“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices

Conference Notes: Recent Developments in Counterterrorism Practices, Litigation & Advocacy

To set up the advanced discussions intended for the October 1-2 meeting, these notes describe recent developments in several countries regarding counterterrorism practices, litigation and advocacy. The notes consist of summaries and excerpts of documents: litigation filings, advocacy letters, legal analyses and documentary reports. A background paper on recent developments in U.S. litigation prepared by the Human Rights Institute is also included.

The summaries and excerpts provide a quick orientation to the specific issues and cases our presenters will discuss at the meeting, while the full documents are available online as a resource for further study.

The summaries and excerpts are organized by session, in the same order we expect the meeting’s short presentations to occur.

List of Summarized and Excerpted Materials

Conference Notes: Recent Developments in Counterterrorism Practices, Litigation & Advocacy

SESSION 1: COMPARING APPROACHES TO SHARED CHALLENGES

Canada: Developments on Transfer
Case study: Maher Arar – Accountability Developments
1. “Human Rights Litigation and the ‘War on Terror’”
2. “Arar working with RCMP as it probes his overseas torture”
3. Additional Readings on Arar Accountability
Case study: Accountability for Torture in Afghan Detainee Transfers
4. Remarks of Alex Neve, AI Canada at Special Forum on the Canadian Mission in Afghanistan
5. Complaint to Military Police Complaints Commission
6. “Standard of Conduct” (Written submissions in “Matter of a public interest hearing before the Military Police Complaints Commission”)

Additional Readings on Canadian Developments
7. Abdelrazik v. Canada

United Kingdom: Commission of Inquiry on Torture and Related Litigation
8. Letter: “Inquiry into alleged UK involvement in the mistreatment of detainees held abroad,”
9. “The Case of Binyam Mohamed”
10. Al Rawi & Ors v the Security Service & Ors

SESSION 2: ACCOUNTABILITY LITIGATION OUTSIDE THE UNITED STATES

Europe: Inquiries into Complicity, Rendition and Secret Detention
11. “CIA ‘Extraordinary Rendition’ Flights, Torture and Accountability – A European Approach”
13. “Poles urged to probe CIA prison acts”

European Court of Human Rights: Barriers to Litigation and Recent Cases
14. Written Comments, Jones v. United Kingdom Mitchell & Ors. V. UK
15. Application: El-Masri v. Macedonia

SESSION 3: ROUNDTABLE DISCUSSION – CHALLENGES IN THE U.S.: LITIGATION BARRIERS, EMERGING ISSUES AND NEW STRATEGIES

Overview
16. HRI Background Paper

Executive Detention
20. “A Trial Within A Trial: Justice, Guantanamo-Style”

Accountability for Torture
21. “Counter-Counter-Terrorism Via Lawsuit: The Bivens Impasse”
22. “‘Rendition’ challenge scuttled”

Emerging Litigation Issues
25. “CUNY CLEAR – Creating Law Enforcement Accountability & Responsibility”

SESSION 4A: CHALLENGING U.S. DETENTION & TRANSFER DECISIONS THROUGH TRANSNATIONAL LITIGATION & ADVOCACY

Canada and the U.S.: Omar Khadr
26. “Comment: Canada (Prime Minister) v. Khadr, 2010 SCC 3”
27. “Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada”
28. Additional Readings on Khadr

Afghanistan and the U.S.: U.S. v. Jawad

SESSION 4B: CHALLENGING INTER-STATE COOPERATION: DETENTION BY PROXY, RENDITIONS AND DRONE KILLINGS IN PAKISTAN

Yemen: Sharif Mobley Case
31. “Re: FOIA/Privacy Act Request of Sharif Mobley”

East Africa: Secret Detention and Renditions

Pakistan: Drone Killings and Secret Detention
35. Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

Secret Detention and Torture in Pakistan
36. UN Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism
37. “Cruel Brittania: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan”
Session One: Comparing Approaches to Shared Challenges

1. “Human Rights Litigation and the ‘War on Terror’”
   Helen Duffy, International Review of the Red Cross, 90:871 (September 2008)

Journal Article: Duffy (Interrights) assesses the willingness of the judiciary, across diverse systems, to question counterterrorism measures. She describes the positive effects of human rights litigation, including: framing the issues as a matter of law, not only politics; serving as a catalyst to change law or practice; securing access to information in the face of a wall of state secrecy; and impacting practice transnationally. In the full article, Duffy traces recent litigation across countries on issues including arbitrary detention; the extraterritorial application of human rights obligations; torture; renditions; and terrorism “lists.”

Canada: Developments on Transfer

Case study: Mahur Arar – Accountability Developments

2. “Arar working with RCMP as it probes his overseas torture”
   Colin Freeze and Steven Chase, Globe and Mail (June 2010)

Media account: The article describes an investigation by Canada’s federal police into the rendition of Canadian national Maher Arar to Syria. While long believed to be complicit in Arar’s rendition, the RCMP is now gathering evidence in support of a possible prosecution of Syrian officials.

3. Additional Readings on Arar Accountability
   Review of the Findings and Recommendations Arising from the Iacobucci and O’Connor Inquiries,” Report of the Standing Committee on Public Safety and National Security (June 2009)

Case study: Accountability for Torture in Afghan Detainee Transfers

4. Remarks of Alex Neve, AI Canada at Special Forum on the Canadian Mission in Afghanistan
   Osgoode Hall Law School, York University (February 2010)

Speech: Alex Neve (Amnesty International Canada) describes the human rights community’s evolving response to revelations, beginning in 2002, that prisoners captured by Canadian forces’ in Afghanistan were tortured at the hands of U.S. personnel and the Afghan National Directorate of Security (NDS). He charts litigation efforts, political developments in Canada and changes in detainee transfer policy. Finally, he describes the Afghan transfer cases in the context of a “much wider erosion” of the effectiveness of international human rights and humanitarian law.

5. Complaint to Military Police Complaints Commission
   Paul Champ (June 2008)

Filing: This update to a complaint to Canada’s military police complaints commission challenges the military police’s failure to investigate possible crimes committed by senior Canadian officers who ordered the transfer of detainees to the custody of the Afghan secret police despite first-hand reports that previous detainees were tortured.
6. “Standard of Conduct” (Written submissions in “Matter of a public interest hearing before the Military Police Complaints Commission”)  
Amnesty International and British Columbia Civil Liberties Association (March 2010)

Filing: The brief applies international legal standards on the duty to investigate potential crimes and breaches of international law to military police charged with investigating Afghan detainee transfer abuses.

Additional Readings on Canadian Developments

7. Abdelrazik v. Canada  
Minister of Foreign Affairs (June 2009)

A Canadian federal court permitted an application for judicial review of the Canadian government’s conduct allegedly thwarting a Canadian national’s return to Canada. In 2003, Abdelrazik was detained and allegedly tortured by Sudanese officials based on the recommendation, “directly or indirectly,” of Canadian intelligence. After being released, he was put on a terrorist list and refused a passport or travel document.

United Kingdom: Commission of Inquiry on Torture and Related Litigation

8. Letter: “Inquiry into alleged UK involvement in the mistreatment of detainees held abroad,”  
AIRE Centre, Amnesty International, et al. (September 2010)

Open letter to government official: Addressing the head of the newly announced UK commission of inquiry into torture, leading UK human rights organizations describe basic human standards with which the inquiry should comply. The letter recommends particular terms of reference and measures to ensure that the inquiry provides “effective redress” for victims.

9. “The Case of Binyam Mohamed”  
Rachel Fleetwood, Interights Bulletin 16:1 (November 2010)

Legal Article: The article provides an overview of legal proceedings in the UK concerning Binyam Mohamed, a British national returned to the UK in February 2009 after having spent almost seven years in custody in Pakistan, Morocco and Guantanamo Bay. UK lawyers claimed that British intelligence sources had been involved in Mohamed’s extraordinary rendition, and sought release of documents from the UK government, i.e., statements which were used as a basis for the charges against him in the U.S. The UK government claimed that releasing the information would risk UK security and the UK’s relationship with the U.S, and the UK Secretary of State claimed “public interest immunity” to prevent their release. Early judgments ordering the government to disclose information were redacted; ultimately, in the face of significant government opposition, the redacted paragraphs were made public.

10. Al Rawi & Ors v the Security Service & Ors  
England and Wales Court of Appeal [2010] EWCA Civ 482 (May 2010)

Six former Guantanamo detainees brought claims for a range of civil wrongs, including torture, false imprisonment and misfeasance in public office. The government asked the lower court to conduct closed proceedings, claiming that hearing the case in open court would require it to vet more than 250,000 documents, which would cost millions of pounds and take up to 10 years. The lower court found it had
authority to order a “closed material procedure” in the absence of statutory authority; the Court of Appeal reversed.

Session Two: Accountability Litigation Outside the United States

Europe: Inquiries into Complicity, Rendition and Secret Detention

11. “CIA 'Extraordinary Rendition' Flights, Torture and Accountability – A European Approach”
   European Center for Constitutional and Human Rights (June 2009)

Report: The report describes freedom of information law-based work in four Eastern European countries: Albania, Macedonia, Poland and Romania. In Albania and Macedonia, freedom of information requests were filed regarding the detention, interrogation and rendition of Khaled El-Masri. Requests in Poland focused on the use of Polish airspace for transfers and the existence of secret detention facilities. Romanian authorities have declined public information requests about the use of Romanian airspace and the existence of secret facilities there, claiming it would be against public interest. The full report provides a comprehensive overview of pending criminal cases and Freedom of Information requests concerning renditions and secret detention sites in Europe.

   Adam Bodnar, Interrights Bulletin 16:1 (November 2010)

Legal article: Bodnar (Helsinki Foundation) describes the Polish government’s “strategy of denial” regarding cooperation with the CIA, secret flights over the territory of Poland and the existence of CIA secret detention sites. The Polish government has refused to cooperate with European Union and Council of Europe investigations. However, Poland’s Prosecutor General is currently investigating whether public officials committed a crime of abuse of power by allowing part of Polish territory to be under the control of a foreign state. Through Freedom of Information requests, the Helsinki Foundation has confirmed the existence of CIA flights in Polish territory; however, many agencies have refused to answer the requests, citing national security arguments. Bodnar also notes the possibility of holding the highest public officials legally responsible before Poland’s “Tribunal of State.”

13. “Poles urged to probe CIA prison acts”
   Associated Press (September 2010)

Media account: The article describes a recently filed petition—which lawyers have not made public yet—requesting that the Appellate Prosecutor in Warsaw investigate and prosecute the people responsible for Guantanamo prisoner Abd al-Rahim al-Nashiri’s transfer, detention, and torture on Polish soil. Al-Nashiri is the first victim of the CIA’s rendition program to pursue legal remedies in Poland. Polish prosecutors are reportedly considering war crimes charges against former President Aleksander Kwasniewski and two other officials in connection with the CIA prison site.

European Court of Human Rights: Barriers to Litigation and Recent Cases

14. Written Comments, Jones v. United Kingdom, Mitchell & Ors. v. UK
   Redress, Amnesty International, Interrights and Justice, App. No. 34356/06; App. No. 40528/06 (February 2010)
Intervenor Brief, European Court of Human Rights: Alleged victims of torture brought a denial of access to justice claim under Article 6 of the European Convention on Human Rights after their attempts to sue a foreign state and its officials were blocked at the domestic level (UK courts) on immunity grounds. The intervenor brief argues that neither state nor subject matter immunity justified interference with the victims’ right to a fair trial, in light of, *inter alia*, the special status of the prohibition of torture in international law (Part A) and the disproportionate impact of immunity on the victims’ ability to obtain redress (Part D).

15. **Application: El-Masri v. Macedonia**

*Open Society Justice Initiative, Application No. 39630/09, European Court of Human Rights (September 2009)*

Filing: In an application to the European Court of Human Rights, the applicant claims that Macedonia violated Article 3 of the European Convention on Human Rights when it illegally detained and transferred Khaled El-Masri to Afghanistan, where we was subjected to ill-treatment. The application notes that the Macedonian government has publicly maintained “a total denial” of complicity in El-Masri’s abuse, “while stating in private that the incident was a favour to the Americans.”

**Session 3: Roundtable Discussion – Challenges in the U.S.: Litigation Barriers, Emerging Issues and New Strategies**

**Overview**

16. **HRI Background Paper**

*Human Rights Institute (September 2010)*

Briefing Paper: To help participants prepare for the roundtable discussion on October 1, this paper provides a broad overview of recent developments in U.S. litigation challenging post-9/11 civil liberties violations and outlines some emerging issues that may be litigated in the coming months.

17. **“Establishing a New Normal: National Security, Civil Liberties and Human Rights Under the Obama Administration”**

*American Civil Liberties Union (July 2010)*

Public Report: The ACLU reviews the Obama Administration’s record on major issues related to civil liberties and national security, including transparency, torture and accountability, detention and the use of lethal force against civilians. At best, the ACLU concludes, the Administration’s record on these issues has been mixed; at worse, the ACLU suggests that “there is a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration.”

**Executive Detention**

18. **“Tackling Prisons Beyond the Law: Guantánamo Revisited”**

*Jonathan Hafetz, excerpted from [TITLE] (forthcoming in 2011) (not to be reproduced without the permission of the publisher)*
Book: In this excerpt from his forthcoming book, Hafetz provides a comprehensive analysis of the major U.S. detention cases decided since 2006 and assesses the impact of these cases on the government’s detention policy. He concludes that although habeas corpus provides a vehicle for the courts to address fundamental legal questions in individual detention cases, the scope of habeas review and its impact on detention policy is potentially quite limited.

*Human Rights First and the Constitution Project (June 2010)*

Report: In a report endorsed by numerous formal federal judges, Human Rights First and the Constitution Project review the D.C. federal courts’ jurisprudence following *Boumediene*. They conclude that the courts are steadily developing a “coherent and rational jurisprudence” on habeas corpus, and there is therefore no need for Congress to intervene to establish a new legal standard for executive detention or to prescribe new procedural rules to govern litigation of habeas cases.

20. “A Trial Within A Trial: Justice, Guantanamo-Style”
*Andrea Prasow, JURIST-Forum (August 2010)*

Op-Ed: Andrea Prasow reports on the military commission proceedings for Ibrahim Al Qosi, a Sudanese man who pled guilty to the crime of providing material support for terrorism and thus became the first person that the Obama Administration has successfully prosecuted in a military commission. While the jury publicly sentenced Al Qosi to 14 years in prison, the judge, counsel, defendant and Convening Authority had already agreed on what sentence the defendant would actually serve, and further agreed that this actual sentence would not be revealed to the jury or to the public. Prasow suggests that by negotiating this secret deal, the players in Al Qosi’s case created “their own mini-justice system” to replace the broken system of the military commissions.

**Accountability for Torture**

21. “Counter-Counter-Terrorism Via Lawsuit: The Bivens Impasse”
*George D. Brown, Research Paper No. 176, Boston College Law School Legal Studies Research Paper Series (September 2009)*

Journal Article: Brown reviews the procedural obstacles confronted by victims of the “war on terror” who seek to bring lawsuits in the U.S. courts based on the *Bivens* doctrine, which permits damages actions for constitutional torts committed by federal officials. He argues that the application of the *Bivens* doctrine presents an impasse in cases concerning the war on terror because courts may not feel competent determining the appropriate balance between individual liberty and national security. In the excerpt, Brown considers the types of fact patterns likely to be found in war on terror *Bivens* suits, the serious hurdles that such suits face in moving forward, and the initial matter in which the lower courts are handling these cases.

22. “‘Rendition’ challenge scuttled”
*Lyle Denniston, SCOTUSblog (September 2010)*

Legal Article: This article discusses the recent ruling by the U.S. Court of Appeals for the Ninth Circuit in *Mohammed, et al., v. Jeppesen Dataplan, Inc.*, in which the court invoked the “state secrets” doctrine to dismiss a lawsuit filed on behalf of five victims of extraordinary rendition.
Emerging Litigation Issues

Department of Justice, et al. (Jan. 22, 2010)

Government Report: This report summarizes the findings of an interagency government task force appointed to evaluate each of the 240 individuals detained at Guantanamo at the time President Obama took office in January 2009. In the report, which was made public in May 2010, the task force recommends transferring 126 detainees home or to a third country, prosecuting 36 for crimes and holding 48 without trial under the laws of war because they are deemed to be “too dangerous to transfer but not feasible for prosecution.”


Media Account: This article describes the considerations by the Obama Administration’s legal team in developing its response to the August 2010 lawsuit, filed by the ACLU and CCR, that seeks to block the targeted killing of Anwar al-Aulaqi.

