human rights principles is missing.

Under the guidelines implementing the executive order, “continued law of war detention is warranted for a detainee subject to periodic review if such detention is necessary to protect against a continuing significant threat to the security of the United States”.¹⁷⁸ Such an assessment by the PRB may draw upon a long and open-ended list of possible criteria, including “the likelihood the detainee may be subject to trial by military commission” (that is, a trial that does not conform to international fair trial standards), evidence of “instability” in the “potential destination country for the detainee”, “any other relevant factors bearing on the threat the individual’s transfer or release may pose to the United States, its citizens, and/or its interests”, and “any other relevant information bearing on the national security and foreign policy interests of the United States”.¹⁷⁹

President Obama’s executive order of 7 March 2011 emphasized that nothing in the order is meant to affect the jurisdiction of the federal courts to determine the legality of any Guantánamo detainee’s detention. But the habeas courts have themselves essentially adopted and applied the “global war” theory as a matter of US domestic law, relying on the vague language of the AUMF; the courts have themselves undermined their own authority to compel the government to give effect to judicial rulings that detentions are unlawful and to orders that detainees unlawfully held be immediately released.¹⁸⁰ Nothing in the 7 March 2011 executive order or the Pentagon’s guidelines implementing it redress the continuing violations of the right to liberty and prohibition of arbitrary detention.

Regardless of whether the review process conducted under the executive order will prove in practice to operate any better than similar boards operated by the Bush administration (the CSRTs and ARBs), and regardless of whether the PRB provides political cover for the administration to bring about more transfers of detainees out of Guantánamo, its establishment can only further corrode the fundamental role the fairness protections of the criminal justice system play in upholding the right to liberty.

- ☑ *The USA must address the Guantánamo detentions as a human rights issue. The detentions must be resolved in a way that fully complies with international law.*
- ☑ *Pending resolution of the detentions, there should be full access to independent medical professionals, UN experts, and human rights organizations, and a review to ensure all policies comply with international human rights law and standards and medical ethics.*
- ☑ *The USA should not place any conditions on transfers of detainees that would, if imposed by the receiving government, violate international human rights law and standards.*
- ☑ *Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.*

F(3) BAGRAM

On 25 March 2013, the US detention facility at Bagram airbase in Afghanistan, now known as the Afghan National Detention Facility in Parwan (ANDF-P) and previously called the Detention Facility in Parwan (DFIP) and before that the Bagram Theater Internment Facility (BTIF), came under formal Afghan control pursuant to a Memorandum of Understanding (MoU) between the US and Afghan governments that has not yet been made public.

In its 3 July 2013 written responses to the Human Rights Committee, the Obama administration has stated that the USA “has transferred all Afghan detainees formerly in its custody at the DFIP to the custody and control of the Government of Afghanistan.”

It is unclear whether the MoU provides for the detention of Afghan nationals taken into custody by US forces in Afghanistan since the MoU was signed, and, if so, under what terms and conditions. Furthermore, it is reported not only that the USA retained custody of a “small number” of Afghan nationals at the time of the March transfer, but also that the USA still exercises some degree of control over the plight of those Afghan nationals who have been transferred, including those it labels “enduring security threats”. The latter are reported to number about 50 detainees, on whose cases the US authorities reportedly received assurances from their Afghan counterparts that they would not be released.¹⁸¹

In its written responses to the Committee, the US administration asserts that the USA “continues to hold third country nationals at the ANDF-P and is assessing potential disposition options for those individuals”. It provides no further details. As of September 2013, the US military was believed to be holding approximately 66 non-Afghan nationals in its exclusive custody and control at Bagram, some of whom were forcibly brought into Afghanistan by US forces over a decade ago (see further below). They are held without charge, trial, and with no access to counsel, and so far efforts to obtain access to judicial review of habeas corpus petitions filed on behalf of such detainees has been blocked.

The Obama administration claims that its authority to detain individuals in Afghanistan is based on the Authorization for Use of Military Force (AUMF). Under this framework, no detainee in US custody there has been able to challenge the lawfulness of his detention in US court. The Bush and Obama administrations have so far successfully blocked these detainees from having courts consider the merits of their habeas corpus petitions. There are a number of cases still pending before the US Court of Appeals for the DC Circuit brought on behalf of a number of non-Afghan nationals.

In 2009, the District Court ruled that three non-Afghan detainees who had brought habeas corpus petitions should have access to the US courts to be able to challenge the lawfulness of their detention. The Obama administration won a ruling from the Court of Appeals in 2010 overturning the decision, on the grounds that the Supreme Court’s 2008 *Boumediene* ruling had invalidated the jurisdiction-stripping §7 of the MCA of 2006 as applied to Guantánamo detainees, but not the Bagram detainees. Lawyers returned to the District Court to file

amended petitions with new information. The District Court dismissed these without review on their merits. Litigation was continuing in the Court of Appeals at the time of writing.

The USA has replaced judicial review of Bagram detentions with executive discretion, namely military Detainee Review Boards (DRBs). In its written responses of 3 July 2013, the administration informed the Committee that in 2009 the Department of Defense (DoD) had enhanced its administrative review procedures for detainees held at DFIP, “which improved DoD’s ability to assess whether the facts supported the detention of each individual, and enhanced a detainee’s ability to challenge the detention.”¹⁸² Whatever marginal improvements the revised procedures have provided, such review falls short of the USA’s human rights obligations in relation to the detainees. As no international armed conflict exists in Afghanistan today, all detainees there have the right to effective access to a fair hearing before an impartial court for the determination of the lawfulness of their detention.

Amin al-Bakri is a Yemeni national believed to have been in US custody for nearly 11 years without charge or trial. According to his habeas corpus petition, he was abducted by US agents in Bangkok on 30 December 2002 when on his way to the airport to fly back to Yemen after a trip to Thailand. His family did not know his whereabouts or whether he was alive or dead until months later when they received a postcard in his handwriting, via the ICRC, from the US detention facility at Bagram airbase in Afghanistan. According to the petition, prior to his transfer to Bagram he had been held for around six months in secret CIA custody at undisclosed locations and subjected to torture and other abuse. Today, Amin al-Bakri is held at the ANDF-P on the Bagram air base.

The US military has said that his detention has been found lawful by the DRB.¹⁸³ The Obama administration has argued that even if a DRB recommends a detainee’s release, as has been alleged it did in Amin al-Bakri’s case in August 2010, “the decision whether to accept the DRB’s recommendation is entirely committed to the discretion of the Executive and necessarily involves complex diplomatic, political, and national security considerations... These considerations are not within the province of the judicial branch”.¹⁸⁴

Amin al-Bakri’s case is one currently pending before the Court of Appeals. The Obama administration is seeking to have his habeas corpus petition dismissed without review of its merits on the grounds that the District Court does not have jurisdiction to consider it, under §7 of the MCA of 2006.

Tunisian national **Redha al-Najar** remains in US custody in Bagram more than 11 years after he was first taken into custody. His habeas corpus petition alleges that he was seized from his home in Kararchi, Pakistan in May 2002, in front of his wife and child. It is alleged that he was subjected to enforced disappearance in secret custody for some 18 months, subjected to torture and other ill-treatment, prior to being taken to Bagram.

Fadi al-Maqaleh is another of the cases pending before the Court of Appeals. This Yemeni man has alleged that he was taken into custody outside Afghanistan in or around 2003, which the US authorities dispute. In an amended petition in April 2011, it is alleged that prior to being brought to Bagram, Fadi al-Maqaleh was held at Abu Ghraib prison in Iraq and in secret detention elsewhere, and that he suffered torture and other ill-treatment during that time.

Pakistani nationals **Yunus Rahmatullah** and **Amanatullah Ali** were taken into custody by UK forces in or near Baghdad in Iraq in February 2004 and handed over to US forces. Both men were subsequently transferred to Bagram, where both remained in September 2013 without charge or trial in US military custody. In a ruling in October 2012, the UK Supreme Court found that “the, presumably forcible, transfer of Mr Rahmatullah from Iraq to Afghanistan is, at least prima facie, a breach of Article 49” of the Fourth Geneva Convention.

A habeas corpus petition was filed in US court in 2010 on behalf of Amanatullah Ali, who by

then had been held in US custody for more than six years without charge or access to legal counsel. The Obama administration argued that the District Court did not have jurisdiction to consider such a petition. On 15 November 2012, the Court granted the administration's motion to dismiss the petition.¹⁸⁵ An appeal is currently pending before the Court of Appeals.

According to a legal brief filed in the Court of Appeals in April 2013, **Hamidullah**, a Pakistani national, has been held in US custody in Bagram since August 2008, when he was 14 years old. He has not had access to counsel or to his family, who only learned in January 2009 via the ICRC that he was held in Bagram.¹⁸⁶ The District Court had dismissed his petition for lack of jurisdiction in October 2012, finding that his age made no difference: "the fact is that some enemy combatants are minors, and § 7 of the MCA contains no exceptions or special provisions for minors."¹⁸⁷ In a brief filed in the Court of Appeals in June 2013, the Obama administration argued that the District Court had been correct.

Amnesty International considers that the USA is violating its international obligations by continuing to deny those Bagram detainees in its custody and control access to the courts and legal counsel, as well as through its general failure to ensure accountability for human rights violations that have been committed at the base in recent years.¹⁸⁸

The USA should grant all those in US custody in Afghanistan – or anywhere – access to legal counsel, relatives, doctors, and to consular representatives, without delay and regularly thereafter, and to US courts to be able to challenge the lawfulness of their detention.

G. UNFAIR TRIALS BY MILITARY COMMISSION (ARTICLE 14)

In May 2009, President Obama criticized the military commissions and the fact that only three detainees had been convicted under them.¹⁸⁹ Rather than abandon the commissions, however, in October 2009 President Obama signed into law revisions to their procedures.¹⁹⁰ Four years later, there have been four convictions under the MCA of 2009, all as a result of pre-trial agreements under which the detainee pleaded guilty.

In total, then, by September 2013, there had been seven convictions by military commission at Guantánamo after nearly 12 years of detentions there. All but two of these convictions came under pre-trial agreements whereby detainees held for years in indefinite detention pleaded guilty in return for the chance that they would be repatriated earlier than might otherwise occur.¹⁹¹ Only one Guantánamo detainee has been tried in federal court.¹⁹²

The USA's abject failure to ensure within a reasonable time fair trials or release of the detainees is unacceptable, and violates the right to trial without undue delay. Anyone in respect of whom the USA has sufficient evidence of responsibility for such crimes should have been charged and brought to trial years ago. A fully functioning civilian judicial system, with the experience, capacity and procedures to deal with complex terrorism prosecutions, was available from day one. The failure of the US authorities to turn to that system not only deprived detainees at Guantánamo of their fair trial rights, it has so far deprived the victims of the 9/11 attacks and other such crimes of their rights to see those responsible brought to justice and the truth firmly established through prompt, proper and public trials.