25. “CUNY CLEAR – Creating Law Enforcement Accountability & Responsibility”

Website: This website describes the “CLEAR” project recent established at CUNY School of Law, which aims to address the unmet legal needs of Muslim, Arab, South Asian and other communities in the New York City area that are particularly affected by national security and counterterrorism policies and practices.

Session Four A: Challenging U.S. Detention and Transfer Decisions Through Transnational Litigation and Advocacy

Canada and the U.S.: Omar Khadr

26. “Comment: Canada (Prime Minister) v. Khadr, 2010 SCC 3”
Audrey Macklin (forthcoming, Supreme Court Law Review)

Journal Article: Macklin describes the abuse of Guantanamo detainee Omar Khadr and litigation filed on his behalf in Canada. Through litigation, Khadr sought to compel the Canadian government to request his repatriation from Guantanamo. The Canadian Supreme Court declined to order the executive to do so, citing executive prerogative. Macklin describes the Canadian Supreme Court’s analysis as similar but distinct from the U.S. political question doctrine. Canadian and UK courts have performed a “prerogative two-step”: although (1) the executive is not exempt from constitutional scrutiny, (2) the courts will defer to the executive given its authority and expertise in foreign affairs. The full article argues that the Supreme Court’s analysis steers the government toward “a specious remedial option of a diplomatic note requesting the exclusion of Canadian evidence.”

27. “Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada”
Lorna McGregor, Human Rights Law Review 10:3 (September 2010)

Journal Article: Using as an example the case of Omar Khadr, a Guantanamo detainee and Canadian national
who sought his repatriation through Canadian courts, Lorna McGregor (Redress) describes the inadequacy of declaratory judgments for human rights violations. In the excerpt, she applies the international law “obligation of cessation,” i.e., the requirement that a state bring the violation to an end, to argue that Canada should formally request that information it provided to the U.S. is not used as a basis for Khadr’s continued detention. Moreover, Canada’s “duty of restitution” under international law requires it to take concrete steps “to restore the status quo ante.” The full article describes the Khadr litigation.

28. Additional Readings on Khadr
Supreme Court judgment on repatriation of Omar Khadr
Human Rights Watch-U of Toronto factum (amicus brief) in Omar Khadr

Department of Defense, Office of Military Commissions (May 2009)

Press Release: This press release describes a petition to the Supreme Court of Afghanistan filed on behalf of Mohammad Jawad, a Guantanamo detainee who was first detained at age 12. The petition challenges Jawad’s “unlawful extradition” and was filed jointly by Jawad’s Office of Military Commissions counsel and the Afghan Independent Human Rights Commission.

Session Four B: Challenging Inter-State Cooperation: Detention by Proxy, Renditions and Drone Killings in Pakistan

Yemen: Sharif Mobley Case

Peter Finn, Washington Post (September 2010)

Media account: The article describes the January 2010 kidnapping and secret detention of U.S. national Sharif Mobley in Yemen, including his interrogation by U.S. officials.

31. “Re: FOIA/Privacy Act Request of Sharif Mobley”
Cori Crider, Reprieve (July 2010)

Filing: This FOIA request to multiple U.S. agencies seeks information on their involvement’ in the January 2010 disappearance and incommunicado detention of U.S. national Sharif Mobley in Yemen. The full filing includes an affidavit describing Mobley’s abduction and detention.

East Africa: Secret Detention and Renditions

Judy Oder, INTERIGHTS Bulletin 16:1 (November 2010)

Legal Article: Oder, a lawyer at Interights, describes cases of unlawful transfer and detention in several African countries which involved interrogation by or at the behest of U.S. or UK officials. In 2007, more than 100 terror suspects were arrested in Somalia and Kenya and transferred to Ethiopia to face interrogation by
U.S. officials. There, they were subject to “secret military tribunals” and both psychological and physical abuse. The government produced some of the detainees in response to habeas applications in Kenyan courts, but defied other court orders. Oder also describes detention and transfer to Afghanistan of individuals detained in Gambia and Malawi. Finally, Oder describes the case of al-Asad, a Yemeni national detained in Tanzania and unlawfully transferred multiple times (reportedly to Afghanistan and eastern Europe) before being detained and ultimately released in Yemen. The full article describes other cases and the regional and international legal framework governing transfer and detention.

33. Additional Reading: "Kenya and Counter-terrorism: A Time for Change"
   Redress and Reprieve (February 2009)

Pakistan: Drone Killings and Secret Detention

Drone Killings

34. "Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009"

Book: The author, a law professor, argues that under *jus ad bellum* principles of necessity and proportionality, the U.S. does not have the right to resort to drone killings in Pakistan. Next, she applies core international humanitarian law principles of targeting, concluding that in western Pakistan, “using drones lawfully may be an insurmountable challenge.” The full chapter provides a history of U.S. use of drones based in part on interviews with U.S. officials. It also describes emerging ethical issues.

35. Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions
   Philip Alston, Special Rapporteur on Extrajudicial Killings, Human Rights Council, 14th Session, A/HRC/14/24/Add.6 (May 2010)

Report: Alston addresses the claim that drones’ surveillance capabilities better prevent collateral civilian casualties and injuries, arguing that “[t]he precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.” He describes interviews with witnesses and victims’ family members showing that “international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding.” He concludes that “[o]utside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal.” The full report describes publicly available information about states’ targeted killing policies and the applicable legal framework.

Secret Detention and Torture in Pakistan

36. UN Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism
   UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances (February 2010)
Report: While the “full extent of secret detention in Pakistan is not yet known,” the UN joint report describe investigations revealing the scale: the Pakistani government announced 567 documented cases of “enforced disappearances” and 2008 and a Senate Committee has acknowledged that intelligence agencies maintain “countless hidden torture cells” across the country. Reportedly, about 400 missing persons cases were pending before the Supreme Court as of 2009. The full report describes the problem secret detention in several countries and includes government responses to the joint study’s questionnaire, sent to all UN member states.

37. “Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan”
Human Rights Watch (2009)

Report: Documenting the abuse of five UK nationals of Pakistani descent in Pakistan, Human Rights Watch terms the conduct of UK officials who provided information to Pakistani authorities an “invitation to abuse.” UK officials met with the abused individuals “shortly after sessions in which the[y] had been tortured, when it was likely that clear and visible signs of torture were present.” UK officials also “supplied questions and lines of enquiry to Pakistan intelligence sources,” although they knew the individuals were being questioned and that torture is routine in Pakistan. The full report calls on the UK to take several measures, including conditioning its cooperation with Pakistani security and intelligence officials on the “end of torture, enforced disappearance, arbitrary arrests, and other illegality.”
Session One: Comparing Approaches to Shared Challenges

1. “Human Rights Litigation and the ‘War on Terror’”
   
   Canada: Developments on Transfer
   
   Case study: Maher Arar – Accountability Developments
   2. “Arar working with RCMP as it probes his overseas torture”
   Additional Readings on Arar Accountability
   
   Case study: Accountability for Torture in Afghan Detainee Transfers
   3. Remarks of Alex Neve, AI Canada at Special Forum on the Canadian Mission in Afghanistan
   4. Complaint to Military Police Complaints Commission
   5. “Standard of Conduct” (Written submissions in “Matter of a public interest hearing before the Military Police Complaints Commission”)
   
   Additional Readings on Canadian Developments
   
   United Kingdom: Commission of Inquiry on Torture and Related Litigation
   6. Letter: “Inquiry into alleged UK involvement in the mistreatment of detainees held abroad,”
   7. “The Case of Binyam Mohamed”
   8. Al Rawi & Ors v the Security Service & Ors

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
Session One: Comparing Approaches to Shared Challenges

Human Rights Litigation and the ‘War on Terror’ p. 594-597
Helen Duffy, International Review of the Red Cross, 90:871 (September 2008)

Journal Article: Duffy (Interrights) assesses the willingness of the judiciary, across diverse systems, to question counterterrorism measures. She describes the positive effects of human rights litigation, including: framing the issues as a matter of law, not only politics; serving as a catalyst to change law or practice; securing access to information in the face of a wall of state secrecy; and impacting practice transnationally. In the full article, Duffy traces recent litigation across countries on issues including arbitrary detention; the exterritorial application of human rights obligations; torture; renditions; and terrorism “lists.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
global criminal justice campaign resulting in the investigation and prosecution of high-level suspects, although undoubtedly many have been either killed or detained and interrogated without charge.

Second, the cases illustrate that the means to achieve that intelligence has involved violations of the most sacred human rights norms, notably torture and arbitrary detention.

Third, to the extent that states may not themselves have engaged in torture, there has been widespread practice of playing fast and loose with safeguards against torture that are part of the prohibition thereof and essential to give it meaningful effect. The decision by some states to challenge the basic rules on non-refoulement before the European Court of Human Rights illustrates this point.

Fourth, unprincipled distinctions have emerged recurrently. This may be between nationals and non-nationals, as illustrated by widespread justification of arbitrary detention of non-nationals. It may be between standards that officials are expected to meet at home, and those considered applicable abroad, as highlighted by the approach of certain states, and the restrictive judgment referred to on the extra-territoriality issue. Or it may be evident in a ‘hands off’ approach to torture whereby distinctions are drawn between what states themselves do, and what they facilitate or encourage at the hand of others, as noted in the case concerning torture evidence, for example.

Fifth, and most insidious perhaps, has been the move from illegality to extra-legality – the practice of removing individuals from the protection of the law altogether, epitomized by rendition and disappearance that have been the subject of various litigation initiatives.

Finally, there is the ‘creeping reach’ of measures and approaches that are originally justified exceptionally in the context of international terrorism and national security. The ‘terrorism’ and ‘national security’ labels have been relied upon to erode standards beyond those exceptional circumstances, to affect persons loosely associated with persons loosely implicated in loosely defined acts of terrorism. The result is that genuine exigencies of the global fight against international terrorism are being brought to bear as a pretext for violations far beyond the terrorism context.

The role of the courts and the impact of human rights litigation

It is clear is that in recent years, across diverse systems, there has been a burgeoning of human rights litigation. That has reinforced the critical role for the courts in human rights protection. Caution is due in trying to draw conclusions from such wide-ranging practice, addressing different issues in diverse systems. But I will offer a few tentative observations on how we might begin to think about the practice of human rights litigation in this field to date and its potential impact.

In many cases the judiciary has shown its reluctance to make determinations that may impact on security, refusing, for example, to question executive assessments of the existence of an emergency. But when particular practices
have come under scrutiny, the courts in diverse systems have often and increasingly proved themselves willing – in some cases promptly, in other cases after painstaking process and only as a matter of genuine last resort – to criticize the legitimacy, necessity or proportionality of particular measures.

While experience has been both positive and negative, I shall suggest the following ways in which litigation may have had, or in some cases may yet have, a positive effect.

First, simply taking a human rights violation to court frames the issue as a matter of law, not only of politics. As such it reasserts the principle of legality and the rule of law in the highly politicized discourse around terrorism and security. Critically, these cases indicate, to varying degrees, the existence of a check on executive action. This is seen in reminders that ‘a state of war is not a blank check for the President’ or by the willingness of courts in cases such as *Belmarsh* or *Haneef* to subject to close scrutiny the determination of what was necessary for national security. As a rebuke to the executive when it has failed in its role as primary protector of rights, this can be critical in reasserting the democratic credentials of the system, which are often lost through the illegitimacy of the conduct impugned.

Judgments have often, to quite varying degrees, been conservative and characterized by judicial deference to political branches. One may ask whether the US Supreme Court could and should have decided whether detainees have the basic right to habeas corpus when the matter first came before it in 2004. At what price in terms of judicial efficiency in the administration of justice – and protection of individuals – came the virtue of judicial restraint? But so far as jurisprudence reflects and deliberates on the thorny issue of the role of courts in determining such matters, and on the relationship between political branches and the judiciary, it may ultimately contribute to and enrich our understanding of the separation of powers and the democratic judicial function.

Second, litigation can also serve as a catalyst to change law or practice. In some cases, such as the changes in law and policy following the *Belmarsh* judgment, the causal effect is fairly clear. In others, it is difficult to tell to what extent, if at all, the irritant effect of litigation contributed to shifts in practice, such as the return of UK nationals from Guantánamo following unsuccessful litigation seeking to obligate the state to intervene on their behalf.\(^{64}\) The course of litigation often itself exposes particular policies and practices, and may lead states to clarify their own policies or articulation of them.\(^{65}\)

Judgments may themselves develop or clarify the law through jurisprudence or, as is often the case in the context of the war on terror, they may simply serve to reinforce established principles that have increasingly been cast in doubt,

---

64 Abbasi case, above note 2.
65 See, e.g., the Al-Skeini case, above note 26, in which the UK government shifted its position as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.
as in the *Saadi* judgment. The challenge in many of the cases highlighted has been to hold ground rather than to advance the protection of human rights as such, in other words to win back and keep winning gains that were made years ago, that were thought secure but rendered vulnerable in the course of the war on terror.

Sometimes courts serve as democracy alerters whereby the interplay between judicial and political branches is such that a signal from the former can be a catalyst to a more proactive approach by the latter. Persuasive judicial messages can also be sent transnationally, as seen, for example, in the unusually robust judicial rebuke of the system of Guantánamo Bay detentions by the English Court of Appeals in the *Abbasi* case.

Cases can themselves play an important role in securing access to information and in prising open facts, sometimes in face of a wall of state secrecy. Litigation may have this as its goal – such as cases in the United Kingdom pursuing access to military files, FOIA (Freedom of Information Act) litigation in the United States which has had a measure of success and Canadian litigation where the government was compelled to produce information or evidence in relation to proceedings in another state – or this may be a by-product of the process. This unearthing of information is particularly critical in areas such as rendition, characterized by a concerted cover-up. At a minimum litigation draws out government positions – as seen, for example, in the shift in positions of the UK government in the course of the *al Skeini* case – as they engage as parties and clarify or adjust their positions in the course of litigation.

Litigation of the sort referred to also opens legal systems to the cross-fertilization of ideas from other systems as international and comparative perspectives are brought to bear, notably through *amicus* interventions. Guantánamo litigation in the United States has been perhaps the most massive piece of international human rights litigation ever, if judged at least by the unprecedented level and nature of interventions before the Supreme Court.

Ultimately, the impact of litigation on human rights issues generally lies in its gradual contribution to social change. There has, for example, been a shift in
public opinion (national and international) on Guantánamo, and arguably litigation may have been an important contributor. What is undoubtedly true is that litigation has to be understood not in isolation but as one small piece of a much bigger and more complex puzzle.

Finally, and perhaps most importantly, real cases serve to tell the victims’ stories. They provide often graphic illustrations of what euphemisms such as ‘extraordinary rendition’ and ‘enhanced interrogation techniques’ mean to human beings like you or me. Judgments validate those stories and experiences. One of the essential characteristics of the ‘war on terror’ has been the attempt to put certain people beyond the reach of the law. Litigation can be a tool, as one English judge put it, not for transferring power from the executive to the judiciary, but for transferring power from the executive to the individual.72 If any particular case can bring an individual back into the legal framework, and reassert the individual as a rights-bearer and human being, then perhaps that is impact enough.

72 Dame Mary Arden has stated that ‘the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual’. (2005) 121 LQR at pp. 623–4, in A. T. H. Smith, ‘Balancing liberty and security? A legal analysis of United Kingdom anti-terrorist legislation’, European Journal on Criminal Policy and Research, 13 (2007), pp. 73–83, DOI 10.1007/s10610-007-9035-6.
“Arar Working with RCMP as it Probes his Overseas Torture”
*Colin Freeze and Steven Chase, Globe and Mail (June 2010)*

Media account: The article describes an investigation by Canada’s federal police into the rendition of Canadian national Maher Arar to Syria. While long believed to be complicit in Arar’s rendition, the RCMP is now gathering evidence in support of a possible prosecution of Syrian officials.

“Next Generation” Strategies
*Challenging Abuse in Transnational Counterterrorism Practices*
June 14, 2010

Arar working with RCMP as it probes his overseas torture

By Colin Freeze and Steven Chase
From Tuesday's Globe and Mail

As U.S. courts throw out his suit, Syrian-Canadian says he’s now co-operating with RCMP detectives probing his overseas torture

Canada's federal police, long faulted for a role in the overseas torture of Canadian Maher Arar, appear to be trying to build a criminal case against the foreign officials who orchestrated his interrogation.

Mr. Arar and his legal team revealed Monday they are co-operating with an RCMP investigation. The probe, known as Project Prism, now involves a team of four detectives said to be jet-setting around the globe to gather evidence.