In its 22 January 2010 final report, the Guantánamo Review Task Force revealed that there were 36 detainees "referred for prosecution" in federal court or by military commission, although without saying which forum for which detainee.¹⁹³ However, since then, a federal court ruling has likely cut the number of detainees who will face prosecution by military commission – and as noted above, the administration to date has appeared unwilling or unable to overcome congressional opposition to trials in federal court.

In its October 2012 ruling, the Court of Appeals for the DC Circuit held that the MCA did not "retroactively punish new crimes" and "material support for terrorism was not a pre-existing war crime".¹⁹⁴ Following the ruling, the Chief Prosecutor of the military commissions

suggested that, rather than 36 detainees being tried there may be a total of about 20, including those already convicted (seven) and those already charged (eight). This would leave around five more detainees to be charged.¹⁹⁵

The USA has announced it will seek the death penalty against six detainees it has slated for trials by these military commissions (and the Convening Authority for military commissions has approved this). Pre-trial proceedings are ongoing in these cases. Amnesty International opposes any use of capital punishment as inconsistent with full respect for the right to life. Any imposition of the death penalty after unfair trials before such military commissions would be arbitrary and so violate the right to life as a matter of international human rights law.¹⁹⁶

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

There were, briefly, indications that the Obama administration would bring five Guantánamo detainees accused of leading involvement in the 9/11 attacks to trial in a regular criminal court. On 13 November 2009, the Attorney General announced that the five – **Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, 'Ali 'Abd al-'Aziz and Mustafa al Hawsawi** – would be transferred from Guantánamo for prosecution in ordinary federal court, “before an impartial jury under long-established rules and procedures”. However, on 4 April 2011, the US Attorney General announced that the five men would be charged for trial by military commission, even though he had previously noted that the military commissions did not have the same “time-tested track record of civilian courts.”¹⁹⁷

The creation and use of military commissions to try these men is incompatible with international human rights. The UN Basic Principles on the Independence of the Judiciary state:

“everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals”.¹⁹⁸

The case of the five – charged for trial by military commission under the MCA 2006, then slated for transfer to federal court in New York, then recharged for trial under the MCA of 2009 – betrays the fact that their looming prosecution by military commission is the result of domestic political considerations, not legal necessity. The administration's blaming of Congress for this outcome is unjustifiable under the Vienna Convention on the Law of Treaties. Its failure to meet its fair trial obligations under the ICCPR is inexcusable.

The Human Rights Committee has stated, on the right to a fair trial, that the trial of civilians (anyone who is not a member of a state's armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.¹⁹⁹ The US government cannot point to any such rationale. It can only point to domestic politics.

The military commissions are not by any measure tribunals of demonstrably legitimate

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

In December 2012, in his role as military commission judge, US Army Colonel James Pohl issued a protective order to protect classified information during the capital trial and pre-trial of the five defendants charged with involvement in the 9/11 attacks. Among other things, this order aims to prevent public disclosure of which “foreign countries” the five detainees were held in for years by the CIA prior to their transfer to Guantánamo; which “enhanced interrogation techniques” were used against them, including “descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations”; the “names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation” of the detainees; and descriptions of the “conditions of confinement.” This applies, “without limitation” to the “observations and experiences” of the detainees themselves. To prevent disclosure of such information at any trial proceedings, there would be a 40-second delay in broadcast from the courtroom to the public gallery.²⁰⁰

On 19 August 2013, Colonel Pohl ordered the five capital defendants from the courtroom while he held a secret hearing on a classified government motion – even the title of the motion was not publicly known, only its number AE 052.²⁰¹ A lawyer for the defendants said to the military judge: “the government has never articulated what it is about this information in 052 that is classified or could reasonably be expected to cause damage to the national security... We’re on a military base. The defendants are constantly locked down. They have no ability to get information out of here whatsoever”.²⁰² Colonel Pohl denied the defence requests not to close the hearing and for the government to explain why the information in the motion was classified, and the secret hearing went ahead.²⁰³

The military commissions should be abandoned in favour of trials in ordinary federal court

H. TREATMENT OF IMMIGRANTS (ARTICLES 2, 3, 26 AND OTHERS)

The Human Rights Committee has asked for clarification from the USA on a range of issues relating to migrants which cut across various ICCPR articles. It has asked for information on what is being done to address possible racial profiling in immigration enforcement programmes, on issues around detention of immigrants, and on obstacles faced by undocumented migrants in accessing health services and higher education institutions.

H(1) RACIAL PROFILING

Racial and ethnic profiling of Latinos and communities living along the southwestern border, including Indigenous communities and US citizens, has reportedly risen in recent years. The increased risk of racial profiling follows the expansion of federal immigration enforcement measures and the blurring in practice of responsibilities between local/state and federal officials in the enforcement of immigration laws. Several Immigration and Customs Enforcement (ICE) programmes, collectively known as ICE ACCESS (ICE Agreements of Cooperation in Communities to Enhance Safety and Security), engage state and local agencies in the enforcement of immigration laws. These include §287(g) of the Immigration and Nationality Act, a provision which allows the federal government to authorize state and local law enforcement agencies to act as federal immigration officers in investigating, detaining and initiating removal proceedings against immigrants; and the Secure Communities programme, which enables federal immigration authorities to screen the fingerprints of people arrested by state and local law enforcement agencies to determine

whether they are lawfully in the USA.

State and local law enforcement agencies in these programmes frequently conduct stops, searches and identity checks that target individuals based on their racial and ethnic identity. Studies and surveys show that Latinos and other communities of colour are disproportionately stopped for minor infractions and traffic violations and that these stops are often used as a pretext to inquire about citizenship and immigration status.²⁰⁴

H(1)(A) SECTION 287(G) OF THE IMMIGRATION AND NATIONALITY ACT

Much of the criticism of the §287(g) programme has focused on deputized officers making traffic stops based on the perceived race of the driver and passengers. Deputized agencies have also carried out so-called “immigration roadblocks” whereby police create checkpoints in areas with large Hispanic populations. Under the guise of checking for licences and miscellaneous traffic violations, police have required those passing through to verify their legal status.

Some of these practices contradict directives issued by the federal immigration authorities, which have prioritized individuals involved in serious criminal offences for immigration enforcement. In September 2007, for example, ICE clarified its policy regarding the use of traffic violations to enforce immigration laws during the implementation of the §287(g) programme. According to the 2007 ICE Fact Sheet, “Officers trained and certified in the §287(g) program may use their authority when dealing with someone suspected of a state crime that is more than a traffic offense”.²⁰⁵ However, while never publicly stating a change in policy, ICE has since removed this information from its website and replaced it with a document that does not discuss whether local police can use their federal powers during routine traffic stops.

In December 2011, the US Department of Justice released the findings of its investigation into the Maricopa County Sheriff’s Office (MCSO) in Arizona. The investigation found that, since 2007, MCSO had conducted discriminatory policing whereby Latino drivers were four to nine times more likely to be stopped than non-Latino drivers in similar situations. After reviewing the findings, ICE terminated the MCSO’s remaining §287(g) agreement for Jail Enforcement, restricted the law enforcement agency’s access to Secure Communities, and informed the Sheriff’s Office that it would cease ICE responses to Maricopa County Sheriff’s traffic stops, civil infractions, or other minor offences. While MCSO represents an extreme example of these types of discriminatory enforcement programmes, there currently are no ongoing official investigations of other jurisdictions with §287(g) agreements in place.

In December 2012, Immigration and Customs Enforcement announced that no Task Force agreements (those where deputized officers make determinations on immigration status in the field) would be renewed at the end of the year as ICE slowly phases out this component of the §287(g) programme.²⁰⁶ The Jail Enforcement model (the second component of the §287(g) programme, where deputized officers make determinations on immigration status following arrest) continues to be utilized and there are currently 36 such contracts in place.²⁰⁷

Racial profiling by state and local law enforcement has been observed during jail and prison booking where §287(g) agreements for local jails are in operation. According to one former official who observed the booking process at the Harris County Jail in Texas in 2008, while all individuals go through the process and are asked where they were born, if an individual said “here” and appeared to be Caucasian, no follow-up questions were asked by the Sheriff Department’s §287(g) deputies. However, if the person looked like an “immigrant” and gave the same reply, they were asked for their citizenship papers or other documentation.²⁰⁸ Advocates in Texas have voiced similar concerns about racial, ethnic and linguistic profiling in local jails. For instance, they have told Amnesty International that if someone does not speak English when he or she is brought into the jail, he or she is sent to speak with ICE.

More studies are needed to ensure §287(g) is being implemented without discrimination against immigrants and communities of colour. The use of remaining §287(g) agreements should be suspended until it has been demonstrated that they do not result in racial profiling in jurisdictions where implemented.

H(1)(B) SECURE COMMUNITIES PROGRAM

In Texas, the “Secure Communities” programme was implemented in several jurisdictions in 2008. Since then, advocates have reported an increase in local law enforcement officers appearing to pull over individuals for “driving while brown”, when they check whether the person has a driver’s license or identification or inquire about his or her immigration status. These types of stops are reportedly more prevalent in smaller, more rural communities.²⁰⁹ Undocumented immigrants in both Arizona and Texas are unable to obtain state issued identification, such as driver’s licenses, and are, therefore, more likely to be taken in to custody for fingerprinting in order to verify their identity, which then triggers Secure Communities. Secure Communities has now been implemented by ICE in all relevant jurisdictions nationwide.²¹⁰

H(1)(C) CRIMINAL ALIEN PROGRAM

Under the Criminal Alien Program (CAP), ICE agents have access to local jails. Although this purportedly takes immigration enforcement out of the hands of local officials, it can encourage discriminatory arrests based on racial profiling because the individuals identified for questioning by ICE may have been arrested in the first place by local officers who relied on racial or ethnic identity as an indication of undocumented status. In 2009, the Chief Justice Earl Warren Institute on Law and Social Policy at the University of California-Berkeley School of Law analyzed arrest data. This data indicated a marked increase in discretionary arrests of Hispanics for petty offences immediately following the September 2006 implementation of a CAP partnership in Irving, Texas, in which local law enforcement had 24-hour access to ICE via video and telephone conferencing. Analysis of the data found strong evidence to support claims that Irving police were engaging in racial profiling. The Warren Institute study found that felony charges accounted for only two per cent of ICE “detainers” (individuals held while ICE decides whether to instigate deportation proceedings); 98 per cent resulted from arrests for misdemeanours under CAP. Studies have also found that Hispanics were arrested at disproportionately higher rates than whites and African Americans for the least serious offences; that is, offences that afford police the most discretion in decisions to stop, investigate and arrest.

ICE ACCESS programmes lack sufficient oversight and safeguards to ensure that they do not encourage discriminatory profiling and other abuses by local law enforcement officials. A review by the Department of Homeland Security (DHS) Office of the Inspector General (OIG) in 2010 found that ICE needed to develop protocols to adequately monitor local agencies that have entered into §287(g) contracts; to collect data and conduct studies to address potential civil rights issues; and to supervise §287(g) officers and to provide them with proper training on immigration issues. At present the Secure Communities programme does not contain adequate oversight to determine whether racial profiling is occurring or to prevent it. In September 2011, a taskforce commissioned by DHS completed a review of Secure Communities, which aimed to address some of the concerns about the programme, including its impact on community policing, the possibility of racial profiling, and ways to ensure the programme’s focus is on “individuals who pose a true public safety or national security threat.”²¹¹ Advocates have criticized the taskforce’s report for failing to provide concrete recommendations to address some of the fundamental flaws of Secure Communities, and have called for the programme to be terminated instead. CAP has received even less oversight by federal authorities. Although the programme has been studied by the Office of Inspector General of DHS to determine whether it is effective in identifying individuals eligible for removal, no analysis was undertaken to determine whether it has led to racial

profiling by local law enforcement officials.

In order to combat racial profiling across the country, the End Racial Profiling Act of 2001 (ERPA 2001) was introduced into the US Congress in 2001. ERPA would compel all law enforcement agencies to ban the practice of racial profiling, document data on stops, searches and arrests disaggregated by both race and gender, and create a private right of action for victims of profiling. At that time, studies showed that US citizens of all races and ethnicities believed that racial profiling was a widespread problem and this was reflected in bipartisan support for the bill. However, following the 9/11 attacks, support for ERPA 2001 dissipated. Congress has since tried and failed to pass various versions of the ERPA. The most recent version was introduced into the US Senate in May 2013 and was awaiting further action by Congress at the time of writing. Without such legislation, it is difficult for individuals to challenge violations of their constitutional rights to be free from discrimination since they would currently need to show proof of intent of the individual officer to discriminate.

H(2) ACCESS TO HEALTH CARE FOR UNDOCUMENTED MIGRANTS

Documented and undocumented immigrants face considerable barriers in accessing essential health care services in the USA, including financial barriers and the fear of being reported for immigration enforcement.²¹² Often such concerns delay or prevent undocumented immigrants from seeking care and result in hospital emergency room visits for illnesses and conditions that have become critical due to a lack of preventative care or early intervention treatment. While the Patient Protection and Affordable Care Act of 2010 (often referred to as “health care reform”) is expected to substantially improve health coverage, many of the provisions that would increase health coverage for US citizens will not be implemented until 2014 or later. Even following full implementation, undocumented immigrants and documented immigrants living in the USA for less than five years will remain ineligible for publicly funded or subsidized health care coverage. The exception to this bar is that states were recently given the option of covering documented immigrant children and pregnant women who have entered the USA in the last five years, if they so choose.

Even if a low-income undocumented immigrant or a documented immigrant who has entered the country in the last five years has a serious, even potentially fatal, medical condition, the federal funding available to them is extremely limited. In order to be covered, Emergency Medicaid requires the “sudden onset” of acute symptoms of sufficient severity that the absence of immediate treatment could reasonably be expected to result in placing the patient’s health in serious jeopardy, serious impairment of bodily functions, or serious dysfunction of a bodily part. Emergency Medicaid does not pay for treatment of chronic conditions, such as cancer, even if the condition is potentially or imminently life threatening.

Fear of deportation is among the major factors undocumented immigrants take into account when deciding whether to seek medical care. Amnesty International has received reports of undocumented immigrants being denied treatment, receiving substandard care or being reported to Customs and Border Protection (CBP) when seeking medical care at hospitals in Arizona. Advocates in Tucson, Arizona, who work with victims of crime have told Amnesty International that local hospitals often check the immigration status of individuals seeking medical care and call CBP to detain those they suspect of being undocumented.

Existing and proposed legislation and regulations include provisions requiring the collection at health facilities of information regarding immigration status. This has led to fears that the information will be passed to the immigration authorities. In 2003, Congress authorized some funding relief for hospitals providing uncompensated care to unauthorized immigrants. However, in order to qualify for federal reimbursement for emergency care, hospitals are required to collect information proving that the patient is ineligible for public insurance, including information regarding their immigration status.

Although undocumented immigrants are ineligible for many federal and state benefits, their US citizen children may be wrongfully denied services and benefits despite being eligible for them. The children of undocumented immigrants are already at greater risk than other children in the USA of having no health insurance – in 2007, nearly half of the children born to unauthorized immigrants had no health insurance, as compared to the national rate of 11 per cent for all children under 18 years old. However, the enactment of state legislation which requires the disclosure of a person's immigration status during the application process for benefits may impact their access to health and nutrition even further.

In Arizona, under HB 2008, parents who are undocumented and are seeking benefits for their US citizen children, such as food, health care and housing benefits, have been required to provide identification and, in some cases, sworn affidavits affirming their own citizenship. Agencies are required to turn over to ICE the names of people who they believe may be illegal immigrants. As of November 2010, the two main Arizona state agencies administering public benefits had reported 1,503 people to ICE. HB 2008 and other bills which affect the ability for children of immigrants who are US citizens to access benefits administered by the state are in violation of guidance provided by the US Department of Health and Human Services, which states, "states may not require applicants to provide information about the citizenship or immigration status of any non-applicant family or household member or deny benefits to an applicant because a non-applicant family or household member has not disclosed his or her citizenship or immigration status."²¹³

Denial of benefits that provide access to adequate food and nutrition, which is a necessary underpinning of the right to health, further disadvantages such children and increases obstacles to achieving their right to the highest attainable standard of health.

Access to medical services is essential for individuals to enjoy the right to health. States should not enact legislation that deters undocumented immigrants from receiving medical care or requires the collection of immigration status. The Office of Civil Rights for the US Department of Health and Human Services should investigate any occurrence of hospitals or medical personnel actively assisting immigration enforcement.

H(3) ACCESS TO HIGHER EDUCATION

Section 505 of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) states, "...an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident."

Sixteen states have taken proactive steps to ensure undocumented students have access to higher education. California, for example, enacted legislation in 2011, which would allow undocumented students at public universities who meet certain requirements to access privately funded scholarships as well as state-funded financial aid. California's legislation came as a response to Congress' failure to pass the federal Development, Relief, and Education for Alien Minors (DREAM) Act. The DREAM Act would provide an opportunity for some undocumented immigrant students to pursue higher education by returning to states the authority to determine who qualifies for in-state tuition. It would also provide conditional legal status to immigrant students if they finish high school and attend college or join the military for two years. Students who complete all requirements will have the opportunity to permanently legalize their immigration status.

Although the DREAM Act has been introduced in Congress repeatedly since 2001, it had not been passed. Current proposed federal legislation to address Comprehensive Immigration Reform includes a provision that would address Section 505 of IIRIRA by restoring the state

option to determine residency for purposes of higher education. However, at the time of writing, the provision is only included in the Senate version of a Comprehensive Immigration Reform bill and has not been passed into law.

All state governments should ensure that legislation respects immigrants' rights, including equal access to higher education.

H(4) DETENTION ISSUES

H(4)(A) MANDATORY DETENTION

Immigrants – including those who have lived in the USA for most of their lives – can be deported for certain crimes, including minor, non-violent crimes (such as receiving stolen property), in some cases committed years ago. These individuals are subjected to mandatory detention when they are placed in deportation proceedings and do not receive any form of custody review. Many individuals who did not serve any time in prison for their offences find that they are immediately locked up and are not entitled to any individualized determination as to whether they pose a danger or a flight risk that would justify their detention pending deportation proceedings. Furthermore, individuals seeking protection through asylum or UNCAT claims may be caught in the mandatory detention system even though under international law, they cannot be deported if it would place them at risk of persecution, torture or other serious human rights violations. It is believed that thousands of individuals are subject to mandatory detention every year: the exact number of people impacted is not known as the DHS does not publish this data.

In 1996 the US significantly expanded the categories of individuals who would be subject to mandatory detention to include those convicted of a variety of crimes, including non-violent misdemeanour convictions without any jail sentence, and anyone considered a national security or terrorist risk. If already in the United States, a person is subject to mandatory detention if he or she is suspected of being a national security or terrorism concern, or is charged under immigration law with two “crimes involving moral turpitude,” an “aggravated felony,” a firearms offence, or a controlled substance violation. If he or she is “seeking admission” into the US, even as a lawful permanent resident, he or she is subject to mandatory detention if charged under immigration law with one crime involving moral turpitude, prostitution, domestic violence, or if he or she has received any number of criminal sentences totalling five years or more. The terms aggravated felony and crime involving moral turpitude are broad and confusing and subject to constant interpretation by the immigration courts, Board of Immigration Appeals, and the federal courts. As a result many individuals are detained for years while courts determine whether a prior criminal conviction is actually a “crime involving moral turpitude” or an “aggravated felony” and as such a deportable offence. Mistakes are common, and in the meantime, individuals incorrectly subject to mandatory detention have no opportunity for release.

While an individual can challenge whether or not they are properly included in a mandatory detention category, they must be able to demonstrate that ICE is “substantially unlikely to establish” the charge of deportability. Unlike other areas of US law, it is the detainee’s burden to demonstrate that he should not be deprived of his liberty rather than the government’s burden to demonstrate that detention is necessary and proportionate. This inversion generally supports mandatory detention, because most individuals in detention have no legal representation and face considerable challenges in developing their own legal arguments in a complex and ever-changing field of law.

Amnesty International found that some US citizens and lawful permanent residents are incorrectly subject to mandatory detention, and spend months or years behind bars before proving they are not deportable from the USA.²¹⁴ Because these cases can take years to resolve and wreak havoc on families, attorneys and detainees told Amnesty International that

mandatory detention often results in the decision to give up the fight to remain in the USA, even when relief from deportation is available. The US mandatory detention system, which provides for the automatic detention of individuals, amounts to arbitrary detention, and is in violation of international law, which requires that detention be justified in each individual case and be subject to judicial review. Unfortunately, legislation to address Comprehensive Immigration Reform currently being debated in Congress will seek to expand the number of crimes that would make a person eligible for mandatory detention. The bill passed in June by the Senate does include provisions that would provide judicial oversight of all detention determinations and de novo reviews by the Attorney General every 90 days thereafter, but these provisions may not be included in the final legislation language.

H(4)(B) DUE PROCESS RIGHTS

Deportation procedures at the border can take a number of forms, one of which assigns criminal penalties and detention for unlawful entry. In 2005, the US government initiated Operation Streamline, a “zero-tolerance” multi-agency law enforcement initiative that has been implemented in some border counties. As originally designed, Operation Streamline mandates the criminal prosecution of all individuals suspected of crossing the US-Mexico border without authorization, regardless of their criminal or immigration history. Prison sentences of up to six months can be imposed for illegal entry; illegal re-entry can carry a penalty of up to 20 years imprisonment.

Those prosecuted for illegal entry into the USA have access to court appointed attorneys. However, the volume of prosecutions has meant that lawyers are often representing groups of immigrants at court hearings, sometimes as many as 70 or 80 people at a time. The lack of access to individualized hearings and inadequate access to legal counsel through Operation Streamline means that courts cannot properly take into account relevant circumstances in individual cases, such as whether someone is a survivor of trafficking or fleeing persecution, and is resulting in arbitrary detention.