Unlike past probes focusing on the actions of Canadian officials, these RCMP detectives are targeting Syrian and, to a lesser extent, American officials, according to Mr. Arar’s lawyer.

After Mr. Arar lost a civil suit against the U.S. government on Monday, Paul Champ revealed that both he and his client have lately had many fruitful conversations with the Mounties. "The RCMP investigators have really gone to great lengths to build trust," he said, adding that "we speak to the RCMP investigators almost every other week."

[http://www.democracynow.org/2010/6/15/supreme_court_torture_and_rendition_victim]

Arar speaks with Democracy Now [http://www.democracynow.org/2010/6/15/supreme_court_torture_and_rendition_victim]

Watch Video

View [http://www.democracynow.org/2010/6/15/supreme_court_torture_and_rendition_victim]
Mr. Champ said Mr. Arar was initially wary of Mountie detectives, but has developed "a very good rapport" after meeting half a dozen times at lawyers' offices in Toronto and Ottawa.

RCMP Project Prism is about four years old, but it stalled while probing Canadian officials. Now, the Mountie team has been "in discussion with American law enforcement officials," Mr. Champ said. He said the RCMP doesn't necessarily know all the identities of the specific U.S. officials they might hope to target. "The primary focus of the investigation has been Syrian officials."

Police declined comment. "The RCMP does not confirm or deny who or what may be the subject of a criminal investigation," said Sergeant Greg Cox, a spokesman. "Sorry, that is all."

Gar Pardy, a former Foreign Affairs official in Ottawa, recalls detectives coming to him with questions more than a year ago. "Quite clearly [the focus] was Canadian officials at that point," he said. He said he had no idea the probe may be turning international, but "if Arar says he had met with the RCMP, then that gives it a specificity it had never had before."

That Mr. Arar is even sitting down with the RCMP is a remarkable turnaround.

For years, the Mounties were fingered as complicit in the Syrian-Canadian's torture, and stonewalled any public investigation of the case. Police said they feared embarrassing international partners.

Eventually, a Canadian judge faulted sloppy RCMP intelligence exchanges for wrongly elevating Mr. Arar to an al-Qaeda suspect in the eyes of the Americans after the attacks of Sept. 11, 2001. But the same judge also upheld that the Mounties never signed off on any overseas interrogation.

The blame for that lies elsewhere.

In 2002, U.S. officials arrested Mr. Arar as he passed through a New York airport. He was held for two weeks and then hustled aboard a Gulfstream jet leased by the U.S. Central Intelligence Agency.

After the CIA jet landed in the Middle East, Mr. Arar spent most of the next year imprisoned in his homeland. In Syria, he was interrogated about his relationship to other Arabs also under investigation.

Upon his return to Canada, Mr. Arar professed his innocence and successfully pressed for an inquiry. Mr. Justice Dennis O'Connor found him credible and supported his claim that Syrian jailers had beaten him with two-inch-thick electric cables. Faulted for an indirect role, Ottawa officials compensated the Arar family with $10.5-million.

No other government has been censured - or paid a penny in compensation.

On Monday, the U.S. Supreme Court announced it would not revisit the landmark Arar v. Ashcroft case. Lower courts had upheld that lawmakers, and not judges, are to rein in the CIA.

Mr. Champ said his client disclosed his co-operation in the RCMP probe because he wanted it known that this "does not end his pursuit of justice and accountability."

Canada is a signatory to the United Nations conventions that technically gives police power to investigate torture as a rare type of international crime. Despite some recent successes in genocide and terrorism prosecutions, Canadian authorities have huge problems pursuing cases overseas.

Project Prism detectives have never visited Syria or the United States, sources said. However, they have gone to Lebanon as well as Italy.
Remarks of Alex Neve, AI Canada at Special Forum on the Canadian Mission in Afghanistan (Pages 1-7)
Osgoode Hall Law School, York University (February 2010)

Speech: Alex Neve (Amnesty International Canada) describes the human rights community’s evolving response to revelations, beginning in 2002, that prisoners captured by Canadian forces’ in Afghanistan were tortured at the hands of U.S. personnel and the Afghan National Directorate of Security (NDS). He charts litigation efforts, political developments in Canada and changes in detainee transfer policy. Finally, he describes the Afghan transfer cases in the context of a “much wider erosion” of the effectiveness of international human rights and humanitarian law.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
SPECIAL FORUM ON THE CANADIAN MISSION IN AFGHANISTAN
Session Theme: Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan

Date and Location: Monday, February 8, 2010, 10am – 4pm, Senate Chambers, 9th Floor Ross Building North, York University (Keele Campus)

For full details and audio/video/text transcripts of the entire day, see: http://nathanson.osgoode.yorku.ca/events/canadian-mission-in-afghanistan/

Transcript of 1st Session of the Special Forum:

10:00 am Alex Neve, Secretary General of Amnesty International (Canada), English branch

Responsibility of the Canadian State under International Law and in Canadian Law: Charter Review, Public Inquiries, and Civil Liability Lawsuits

***

ALEX NEVE SESSION (edited as of February 28, 2010)

Alex Neve: It was eight years ago, in early 2002, that the first wave of Canadian troops arrived in Afghanistan. Those 140 initial soldiers marked a deployment that would climb steadily over the months and years to come: to 750 by the spring of 2002; to the current level of around 2,800 troops. Right at the outset, there were any number of questions that arose with respect to international human rights and international humanitarian law
challenges that the Canadian Forces would encounter in the course of military operations.

One that arose quite early was how the troops would handle and deal with prisoners who would inevitably be apprehended on the battlefield. Would measures be put in place to ensure that Canadian soldiers were able and expected to fully comply with those international obligations, both during any time that prisoners were in Canadian custody and if prisoners were to be transferred in the course of, and following, the transfers as well?

It soon became apparent that Canadian Forces in Afghanistan would not keep prisoners in Canadian custody for anything longer then the initial hours following capture. Instead, we learned, in 2002, that Canadian policy and practice would be to hand prisoners over to US Forces in Afghanistan.

Amnesty International and many others were concerned. Already, in those very early days, grave problems had arisen with respect to the US approach to handling prisoners in the country. The Canadian government, to it's credit, had, from the outset of Canadian involvement in Afghanistan, acknowledged the full applicability of the Geneva conventions to the conflict. The US government, on the other hand, had refused to acknowledge being bound by the conventions.

As early as January 2002, US officials were declining to admit that the detainees were covered by Geneva Convention 3, for instance, dealing with prisoners of war, and were already labelling them to be unlawful combatants with virtually no legal status or rights.

As well, plans were already underway to make use of Guantanamo Bay as a prison camp for detainees captured in Afghanistan, and US official policy was that neither international humanitarian law, nor US constitutional and domestic law, would apply to individuals held there.

In a letter to then Minister of National Defence, Art Eggleton, we called on the Canadian government to, quote: “Instruct Canadian soldiers to refrain from turning over captured Taliban and Al Qaeda fighters to US Forces, unless and until the US government reverses it’s policy and both recognizes and fully applies all relevant provisions of the Geneva conventions and other international legal documents.”

Canadian policy did not change; US policy did not change; and concerns mounted about the US handling of Afghan detainees. Shocking reports of abuse and death emerged from the US’s Bagram Air Base in Afghanistan. Hundreds of prisoners began to arrive in Guantanamo and were subject to harsh prison conditions, which, with time, became credible, disturbing allegations about torture and ill treatment.

And prisoners held there were, of course, given no access to any legal means of
challenging their detention, nor any ability to consult with lawyers or other advocates.

As time passed, our concerns mounted. We spoke out when reports came to light that some prisoners initially captured by Canadian Forces had actually ended up at Guantanamo Bay. We repeatedly asked for transfers to be halted. We urged the government to consider other approaches to handling prisoners, including developing Canada’s own long-term detention capacity so as to ensure we were complying with our own international obligations.

Canadian policy did not change; US policy did not change... until late 2005. In November, we were informed by then Defence Minister Bill Graham that Canada would indeed end the practice of transferring prisoners into US custody. Instead, we were informed a new policy and practice would be to transfer prisoners into Afghan custody. We were told that Canada and Afghanistan were about to finalize an agreement to govern such transfers, and that is, of course, what happened. The agreement was finalized in December 2005, and, since that time, individuals captured by Canadian troops in Afghanistan have been handed over to Afghan authorities.

As soon as we were informed of the new policy, even before the December 2005 agreement had been finalized, we immediately highlighted that the human rights problems had not been resolved. We noted that torture was rampant throughout the Afghan prison system and shared a copy of numerous documents, including a lengthy Amnesty International report from 2003, that provided a comprehensive overview of a range of serious human rights concerns in Afghan prisons, certainly including widespread torture.

Between late 2005 and early 2007, we again wrote several letters to the Canadian government. It was becoming apparent that, with an increased Canadian deployment focussed on the conflict-ridden Kandahar region, the number of prisoners taken into custody by Canadian soldiers was rising. Even more alarming, it became apparent that prisoners were being handed over to Afghanistan’s notorious National Directorate of Security (NDS), an intelligence agency dating back to the era of the Soviet occupation of Afghanistan in the 1980’s.

The NDS was well known for it’s abysmal human rights record, including extensive torture. In many respects, Canada could not have chosen a worse partner for handling prisoners.

We continued to press Canada to take a different approach. We urged exploration of the possibility of working jointly with other NATO governments, collaboratively with the Afghans, to retain responsibility for the captured prisoners, but also to do so in a manner that would assist with training, capacity building, reform, and improvements in the Afghan prison system.

We were told that the December 2005 agreement provided all necessary
safeguards to protect prisoners from torture. We highlighted the many shortcomings in the agreement, particularly when it came to very weak provisions regarding access to prisons and monitoring of prisoners. But, more crucially, we stressed that the answer did not—and could not—lie in agreements and monitoring arrangements. The solution could only lie in tackling torture in the Afghan prison system, and only once the risk of torture had been eliminated would it be possible and lawful to transfer prisoners, no matter what promises, assurances, agreements, or monitoring mechanisms were in place.

By early 2007—five years of transferring prisoners in Afghanistan, some 14 months of transferring prisoners into the custody of the NDS—we felt the only course of action left was to launch legal proceedings. Therefore, joining with the BC Civil Liberties Association in February of 2007, we commenced an application for judicial review of the transfer policy in federal court and, at the same time lodged a complaint with the Military Police Complaints Commission.

I believe that the courts of those two legal proceedings is [sic] well known. With a variety of preliminary and interlocutory hearings and rulings along the way, ultimately, in March 2008, the federal court ruled that the application for judicial review could not proceed because the Charter of Rights had no application to Canadian soldiers operating outside Canada.

The Charter had been our legal avenue to raise concerns about compliance with Canada’s obligations under international treaties, such as the United Nations convention against torture. Without the Charter, there was no way to independently enforce those treaties.

The Federal Court of Appeal, despite the auspicious opportunity of hearing the appeal on December the 10th, 2008—the 60th anniversary of the Universal Declaration of Human Rights (that should have been a high water mark for human rights jurisprudence)—rather summarily agreed that the Charter did not apply; and, in May 2009, the Supreme Court declined leave to hear a further appeal.

The Military Police Complaints Commission process is, however, still underway. It has not been an easy process by any means. After more than one and a half years of trying to make headway with it’s investigations through a confidential process, the MPCC took the exceptional step of convening public hearings into the issue, citing considerable lack of cooperation from government departments as a barrier in proceeding with the investigations route.

Government lawyers turned to the courts in an effort to obtain a court ruling overturning the decision to hold public hearings. That was unsuccessful, though the court did ultimately scale back the scope of the hearings, focusing it on the specific issue of alleged military policy failure to investigate concerns about transferred prisoners being tortured.
Those hearings continue, despite the evident hostility of the government to the process and the alarming decision not to renew the mandate of the MPCC chair when his mandate expired last December, when he was in the midst of proceeding over these particular hearings. The hearings are to resume next month.

That is just the legal front. There, of course, have been a multitude of politically charged chapters to this as well. In 2007, concerns mounted rapidly that government ministers were either misleading Parliament and the public, were confused and uncertain about the issue of Afghan prisoner transfers, or were very poorly briefed, or some combination of all of that. And, in particular, there was much debate about what ministers were conveying to Parliament and the public about the precise nature and reliability of the initial December 2005 monitoring agreement.

The debacle at the time led to the resignation of then Defence Minister Gordon O’Connor. The politics of the issue erupted again in the fall of 2009, following explosive public revelations from diplomat Richard Colvin, who laid out his own findings from when he was posted in Afghanistan in 2006 and ’07, and had, amongst other duties, primary responsibility for looking into concerns about prisoners being tortured. The details of what he reported and his concerns that his reports were not taken seriously—and, worse, were, in the end, squelched—are, of course, very well known and have been at the centre of hearings carried out by the House of Commons’ Special Committee on Afghanistan this last fall.

The concerns about his reports being ignored and sidelined by senior officials, and his description of being told to stop providing such reports in writing, have led many, including Amnesty International, to call for a public inquiry to examine the entirety of Canadian law, policy, and practice with respect to the handling and treatment of prisoners in Afghanistan.

In May 2007, the monitoring agreement had been improved to, at least, provide a specific possibility for Canadian officials to conduct follow-up monitoring of prisoners after transfer. That, too, has proven inadequate, with disturbing, credible allegations of torture since, including from government monitors, such as Mr. Colvin. The allegations have proven serious enough to lead Canadian military officials to suspend transfers on a number of occasions since then, sometimes for periods of many weeks. But despite these numerous instances of concern, the government continues to refuse to reverse the policy, to terminate the arrangement with the Afghan government, or to adopt a new approach to handling prisoners.

That provides an overview—lengthy, but, believe it or not, still very abbreviated—of our involvement in this issue over the past years. Let me conclude by highlighting why we have pursued this issue so vigorously.

With the response to the September the 11th terrorist attacks, and in the context
of the conflicts in Afghanistan and Iraq, we have been gravely concerned about the multitude of ways that crucial international legal standards in the areas of human rights and humanitarian law have been undermined and violated, with governments expressly or implicitly using national security as a pretext, an excuse, or, at the very least, a backdrop for doing so.

The measures taken for handling prisoners apprehended in so-called “war on terror” conflicts, such as the war in Afghanistan, are central to these concerns, ranging all the way from how military operations have been conducted on the ground, how detention centres in the country have been run, and conditions in Guantanamo Bay halfway around the world. Numerous governments and military forces, including Canada, are implicated; the range of human rights concerns is extensive, certainly including the fundamental protection against torture and ill treatment.

We have been concerned about abuses in such situations, firstly, because the rights of the individuals directly at risk must, of course, be protected. But also, secondly, because we believe that these developments have risked a much wider erosion of the integrity and effectiveness of international human rights and humanitarian law, which are, of course, areas of law already facing numerous challenges.

In the context of these setbacks, we have pointed out, in particular, the insidious and very troubling ways that many governments—and, in particular, many western governments—have become complicit in serious human rights violations, as if complicity has become a determined strategy.

We have stressed that governments do not only carry an obligation to refrain from violating human rights directly themselves, they must also ensure that they do not aid or abet violations by other governments. We have been particularly worried that Canada, with a relatively strong global reputation for upholding international norms, not be implicated in violations of this sort. We have stressed how important it is, therefore, that Canada be at the forefront of efforts to confront and ultimately eradicate torture in Afghanistan, and that turning over prisoners to officials infamous for their use of torture fatally impairs those efforts.

We’ve also been worried that this case is symptomatic of a wider tendency on the part of governments to rely on patently unreliable promises and assurances, backed up by so-called monitoring mechanisms, as an excuse for carrying out what are otherwise obviously unlawful transfers and returns of prisoners facing a risk of torture. We also see this in the immigration context and the criminal law extradition context. These arrangements represent an end run around international norms that should be rejected by Canada, not championed and defended.

And finally, as the case has proceeded, we’ve become particularly distressed about a legal vacuum that has emerged. Under the Canadian legal system, as I mentioned earlier, international treaties ratified by and, thus, binding on Canada—such
as those dealing with civil and political rights, or protection against torture—cannot be independently enforced in Canadian courts. They can only be upheld indirectly, largely as an interpretative aid, for other Canadian laws, such as the *Charter of Rights*.

But the federal court ruling that the Charter doesn’t apply to troops outside the country raises the disturbing reality that our country’s pre-eminent human rights document cannot be used directly as a human rights tool, and is also not available as an indirect means of upholding important international human rights norms, precisely at a time when it’s application may be most necessary—in the heat and intensity of conflict, violence, and insurgency.