Criminal penalties for unauthorized entry are obstacles to identifying the victims of human rights abuses, such as people trafficking and prevent victims from seeking justice. They therefore undermine human rights protections afforded in international law, including the right to seek asylum. The Special Rapporteur on the Human Rights of Migrants has repeatedly stressed that where detention is used as a punitive measure, it is disproportionate and inappropriate and stigmatizes undocumented immigrants as criminals.

In addition, according to reports received by Amnesty International, people are routinely pressured by local law enforcement, ICE or CBP officials into signing forms agreeing to their removal without a hearing in front of an immigration judge. If someone agrees to “voluntary departure”, they agree to leave the USA within a specific period of time without being issued with a deportation order. Taking this route means that they do not face any bars to readmission to the USA in the future and this is often offered to people without any record of previous immigration violations. Alternatively, people may be offered “stipulated removal” which means that the individual receives a removal order and will be prevented from re-entering the USA for a period of time after removal.

Individuals who agree to voluntary departure or stipulated removal effectively waive their rights to due process, such as the right to a hearing before an immigration judge, and possible claims to remain in the USA. People signing these removal documents may do so without being aware of the consequences, either because the documents are not provided in a language they understand or because they are not given sufficient time to review the documents. Some of those who refuse to sign voluntary or stipulated removal documents have reportedly been threatened with lengthy detention.

The USA should pass legislation creating a presumption against the detention of immigrants and asylum seekers and ensuring that detention be used as a measure of last

resort. Detention should be used only if the US government demonstrates in each individual case that it is a necessary and proportionate measure. All decisions to detain should be subject to formal and regular review by a judicial body.

H(4)(C) DETENTION OF PARENTS AND ITS IMPACT ON CHILDREN

Once in detention, it is often impossible for parents to make arrangements for their children's care and, as a result, the children may be separated from their families and taken into care temporarily or, in some cases, permanently. People in immigration detention are often transferred between facilities and have no way of obtaining permission or transport to attend court hearings regarding their children. According to a 2010 report by the Women's Refugee Commission, "The gaps and failures in [US] immigration laws and child welfare system can create long-term family separation, compromise parents' due process rights and leave children with lasting psychological trauma and dependency on the state."²¹⁵

According to one study, the pervasive fear of engaging with authorities because of the risk of immigration enforcement actions has made many parents reluctant to provide information about relatives who may be able to take care of a child. As a result, the children of people detained or deported as a result of immigration enforcement may wind up in the foster care system rather than with family members.

A policy memorandum of 30 June 2010 to ICE employees from Assistant Secretary of ICE John Morton outlined immigration enforcement priorities for ICE – namely immigrants who pose "a danger to national security or a risk to public safety" including individuals engaged in or suspected of terrorism or espionage, individuals convicted of certain felonies and violent crimes, and repeat offenders – and gives ICE officers discretion in making detention decisions.²¹⁶ The memorandum also states: "Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be... pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest." Amnesty International welcomes the memorandum and believes these policies, if fully implemented, will alleviate the impact on family unity as well as other rights.

In the context of deportation hearings, prior to 1996, Immigration Judges had authority to grant discretionary waivers in immigration proceedings where family unity would be threatened by deportation. However, following changes to the immigration law in 1996, that discretionary authority has been sharply constrained.

The right to family life is enshrined in international law. In order to live up to its obligations, the USA should give due consideration to family circumstances, on a case-by-case basis, before detaining or deporting an immigrant.

I. LIFE SENTENCES FOR CRIMES COMMITTED BY UNDER-18-YEAR-OLDS

On 25 June 2012, the US Supreme Court outlawed mandatory life imprisonment without the possibility of parole (life without parole) for offenders who were under 18 at the time of the crime. Amnesty International had joined a legal brief to the Court seeking a categorical prohibition of this sentence against this age group as required by international law.²¹⁷

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

At the time of the *Miller* ruling, there were about 2,500 child offenders serving life without parole in the USA, in some 38 states and in federal prison. According to the Chief Justice, one of the four Justices who dissented from the *Miller* opinion, more than 2,000 of these

inmates were sentenced under mandatory sentencing schemes. According to the Court, 28 states and the federal government make life without parole sentences mandatory for some children convicted of murder in adult court.

By late August 2013, it was reported that at least 15 states had not yet brought their laws into compliance with the *Miller* ruling by eradicating mandatory life without parole for under 18-year-old offenders. There have been inconsistent state rulings on the question of whether the *Miller* ruling applies retroactively or only to future cases.²¹⁸ The Wall Street Journal reported in September 2013 that “the schism over the *Miller* ruling has helped sow deep confusion among inmates, their lawyers, lawmakers and sentencing-policy advocates. More than a year after the high court ruling, many of the approximately 2,100 people sentenced as juveniles to mandatory life-without-parole sentences before June 2012 are being held in a sort of legal limbo – with few answers in sight”.²¹⁹

While *Miller* was a welcome step, the USA remains in violation of international law on this issue, and children still face life without parole. On 20 August 2013, in Michigan, a defendant was sentenced to life imprisonment without the possibility of parole for a murder committed when he was 16 years old.²²⁰ On 3 September 2013 in Florida, another defendant was sentenced to life without parole for a murder committed when he was 16.²²¹

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

ENDNOTES

¹ Common Core Document of the United States of America; ¶¶104 and 141.

² Amnesty International's submission to the Human Rights Committee on the US death penalty is available at <http://www.amnesty.org/en/library/info/AMR51/O62/2013/en>

³ See US Supreme Court, *Sosa v. Alvarez-Machain* (2004). “[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”

⁴ US Senate Executive Report (102-23 (102nd Congress, 2d session), 24 March 1992.

⁵ Liberia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, 2002. Published 31 March 2003, <http://www.state.gov/g/drl/rls/hrrpt/2002/18211.htm>

⁶ Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007, page 39.

⁷ Human rights: A commitment to action, 22 December 2009, <http://www.state.gov/documents/organization/134134.pdf> and Fourth Periodic Review ¶12

⁸ The Obama administration and international law, Harold Hongju Koh, Legal Adviser, US Department of State, Annual Meeting of the American Society of International Law, Washington, DC, 25 March 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>

⁹ Common Core Document, *op. cit.*, ¶121.

¹⁰ Statement of Eve Hill, Senior Counselor to the Assistant Attorney General for Civil Rights, Department of Justice, before the Committee on Foreign Relations, United States Senate, regarding the United Nations Convention on the Rights of Persons with Disabilities, 12 July 2012, http://www.foreign.senate.gov/imo/media/doc/Eve_Hill_Testimony.pdf

¹¹ See for example, Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, N.P. Engel, Publisher, p.43. (“The obligation of a State party to ensure the rights of the Covenant relates to all individuals ‘within its territory and subject to its jurisdiction’. An excessively literal reading would again lead to often absurd results”).

¹² Human Rights Committee General Comment 31, UN Doc. CCPR/C/74/CRP.4/Rev.629 (March 2004), para. 10. See also *López Burgos v. Uruguay*, UN Doc. A/36/40, 6 June 1979, para. 12.3 (“...it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.”)

¹³ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, General List, No.131 paras. 109-111.

¹⁴ For example, “although the ICCPR is a legally binding agreement under international law, it is a non-self-executing agreement under the express conditions of the Senate and thus has no legal effect in US courts. Moreover, the ICCPR does not apply to the treatment of enemy combatants, because the rights of enemy combatants are governed by a separate body of international law applicable during armed conflicts, namely, the laws of war... Human rights laws such as the ICCPR thus do not apply in cases of armed conflict”. Letter with memorandum from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, to William Haynes, General Counsel, Department of Defense, 7 February 2003, <http://www.justice.gov/olc/docs/memo-aba-taskforce.pdf>

¹⁵ In 2003, after the UN Special Rapporteur on extrajudicial, summary or arbitrary executions raised the case of the killing of six men in a car in Yemen by missiles fired from a US remote-controlled Predator “drone” in November 2002, the USA rejected the applicability of the ICCPR to the situation and stated that: “inquiries related to allegations stemming from any military operations conducted during the course of an armed conflict with al Qaida do not fall within the mandate of the Special Rapporteur... [T]he [UN Human Rights] Commission and Special Rapporteur lack competence to address issues of this nature arising under the law of armed conflict”. E/CN.4/2003/G.20, 22 April 2003.

¹⁶ The AUMF authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”

¹⁷ Doctrine of pervasive ‘war’ continues to undermine human rights. A reflection on the ninth anniversary of the AUMF, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>.

¹⁸ “Let me be clear, we are indeed at war with al Qa’ida and its affiliates”. In his latest speech, he said: “Under domestic law, and international law, the United States is at war with al Qa’ida, the Taliban, and their associated forces.” His speech of 21 May 2009 is at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>. See also USA: President Obama defends Guantánamo closure, but endorses ‘war’ paradigm and indefinite preventive detention, 22 May 2009, <http://www.amnesty.org/en/library/info/AMR51/072/2009/en>

¹⁹ Remarks by the President at the National Defense University, 23 May 2013, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

²⁰ See, e.g., UN General Assembly, “The United Nations Global Counter-Terrorism Strategy”, resolution

60/288, adopted 8 September 2006; Security Council resolution 1456 (2003); International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, paragraph 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, paragraph 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2005, paragraphs 216-20, 345(3); Human Rights Committee, General Comment no 31 on the nature of the general legal obligation imposed on States parties to the Covenant UN Doc CCPR/C/21/Rev.1/Add.13 (2004), ¶11.

²¹ In its 1995 conclusions on the USA, the Committee said that it “regrets the extent of the State party’s reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States. The Committee is also particularly concerned at reservations to article 6, paragraph 5, and article 7 of the Covenant, which it believes to be incompatible with the object and purpose of the Covenant.”

²² Counter Resistance strategy meeting minutes, 2 October 2002. Comments attributed to individuals are paraphrased in the record of this meeting. The former CTC legal counsel has challenged the accuracy of the paraphrasing, but apparently does not challenge the attributed comments on the US reservations. See <http://www.docstoc.com/docs/6199392/Jonathan-Fredman-to-SASC-November-17-2008>

²³ Memorandum for Commander, Joint Task Force 170. Legal brief on proposed counter-resistance techniques. LTC Diane E. Beaver, Staff Judge Advocate, Guantánamo Bay, Cuba, 11 October 2002.

²⁴ Counter-resistance techniques. Action memo for Secretary of Defense, from William J. Haynes, General Counsel, US Department of Defense, 27 November 2002.

²⁵ Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

²⁶ The six techniques were “facial hold”, “attention grasp”, “abdominal slap”, “insult (or facial) slap”, “dietary manipulation” and “extended sleep deprivation”.

²⁷ Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

²⁸ See USA: The promise of real change. President Obama’s executive orders on detentions and interrogations, 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>

²⁹ “Conduct... that constitutes torture or cruel, inhuman or degrading treatment or punishment plainly violates Article 7, subject to the US ratification reservation that the United States considers itself bound by Article 7 to the extent that ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the US Constitution.”

³⁰ E.g., under the ICCPR, “Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.” General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13, ¶15.

³¹ UN Human Rights Committee, General Comment 29 (States of Emergency), 31 August 2001, UN Doc.: CCPR/C/21/Rev.1/Add.11. ¶14.

³² Principle 11, 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 under General Assembly resolution 60/147, 16 December 2005.

³³ E.g., *ibid.* Principles 18 – 23; also Human Rights Committee, General Comment no. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13, ¶¶ 16 and 18).

³⁴ *Webster Bivens v. Six unknown named agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

³⁵ *Wilkie v. Robbins*, 551 U.S. 537, 25 June 2007.

³⁶ The doctrine of qualified immunity in US law protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, US Supreme Court (1982). An official’s conduct violates clearly established law “when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Al-Kidd v. Ashcroft* (2011), citing *Anderson v. Creighton* (1987).

³⁷ Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008.

³⁸ One of the starkest examples was passage of the MCA which furthered impunity, blocked remedy, sought to strip courts of habeas corpus jurisdiction, provided for unfair trials by military commission, and gave the green light, as the administration saw it, for the CIA’s secret detention programme to continue. The MCA retroactively (back to 11 September 2001) applied DTA §1004 which provided a “good faith” defence for US personnel relying on authorized interrogation techniques. And while DTA §1003 prohibiting the “cruel, inhuman or degrading treatment or punishment” of persons in US custody was a positive step, this protection was limited to US interpretations of what constituted such ill-treatment.

³⁹ *Vance v. Rumsfeld*, Seventh Circuit Court of Appeals, 7 November 2012, Judge Hamilton dissenting.

⁴⁰ See, for example, USA: Blocked at every turn: The absence of effective remedy for counter-terrorism abuses, 30 November 2009, <http://www.amnesty.org/en/library/info/AMR51/120/2009/en>

⁴¹ Shafiq Rasul, Asif Iqbal, Rhuheh Ahmed and Jamal al-Harith.

⁴² Their allegations of torture and other ill-treatment include: repeated beatings; prolonged solitary confinement; threats of attacks by dogs; forced nudity; repeated body cavity searches; denial of food and water; sleep deprivation and disruption; and shackling in painful stress positions for extended periods.

⁴³ Iraqi nationals Arkan Mohammed Ali, Thahe Mohammed Sabar, Sherzad Kamal Khalid, Ali H., and Najeab Abbas Ahmed; and Afghan nationals Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman.

⁴⁴ The men alleged, among other things, beatings, stabbing, stripping, hooding, confinement in a box, prolonged sleep deprivation, deprivation of adequate food and water, mock execution, death threats, sexual assault, sexual humiliation, threat of rape, exposure to extreme temperatures, denial of necessary medical care, intention exposure to infection, threats of transfer to Guantánamo, cruel use of restraints, racial abuse, stress positions, intimidation with dogs, threats to family members, sensory deprivation, humiliation through being photographed while naked, solitary confinement, and dousing with cold water.

⁴⁵ In Re: Iraq and Afghanistan detainee litigation, Memorandum opinion, US District Court for DC, 27 March 2007.

⁴⁶ The dissenting judge wrote: “The plaintiffs in these cases allege that they were beaten, electrocuted, raped, subject to attacks by dogs, and otherwise abused by private contractors working as interpreters and interrogators at Abu Ghraib prison... No act of Congress and no judicial precedent bars the plaintiffs from suing the private contractors – who were neither soldiers nor civilian government employees”. He argues that the claims should have been allowed to proceed against both companies. *Saleh et al v Titan*

and *CACI*, US Court of Appeals for the DC Circuit, 11 September 2009.

⁴⁷ *Arar v. Ashcroft et al*, US Court of Appeals for the Second Circuit, 2 November 2009.

⁴⁸ USA: Remedy blocked again: Injustice continues as Supreme Court dismisses rendition case, 25 May 2011, <http://www.amnesty.org/en/library/info/AMR51/044/2011/en>

⁴⁹ *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012.

⁵⁰ *El Masri v Former Yugoslav Republic of Macedonia* [Grand Chamber], No. 39630/09, 13 December 2012, ¶191.

⁵¹ UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, ¶1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005 and UN Human Rights Council, Res. 21/7, 'Right to the truth', UN Doc. A/HRC/21/L.16, 24 September 2012, ¶1 and preamble.

⁵² UN Committee against Torture, General Comment No. 3 on Implementation of Article 14 by States parties, 19 November 2012, UN Doc. CAT/C/GC/3, ¶42.

⁵³ *Ibid.*

⁵⁴ "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations." Human Rights Committee General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Adopted on 29 March 2004, UN Doc.: CCPR/C/21/Rev.1/Add. 13.

⁵⁵ *Vance v. Rumsfeld*, Seventh Circuit Court of Appeals, 7 November 2012, Judge Hamilton dissenting.

⁵⁶ "The State Department relied on the availability of *Bivens* actions when it filed its answers to a number of questions posed by the [UN Committee against Torture]... I do not know whether the State Department will feel compelled to inform the Committee that it was in error with respect to its *Bivens/Davis* representation in light of the majority's opinion, but there is no ambiguity in what it said". *Vance v. Rumsfeld*, Judge Wood concurring in judgment.

⁵⁷ "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? The bill meets that test" and "our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs". President George W. Bush, remarks on signing the Military Commissions Act of 2006, 17 October 2006. Public Papers of the Presidents of the United States, 2006, book 2, page 1858, <http://www.gpo.gov/fdsys/pkg/PPP-2006-book2/pdf/PPP-2006-book2-doc-pg1857.pdf>

⁵⁸ Letter from Acting Assistant Attorney General Steven G. Bradbury, to John Rizzo, Acting General Counsel, Central Intelligence Agency, 31 August 2006.

⁵⁹ Re: Application of the Detainee Treatment Act to conditions of confinement at Central Intelligence Agency detention facilities. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Acting Assistant Attorney General Steven G. Bradbury, Office of Legal Counsel, US Department of Justice, 31 August 2006. Also Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel,

US Department of Justice, 31 August 2006.

⁶⁰ Letter to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 31 August 2006.

⁶¹ See USA: Military Commission Act of 2006 – Turning bad policy into law, 29 September 2006, <http://www.amnesty.org/en/library/info/AMR51/154/2006/en>

⁶² Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009, page 154.

⁶³ Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007, page 34. See also pages 153-154 of Investigation into the Office of Legal Counsel's Memoranda concerning issues relating to the Central Intelligence Agency's use of 'enhanced interrogation techniques' on suspected terrorists. Report of the Office of Professional Responsibility, US Department of Justice, 29 July 2009.

⁶⁴ *Al Janko v. Gates et al*, Memorandum Opinion, US District Court for DC, 11 December 2011

⁶⁵ *Al Janko v. Gates et al*. Brief for Defendants-Appellees, Court of Appeals, DC Circuit, 1 March 2013.

⁶⁶ *Ameur v. Gates*, Second amended complaint. In the US District Court for the Eastern District of Virginia, 12 September 2012.

⁶⁷ *Ameur v. Gates*, Memorandum in support of the United States' motion to dismiss... for lack of subject matter jurisdiction. In the US District Court for the Eastern District of Virginia, 1 December 2012.

⁶⁸ *Ameur v. Gates*, Memorandum opinion and order. In the US District Court for the Eastern District of Virginia, 20 June 2013.

⁶⁹ See Re Guantánamo: A human rights appeal to the US administration and Congress, 17 May 2013, <http://www.amnesty.org/en/library/info/AMR51/030/2013/en>

⁷⁰ USA: See no evil: Government turns the other way as judges make findings about torture and other abuse, February 2011, <http://www.amnesty.org/en/library/info/AMR51/005/2011/en>

⁷¹ For information on Musa'ab Al-Madwani's case, see USA: 'I have no reason to believe that i will ever leave this prison alive', 3 May 2013, <http://www.amnesty.org/en/library/info/AMR51/022/2013/en>; USA: See no evil, *op. cit.*, and USA: Still failing human rights in the name of global 'war', 20 January 2010, <http://www.amnesty.org/en/library/info/AMR51/006/2010/en>

⁷² *Al-Madhwani v. Obama*, Brief for petitioner-appellant Musa'ab Al-Madhwani, In the US Court of Appeals for the DC Circuit, 15 November 2010.

⁷³ UN Office of the High Commissioner for Human Rights, Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004, UN Doc.: HR/P/PT/8/Rev.1, para. 241. The UN Committee against Torture (CAT) has also observed that "victims may be at risk of re-traumatization and have a valid fear of acts which remind them of the torture or ill-treatment they have endured." UN CAT, General Comment No. 3: Implementation of article 14 by States parties, 13 December 2012, UN Doc. CAT/C/GC/3, (GC 3) ¶13.

⁷⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 14 (ratified by the USA on 21 October 1994); see also CAT, GC 3, ¶¶11-15.

⁷⁵ *Anam et al v. Bush et al*, Supplemental Memorandum to The Issue of Jurisdiction Regarding

Petitioner's Emergency Motion, In the US District Court for DC, 11 April 2013.

⁷⁶ "The Court lacks jurisdiction to consider a conditions-of-confinement and treatment request to enjoin [the administration] from providing essential nutritional and medical care... Here, through Section 7 of the Military Commissions Act of 2006, Congress has exercised its constitutional prerogative, not to grant, but to withdraw from federal courts jurisdiction to adjudicate conditions-of-confinement claims by detainees at Guantánamo Bay". *Hadjarab et al v. Obama et al*. Respondents' opposition to petitioners' motion for preliminary injunction to stop involuntary feeding. In US District Court for DC, 3 July 2013.

⁷⁷ *Shaker Aamer et al v. Barack H. Obama et al*, Opinion. US District Court for DC, 16 July 2013.

⁷⁸ *Al Odah et al v. USA et al*, Memorandum Opinion, US District Court for DC, 20 October 2004.

⁷⁹ *In re: Guantánamo Bay detainee litigation. Hatim et al v. Obama et al*. Memorandum opinion, US District Court for DC, 11 July 2013.

⁸⁰ *In Re: Guantanamo Bay Detainee Continued Access to Counsel*. Memorandum Opinion, US District Court for DC, 6 September 2012.

⁸¹ One such detainee was Obaidullah, an Afghan national. See USA: 'I am fallen into darkness': The case of Obaidullah, Guantánamo detainee now in his 12th year without trial, 25 July 2013, <http://www.amnesty.org/en/library/info/AMR51/051/2013/en>

⁸² *In Re Guantanamo Bay Detainee Litigation*, Respondent's motion for a stay pending possible appeal and request for an administrative stay. In the District Court for DC, 16 July 2013.