But a federal court’s assurance that there is no vacuum, because both Afghan laws and international laws do apply to Canadian troops in Afghanistan, offers no real comfort, given the patently weak and illusory possibility of turning to either of those legal systems for enforcement.

This legal vacuum is not only a worry for prisoners in Afghanistan; it is of wider concern. Alongside cases like the two Supreme Court of Canada judgements dealing with the case of Omar Khadr, in which the Charter was found to apply to the actions of Canadian officials operating outside of Canada, we have an incoherent and incomprehensible set of jurisprudence right now in this country when it comes to the critical question of how far Canada’s human rights protections reach.

So there’s much that has gone wrong with Canada’s approach to the handling of prisoners in Afghanistan. For eight years, through two Liberal and three Conservative governments, six different Ministers of National Defence, and three Chiefs of Defence Staff, there are numerous issues around political accountability, oversight, responsibility, and decision making; there are worrying questions about Canada’s compliance with international obligations; there are concerns about the coherence and effectiveness of Canadian law when applied extraterritorially; there are unanswered questions that Canadian soldiers and our government officials could be criminally culpable; and, more then anything, I really want to stress—and I think this gets lost so much in the politics of the debate—there is the very real worry about the safety of prisoners who are, perhaps even today, as we gather here, being transferred into NDS custody in Kandahar.

There seems nowhere left to turn for resolution. The courts have turned away from the issue. An administrative tribunal valiantly tries to grapple with it, but faces almost insurmountable obstacles. Parliamentary debates and committee hearings have become notably partisan and politicized. No international level process or body has the powers or mandate to require answers and order corrective action. In our view, there is no other option left then to convene an independent public inquiry with a mandate wide enough to look into all aspects of this issue and covering the entirety of the past eight years. Thank you.
Complaint to Military Police Complaints Commission
Paul Champ (June 2008) (p. 1, 3-7)

**Filing:** This update to a complaint to Canada’s military police complaints commission challenges the military police’s failure to investigate possible crimes committed by senior Canadian officers who ordered the transfer of detainees to the custody of the Afghan secret police despite first-hand reports that previous detainees were tortured.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
Our File No.: 2257-7147

June 12, 2008

BY COURIER

Peter A. Tinsley
Chairperson
Military Police Complaints Commission
270 Albert Street, 10th Floor
Ottawa, ON K1P 5G8

Dear Mr. Tinsley:

Re: Update of Detainee Complaint MPCC-2007-006 and Commencement of New Complaint

I act for the Applicants, Amnesty International Canada and the British Columbia Civil Liberties Association, in the above-captioned matter. This letter sets out two requests by the Applicants, which briefly are:

1. To update their complaint now pending before the MPCC (your file MPCC-2007-006); and

2. To commence a new, discrete complaint in accordance with s. 250.18 of the National Defence Act, R.S.C. 1985, c. N-5, respecting the failure of the Military Police (particularly those assigned to the National Investigation Service) to investigate the officers having command responsibility for directing the transfer of detainees to the Afghan authorities, in the face of a known risk of torture.

These requests are dealt with in turn.

Enlargement and Updating of File MPCC-2007-006

By letter of February 26, 2007, the MPCC accepted jurisdiction over the Applicants’ complaint in this matter. At the time, the Applicants’ knowledge of individual detainee transfers was highly
given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads.\(^4\)

The Court also writes of a visit by Canadian officials to an Afghan prison on November 5, 2007. In the course of an interview, a detainee told Canadian officials that “he had been held to the ground and beaten with electrical wires and a rubber hose.”\(^5\) The Court also found that, upon further investigation, the Canadian officials observed physical marks confirming the beating and “then located a large piece of braided electrical wire and a rubber hose” in exactly the location where the detainee alleged these torture implements would be found.\(^6\)

Thus the new evidence suffices to establish: (i) that detainee operations continued after the instances in 2006 which were the subject matter of the original complaint; and (ii) that the risk of torture faced by detainees upon transfer was regretably confirmed by first-hand accounts and physical evidence. The Applicants accordingly request the Chair to update and expand the scope of their original complaint, to cover detainee transfers up to the present date. Should it be argued that such a request is time-barred, the Applicants ask the Chairman to exercise his discretion under s. 250.2 of the National Defence Act to extend the time, having regard to the fact that all the evidence cited herein only became available to the Applicants less than six months ago. More importantly, these issues are serious matters of legitimate public concern, and that the public interest would be served by an expanded inquiry.

**The New Complaint – Failure to Investigate**

Amnesty International Canada and the B.C. Civil Liberties Association hereby file a new, discrete conduct complaint pursuant to section 250.18 of the National Defence Act, concerning the failure of certain members of the Military Police to investigate crimes or potential crimes committed by senior officers in command of Task Force Afghanistan, from May 3, 2007, to the present.

Specifically, members of the National Investigation Service (NIS) in Kandahar and the Task Force Provost Marshall (TFPM) have been aware that former Canadian Forces (CF) detainees were likely tortured by Afghan authorities, yet they failed to investigate whether any members of the CF should be charged for their role in facilitating these crimes. In particular, senior officers

\(^4\) *Afghan Detainees I*, para. 85. The Court record indicates that at least eight complaints of abuse were received during that period, and possibly more. The original “torture reports” by officials from the Department of Foreign Affairs can also be found on the BCCLA’s website: www.bccla.org.

\(^5\) *Afghan Detainees I*, para. 96.

\(^6\) *Afghan Detainees I*, paras. 97-98. Detainee transfers were temporary halted owing to this discovery, but as noted above, transfers were resumed again as of February 26, 2008.
occupying the position of Commander of Task Force Afghanistan ordered the transfer of detainees to the custody of the Afghan secret police during the relevant period, despite compelling first-hand reports that previous CF detainees were tortured by those authorities.

In our submission, when officers in the chain of command order a detainee to be transferred to the custody of Afghan authorities, in full knowledge that the Afghan authorities are predisposed to torture these persons, a number of possible criminal offences warrant investigation. Sections 269.1, 265, and 219 of the Criminal Code define the offences of torture, assault, and criminal negligence, respectively. Further, ss. 21-23 of the Criminal Code broaden all these offences, so that criminal culpability is not limited to the perpetrator, but also extends to those who aid or abet (s. 21), who counsel (s. 22), or who are accessories after the fact (s. 23) to the commission of the offences. By virtue of s. 130(1) of the National Defence Act, it is immaterial if these offences are committed outside Canada, and criminal culpability exists for acts committed by members of the Canadian Forces in Afghanistan. CF officers may also be criminally liable under ss. 6 and 8 of the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, which expressly apply to Canadian soldiers acting abroad. Further, a number of service offences in the National Defence Act, such as cruel or disgraceful conduct (s. 93), negligent performance of a military duty (s. 124), or conduct to the prejudice of good order and discipline (s. 129) might in some cases overlap with the Criminal Code offences.

In addition to the above, the CF are participating in an armed conflict in Afghanistan, and as such are governed by the 1949 Geneva Conventions. Parliament has chosen to incorporate these international treaties into domestic law by passing the Geneva Conventions Act. R.S.C. 1985, c. G-3. Section 3 of that Act makes it a crime to commit a “grave breach” of the Geneva Conventions. The Applicants submit that the CF role in handing over detainees to another state party, where those individuals are subsequently tortured, may violate the prohibition against inhumane treatment under Common Article 3. Such violations would constitute grave breaches under Article 147 of Schedule IV of the Geneva Conventions Act, and thus warranted a Military Police investigation of the responsible officers.

Following May 3, 2007, when Canada signed a new detainee agreement with Afghanistan that permitted Canadian officials to visit and inspect detainees in Afghan custody, a large number of highly credible allegations of torture became known to the chain of command of the Canadian Forces. The Federal Court found in Afghan Detainees I that “complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghan detention facilities between May 3, 2007 and November 5, 2007”. The Court also found that “the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan

---

7 In particular, it is evident that Common Article 3 applies to the Afghan conflict, as well as the Fourth Geneva Convention, the Geneva Convention Relative to the Protection of Civilians in Time of War, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, art. 3.

8 Afghan Detainees I, para. 85.
prisons, as recorded in independent country condition reports, including those emanating from DFAIT.\textsuperscript{9} As such, the allegations of torture were unlikely to be fabricated, and should have been taken with the utmost seriousness by officers in the chain of command.

On or about November 6, 2007, the acting Commander of Task Force Afghanistan did issue a temporary moratorium on detainee transfers. This followed a report by Canadian officials who interviewed a detainee held by the Afghan secret police (the National Directorate of Security or NDS) on November 5, 2007. This disturbing report relates in part:

[The detainee] indicated that he could not recall the [***] interrogation in any details as he was allegedly knocked unconscious early on. He alleged that during the [***] interrogation, [*] individuals held him to the ground while the other [***] beating him with electrical wires and rubber hose. He indicated a spot on the ground in the room we were interviewing in as the place where he was held down. He then pointed to a chair and stated the implements he had been struck with were underneath it. Under the chair, we found a large piece of braided electrical wire as well as a rubber hose. He then showed us a bruise (approx. 4 inches long) on his back that could possibly be the result of a blow.\textsuperscript{10}

While the Applicants were obviously relieved to learn that the Canadian Forces ceased transfers following this report, there is no reasonable explanation why the Commander did not halt transfers much sooner when earlier direct reports of torture were disclosed to Canadian officials. In short, officers in the chain of command ignored much evidence of a substantial risk of torture, and ceased detainee transfers only when confronted with evidence of the implements of torture. The use of such a high threshold is not lawful, and at the very least shows wanton or reckless disregard for the lives or safety of other persons.\textsuperscript{11}

\textsuperscript{9} Afghan Detainees I, para. 86.

\textsuperscript{10} This document forms part of the Court Record in Court File T-324-07. It can also be found in the Appeal Book filed with the Federal Court of Appeal in Court File A149-08. It is also easily accessible on the BCCLA website: [www.bccla.org/antiterrorissue/DFAIT\%20Torture\%20Reports.pdf](http://www.bccla.org/antiterrorissue/DFAIT%20Torture%20Reports.pdf) All references in brackets with an asterisk – [*] – reflect information withheld by the Attorney General of Canada under the Canada Evidence Act.

\textsuperscript{11} It should be noted that under ss. 217.1 and 219 of the Criminal Code, an officer in the chain of command who showed wanton or reckless disregard for the lives or safety of other persons while omitting to respect the following duty would have committed the offence of criminal negligence: “Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”
Had the responsible CF officers heeded the widely available public reports on torture in Afghan custody, would any of these individuals been transferred and tortured? The answer, in our submission, is no. Even if one argues that these public reports alone did not meet the standard of substantial risk of torture, the CF later received highly credible, direct, first-hand reports from Canadian officials that indicated former CF detainees were likely being tortured. The responsible CF officers nevertheless continued to order the transfer of detainees, despite the overwhelming evidence those individuals faced a serious risk of torture in Afghan custody.

The Applicants believe this conduct merited investigation by the NIS for the range of offences cited above. Certainly the NIS officers in Kandahar and the Task Force Provost Marshall (all of whom are Military Police) should have investigated the officers in the chain of command who failed to intervene at an earlier stage to halt detainee transfers. It is thought that the Commander of Task Force Afghanistan, who decides on a case by case basis to approve detainee transfers, and the Task Force Provost Marshall, who arranges individual detainee transfers, play especially pivotal roles in the chain of command, although other officers above or below them could as well.12 Yet there seems to be no evidence that the NIS or the TFPM investigated any officer. The fact that the TFPM was likely involved in these suspect transfer decisions may have been a factor in the reluctance of other Military Police to investigate the matter, particularly given that that the NIS officers in Kandahar report to the TFPM as part of the policing chain of command.

Based on all the foregoing, the Applicants request the Chair to initiate this new complaint in respect of the NIS’s failure to conduct investigations regarding the acts and potential offences described herein, for the timeframe of May 3, 2007 to the present.

The Applicants further request that this complaint be referred directly to a public hearing pursuant to s. 250.38 of the National Defence Act, in view of the serious nature of the allegations, the significant public interest in the subject matter, and the fact that the Commission has already encountered difficulties obtaining information on related issues in complaint file number MPCC-2007-006. To the extent it is expedient to do so, the Applicants also request that the two complaints be heard together given the overlap in factual and legal issues.

To conclude, the public importance and urgency of this matter cannot be over-emphasized. The Federal Court ruled in Afghan Detainees II that individuals held by the Canadian Forces in Afghanistan are not protected by the Canadian Charter of Rights and Freedoms. However, the Court stated that Canadian law did offer indirect protection to detainees because CF members could be prosecuted for their actions.13 This limited protection may be illusory if there is no

---

12 See the Affidavit of Major Jeffrey Allan Harvey, dated May 16, 2008, in Federal Court file T-581-08.

13 Afghan Detainees II, supra, para. 344. The Court also ominously warns at para. 345 that Canadian soldiers could be prosecuted by the International Criminal Court.
realistic chance that CF members will be investigated for their knowledge of or role in the torture of detainees by Afghan authorities. In the present case, there is clear evidence that, for at least eight individuals, the chain of custody which started with the Canadian Forces ended in torture. This is surely a matter that warranted investigation by the Military Police. For the same reasons, the failure of the NIS and TFPM to investigate is a matter that demands scrutiny by the MPCC

All of which is respectfully submitted.

Yours truly,

Paul Champ

c: General Rick J. Hillier, Chief of Defence Staff for the Canadian Forces
   Alex Neve, Secretary General, Amnesty International Canada
   Rob Holmes, President, B.C. Civil Liberties Association
Session One: Comparing Approaches to Shared Challenges

“Standard of Conduct” (Written submissions in “Matter of a public interest hearing before the Military Police Complaints Commission”) (p. 1, 5-12)
Amnesty International and British Columbia Civil Liberties Association (March 2010)

Filing: The brief applies international legal standards on the duty to investigate potential crimes and breaches of international law to military police charged with investigating Afghan detainee transfer abuses.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
IN THE MATTER OF a public interest hearing before the Military Police Complaints Commission, pursuant to section 250.38 of the National Defence Act, R.S.C. 1985, c. N-5

STANDARD OF CONDUCT

WRITTEN SUBMISSIONS BY AMNESTY INTERNATIONAL CANADA AND B.C. CIVIL LIBERITES ASSOCIATION

INTRODUCTION

1. The Commission has been asked to issue a preliminary ruling regarding the standards of conduct against which the subjects of the herein complaint shall be measured. Amnesty International Canada and the B.C. Civil Liberties Association ("Complainants") submit that such a ruling on a preliminary basis is not necessary at law. Nevertheless, the Complainants take this opportunity to put forward their views on the legal standards surrounding the duty to investigate potential crimes and breaches of international law. Further, the Complainants make submissions with respect to the legal duty and test regarding the transfer of individuals to the substantial risk of torture.

2. The submissions that follow do not depart substantially from those of the Department of Justice. On the main issue, we are in essential agreement that the subjects should be judged on the basis of how a reasonable Military Police officer would act in the circumstances. However, the Complainants expand
standard of conduct to be applied and the sources relevant to its application at a
general and conceptual level.

**DUTY TO INVESTIGATE CRIMES AND BREACHES OF INTERNATIONAL
LAW**

(i) The Duty of MPs to Investigate Crimes

11. The duty of MPs to investigate crimes stems from their critical role in
providing law enforcement services within the Canadian armed forces.\(^{12}\) MP
Doctrine specifically indicates that MPs are expected to investigate allegations
not only of grave breaches of the *Geneva Conventions*, such as torture,
inhumane treatment of persons, and mistreatment of prisoners of war, but also
allegations of other breaches of the *Geneva Conventions*.\(^{13}\) MP Doctrine
moreover specifies that MPs may be required to investigate “allegations involving
violations of the rules of engagement, laws of armed conflict or international
law”.\(^{14}\)

12. In the context of the operation in Afghanistan, the MPCC has previously
found that the most immediate source of the duty of MPs to investigate crimes is
the Military Police Technical Directive for the MPs deployed to Kandahar with the
Task Force Afghanistan,\(^{15}\) which emphasises that MPs are expected to
investigate allegations of crimes and breaches of international law while
deployed.\(^{16}\)

---

\(^{12}\) See Final Report following a public interest investigation pursuant to section 250.38 of the
National Defence Act of a Complaint submitted by Dr. Amir Attaran concerning the Conduct of the
Task Force Afghanistan Military Police (Roto 1) at Kandahar Air Field in Kandahar, Afghanistan,

\(^{13}\) Military Police Doctrine, B-GL-362-001/FP-001, at Ch. 6, Sec. 4, para. 38 (“MP Doctrine”).

\(^{14}\) *Ibid.*, at Ch. 6, Sec. 4, para. 39.