⁸³ *Hatim et al v. Obama et al*, Emergency motion for temporary administrative stay, pending the filing of a full motion for stay pending appeal, in the US Court of Appeals for the DC Circuit, 17 July 2013.

⁸⁴ Section 1004 of the DTA (further amended by section 8 of the MCA) purports to create a sort of special "ignorance of the law" defence for any US personnel against whom civil or criminal proceedings are brought in relation to their activities in the detention and interrogation of foreign nationals suspected of involvement or association with "international terrorist activity". Section 5 of the MCA purports to prohibit anyone from invoking "the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories". Section 6 of the MCA purports to artificially restrict under US law the definition of certain war crimes under the Geneva Conventions.

⁸⁵ CCPR General Comment No. 6, The right to life (Article 6), 1982.

⁸⁶ USA: 'Targeted killing' policies violate the right to life, 15 June 2012, <http://www.amnesty.org/en/library/info/AMR51/047/2012/en>. USA: The devil in the (still undisclosed) detail, 6 February 2013, <http://www.amnesty.org/en/library/info/AMR51/006/2013/en>

⁸⁷ See USA: In Hostile Terrain: Human rights violation in immigration enforcement in the US Southwest, chapter 2, March 2012, <http://www.amnesty.org/en/library/info/AMR51/018/2012/en>.

⁸⁸ UN Basic Principles on the Use of Force and Firearms, Principle 9.

⁸⁹ Human Rights Committee, *Olimzhon Eshonov v Uzbekistan*, Communication No 1225/2003, Views, 22 July 2010, ¶9.2, UN Doc. CCPR/C/99/D/1225/2003. See also Principle 9, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by the UN Economic and Social Council in Resolution 1989/65, 24 May 1989.

⁹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/14/24, 20 May 2010, ¶49. See also,

⁹¹ In 2009, the US Court of Appeals for the Fourth Circuit described the death of Abdul Wali thus: "Wali

voluntarily surrendered himself for questioning on June 18, 2003.... American commanders at Asadabad decided to detain Wali. They imprisoned him in a detention cell, shackling his legs, binding his wrists together, and placing a hood over his head... Sometime on the evening of the next day, June 19, the CIA commander at Asadabad authorized Passaro to interrogate Wali. It is undisputed that for the next two days, Passaro 'interrogated' Wali. This 'interrogation' involved Passaro's brutal attacks on Wali, which included repeatedly throwing Wali to the ground, striking him open handed, hitting him on the arms and legs with a heavy, Maglite-type flashlight measuring over a foot long, and, while wearing combat boots, kicking Wali in the groin with enough force to lift him off the ground. Passaro 'interrogated' Wali in this manner throughout the next day, June 20. And, although Wali's condition greatly deteriorated, Passaro continued the 'interrogation' through the night of June 20. By June 21, Wali had lapsed into delirium, to the point where he twice asked his guards to shoot him and even lunged at a guard as if to take his gun. Later that day, while still in United States custody at Asadabad, Wali collapsed and died."

⁹² CIA is likely to avoid charges in most prisoner deaths. New York Times, 23 October 2005. See also Seal Officer Hears Charges in Court-Martial in Iraqi's Death, New York Times, 25 May 2005.

⁹³ A review of the FBI's involvement and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. *op. cit.* (October 2009, revised). Note 173.

⁹⁴ Materials on this case are available at

http://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOACID009482.pdf

⁹⁵ "External injuries are consistent with injuries sustained during apprehension. Ligation injuries are present on the wrists and ankles. Fractures of the ribs and a contusion of the left lung imply significant blunt force injuries of the thorax and likely resulted in impaired respiration. According to investigative agents, interviews taken from individuals present at the prison during the interrogation indicate that a hood made of synthetic material was placed over the head and neck of the detainee. This likely resulted in further compromise of effective respiration.... The cause of death is blunt force injuries of the torso complicated by compromised respiration." Final autopsy report, at

http://www.thetorturedatabase.org/files/foia_subsite/pdfs/dod003212_0.pdf and other materials at http://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOACID009482.pdf

⁹⁶ Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees, US Department of Justice 30 June 2011, <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>.

⁹⁷ Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 August 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>. The CIA interrogator in the al-Jamadi case has been identified as Mark Swanner. See 'A Deadly Interrogation. Can the CIA legally kill a prisoner?', by Jane Mayer November 14, 2005, http://www.newyorker.com/archive/2005/11/14/051114fa_fact. In 2011, Swanner was reported to be a focus of the Justice Department investigation. 'Haunted by Homicide: Federal Grand Jury Investigates War Crimes and Torture in Death of 'the Iceman' at Abu Ghraib, Plus Other Alleged CIA Abuses'. Time Magazine, 13 June 2011, <http://nation.time.com/2011/06/13/haunted-by-homicide-federal-grand-jury-investigates-war-crimes-and-torture-in-death-of-the-ice-man-at-abu-ghraib-and-other-alleged-cia-abuses/>

⁹⁸ Guantanamo Bay: Overview of the ICRC's work for internees, 30 January 2004, Operational Update, <http://www.icrc.org/eng/resources/documents/misc/5qrc5v.htm>

⁹⁹ UN Doc.: CAT/C/USA/CO/2, 25 July 2006.

¹⁰⁰ See USA: Another detainee dies at Guantánamo, 11 September 2012, <http://www.amnesty.org/en/library/info/AMR51/077/2012/en>

¹⁰¹ See also, The death of Adnan Latif, by David Remes (who was Adnan Latif's habeas counsel), 20 July 2013, <http://pubrecord.org/special-to-the-public-record/10900/the-death-of-adnan-latif/>

¹⁰² The list was obtained by the Miami Herald under a Freedom of Information Act request, and is available at <http://media.miamiherald.com/smedia/2013/06/17/15/48/2VNpb.S0.56.pdf>

¹⁰³ “At the time of their deaths, both men had been detained for over four years without charge, without notice of why they were being held or a fair chance to defend themselves, and without knowing whether or when their imprisonment would end. They were held in conditions and subjected to techniques that were designed and intended to break them down physically and emotionally, and which caused them to suffer severely. To protest their conditions and illegal detention and demand their rights, they along with dozens of other detainees went on hunger strike for months at a time. Rather than bring their conditions and detention into compliance with basic standards for humane treatment and the rule of law, the government’s response was to restrain the men in chairs, force tubes down their noses and throats, and pump food into their stomachs. On June 10 [2006], Mr Al-Zahrani and Mr Al-Salami were reportedly found dead in their cells. A third detainee, Mani Al-Utaybi, was found dead the same night. The day of the deaths, prior to conducting autopsies or an investigation, the government made a public statement describing the deaths as suicides by hanging. Certain high-level government and military officials had a different choice of words, calling the suicides ‘asymmetrical warfare’ and ‘a good PR move’. The deceased’s families and the public had no further information as to the cause and circumstances of the deaths apart from the government’s initial public statements for two years, until the Naval Criminal Investigative Service (NCIS), the military agency charged with investigating the deaths, released its final report in June 2008. The military concluded that the deaths were suicides by hanging.” *Al Zahrani v Rumsfeld*. Amended Complaint. In the District Court for DC, 29 January 2009.

¹⁰⁴ *Al-Zahrani v. Rumsfeld*, US District Court for DC, 16 February 2010.

¹⁰⁵ *Al-Zahrani v Rodriguez*, Brief for defendants-appellees, US Court of Appeals, DC Circuit, 13 July 2011.

¹⁰⁶ *Al-Zahrani v. Rodriguez*, US Court of Appeals for the DC Circuit, 21 February 2012.

¹⁰⁷ See, generally, The torture candidates, Editorial, The New York Times, 14 November 2011.

¹⁰⁸ Video clip: <http://thinkprogress.org/security/2011/11/29/377907/gingrich-waterboarding-not-torture/>

¹⁰⁹ While prisoners in most US long-term segregation facilities are allowed TVs and a limited number of books in their cells, access to hobby-craft and other materials can be severely limited. While in-cell activities may mitigate some of the effects of isolation they cannot compensate for the harsh conditions of long-term cellular confinement, inadequate exercise and lack of human inter-action.

¹¹⁰ In the Special Management Unit (SMU) of Arizona State Prison and in Pelican Bay SHU, California, the cells have no windows to the outside and face a blank wall. The cell doors in both SMU and Pelican Bay are constructed of heavy gauge perforated metal which a federal judge found “significantly blocks vision and light” (*Madrid v Gomez*) (see USA: Cruel Isolation, AI’s concerns about conditions in Arizona Maximum Security Prisons, 3 April 2012, <http://www.amnesty.org/en/library/info/AMR51/023/2012/en>, and USA: The Edge of Endurance, Prison Conditions in California’s Security Housing Units, 27 September 2012, <http://www.amnesty.org/en/library/info/AMR51/060/2012/en> Since 1990, Texas has also constructed a series of long-term segregation units in which the cells have no windows and little access to natural light.

¹¹¹ SHU prisoners entering a new “step down” programme in California will be allowed one phone-call after the first year of successful completion of the programme, during which they will remain in the same isolated conditions while being monitored for possible progression to graduated group activity after two years.

¹¹² Although prisoners in ADX have access to in-cell programmes, their conditions of isolation are severe. All are single-celled and while the cells have outside windows, conditions are stark. Cells in the general population do not face other cells and have double-doors, further isolating the occupants. The exercise

provision falls short of the UN SMR as inmates are allowed outdoor exercise only on two or three days each week (alternating with indoor exercise), and this takes place in individual cages with no equipment set in an enclosed yard with no view. While prisoners are eligible for the SDP after one year, according to a DOJ analysis provided to the European Court of Human Rights (ECHR) inmates were likely to spend at least three years before being admitted to the SDP; another survey found that at least 43 inmates at ADX had spent eight years in isolation at the facility (evidence presented in case of *Babar Ahmad and Others v UK*, before ECHR).

¹¹³ Interim Report by the Special Rapporteur on Torture Juan Mendez, 5 August 2011, UN General Assembly A/66/268. The SR defined solitary confinement as the “physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day”.

¹¹⁴ *Cunningham v. Bureau of Prisons*, 1:12-cv-01570 (D.Colo). The BOP has also admitted that “The main mental health disorders such as bipolar affective disorder, depression, post-traumatic stress disorder and schizophrenia would not preclude a designation to ADX and could be managed successfully there” (*Case of Babar Ahmad and Others v UK*, Judgement of ECHR, 10 April 2012).

¹¹⁵ See AI statement, *Cruel Conditions for pre-trial prisoners in US federal custody*, 12 April 2011, AI Index: AMR 51/030/2011.

¹¹⁶ *Wilson v Seiter*, 501 U.S. (1991)

¹¹⁷ Initial report of the USA to the Human Rights Committee, 24/08/94. CCPR/C/81/Add.4, ¶¶176, 177.