\(^{16}\) Final report on Attaran Complaint, paras 77-81.
13. There is little specific guidance either in military law or doctrine on the threshold at which the duty of MPs to investigate crimes is triggered. One indication of this threshold can be drawn from s. 156 of the *National Defence Act*, which provides MPs with the authority to arrest other members of the Canadian armed forces, irrespective of rank, for service offences. This section provides the authority for such an arrest when there are “reasonable grounds” to believe that a person is about to commit or has committed a service offence. Clearly, the duty to investigate may be triggered in the presence of reasonable grounds to believe that a service offence has been committed. Given that the power to arrest likely involves a higher threshold than the one applicable for the duty to investigate, the Complainants submit that something less than reasonable grounds may be necessary to trigger the latter duty.

14. The provisions in the MP Doctrine on the other duties of MPs may also assist in interpreting the extent of the duty to investigate. MP Doctrine provides that MPs play a critical role in preventing crimes and refers in this regard to actions taken in the light of or in relation to “criminal opportunities” (para. 21) and “the criminal threat” (para. 25). As such, the threshold of the duty to investigate may be lowered in situations where there is a risk that a particular offence may be repeatedly committed in light of the duty of MPs to prevent crime.

(ii) The Duty of Police Officers to Investigate Crimes

15. The duty of civilian police officers to investigate crimes may be of relevance to defining the nature and extent of the duty of MPs to investigate crimes. Recourse to the law and policy relating to civilian police officers is all the more appropriate as MPs are designated as peace officers pursuant to s. 2 of the *Criminal Code*.

16. At common law, police officers are recognized as being charged with the duties to enforce the law and to protect the life and property of individuals,
including through the investigation and prevention of crime.\textsuperscript{17} In discharging their duties under the law of negligence, police officers are held to a standard of the reasonable police officer. In this regard, the Supreme Court has held that “[p]olice meet a standard of reasonableness by merely doing what a reasonable police officer would do in the same circumstances — by living up to accepted standards of professional conduct to the extent that it is reasonable to expect in given circumstances.”\textsuperscript{18}

17. In the specific circumstances of this complaint, the common law of negligence may be particularly appropriate for interpreting the duty of MPs to investigate crimes. The relationship between MPs and detainees is analogous to those relationships where a duty of care has been found to exist for soldiers, \textit{i.e.} when a prisoner is in their custody,\textsuperscript{19} or police officers, \textit{i.e.} when there is a foreseeable risk of a crime being committed against persons belonging to a particular class of victims.\textsuperscript{20}

18. Another source of guidance for the extent of the duty to investigate crimes may be taken from the threshold test for the exercise of police powers of search and seizure. In \textit{R. v. Brown}, the Supreme Court held that the threshold for the exercise of the police power to conduct searches in fulfilment of their general duty to investigate crime was not one of “reasonable suspicion,” but one of “reasonable and probable grounds.”\textsuperscript{21} However, the threshold for investigating crimes must necessarily be lower than the threshold for search and seizure as it does not infringe on the right to privacy.


19. These different authorities thus support the notion that civilian police officers have a duty to investigate crimes and that this duty may be triggered by the reasonable suspicion that a crime has been committed. In assessing whether a police officer has effectively discharged this duty, the conduct of a police officer during an investigation should be measured against the standard of how a reasonable police officer in like circumstances would have acted.

20. In addition to the above Canadian authorities, there are a number of international sources that can provide guidance in interpreting the duty of police officers to investigate crimes.

21. The *U.N. Code of Conduct for Law Enforcement Officials*, UNGA Resolution 34/169, 17 December 1979 sets out the general duties and responsibilities incumbent on law enforcement officials. Articles 1 and 2 express in no uncertain terms the responsibility of law enforcement officials to protect persons against illegal acts and uphold their human rights:

   1. Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

   2. In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

22. Article 5 moreover provides that law enforcement officials should abstain not only from inflicting or instigating torture, but also from tolerating acts of torture. These provisions thus support the notion that the duty to investigate crimes is a broad one, especially in situations involving the human dignity of individuals and acts of torture.
(iii) Standards of Conduct Applicable to the Investigation of Torture, International Crimes and other Serious Human Rights Violations in International Law and Policy

23. International human rights law and policy also informs the nature and extent of the duty of MPs to investigate crimes. A number of international human rights conventions to which Canada is a party reinforce the importance of the duty to investigate serious human rights violations. The duty to investigate stems first and foremost from the general obligation to provide victims of human rights violations with an effective remedy, as set out in art. 2 of the International Covenant on Civil and Political Rights for instance.

24. The importance of the duty to investigate a human rights violation is further underscored by the fact that the failure to properly investigate constitutes a further human rights violation. The United Nations Human Rights Committee has emphasized the importance of the duty to investigate for the enjoyment and protection of human rights as a whole:

   The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by Article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.22

25. The IACtHR has likewise held that:

The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.23

26. Finally, in interpreting the notion of an “effective remedy” for a human rights violation, the ECtHR has held that state parties are required to undertake a “thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the complainant to the investigatory procedure.”24

27. The obligation to investigate a human rights violation is strongest in cases involving the most serious human rights abuses, such as torture or cruel, inhuman or degrading treatment. The Torture Convention thus specifically imposes upon state Parties the obligations to “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction” (art. 12) and to “ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities” (art. 13). The ECHR has also held when confronted with “credible assertions” of torture, the general duty to secure human rights requires that there should be “an effective official investigation.”25

28. Of particular relevance to the investigation of torture are the Principles on the Effective Investigation and Documentation of Torture and Other Cruel,

25 Sadık Önder v. Turkey, ECHR Application no. 28520/95, Judgement, 8 January 2004, at para. 43.
Inhuman or Degrading Treatment or Punishment The Commission on Human Rights ("Principles on the Investigation of Torture"). The Principles on the Investigation of Torture were recommended by the U.N. General Assembly in UNGA resolution 5/89 on 4 December 2000 as a useful tool in efforts to combat torture. Paragraph 2 of the Principles on the Investigation of Torture provides as follows:

States shall ensure that complaints and reports of torture or ill-treatment shall be promptly and effectively investigated. **Even in the absence of an express complaint, an investigation should be undertaken if there are other indications that torture or ill-treatment might have occurred.**

29. These sources thus provide support for the principle that the duty to investigate is triggered by the existence of a reasonable grounds for believing that torture has been committed, including credible assertions of torture and indications that torture might have occurred.

30. International sources also provide guidance on the manner in which the duty to investigate must be discharged. The IACtHR has held that the duty to investigate serious human rights violations must be undertaken seriously and in good faith:

In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. **The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective.** An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation.26

---

31. These different sources emphasize the various features that an investigation of a human rights violation must possess in order to discharge the duty to investigate, including that it be undertaken seriously and in good faith, with sufficient independence and impartiality, promptly and expeditiously, in a public or consultative manner, and in a manner capable of actually establishing the truth.

THE PROHIBITION AGAINST TRANSFERS TO THE RISK OF TORTURE

32. We set forth below our submissions on the standards of conduct applicable to the transfer of detainees where there is a risk of torture. The following is intended to follow a general introduction setting forth

I. The Absolute Prohibition Against the Use of Torture

33. The prohibition against the use of torture is clear and well-established by domestic and international law. The Universal Declaration of Human Rights first articulated this universal prohibition over six decades ago, in the aftermath of the atrocities of World War II. Article 5 of the Universal Declaration states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”27 This principle of customary law was codified as treaty obligations through Articles 7 and 10(1) of the International Covenant on Civil and Political

Letter: “Inquiry into Alleged UK Involvement in the Mistreatment of Detainees Held Abroad
AIRE Center, Amnesty International, et al. (September 2010)

Open letter to government official: Addressing the head of the newly announced UK commission of inquiry into torture, leading UK human rights organizations describe basic human standards with which the inquiry should comply. The letter recommends particular terms of reference and particular measures to ensure the inquiry provides “effective redress” for victims.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
The Rt. Hon. Sir Peter Gibson  
c/o Ripley Building  
26 Whitehall  
London  
SW1A 2WH  
United Kingdom  

08 September 2010

Re: Inquiry into alleged UK involvement in the mistreatment of detainees held abroad

Dear Sir Peter,

Following the announcement by Prime Minister David Cameron on 6 July of an inquiry into allegations of UK involvement in the mistreatment of detainees held abroad, the AIRE Centre, Amnesty International, British Irish RIGHTS WATCH, Cageprisoners, Justice, Liberty, Redress, Reprieve, and the Medical Foundation for the Care of Victims of Torture, write to offer a number of constructive comments to ensure the success of the inquiry.

A sufficiently empowered and transparent inquiry could discharge the United Kingdom’s duty to effectively investigate damaging allegations of knowledge and/or involvement by state actors or agents in the torture, ill-treatment or rendition of individuals that have arisen in the last decade. Such an inquiry could also play an important role in clarifying how involvement in torture, ill-treatment or rendition might be prevented in the future.

It is incumbent on governments to promptly and effectively investigate all allegations of torture and other related human rights abuses. In order to comply with basic human rights standards, it is essential that the inquiry be:

1) **Prompt.** The earliest events that this inquiry must consider occurred at least a decade ago. Delay has increased the damage caused by allegations of involvement in torture and ill-treatment and has already reduced the potential for the inquiry to uncover the truth.

2) **Independent.** The persons responsible for and carrying out the inquiry must be fully independent of any institution, agency or person who may be the subject of, or are otherwise involved in, the inquiry. Where allegations of involvement in torture and ill-treatment have been made, an independent response is particularly important in order to preserve confidence in the administration of justice.
(3) **Thorough.** The inquiry must be sufficiently empowered, staffed, and resourced to be thorough, wide-ranging and rigorous. It must be able to pronounce on state responsibility for knowledge and involvement in the serious human rights violations that have been alleged and to identify any individuals responsible for such abuses, including establishing the responsibility of superior officers for crimes committed by subordinates under their effective control. The inquiry must be capable of determining whether any conduct was unlawful and thus must be empowered to: secure all relevant evidence and testimony; interview victims and their families; question any eye witnesses; take statements of any officials alleged to have been involved in violations; secure appropriate medical reports; and consider any evidence which implicates any public officials or agents of the state.

(4) **Subject to public scrutiny, with the participation of victims.** The inquiry must be open to adequate public scrutiny. Survivors or victims must be involved in the process to ensure their right to effective investigation and redress, and special measures must be adopted to ensure this participation is supportive, safe and effective; non-governmental organizations have an important role to play in this regard. The participation of survivors, victims and civil society ensures the adherence of the inquiry to the rule of law, prevents any appearance of collusion in or tolerance of illegal acts, and helps safeguard victims' rights to an effective remedy and reparations.

It is fundamental to the legality, credibility and utility of the inquiry that it complies with the United Kingdom's international human rights obligations, including standards arising from the Convention against Torture, the European Convention on Human Rights, and the common law.

**Terms of reference**

The terms of reference of the inquiry must permit the consideration of the full range of alleged abuses. To that end, we propose the following terms:

“(...) The inquiry shall be empowered to inquire into knowledge of and involvement in the unlawful rendition of individuals, and torture and other cruel, inhuman or degrading treatment of detainees held abroad, by any UK state actors and agents, including corporate bodies, in the lead up to the 11 September 2001 attacks in the USA and subsequent to them. The inquiry shall examine both policy and practice, and make recommendations.”

The development of satisfactory terms of reference - in consultation with the survivors and victims of abuses, their representatives, and interested non-governmental organizations - is essential to ensure that the inquiry provides effective redress for all victims of the alleged abusive practices, identifies the policies that gave rise to them, and suggests appropriate reforms.

**Conduct of the inquiry**

The UK government has noted a variety of reasons for establishing a forensic inquiry - the reputational damage to the country and the security services caused by the allegations; the desire on the part of the security services to establish their integrity; the resource burden on the security services in lengthy court cases; exploitation of the allegations by extremists for propaganda purposes; and the need to systematically get to the truth and ensure that such abuses will not happen again. Our organizations would add to this list the requirement of effective redress for any victims of these alleged abuses and the need to hold accountable those responsible for serious human rights violations.

In order for the inquiry to fulfil its purposes, we recommend the following:

(1) The inquiry must appoint a strong legal team with sufficient expertise to deal with the range of human rights, intelligence, and secrecy issues that it is likely to face;
(2) The presumption must be that each stage of the inquiry will be public, with as much evidence as possible to be heard and considered in public;

(3) The inquiry must ensure that survivors and victims have standing as parties to the inquiry and have a right to legal representation funded by the inquiry. Survivors, victims and their representatives must be kept informed of all information relevant to the investigation and have access to hearings and the ability to make submissions;

(4) Other interested parties, including the intelligence services, must also have standing and the right to legal representation funded by the inquiry. They and their representatives must be kept informed of all information relevant to the investigation; and have access to hearings and the ability to make submissions;

(5) The inquiry must require that all relevant documents be disclosed to the inquiry by the government; the head of the inquiry must have the power to decide whether or not to make such documents public;

(6) The inquiry must aim to achieve maximum possible disclosure. Any determination that certain information should be kept confidential, including on the grounds of national security, should be made applying limited and precisely defined grounds that are specified in advance; an independent mechanism should be developed to ensure that any decision by the inquiry panel to withhold such information is in the public interest;

(7) The inquiry must ensure that any invocation of secrecy or confidentiality on the part of the government, its agents, or the inquiry does not: prevent an independent, impartial, and thorough investigation of alleged human rights violations; prevent the government and individual perpetrators from being held accountable; prevent a victim from receiving an effective remedy, including reparation; or prevent full and public disclosure of the truth;

(8) The inquiry must be empowered to require the production of evidence, subject to ordinary rules of admissibility, and must also be able to require a person to attend the inquiry to give evidence or to provide a written statement. It must be an offence for a person to fail to do anything that is required of him or her regarding the production of evidence. It must be an offence to do anything to distort or alter evidence provided to the inquiry;

(9) The inquiry panel must request the cooperation of agents and officials of foreign states who can provide relevant evidence, and that the government should support such requests;

(10) The inquiry panel should be empowered to enforce cooperation from corporations doing business in the UK who are alleged to have had knowledge of or been involved in any abuses that are the subject of the inquiry;

(11) It is imperative that the inquiry report be published, and that any redactions for national security reasons be agreed by the inquiry panel and be subject to review by a court. The inquiry must be empowered to not only establish particular facts, practices and policies, but should also consider the adequacy of measures in place to prevent the occurrence of any wrongdoing in the future. The final report must be made public and should at a minimum include the conclusions and recommendations based on findings of fact and applicable law, in sufficient detail to satisfy the requirement of full and public disclosure of the truth about UK responsibility for the human rights violations in question.

Involvement of Non-Governmental Organizations

The direct participation of civil society is imperative for the proper conduct of this inquiry.

First, the allegations of UK involvement in illegal conduct are wide ranging in time and nature. Various NGOs have been at the forefront of establishing such patterns of conduct, and are in a position to assist the inquiry in designing its scope and in pursuing certain lines of inquiry.
Second, the participation of survivors and victims, which is a requisite component of an effective, human rights-compliant investigation, is complicated in many instances. For example, some who might have substantial evidence of great relevance to the terms of the inquiry remain in illegal detention in Guantanamo Bay and elsewhere. It is important that their voices should be heard.

Third, the credibility of this inquiry rests on the extent to which it properly engages with public concerns about these most serious allegations. Allowing for close NGO scrutiny will ensure that the inquiry is seen to be robust and fair.

NGOs should have the opportunity to be present throughout the inquiry, including representation by counsel, and have the opportunity to make submissions regarding any aspect of the inquiry.

We believe that a human rights compliant inquiry that provides full victim and NGO participation by implementing the above modest suggestions has every prospect of success, and encourage the inquiry’s engagement with the victims, their representatives, and the broader NGO sector.