¹¹⁸ They were placed in solitary in 1972 after the murder of a prison guard at Louisiana State Prison, Angola. They were subsequently convicted of the murder, based largely on the perjured testimony of another prisoner. Both have consistently denied the charges and there are serious concerns about the fairness of their state trials, including the withholding of key exculpatory evidence, which are still pending appeals in the federal courts. Their membership of the Black Panther Party and prison activism has been cited by the Warden of Angola Prison as a factor in the decision to keep them in solitary confinement. Together with another prisoner who has since been released (Robert King), they are known as the “Angola Three” (see USA: 100 Years In Solitary, The ‘Angola 3’ And Their Fight for Justice, 7 June 2011, <http://www.amnesty.org/en/library/info/AMR51/041/2011>. After being diagnosed with terminal cancer in 2013, Herman Wallace was removed to a dormitory in a prison infirmary; appeals for his release on humanitarian grounds have been turned down by the state authorities. Albert Woodfox remains in solitary confinement.

¹¹⁹ In some US jurisdictions, including the Federal Bureau of Prisons, high security prisoners are made to wear electro-shock stun belts during transportation. Amnesty International has condemned such devices as inherently cruel and degrading because the wearer is under constant fear of being subjected to an electric shock at the push of a remote controlled button by officers for as long as the belt is worn.

¹²⁰ See USA: Less Than Lethal? The Use of Stun Weapons in US Law Enforcement, December 2008, <http://www.amnesty.org/en/library/info/AMR51/010/2008/en>

¹²¹ In *Less than Lethal? op. cit.*, Amnesty International describes these concerns in more detail, based on information on more than 300 reported deaths from June 2001 to August 2008, including a review of more than 90 autopsy reports; see also, USA: Stricter limits urged as deaths following police Taser use reach 500, 15 February 2012, <http://www.amnesty.org/en/for-media/press-releases/usa-stricter-limits-urged-deaths-following-police-taser-use-reach-500-2012->

¹²² Sudden Cardiac Arrest and Death Associated with Application of Shocks from a TASER Electronic Control Device, <http://circ.ahajournals.org/content/early/2012/04/20/CIRCULATIONAHA.112.097584>

¹²³ Arizona, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Louisiana, Pennsylvania, New Mexico, Nevada, New York, Rhode Island, Texas, Vermont, Washington, and West Virginia.

¹²⁴ These states include Illinois and California, which passed legislation in 2012 extending existing restrictions to include all stages of pregnancy.

¹²⁵ Memorandum for the Files. Re: Legal review of Department of Defense draft documents regarding treatment and interrogation of detainees. From Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 April 2006.

¹²⁶ Appendix M of FM 2-22.3 (FM 34-52) Human Intelligence Collector Operations. Department of the Army, September 2006.

¹²⁷ Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high-value al Qaeda detainees. Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007, page 39.

¹²⁸ Statement of Attorney General Eric Holder on closure of investigation into the interrogation of certain detainees, US Department of Justice, Office of Public Affairs, 30 August 2012, <http://www.justice.gov/opa/pr/2012/August/12-ag-1067.html>

¹²⁹ Article 4, CAT; Enforced disappearance has been recognized as a crime under international law since the judgment of the Nuremberg Tribunal in 1946: Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg 30 September and 1 October 1946 (Nuremberg Judgment), Cmd.6964, Misc. No.12 (London: H.M.S.O. 1946), p. 88. See also other international instruments, including, International Law Commission 1996 Draft Code of Crimes against the Peace and Security of Mankind, Article 18 (i).

¹³⁰ See President Barack Obama, News Conference, 29 April 2009 (“I believe that waterboarding was torture”). Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009 (“As I unequivocally stated in my confirmation hearing before the US Senate, waterboarding is torture).

¹³¹ US must begin criminal investigation of torture following Bush admission, 10 November 2010, <http://www.amnesty.org/en/news-and-updates/us-must-begin-criminal-investigation-torture-following-bush-admission-2010-11-10>; See also memorandum to the Swiss authorities, 6 February 2011, <http://www.amnesty.org/en/library/info/AMR51/009/2011/en>; and to the Canadian authorities, 12 October 2011, <http://www.amnesty.org/en/library/info/AMR51/080/2011/en>

¹³² George W. Bush, Decision points, Virgin Books, 2010, page 168-169.

¹³³ *Ibid.*, page 170-171.

¹³⁴ *Ibid.* See Action memo, ‘Counter-resistance techniques’. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002.

¹³⁵ Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9 November 2009, <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>

¹³⁶ *ACLU et al v. Department of Defense, et al.* Opinion and order denying motion to hold defendant CIA in civil contempt. US District Court, Southern District of New York, 5 October 2011.

¹³⁷ “[redacted] the DCI [Director of Central Intelligence] assigned responsibility for implementing capture and detention authority to the DDO [Deputy Director of Operations] and to the Director of the DCI Counterterrorist Center (D/DCI)”. Special Review: Counterterrorism detention and interrogation activities (September 2001 – October 2003), Central Intelligence Agency, Inspector General, 7 May 2004, para 3. “My transition to chief of CTC came during a precarious time. We had just captured our first major al-Qa’ida figure, Abu Zubayda” in late March 2002. José A. Rodríguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives.* Threshold Editions (2012), page 79. “Once Abu Zubaydah

was stabilized, the Pakistanis turned him over to CIA custody. It was at this point that we got into holding and interrogating high-value detainees – ‘HVDs’, as we called them – in a serious way”. George Tenet, *At the Center of the Storm*, Harper 2007, page 365.

¹³⁸ José A. Rodríguez, Jr., *Hard measures: How aggressive CIA actions after 9/11 saved American lives*. Threshold Editions (2012). Preface, ‘Who I am’.

¹³⁹ *Ibid.*, especially pages 183-196.

¹⁴⁰ See USA: Another door closes on accountability, 10 November 2010, <http://www.amnesty.org/en/library/info/AMR51/104/2010/en>. On 5 October 2011, a judge on the US District Court for the Southern District of New York ruled that he will not hold the CIA in civil contempt for destroying 92 videotapes, 12 of which depicted the use of “enhanced interrogation techniques” against two detainees, Abu Zubaydah and ‘abd al Nashiri, held in secret custody by the CIA, reportedly in Thailand. To hold the CIA in contempt for violating a court order, the judge said, would “serve no beneficial purpose”. He said that the CIA’s failure to produce the tapes in response to the court’s “repeated order” and the subsequent destruction of the tapes, “has been remedied” by the information about what was on them and who destroyed them having been produced and by the CIA’s assurances that new protocols against repetition of such an event having been put in place.

¹⁴¹ Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009.

¹⁴² Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the Senate Review of CIA’s Interrogation Program, 5 March 2009, <https://www.cia.gov/news-information/press-releases-statements/senate-review-of-cia-interrogation-program.html>; Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on the New Review Group on Rendition, Detention, and Interrogation, 16 March 2009, <https://www.cia.gov/news-information/press-releases-statements/new-review-group-on-rendition-detention-and-interrogation.html>

¹⁴³ Feinstein Statement on CIA Detention, Interrogation Report, 13 December 2012, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=46c0b685-a392-4400-a9a3-5e058d29e635>

¹⁴⁴ “To date, governments have been unwilling to establish the truth and ensure accountability for their complicity in the unlawful programme of ‘extraordinary renditions’ – involving abduction, detention and ill-treatment of suspected terrorists – carried out by the CIA in Europe between 2002 and 2006. In many cases, an abuse of the state secrets privilege hampered judiciary and parliamentary initiatives to determine responsibility. Though secrecy is sometimes necessary to protect the State, it should never serve as an excuse to conceal serious human rights violations.” Time for accountability in CIA torture cases, Nils Muižnieks, Council of Europe Commissioner for Human Rights, 11 September 2013, <http://humanrightscomment.org/2013/09/11/time-for-accountability-in-cia-torture-cases/>

¹⁴⁵ *ACLU v Department of Defense*, Declaration of Leon E. Panetta, Director, Central Intelligence Agency, US District Court, Southern District of New York, 21 September 2009.

¹⁴⁶ *ACLU v. DoD and CIA*, Memorandum Opinion, US District Court for DC, 16 October 2009.

¹⁴⁷ *ALCU v. Department of Defense, Central Intelligence Agency*. Brief for appellees, In the US Court of Appeals for the DC Circuit, March 2010.

¹⁴⁸ *ALCU v. Department of Defense and Central Intelligence Agency*, US Court of Appeals for the DC Circuit, 18 January 2011.

¹⁴⁹ Human Rights Committee, General Comment 31 (2004), ¶¶15 and 18. Also General Comments 7 (1982) and 20 (1992). UNCAT, articles 12 and 13. Human Rights Committee, General Comment 20 (1992), ¶ 13. UNCAT, articles 1 and 4. Committee against Torture, General Comment 2 (2008), ¶26.

¹⁵⁰ Human Rights Committee, General Comment no. 20 (1992), para. 13. UNCAT, articles 1 and 4. Committee against Torture, General Comment no. 2 (2008), para. 26.

¹⁵¹ General Comment no. 31 para. 18.

¹⁵² See e.g. UNCAT articles 5-7, 9.

¹⁵³ See USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', 4 December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>

¹⁵⁴ USA: Law and executive disorder: President gives green light to secret detention program, AI Index: AMR 51/135/2007, August 2007, <http://web.amnesty.org/library/Index/ENGAMR511352007>.

¹⁵⁵ Letter from William K. Lietzau, Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, 23 August 2011.

¹⁵⁶ Detainee Transfer Announced. US Department of Defense news release, 29 August 2013, <http://www.defense.gov/releases/release.aspx?releaseid=16235>

¹⁵⁷ Detainee Transfer Announced, US Department of Defense News Release, 29 September 2012, <http://www.defense.gov/releases/release.aspx?releaseid=15592>.

¹⁵⁸ See, Annemie Schaus, Les Conventions de Vienne sur le droit des traités. Commentaire article par article, Olivier Corten & Pierre Klein (dir.), Bruxelles, Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, article 27, p.1124 ("Le principe d'impuissance du droit interne à justifier la non exécution d'un traité, telle que contenue à l'article 27, reflète en tout état de cause le droit international coutumier"). See also, Oliver Dörr & Kirsten Schmalenbach eds., Vienna Convention on the Law of Treaties, A Commentary, Springer, 2012, p.454 "In view of long-standing State practice and case law, Art 27 codifies a rule of customary law".

¹⁵⁹ See Final Report of the Guantánamo Review Task Force, 22 January 2010, <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>

¹⁶⁰ It was not until more than three years after the Task Force issued its final report that the administration made public the list of the detainees slated for indefinite AUMF detention.

¹⁶¹ *Abdulmalik v. Obama*, Declaration by Mohammed Abdulmalik, In the US District Court for the District of Columbia, 13 October 2010.