Yours sincerely

The AIRE Centre

Amnesty International

British Irish Rights Watch

Cageprisoners

Justice

Liberty

The Medical Foundation for the Care of Victims of Torture

Redress

Reprieve

cc:

The Rt. Hon. Dame Janet Paraskeva
The Rt. Hon. Peter Riddell
The Rt. Hon. David Cameron, Prime Minister
The Rt. Hon. Nick Clegg, Deputy Prime Minister
The Rt. Hon. Baroness Neville-Jones
Sir Gus O’Donnell
Sir Peter Ricketts
Session One: Comparing Approaches to Shared Challenges

The Case of Binyam Mohamed p.42-43
Rachel Fleetwood, Interights Bulletin 16:1 (November 2010) [Excerpt] [Full Text]
Legal Article: The article provides an overview of legal proceedings in the UK concerning Binyam Mohamed, a British national returned to the UK in February 2009 after having spent almost seven years in custody in Pakistan, Morocco and Guantanamo Bay. UK lawyers claimed that British intelligence sources had been involved in Mohamed’s extraordinary rendition, and sought release of documents from the UK government, i.e., statements which were used as a basis for the charges against him in the U.S. The UK government claimed that releasing the information would risk UK security and the UK’s relationship with the U.S, and the UK Secretary of State claimed “public interest immunity” to prevent their release. Early judgments ordering the government to disclose information were redacted; ultimately, in the face of significant government opposition, the redacted paragraphs were made public.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
The Case of Binyam Mohamed

Binyam Mohamed, a British national born in Ethiopia, returned to the United Kingdom on 23 February 2009 after having spent almost seven years in custody in Pakistan, Morocco and Guantánamo Bay in Cuba having been suspected of terrorism offences.

Legal challenges surrounding the circumstances of his case are continuing in both the courts of England and Wales, and in the USA.

In the former, an on-going case before the High Court and the Court of Appeal has been focused on the disclosure of evidence contained in documents held by the UK Government which it claimed it could not release for reasons of risking national security and damaging relations with the USA.

Cases in the USA have been focused predominantly on two different areas: the first a habeas corpus claim challenging the legality of Mohamed’s detention, the second a civil claim against a subsidiary of Boeing, Jeppesen Dataplan Inc, which allegedly arranged the rendition flights which took Mohamed, and others, to Guantánamo Bay.

These cases reveal the challenges and complexities of the different approaches which aim to seek legal redress for violations resulting from the practice of extraordinary rendition.

Background

Binyam Mohamed was arrested in Karachi, Pakistan in April 2002, after he attempted to use a false passport to get on a flight back to London.

After a three month detention in a Pakistani prison, in July 2002 he was flown to Morocco, and whilst there was questioned regarding information that he claims could only have come from British intelligence sources. Documents submitted in the High Court hearings in the UK show that an officer from MI5, the British intelligence agency, visited Morocco three times but no detailed information on these visits is available.

Mohamed’s testimony details that during his time in detention in Morocco, he was subjected to torture by his captors, including having his genitals cut with a razor blade. Mohamed was then transferred onto Kabul, Afghanistan in January 2004 and then to Guantánamo Bay, Cuba in September 2004.

In August 2007 the UK Government began to request that Mohamed was returned to the UK.

In May 2008 Mohamed was charged in the USA with offences of conspiracy and allegations of involvement with al Qaida to commit offences relating to terrorism. These charges were triable by a Military Commission established for the purpose. However, the charges were dropped on 21 October 2008, possibly due to the identification of procedural problems with the Military Commission process. The Chief Prosecutor at Guantánamo has reserved the right to re-charge and it is therefore possible that Mohamed may be called to face trial before a Military Commission in the future.

Disclosure of Evidence and the Secretary of State for Foreign and Commonwealth Affairs

Judicial review proceedings were initiated in the High Court (Queen’s Bench Division) in England and Wales by Reprieve, a charity working to enforce the human rights of prisoners, on behalf of Mohamed, in relation to the claim that British intelligence sources had been involved in his extraordinary rendition.

Mohamed sought the release of documents from the UK Government relating to his case. The evidence in these documents is thought to have been statements which were used as the basis for the charges against him. He alleges he was tortured during the time the statements were taken and that accordingly the evidence is inadmissible and he could not be tried using it.

The UK Government continued to restrict access to such documents by trying to limit disclosure claiming a risk to transatlantic relations and possible harm to national security.

This matter has now been the subject of six judgments from the High Court and two judgments from the Court of Appeal.

The first and second judgments, in August 2008, ordered that the UK Government had a duty to disclose 42 documents to Mohamed and his legal team. Parts of these judgments were redacted.

The Secretary of State for Foreign and Commonwealth Affairs (‘the Secretary of State’) claimed public interest immunity to prevent the release of the documents. The USA Government subsequently disclosed redacted versions of seven of the documents, and following a third judgment from the High Court on 22 October 2008, the remainder of the 42 documents were disclosed.

The Court sought advice from the parties as to whether the media should be invited to comment on the matter, due to its significance to the rule of law, an unusual step which led to much media coverage of the issue in UK newspapers.

Rachel Fleetwood
The fourth judgment on 4 February 2009 followed the subsequent press requests for disclosure of information and held that evidence containing information relating to Mohamed’s treatment should continue to be redacted:

*In short, whatever views may be held as to the continuing threat made by the Government of the United States to prevent a short summary of the treatment of BM being put into the public domain by this court, it would not, in all the circumstances we have set out and in the light of the action taken, be in the public interest to expose the United Kingdom to what the Foreign Secretary still considers to be the real risk of the loss of intelligence so vital to the safety of our day to day life.*

Following the judgment, the Secretary of State made a statement to the House of Commons denying the threat:

*It therefore was and remains my judgment that the disclosure of the intelligence documents at issue, by order of our courts and against the wishes of the US authorities, would indeed cause real and significant damage to the national security and international relations of this country...*

For the record, the United States authorities did not threaten to “break off” intelligence co-operation with the UK. What the United States said—and it appears in the open, public documents of this case—is that disclosure of the documents by order of our courts would be “likely to result in serious damage to US national security and could harm existing intelligence information-sharing...between our two governments”.5

It had also been noted in the judgment that the change of administration in the USA had not affected the position in relation to disclosure. It subsequently transpired that no approach to the new administration had actually been made.

These factors formed the basis for Reprieve’s submission to re-open the case before the High Court heard in April 2009. In May 2009 the High Court announced it would re-open the original judgment and on 30 July 2009 the Court delivered a revised version.

On 16 October 2009 the High Court delivered the fifth judgment in the case, ordering that seven redacted paragraphs of the original judgment should be made public:

*We have therefore concluded that, as the public interest in making the paragraphs public is overwhelming, and as the risk to national security judged objectively on the evidence is not a serious one, we should restore the redacted paragraphs.*

A sixth judgment from the High Court on 19 November 2009 released details of two of the paragraphs and ordered four more from the fifth ruling to be made available.

The Secretary of State appealed against the fifth and sixth judgments. The appeal was heard in December 2009. The Foreign Office subsequently agreed to the release of three paragraphs from the judgment ‘which appear to acknowledge that Mr Mohamed was interrogated using controversial methods that have already been made public – and condemned – by the Obama administration’.

On 10 February 2010, the Court of Appeal delivered a judgment dismissing the Secretary of State’s appeal and requiring the Government to publish the seven paragraphs from the original High Court judgment of August 2008. These paragraphs relate to the treatment of Mohamed whilst in USA custody, with the final paragraph concluding that this treatment ‘could readily be contended at the very least cruel, inhuman and degrading treatment by the United States authorities’.

Welcomed by Reprieve and other human rights organisations, the full implications of this disclosure on Mohamed’s case, and on the wider issue of complicity, remain to be determined.

In a further development in the case, it transpired that the Government’s lawyer wrote a letter to the Court seeking amendments to the draft judgment to limit criticism of the security service. The judgment was subsequently altered.

Wide media coverage of the amended judgment ensued, with the Head of the Security Services taking the rare step of writing a comment piece in a daily newspaper to respond to some of this coverage, in which he defended the security services and stated that as ‘head of the security service, I know that the reason the Government appealed against the Divisional Court judgment in the Binyam Mohammed case was not to cover up supposed British collusion in mistreatment, but in order to protect the vital intelligence relationship with America and, by extension, with other countries’.

On 26 February 2010, the Court of Appeal held that, in the interests of the principles of open justice, the original paragraph from Lord Neuberger’s judgment should be published, alongside a slightly amended version which limited the reference to Mohamed’s case only. This stated that:

*at least some SyS officials appear to have a dubious record when it comes to human rights and coercive techniques, and indeed when it comes to frankness about the UK’s involvement with the mistreatment of Mr Mohamed by US officials.*

Whilst a police investigation into the behaviour of a member of the security services who visited Mohamed in detention (referred to as Witness B in the judgments) continues, and amidst calls for a wider inquiry into the alleged complicity in torture by security services, this episode exemplifies how Mohamed’s individual case has become part of much wider political and legal issues in the UK, which, it would seem likely, are not going to be quickly resolved.
Session One: Comparing Approaches to Shared Challenges

**Al Rawi & Ors v the Security Service & Ors**
*England and Wales Court of Appeal [2010] EWCA Civ 482 (May 2010) (paragraphs 1-12, 49-57)*

Six former Guantanamo detainees brought claims for a range of civil wrongs, including torture, false imprisonment and misfeasance in public office. The government asked the lower court to conduct closed proceedings, claiming that hearing the case in open court would require it to vet more than 250,000 documents, which would cost millions of pounds and take up to 10 years. The lower court found it ha authority to order a “closed material procedure” in the absence of statutory authority; the Court of Appeal reversed.

“Next Generation” Strategies
*Challenging Abuse in Transnational Counterterrorism Practices*
Lord Neuberger MR:

This is the judgment of the court, to which all members have contributed.

The issue to be resolved

1. The issue on this appeal is whether Silber J was right to conclude, as the defendants contend, that it is open to a court in England and Wales, in the absence of statutory authority, to order a closed material procedure for part (or, conceivably, even the whole) of the trial of a civil claim for damages in tort and breach of statutory duty.

2. A closed material procedure has been defined by agreement between the parties, at least for present purposes, as being:

"A procedure in which:-

(a) a party is permitted

(i) to comply with his obligations for disclosure of documents, and (ii) to rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties"
if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as 'closed material'); and

(b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and

(c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest.

For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest."

3. The "party" referred to in that definition will almost always be the Crown or some arm or emanation of the Government. A special advocate is a lawyer with rights of audience, who has been cleared by the Government to see closed material, and who is appointed by the Attorney General in a case where closed material is involved. The special advocate's role was succinctly described by Sedley LJ in Murungaru v Secretary of State for the Home Department [2008] EWCA Civ 1015, paragraph 17, as being "to test by cross-examination, evidence and argument the strength of the case for non-disclosure", and, if the case for non-disclosure is made out, "to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material". Thus, although the special advocate is engaged to protect the interests of the other party in the litigation, he or she does not actually act for, and cannot normally take instructions from, that other party.

4. The issue is raised as one of general principle. However, perhaps unsurprisingly, Ms Rose QC and Mr Fordham QC, for the claimants, and Mr Crow QC for the defendants, have relied in the course of their submissions on the facts of the instant case as an example of why the issue should be resolved in the way that they respectively contend. A very brief summary of the factual background to this appeal is therefore appropriate.

The factual background

5. The six claimants are individuals who were detained at various locations, including the United States detention facility in Guantanamo Bay. Although their claims are, of course, not identical, it is sufficient for present purposes to say that they each contend that, as a result of their respective detention and alleged mistreatment while detained, they have valid claims under at least some of the following heads, namely, false imprisonment, trespass to the person, conspiracy to injure, torture, breach of contract, negligence, misfeasance in public office, and breach of the Human Rights Act 1998. The claimants brought their claims by issuing claim forms, together with fully pleaded Particulars of Claim, in the Queen's Bench Division of the High Court. The defendants to the claims are the Security Service, the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office, and (in a representative...
6. The defendants then filed an "Open Defence", in which, while admitting that each of the claimants was detained and transferred, the defendants put in issue any mistreatment which the claimants allege, and, in any event, denied any liability in respect of any of the claimants' detention or alleged mistreatment. Paragraph 1 of the Open Defence explains that "there is material not pleaded in this Open Defence which [the defendants] wish to contend that the court should consider but which cannot be included without causing real harm to the public interest." In paragraph 3, it is stated that there is a "Defence", which "pleads more fully to the Particulars of Claim and includes material the disclosure of which the defendants consider would cause real harm to the public interest". Paragraph 3 goes on to explain that "[w]here a paragraph of the Particulars of Claim is not pleaded to in this Open Defence, it will have been the subject of pleading in the Defence" and that "some of the pleadings in this Open Defence are more fully pleaded to [sic] or qualified by statements in the Defence."

7. The Open Defence makes it clear that the defendants wish the case to proceed throughout on the basis that it includes what may be characterised as a closed element. Thus, at least on the face of it, during the period prior to trial, there would be parallel open and closed pleadings, parallel open and closed disclosure and inspection, parallel open and closed witness statements, and parallel open and closed directions hearings. Similarly, at the trial, the hearing would be in part open and in part closed, no doubt with some documents and witnesses being seen and heard in the open hearing and others in the closed hearing (and some witnesses conceivably giving evidence at both hearings). After trial, there would be a closed judgment and an open judgment, which would be in substantially the same terms save that those passages in the closed judgment which referred to or relied on closed material would be excluded from the open judgment. In relation to the open elements of the proceedings, the claimants would be represented by their solicitors and counsel in the normal way; however, in relation to the closed elements, their interests would, in effect, be protected by special advocates.

8. The claimants object to the course proposed by the defendants, contending for the normal approach in cases where the Crown or Government emanations are parties and consider that they have relevant documents in respect of which public interest immunity ("PII") might be claimed, and where the defendants could call relevant oral evidence which might not be able to be given on public interest grounds.

9. The defendants accept that the PII procedure is well established, but they contend that the course which they favour is permissible in any civil case, at least before a judge sitting without a jury, and that it may well be appropriate in this case, where there is a very substantial amount of potentially relevant material which may be subject to PII. The evidence filed on behalf of the defendants suggests that there may be as many as 250,000 potentially relevant documents, and that PII may have to be at least considered in respect of as many as 140,000 of them. It is also said by the defendants that the PII exercise may take three years before the relevant Ministers can conscientiously decide in respect of which documents PII can properly be claimed. The effort, cost, and delay involved in such an exercise, argue the defendants, may well justify a
different approach, such as that presaged by the Open Defence.

10. The issue came before Silber J, and he decided that, as a matter of principle, it was open to the
court to order a closed material procedure in relation to a civil claim for damages – [2009]
EWHC 2959 (QB). The claimants' appeal is supported by Justice and Liberty, represented by
Mr Howell QC, and by Guardian News and Media Ltd, Times Newspapers Ltd, and the BBC,
for whom Mr Vassall-Adams appears.

Summary of conclusion

11. We have concluded that we should allow this appeal, and that we should say firmly and
unambiguously that it is not open to a court in England and Wales, in the absence of statutory
power to do so or (arguably) agreement between the parties that the action should proceed on
such a basis, to order a closed material procedure in relation to the trial of an ordinary civil
claim, such as a claim for damages for tort or breach of statutory duty.

12. The primary reason for our conclusion is that, by acceding to the defendants' argument, the
court, while purportedly developing the common law, would in fact be undermining one of its
most fundamental principles. In addition, even if it would otherwise be a legitimate
development of the common law, it would be neither permissible in the light of the Civil
Procedure Rules ("CPR") nor practical, in terms of effective case management or costs
management, to adopt the defendants' proposals.

13. We propose to develop these points in turn, and then to deal with the cases on which the Judge
relied to justify the contrary conclusion. However, before doing so, it is convenient to identify
some relevant basic principles of common law, to expand a little on the well established
practice and procedure involved when PII is claimed by the Crown, and to explain the basis for
the more recent closed material procedure.

Principles which are involved in this case

14. Under the common law, a trial is conducted on the basis that each party and his lawyer, sees and
hears all the evidence and all the argument seen and heard by the court. This principle is an
aspect of the cardinal requirement that the trial process must be fair, and must be seen to be fair;
it is inherent in one of the two fundamental rules of natural justice, the right to be heard (or audi
alterem partem, the other rule being the rule against bias or nemo iudex in causa sua). As the
Privy Council said in the context of a hearing which resulted in the dismissal of a police officer,
"[i]f the right to be heard is to be a real right which is worth anything, it must carry with it a
right in the accused man to know the case which is made against him. He must know what
evidence has been given and what statements have been made affecting him; and then he must
be given a fair opportunity to correct or contradict them" - Kanda v Government of the

15. More recently, in R v Davis [2008] UKHL 36, [2008] 1 AC 1128, paragraph 5, Lord Bingham
of Cornhill traced the history of the common law "right to be confronted by one's accusers". He
explained how this right, having been abrogated during the 16th century by the Court of the Star
acceptance that the general rules about evidence and disclosure have to be modified (see e.g. CPR 76.26).

48. Again, there may be necessary exceptions where the very subject matter of the hearing is material which should, or arguably should, not be shown to the other party, as in the PII procedure itself. In such a case, it is, as a matter of inevitability, necessary to have a closed material procedure. It is not a question of desirability or convenience: the hearing simply could not occur, as a matter of inevitable logic, other than on a closed basis. In an ordinary civil claim, that is not the position. In any event, and crucially, the closed procedure would not be in connection with, let alone part of, the trial, but would be part of the disclosure process.

**Practical considerations**

49. Although we are asked to determine the preliminary issue as a matter of principle, rather than determining whether a closed material procedure could be adopted in this case, it is helpful to consider what are said by the defendants to be the potential advantages of adopting a closed material procedure. Mr Crow submits that there would be two potential advantages. The first is that, in an appropriate case, such a procedure would be more likely to achieve a fair result, because the court would be able to rely at trial on relevant material whose disclosure would, if the PII procedure was adopted, be excluded from the trial process altogether. The second advantage is said to be that, at least in cases such as the present, the PII procedure would be unmanageable in practice, and adopting a closed material procedure would be the only way of bringing the case to trial economically and expeditiously.

50. There is obvious attraction in the submission that the court should have power to order a closed material procedure hearing in a case in which it is satisfied that justice would be more likely to be served by adopting such a procedure. However, even putting to one side the objections in principle to the closed material procedure, the submission begs the important practical question as to how the court would be able to satisfy itself that adopting such a procedure would be more likely to achieve a fair result.

51. It is possible to envisage a procedure which required the court to be satisfied, after having first carried out the balancing exercise laid down in *Wiley* [1995] 1 AC 274, that:

- disclosure of certain material would result in a real risk of harm to an important public interest;
- the only alternative to excluding the material altogether would be to consider it in a closed material procedure;
- adopting a closed material procedure would better enable the court to deal justly with the case in accordance with the overriding objective, than would excluding the material.

52. When deciding whether adopting a closed material procedure would better enable it to deal justly with the case, the court would have to consider a wide range of factors, and not simply the desirability of taking account of as much relevant evidence as possible. Thus, weight would
have to be given to factors such as the significance of the material that would otherwise have to
be excluded, the extent to which the party excluded from the closed hearing would be able to
respond to the material, the degree to which the special advocate might be able to mitigate the
disadvantage to the excluded party, and the desirability of justice being seen to be done in an
open procedure. Subject to these considerations, such a closed material procedure would be
capable of providing the first of the claimed advantages; i.e. it would be more likely to achieve
a fair result.

53. However, such a closed material procedure would not avoid the need to carry out the
"unmanageable" PII exercise, and that is why it is not the closed material procedure as defined
in the preliminary issue. It is only because the closed material procedure as defined avoids the
need to carry out the PII exercise that it is said to be capable of achieving the second advantage:
making the procedure "manageable", and thereby enabling a trial within a reasonable time.

54. There is thus an inherent conflict between the two claimed advantages of the defendants'
proposed closed material procedure. If the court has to decide whether the trial is more likely to
be fair because the judge will be able to rely on relevant material which would be excluded
from the trial process altogether under the PII procedure, then the defendants' proposals would
be more expensive and time consuming, as the exercise of deciding whether to have a closed
material procedure would be an add-on to the PII procedure. If, on the other hand, the
defendants are suggesting that the closed material procedure is to be adopted without first
carrying out the PII procedure, it may be potentially less expensive and time consuming in
some cases, but it would mean that material which would not be excluded from the trial process
on a traditional PII procedure will not be disclosed to the claimants, but will be considered by
the court in closed session, which would be to the claimant's obvious disadvantage.

55. The preliminary issue is silent as to the role of the special advocate, but it raises the same
conundrum for the defendants' case. In those closed material procedures authorised by statutes
such as the 2005 Act, the special advocate's most valuable function is often at the disclosure
stage – i.e. in assisting the court in deciding whether there is any material for which PII is
claimed which should in fact be released into the open proceedings. If, under the defendants'
proposals, the special advocate's first task will be to help the court to ascertain whether PII has
properly been claimed in respect of any document, there will be no reduction in the
"unmanageable" workload, but an increase in his work and a partial shifting of the burden onto
the special advocate and the court. On the other hand, if the workload is to be reduced, because
the special advocate's duties will not include considering whether PII has properly been
claimed, then documents which would have been disclosed to the claimants on a PII procedure
will remain closed. The special advocate, unable to take a claimant's instructions, would, in
dealing with such material in a closed hearing, be a particularly poor substitute for the
claimant's own advocate in an open hearing.

56. While considering practical considerations, it is helpful to stand back and consider not merely
whether justice is being done, but whether justice is being seen to be done. If the court was to
conclude after a hearing, much of which had been in closed session, attended by the defendants,
but not the claimants or the public, that for reasons, some of which were to be found in a closed
judgment that was available to the defendants, but not the claimants or the public, that the
Al Rawi & Ors v Security Service & Ors [2010] EWCA Civ 482...

http://www.bailii.org/ew/cases/EWCA/Civ/2010/482.html

claims should be dismissed, there is a substantial risk that the defendants would not be vindicated and that justice would not be seen to have been done. The outcome would be likely to be a pyrrhic victory for the defendants, whose reputation would be damaged by such a process, but the damage to the reputation of the court would in all probability be even greater.

57. The contention that the defendants' proposed procedure should not be adopted is reinforced by recent observations of the Joint Committee on Human Rights on Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation (HL Paper 64 HC 395). In paragraph 15 of the report, the Committee referred to the fact they had previously "maintained an open mind" as to whether "the control orders regime can be made to operate in a way which is compatible with the requirements of basic fairness which are inherent in both the common law and Article 6 ECHR", and then said that its "assessment now, in the light of five years' experience of the operation of the system, is that the current regime is not capable of ensuring the substantial measure of procedural justice that is required." It is fair to add that the Committee went on to suggest that "fundamental reforms" were needed, which suggests that the closed material procedure might be made to work more fairly. It is also right to add that, subject to its inherent limitations, the special advocate system enjoys a high degree of confidence among the judiciary, as Maurice Kay LJ says in Tariq [2010] EWCA Civ 462, paragraph 32. However, it seems to us that if a regime, which is statutorily authorised in certain classes of case, has been litigated and considered in many cases and is subject to detailed statutory rules, but cannot be guaranteed to ensure procedural justice, that is another reason why the common law should refuse to adopt such a regime.

The authorities relied on by the Judge

58. Silber J relied on a number of cases to justify the conclusion that, in an ordinary civil claim, the court had jurisdiction which it could exercise to order a closed material procedure.

59. First, there was Secretary of State for the Home Department v Rehman [2001] UKHL [2003] 1 AC 153, where, at paragraph 31, Lord Woolf MR stated that, albeit "in the most extreme circumstances", the Court of Appeal could "hear submissions in the absence of [a party] and his counsel, under the inherent jurisdiction of the court", on the basis that the party's interests would be protected by a special advocate. We are unconvinced that this is an observation which assists the defendants here. First, there is no suggestion that the contrary was argued (and the list of authorities cited strongly suggests that it was not). Secondly, it was a plainly obiter observation, as the procedure was not, in the event, adopted on that appeal. Thirdly, as the tribunal from which the appeal in question was brought, the Special Immigration Appeals Commission ("SIAC") had statutory power to adopt a closed material procedure, it seems clear that the Court of Appeal did also – quite apart from common sense, see section 15(3) of the Senior Courts Act 1981. Finally, and arguably, Rehman [2003] 1 AC 153 was not a case where the court was simply an arbiter: there was, at least arguably, a public interest dimension in the issue involved.

60. In R v Shayler [2002] UKHL 11, [2003] 1 AC 247 the House of Lords was concerned with a preparatory hearing in relation to a prosecution of a defendant charged with unauthorised disclosure of material under the Official Secrets Act 1989. The relevant issue arose rather
Session Two: Accountability Litigation Outside the United States

Europe: Inquiries into Complicity, Rendition and Secret Detention
9. “CIA 'Extraordinary Rendition' Flights, Torture and Accountability – A European Approach”
11. “Poles urged to probe CIA prison acts”

European Court of Human Rights: Barriers to Litigation and Recent Cases
12. Written Comments, Jones v. United Kingdom Mitchell & Ors. V. UK

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
Session Two: Accountability Litigation Outside the United States

CIA 'Extraordinary Rendition' Flights, Torture and Accountability – A European Approach (p. 63-67)

European Center for Constitutional and Human Rights (June 2009)
Report: The report describes freedom of information law-based work in four Eastern European countries: Albania, Macedonia, Poland and Romania. In Albania and Macedonia, freedom of information requests were filed regarding the detention, interrogation and rendition of Khaled El-Masri. Requests in Poland focused on the use of Polish airspace for transfers and the existence of secret detention facilities. Romanian authorities have declined public information requests about the use of Romanian airspace and the existence of secret facilities there, claiming it would be against public interest. The full report provides a comprehensive overview of pending criminal cases and Freedom of Information requests concerning renditions and secret detention sites in Europe.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
2. Freedom of information cases in Eastern Europe

Freedom of information laws have been enacted in Albania, Macedonia, Poland and Romania.

In October 2007, groups in all four countries began working with the Open Society Justice Initiative on a project to explore how freedom of information requests and related litigation might be used to shed light on the involvement of their governments in the CIA’s program of extraordinary rendition. The aim was to pave the way for possible cases before the European Court of Human Rights to challenge information denials and complicity in those renditions.

In Albania, the Center for Development and Democratization of Institutions (CDDI) filed freedom of information requests with the Ministry of Defense and the Ministry of the Interior regarding Albania’s role in the detention, interrogation and rendition of Khaled El Masri. CDDI’s freedom of information requests were rejected on personal privacy and state secrets grounds. CDDI appealed this judgment. To date, the parties are still awaiting the decision of the Tirana District Court. It should be noted that the Ministry of Defense failed to appear at most scheduled court hearings or defend its denial. CDDI recently filed a second freedom of information request against

24 For further details about the case, please see the separate chapter “6. The Cases of Murat Kurnaz and Khaled El Masri (Germany).”

the Ministry of the Interior demanding clarification on many of the unanswered inquiries. The Ministry of Interior denied having any knowledge or records related to El Masri’s entry into Albania, but confirmed that their records did indicate that El Masri left Albania on a commercial flight on May 29, 2004. There have been no further explanations provided for how El Masri entered the country and whether he was ever detained by Albanian law enforcement agencies.

In Macedonia on May 15, 2008, the Open Society Foundation filed information requests on behalf of El Masri against the Ministry of Interior, the Ministry of Defense, and the Civil Aviation authorities. This freedom of information request focused on the circumstances of El Masri’s stay in Macedonia and the flight that brought him to Afghanistan. The Civil Aviation authorities confirmed that a flight landed in Macedonia without passengers and then took off for Afghanistan with one passenger. To date, there have been no responses provided from the other ministries involved. As a part of a multi-track strategy, on October 6, 2008 attorneys for El Masri in Macedonia filed a criminal complaint against torture and unlawful deprivation of liberty with the General Public Prosecutor’s Office in Skopje. The case is still pending.

In Poland, the Helsinki Foundation for Human Rights filed information requests with Prime Minister Donald Tusk (PO) and the Chairman of the Parliamentary Special Services Committee, Janusz Zemke (LiD), on January 10, 2008. The requests focused on previous and planned actions by the committee involving the alleged use of Polish air space, the Szymany Airport near Szczyno, and in-

27 Lewica i Demokraci [Left and Democrats] is a coalition of parties established in 2006 from the Sojusz Lewicy Demokratycznej (SLD), Unia Pracy (UP), Partia Demokratyczna - demokraci.pl and Socjaldemokracja Polska (SDPL), led by former polish president Aleksander Kwaśniewski.
telligence facilities in Stare Kiejkuty, by the Central Intelligence Agency (CIA) to transport, interrogate and detain individuals suspected of terrorism between 2002 and 2005 by the U.S. government. Less than two weeks later, the chairman of the committee withdrew the request stating that it was unfounded. A second request was submitted on February 15, 2008, demanding an endorsement of this decision by the committee. The Polish Parliament (Sejm) replied on February 29, 2008 with a statement asserting that according to parliamentary rules of procedure and the law on access to public information, the chairman of the committee was not entitled to admit or deny the request for access to public information. On March 14, 2008, Prime Minister Donald Tusk replied to the request claiming that the allegations had been clarified in 2005, and that at this point the Polish government did not have any intention to start a new investigation.  

In late June, Polish Ombudsman Janusz Kochanowski asked the Prime Minister to clarify which measures had been undertaken or are currently planned to verify the information about the detention and torture of terror suspects in secret detention facilities. In his letter, Kochanowski affirmed that the allegations were of renewed interest after a publication by Scott Shane in the *New York Times*. After a subsequent request by the Polish Helsinki Foundation on May 9, 2008, the Prime Minister transferred the case to the National Prosecution Service in Warsaw. A secret investigation examining the existence of secret detention facilities has been ongoing since that time.  

Despite the allegations about the existence of a secret detention in Romania and the involvement of Romanian officials in the rendition program, the Romanian government has strongly denied that renditions or detention have taken place on Romanian territory. The government has also pointed to internal investigations by relevant Romanian authorities into the allegations. A Senate Committee of Inquiry to investigate these allegations was established in December 2005. The inquiry, which was documented in a final report in March 2007, found that there was no evidence of a CIA rendition aircraft landing in Romania or overflying Romanian territory, that no Romanian authorities could have participated, either knowingly or through omission or negligence, and that there was no facility base, which could have been used for the purpose of detention. The adequacy of the Senate investigations has been strongly questioned: the Special Rapporteur of the Council of Europe, Dick Marty, criticized the restrictive terms of the inquiry’s ambit in his report and pointed to contradictions between the conclusions of the parliamentary committee and flight records of aircraft linked with the CIA. The European Commission was also unsatisfied with the Romanian parliamentary inquiry and European Justice Commissioner Franco Frattini sent a letter to the Romanian government in November 2007 demanding further information about this issue.  

---

31 For further details about the case please see the separate chapter “9. The Criminal Investigation into the Existence of black sites in Poland.”  
32 Letter from Mihal-Razvan Unqureanu (Romanian Minister of Foreign Affairs) to Terry Davis. Response of the Romanian government on the investigation initiated by the Secretary General of the Council of Europe, 15 February 2006.  
33 Letter from Parliamentary Assembly of the Council of Europe. Doc. 11302 Addendum, Secret detentions and illegal transfers of detainees involving Council of Europe member states: Dissenting Opinion by the delegation of Romania to the Parliamentary Assembly, 15 June 2007.  
34 Art. 1 of Decision No. 29 of the Senate. See also the homepage of the Romanian Senate to this issue: http://diasan.vsat.ro/pls/parlam/structura.co?idc=87&cam=1&leg=2004&idd=1.  
35 See also Senate Decision to approve the Commission’s Report, available at: http://diasan.vsat.ro/pls/legis/legis_pck.htm?ida=79336&frame=0.  
The fragmented explanations provided by Romanian officials were challenged by the Romanian Helsinki Committee (APADOR-CH) when the organization filed an request for information in April 2008. Submitted to the Ministry of Transport and Civil Aviation, the request contained a number of inquiries into the use of Romanian airports by CIA authorities between 2002 and 2006. The Romanian Helsinki Committee isolated the suspicious flights and requested information regarding the exact route of each of these flights, including dates and locations of departures and arrivals, information about stopovers and the exact Romanian airports involved, and the purpose of the flights and the identities of the passengers. In the same request, the organization asked the authorities to specify the number of departures or arrivals of flights involving Centurion Aviation, Jeppesen, and Jeppesen Sanderson, all companies which allegedly performed several extraordinary rendition flights. The Romanian authorities declined the public information request on the basis that it would not be in the “public interest.” The Romanian Helsinki Committee appealed this decision before the Magistrates Tribunal in attempt to compel the Senate, the Ministry of Transport and Civil Aviation, and the President to provide a range of information regarding the existence of unofficial agreements between Romania and the U.S. permitting the use of Romanian airports in the framework of the CIA rendition program. The appeal is still pending.

Importance of the Cases

Freedom of information requests can reveal important information and raise awareness about rendition-related abuses. Freedom of information cases can also strengthen ongoing criminal and civil litigation cases. Moreover, revealed information can be used in future detention/torture cases.