¹⁶² President Obama's speech of 23 May 2013 at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>,

¹⁶³ See for example, US claims no indefinite detention at Guantánamo, 13 March 2013, <http://www.ipsnews.net/2013/03/u-s-claims-no-indefinite-detention-at-guantanamo/>

¹⁶⁴ DoD responds to ABA enemy combatant report, US Department of Defense News Release, 2 October 2002, <http://www.defense.gov/releases/release.aspx?releaseid=3492>

¹⁶⁵ See Inquiry into the treatment of detainees in US custody. Report of the US Senate Committee on Armed Services, 20 November 2008, notes 1100 and 1101, http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf See also, for example, Torture at Guantánamo: Lt. Col. Stuart Couch on His Refusal to Prosecute Abused Prisoner, Democracy Now, 22 February 2013, <http://m.democracynow.org/stories/13478>. Also, USA: Rendition - torture - trial? : The case of Guantánamo detainee Mohamedou Ould Slahi, 19 September 2006, <http://www.amnesty.org/en/library/info/AMR51/149/2006/en>

¹⁶⁶ Donald Rumsfeld, *Known and unknown: a memoir*. Sentinel books (2011), page 580n.

¹⁶⁷ *Ibid.*, page 580. In a claim reflecting a distorted perspective, he said that "I understood that the techniques I authorized were for use with only one key individual", Mohamed al-Qahtani, as if

authorizing torture or other ill-treatment for even one person was acceptable and lawful. He made this claim despite the fact that the memorandum he signed expressly stated that the techniques were for use “in the interrogation of detainees” (plural) and “at the discretion” of the military authorities (moreover, the request for his approval from the military expressly referenced “some detainees” having resisted “our current interrogation methods”).

¹⁶⁸ See USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/042/2008/en>; and USA: Torture acknowledged, question of accountability remains, 14 January 2009, <http://www.amnesty.org/en/library/info/AMR51/003/2009/en>

¹⁶⁹ For example, on the executive ARB process, the Bush administration said: “This process is discretionary, administrative and is not required by the Geneva Convention or by US or international law... The ARB process represents an effective way for the US Government to achieve a balance between the risk posed by these detained enemy fighters and the US Government's desire to not hold these individuals any longer than necessary. The rigor of the ARB process helps mitigate the risk that a released/transferred detainee will return to the fight and the Global War on Terror.” US Department of Defense News Release, 7 March 2007, <http://www.defense.gov/releases/release.aspx?releaseid=10582>

¹⁷⁰ Executive Order 13567 – Periodic review of individuals detained at Guantánamo Bay Naval Station pursuant to the Authorization for Use of Military Force, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava> ; Fact Sheet: New Actions on Guantánamo and Detainee Policy, 7 March 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>

¹⁷¹ Directive-Type memorandum (DTM) 12-005, ‘Implementing guidelines for periodic review of detainees held at Guantánamo Bay per Executive Order 13567’. 9 May 2012, incorporating change 1, 31 October 2012 [hereinafter DTM 12-005, 2012], <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf>, attachment 3, §5(f-g).

¹⁷² The PRB would consist of senior officials from the Departments of Defense, Homeland Security, Justice, and State, and the Offices of the Chairman of the Joint Chiefs of Staff and the Director of National Intelligence. DTM 12-005, 2012, *op. cit.*, attachment 3, §5.

¹⁷³ DTM 12-005, 2012, *op. cit.*, attachment 3, §6k(4).

¹⁷⁴ DTM 12,005, 2012, *op. cit.*, attachment 3, §6m(3).

¹⁷⁵ Remarks by the President at the National Defense University, 23 May 2013, <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

¹⁷⁶ DTM 12-005, 2012, *op. cit.*, glossary part II, and attachment 1 (b).

¹⁷⁷ Executive Order 13567, *op. cit.*, Sec. 9. Definitions. (a) ‘Law of War Detention’ means: detention authorized by the Congress under the AUMF, as informed by the laws of war.

¹⁷⁸ DTM 12-005, 2012, *op. cit.*, attachment 3, §3.

¹⁷⁹ DTM 12-005, 2012, *op. cit.*, attachment 3, §3.

¹⁸⁰ E.g., *Kiyemba v. Obama*, US Court of Appeals for the District of Columbia Circuit, 28 May 2010 (“It is for the political branches, not the courts, to determine whether a foreign country is appropriate for resettlement”; it is “within the exclusive power of the political branches to decide which aliens may, and which aliens may not, enter the United States, and on what terms”).

¹⁸¹ See ‘US cedes control, almost, on Afghan prisoners’, New York Times, 25 March 2013, <http://www.nytimes.com/2013/03/26/world/asia/us-cedes-control-almost-on-afghan->

[prisoners.html?pagewanted=all](#)

¹⁸² See USA: Government opposes habeas corpus review for any Bagram detainees; reveals 'enhanced' administrative review procedures, 16 September 2009, <http://www.amnesty.org/en/library/info/AMR51/100/2009/en>

¹⁸³ *Al Maqaleh et al v. Gates et al*, Declaration of Vice Admiral Robert S. Harward, in the US District Court for DC, 13 May 2011.

¹⁸⁴ *Al Maqaleh et al v. Gates et al*, Respondents' opposition to petitioners' motion to file supplemental materials in further support of petitioners's opposition to motion to dismiss, In the US District Court for DC, 12 August 2011.

¹⁸⁵ *Amanatullah v. Obama*, Memorandum opinion, US District Court for the District of Columbia, 15 November 2012.

¹⁸⁶ *Hamidullah v. Obama*, Brief for appellants Hamidullah and Wakeel Khan, US Court of Appeals for the DC Circuit, 26 April 2013.

¹⁸⁷ *Hamidullah v. Obama*, Memorandum opinion, US District Court for DC, 19 October 2012.

¹⁸⁸ Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>; USA: Urgent need for transparency on Bagram detentions, 6 March 2009, <http://www.amnesty.org/en/library/info/AMR51/031/2009/en> USA: Administration opts for secrecy on Bagram detainee details, 12 March 2009, <http://www.amnesty.org/en/library/info/AMR51/034/2009/en>

¹⁸⁹ "...the system of military commissions that were in place at Guantánamo succeeded in convicting a grand total of three suspected terrorists. Let me repeat that: three convictions in over seven years." Remarks by the President on national security, 21 May 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09

¹⁹⁰ USA: Trials in error: Third go at misconceived military commission experiment, 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>

¹⁹¹ See, for example, USA: One-way accountability: Guantánamo detainee pleads guilty; Details of government crimes against him remain classified top secret, 18 July 2012, <http://www.amnesty.org/en/library/info/AMR51/063/2012/en>

¹⁹² Ahmed Khalfan Ghailani, a Tanzanian national, was convicted in US District Court in New York in 2010 and sentenced to life imprisonment in January 2011.

¹⁹³ The January 2010 report did not reveal the identities of the detainees. That information was made public in June 2013, <http://media.miamiherald.com/smedia/2013/06/17/15/48/2VNPb.So.56.pdf>

¹⁹⁴ *Hamdan v. USA*, US Court of Appeals for the DC Circuit, 16 October 2012.

¹⁹⁵ Prosecutor: Court ruling cuts vision for Guantánamo war crimes trials, Miami Herald, 16 June 2013.

¹⁹⁶ See Amnesty International supplementary submission on the death penalty to UN Human Rights Committee, September 2013, <http://www.amnesty.org/en/library/info/AMR51/062/2013/en>

¹⁹⁷ Attorney General Eric Holder speaks at the US Constitution Project Awards Dinner, 15 April 2010, <http://www.justice.gov/ag/speeches/2010/ag-speech-1004152.html>

¹⁹⁸ UN Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly 1985.

¹⁹⁹ UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc CCPR/C/GG/32, 23 August 2007, para. 22.

²⁰⁰ *USA v. Khalid Sheikh Mohammad et al.*, Protective Order #1 to protect against disclosure of national

security information, Military Commission Trial Judiciary, Guantánamo Bay, Cuba, 6 December 2012.

²⁰¹ See Guantánamo judge holds first secret hearing of 9/11 trial, The Miami Herald, 20 August 2013, <http://www.miamiherald.com/2013/08/19/3573180/guantanamo-judge-holds-first-secret.html>

²⁰² Unauthenticated transcript of the motions hearing, 19 August 2013, 2.05pm to 3.55pm.

²⁰³ See also Guantánamo judge makes secret ruling on secret motion in secret hearing. Miami Herald, 11 September 2013, <http://www.miamiherald.com/2013/09/10/3618700/guantanamo-judge-makes-secret.html>

²⁰⁴ See, for example, USA: In Hostile Terrain: Human rights violation in immigration enforcement in the US Southwest, March 2012, <http://www.amnesty.org/en/library/info/AMR51/018/2012/en>, chapter 4.

²⁰⁵ Available at <http://www.justicestrategies.org/sites/default/files/ICE-287gMemo-09062007.pdf>

²⁰⁶ The Task Force Model is the component of Section 287 (g) where deputized (state or local) officers make determinations on immigration status in the field.

²⁰⁷ See ICE Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, available at: <http://www.ice.gov/news/library/factsheets/287g.htm>.

²⁰⁸ See In Hostile Terrain, *op. cit.*, chapter 4.

²⁰⁹ *Ibid.*

²¹⁰ Immigration and Customs Enforcement, Secure Communities: Activated Jurisdictions, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>, last visited 28 August 2013.

²¹¹ Homeland Security Advisory Council, "Task Force on Secure Communities Findings and Recommendations", September 2011, available at <http://big.assets.huffingtonpost.com/TaskForce.pdf>

²¹² See In Hostile Terrain, *op. cit.*, chapter 7.

²¹³ <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/triagencyletter.html>

²¹⁴ Amnesty International report, Jailed Without Justice, Immigration Detention in the USA, 2009, available at: <http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf>

²¹⁵ E. Butera, Torn apart by immigration enforcement: Parental rights and immigration detention, Women's Refugee Commission, December 2010, pp 2-3. available at <http://www.womenscommission.org/programmes/detention/parental-rights>

²¹⁶ <http://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf>

²¹⁷ The brief is at http://www.njdc.info/njdc_members/images/pdfs/amicus_brief_miller_jackson.pdf. See also USA: 'This is where I'm going to be when I die', 30 November 2011, <http://www.amnesty.org/en/library/info/AMR51/081/2011/en>

²¹⁸ States struggling with limits on life for juvenile murderers, 28 August 2013, http://blogs.findlaw.com/supreme_court/2013/08/states-struggling-with-limits-on-life-for-juvenile-murderers.html

²¹⁹ Courts split over ruling on juvenile life sentence: confusion on 2012 decision creates a legal limbo for inmates, their lawyers. Wall Street Journal, 4 September 2013.

²²⁰ See Flint teen gets life in prison without parole in first-of-its-kind juvenile sentencing hearing, 20 August 2013, http://www.mlive.com/news/flint/index.ssf/2013/08/flint_teen_gets_life_in_prison.html

²²¹ Man sentenced to life in prison for murder he committed as teen, 3 September 2013, http://www.baynews9.com/content/news/baynews9/news/article.html/content/news/articles/bn9/2013/9/3/man_sentenced_to_lif.html