I. Lawyers Involved:
- Shayana Kadidal (for the CCR)
- Margaret L. Satterthwaite (for AI USA and WSLS)
- Catherine Kane Ronis (Wilmerhale for AI USA)
- Baher Azmy
- Diana Hatneanu (for the Romanian Helsinki Committee)
- Adam Bodnar (for the Polish Helsinki Foundation for Human Rights)
- Dorota Pudzianowska (for the Polish Helsinki Foundation for Human Rights)
- Neda Korunovska (for the Open Society Foundation-Macedonia)
- Filip Medarski (for the Open Society Foundation-Macedonia)
- Ilir Aliaj (for the Centre for Development and Democratization of Institutions (CDDI), Albania)
- Darian Pavli (for the Open Society Justice Initiative)

II. Main Non-Governmental Organizations Involved:
- Amnesty International USA: www.amnestyusa.org
- Center for Constitutional Rights: www.ccrjustice.org
- Centre for Development and Democratization of Institutions (CDDI): http://www.qzhdi.com/
- Open Society Justice Initiative: www.soros.org/initiatives/osji or www.justiceinitiative.org

III. Main Sources:
1. Complaint of CCR, AI USA and WSLS versus Central Intelligence Agency, Department of Defense, Department of Homeland Security, Department of Justice, Department of State and their components before the U.S. District Court for the Southern District of New York, 7 June 2007: www.ccrjustice.org/files/CCRvCIA_complaint_06_07.pdf.
“CIA Secret Detention Places in Poland – Current Legal Developments p. 36-38

Adam Bodnar, Interights Bulletin 16:1 (November 2010)
Legal article: Bodnar (Helsinki Foundation) describes the Polish government’s “strategy of denial” regarding cooperation with the CIA, secret flights over the territory of Poland and the existence of CIA secret detention sites. The Polish government has refused to cooperate with European Union and Council of Europe investigations. However, Poland’s Prosecutor General is currently investigating whether public officials committed a crime of abuse of power by allowing part of Polish territory to be under the control of a foreign state. Through Freedom of Information requests, the Helsinki Foundation has confirmed the existence of CIA flights in Polish territory; however, many agencies have refused to answer the requests, citing national security arguments. Bodnar also notes the possibility of holding the highest public officials legally responsible before Poland’s “Tribunal of State.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
CIA Secret Detention Places in Poland – Current Legal Developments

Adam Bodnar

Poland was one of the Central European countries named in reports by Human Rights Watch and articles in The Washington Post in November 2005 as hosting USA Central Intelligence Agency (CIA) secret detention places. A few years have since passed and we are now much closer to the truth of Poland’s shameful involvement in the CIA rendition programme.

Currently, there is an official investigation being undertaken by the Prosecutor General into the matter. Until 2008, almost every politician in Poland denied any cooperation with the CIA in this regard.

It has also been officially confirmed that CIA planes landed in the territory of Poland at Szymany airport. However, we still do not have the final confirmation as regards the existence of CIA secret detention places in the territory of Poland, although there are more facts now known which confirm this supposition. It has been claimed that such detention places could have been located at the territory of the Polish intelligence school in Stare Kiejkuty.

Denial by the Polish Government
Poland has been accused of being one of the countries which helped the USA during 2003 in the CIA rendition programme, supposedly hosting a secret detention place, where detainees were transported from Afghanistan and Pakistan, tortured, and then sent to Guantánamo or other places of detention.

From the very beginning of such claims being made, the Polish left-wing Government and politicians adopted a strategy of denial. Denial was made even by the former President of Poland, Aleksander Kwaśniewski. Politicians denied cooperation with CIA, secret flights over the territory of Poland and the existence of CIA secret detention places.

They also refused any cooperation with the investigative committees of the European Union and the Council of Europe, led by Dick Marty. In fact, there was only one politician, the Polish MEP Józef Pinior who was a member of the special committee created by the European Parliament, who presented a different vision of facts and was indeed interested in explaining the matter.

The same approach was adopted by the next Government which took power in September 2005, formed by the Law and Justice Party. It continued the policy of denial, but possibly due to different reasons. The former left-wing Government could have been interested in covering up the matter due to its personal interest (in 2003 Aleksander Kwaśniewski was the President of Poland and left-wing politicians were in the Government). The right-wing Law and Justice Party headed by Jarosław Kaczyński most probably did not want to spoil good relations with the USA, the most important international partner for Poland.

In mid 2008, the new Polish Government, headed by Donald Tusk, decided to change the policy of denial and started an investigation as regards the existence of CIA sites in Poland. One can explain this change of strategy through political and international factors. The ruling party – Civic Platform – could feel secure as regards the potential results of investigation. Finding that Poland hosted CIA sites was not a political threat for its major politicians, as they were not in power when it happened. It was also important internationally to start an investigation. The policy of denial, when respected international actors (such as the Council of Europe or the European Parliament or NGOs such as Amnesty International) confirmed Poland’s involvement in the CIA rendition programme, stopped being a good strategy. By starting an investigation, the Polish Government could start to present itself as accountable towards the international community.

Current Status of Proceedings
Currently the criminal investigation by the Prosecutor General in Poland is still pending. One of the country’s leading prosecutors has been appointed to deal with the case. The case is being treated with maximum seriousness (which is not always the case in Poland as regards major political cases).

The investigation seeks to identify whether public officials committed a crime of abuse of power by allowing a certain part of Polish territory to be under control of a foreign state. One may question whether a Polish prosecutor is equally interested in the crime of torture allegedly committed on Polish territory. There is a risk that there will be no sufficient evidence to prove it, especially if the USA would prefer to protect its agents against any international liability. One can presume the defence strategy of Polish officials involved in the matter would be that they did not really know what
was happening in Stare Kiejkuty, at the
territory of the school of Polish
intelligence. According to some
journalists, ‘Zero Zone’ was located in
this school which was an area only CIA
agents could access, and secret
detention places were created in
specially modified houses.6

Without the official results of the
investigation these are only
predictions. We can only base our
knowledge on publicly available
information, the results of journalists’
investigations as well as new official
reports.

Despite official requests by the
Helsinki Foundation for Human
Rights (HFHR) and demands
expressed by the media, there is no
information about the current stage of
proceedings and when it is going to
end.

It is believed that the Polish
investigation may be affected by the
results of an investigation in
Lithuania.7 An important question
raised by this investigation is whether
High Value Detainees were
transported from Polish secret
detention places to the Lithuanian
ones. If there is proof of that in the
Lithuanian investigation, then it
should be taken into account in the
Polish investigation.

One of the most important recent
reports is the one prepared by the
United Nations Special Rapporteur on
torture, the United Nations Special
Rapporteur on the promotion and
protection of human rights while
combating terrorism, the Working
Group on Arbitrary Detention, and the
Working Group on Enforced or
Involuntary Disappearances.8 In
addition to general information as
regards Poland’s involvement in the
CIA rendition programme, the report
provides information on using private
aviation contractors to make flights in
the territory of Poland and the practice
of preparing fake documentation. Most
importantly, it includes information on
the alleged detention of Abd al-Rahim
al-Nashiri in Poland.

**Freedom of Information Act Litigation
by the Helsinki Foundation for
Human Rights**

The HFHR was one of the few
organisations to be continuously
interested in seeking an explanation of
Poland’s involvement in the matter.
Since November 2005, the HFHR has
sent different intervention letters to
Prime Ministers and members of
Polish Parliament – however with no
result.9

The similar policy of denial was used
both with respect to international
actors and to domestic non
governmental organisations (NGOs).
In 2007 the HFHR, in cooperation
with the Open Society Justice Initiative
(OSJI), started a special programme
designed to gain access to information
on Poland’s involvement in the CIA
rendition programme, using the Act of
1997 on the Access to Public
Information. The objective is to obtain
as much knowledge as possible about
secret flights in the territory of Poland,
secret detention places, agreements
signed with foreign governments and
intelligence, the stage of investigation
led by the Prosecutor General as well
as the role of the Parliamentary
Committee of Special Services.

The HFHR is currently in the stage of
submission of different freedom of
information (FOI) requests. Some of
them are answered, but in most of the
cases different Polish agencies refer to
the national security argument and
refuse to answer our questions. The
aim of proceedings is to bring certain
cases in front of the administrative
courts. In the opinion of the HFHR,
the administrative courts should
confirm that, because of the risk of
serious violation of human rights,
freedom of information prevails over
national security and certain
information should be made available.

Most importantly, as a result of FOI
requests, the HFHR has officially
obtained the list of flights of CIA
planes into the territory of Poland from
the Polish Aviation Authority.10 It was
another confirmation (following the
admittance by the prosecutor’s
authority)11 that such flights took place.
It seems also that the list of flights, and
information related to them, contains
new facts as compared to those
available from Eurocontrol which were
provided to Dick Marty.12 The HFHR,
together with its international
partners, is currently analysing in
detail the content and importance of
the data provided.

If the criminal investigation (discussed
above) concludes with an official
indictment, the HFHR would seek to
join proceedings as a third party. Our
ultimate goal is to watch over the
activities of the Polish authorities in
explaining Poland’s participation in
the CIA rendition programme.

However, the hitherto outcome of our
activities shows that, in general, there
is no sufficient democratic supervision
over intelligence in Poland. Therefore,
the HFHR has started other litigation,
not related directly to the CIA
rendition programme. For example, in
July 2009 we submitted a case to the
Regional Administrative Court in
Warsaw, claiming that Polish special
services should provide us with
statistics of wire-tapping and
operational control. The special
services claim that even statistics are
confidential.

It should be underlined that our
activities in this area resulted in
bringing this issue to the public
agenda and discussion. Recently, the
Minister of Justice has announced the
draft law which stipulates the
disclosure of such data.
The activities in Poland are part of the broader strategy of OSJI of using FOI laws in order to bring accountability for the CIA rendition programme, undertaken also in other countries (e.g. Romania, Macedonia and recently Lithuania). The cooperation within the international network allows for the exchange of information and strategies between OSJI partners.

Journalists’ Approach to the Issue
An issue of special concern is the approach of the Polish press towards Poland’s involvement in the CIA rendition programme. When the news first broke, the Polish media obviously reported the story and made their checks. However, without getting any special or additional knowledge, they stopped being interested in the topic. There was no real journalists’ investigation undertaken and one could learn more about the CIA rendition programme in Poland from Dick Marty’s reports than from the Polish media.

There is a risk that some journalists accepted the hypothesis presented by politicians that the whole story is a product of imagination of USA journalists.

Alternatively, some journalists could have adopted a strategy of self-restraint and were not especially interested in the issue due to the potential threat to Poland’s national security. It is remarkable that the first real journalists’ investigation took place as late as in the first quarter of 2009, by journalists at Rzeczpospolita, who managed to find more facts than had been found previously by investigative committees.13

Obama Administration’s Impact on the Proceedings in Poland
It is quite probable that the administration of Barack Obama, President of the USA, may have a substantial impact on the situation in Poland.

It seems that the strategy of the new administration is to steadily disclose information on the CIA rendition programme to the public. Up to now, none of the publicly disclosed documents officially confirm Poland’s involvement in the programme. Nevertheless, we know more and more about what really has happened during the Bush administration and the ‘war on terror’ or about certain details concerning possible detention of High Value Detainees in the secret detention places in Poland.14

Another source of information could be different trials undertaken by civil liberties groups in the USA and testimonies made by people involved in the rendition programme. As a consequence, one may expect that the Polish public will obtain an official confirmation by external sources before one by internal sources.

It is also probable that some of this information (if not yet publicly disclosed) is already being used by the Polish prosecutor’s authorities in its domestic investigation.

If Poland’s involvement in the CIA rendition programme is confirmed, it could be one of the greatest sins of the new Polish democracy.

Who May Be Liable?
Confirmation of the existence of CIA secret detention places on the territory of Poland may have serious legal consequences.

First, public officials (most probably agents of the Polish intelligence services) could face indictment for abuse of their power (and maybe for negligence to prevent torture in the territory of Poland).

However, there is also a possibility of responsibility of the highest public officials, especially ministers, before the Tribunal of State – a special constitutional organ designed to deal with violations of the laws and the Constitution. One can imagine a prosecution of the minister responsible for secret services who could have known about CIA secret detention places. The prosecution may reach both left-wing Government members (responsible for what happened in 2003) as well as right-wing Law and Justice Government members (as it is most certain that they knew about Poland’s involvement and did nothing in order to properly explain it or to start the investigation).

Why Was Poland Involved in the CIA Rendition Programme?
There are two likely reasons for Poland’s involvement in the CIA rendition programme.

First, for many years, Poland has traditionally been an ally of the USA. Poland was one of the few EU Member States which decided to support the USA intervention in Iraq by providing military assistance. It seems that the support for the USA in its fight with terrorism was just a part of keeping good relations. There is also no doubt that Polish intelligence, for many years, had good cooperation with USA intelligence.

Second, it seems that Polish intelligence could act beyond sufficient political control and supervision. One may guess that the cooperation between Polish and USA intelligence started with typical activities, but then – due to lack of sufficient supervision – turned into more advanced form of cooperation, which was not even known to ministers supervising the coordination of special services.

Polish special services have undertaken recent reforms. First, the lack of supervision and sufficient control over the Military Intelligence Services was a major point of public debate in 2006-2007, and resulted in the dissolution of these services and creation of the new services – Service of the Military Intelligence (Szczaba Wywiadu Wojskowego) and Service of the Military Counter-Intelligence (Szczaba Kontrwywiadu Wojskowego). Second, the role of the Agency of Internal Security (Agencja Bezpieczeństwa Wewnętrznego) has been strengthened, as well as improving democratic control over it and other intelligence services.

If Poland’s involvement in the CIA
On 14 December 2009, a one day international conference entitled **War on Terror and Human Rights – In Search for Truth and Responsibility** was held at the Warsaw University Law Faculty premises. The conference was organised by the Helsinki Foundation for Human Rights (HFHR) in Warsaw under the auspices of the Dean of the Law Faculty of Warsaw University.

The aim of the conference was to analyse the situation in Poland with respect to allegations about the existence of secret CIA detention centres in the north of Poland (at Stare Kiejkuty) and the involvement of Poland in the CIA secret rendition programme.

For further details on the conference please visit: <http://humanrightshouse.org/Articles/13644.html>.
APNewsBreak: Poles urged to probe CIA prison acts

By ADAM GOLDMAN and MONIKA SCISLOWSKA, Associated Press Writers Adam Goldman and Monika Scislowska, Associated Press Writers – 21 mins ago

WARSAW, Poland – A human rights organization and lawyers for a Saudi man accused in the 2000 bombing of the USS Cole demanded Tuesday that Polish prosecutors investigate the terror suspect's detention and treatment at a CIA prison once housed in Poland.

A Polish attorney working in conjunction with the Open Society Justice Initiative group filed a lengthy petition Tuesday in Warsaw with prosecutors — a move that rights advocates hope will spur similar efforts elsewhere in Europe.

Abd al-Rahim al-Nashiri is the first detainee subjected to the CIA's detention and interrogation program who has taken legal action in Poland, said Amrit Singh, the justice initiative's senior legal officer. Mikolaj Pietrzak, who represents al-Nashiri in Poland, told The Associated Press he filed the petition.

"We hope that the prosecutor will heed this call for a serious investigation into al-Nashiri's ill-treatment on Polish soil," Singh said. "The quest for accountability for the CIA's illegal rendition program must continue in Europe, especially as U.S. courts appear to be closing their doors to victims of this program."

Polish prosecutors have already been examining the country's involvement in a now-shuttered U.S. system of secret prisons around the globe. Inside the so-called black sites, terror detainees were exposed to harsh interrogation methods such as the simulated drowning technique of waterboarding — a practice that critics have called torture.

Prosecutor Jerzy Mierzewski said Pietrzak's petition would likely be wrapped into his office's overall probe.

"It does not require the opening of a separate investigation," he said, adding that he still had to study the documents in detail.

The prosecutors are investigating possible abuse of power by Polish public officials in connection with the closed CIA black site near the secluded Szymany airport in northeast Poland. Flight logs trace several landings of planes linked to the CIA there. Prosecutors have been looking into the site since 2008 but have not yet filed charges.

Polish media have reported that prosecutors are considering war crimes charges against former President Aleksander Kwasniewski and two other officials in connection with the CIA prison site. Kwasniewski, Poland's president from 1995-2005, has said he was unaware of the CIA prison.
Following the AP's report earlier this month on al-Nashiri's treatment, Leszek Miller, Poland's prime minister at the time, flatly denied the existence of any such facility, saying there were "no secret CIA prisons in Poland."

On Tuesday, Miller told the AP in a telephone interview he had no comment on the petition or on whether Poland housed a CIA secret prison.

"Anybody can say what they want on the matter," Miller said.

According to several former U.S. intelligence officials, the CIA's prison in Poland — code-named "Quartz" — was shut down in late 2003. The officials spoke about the prison and al-Nashiri's case on condition of anonymity because details of the secret program remain classified.

Al-Nashiri is accused of masterminding the plot to bomb the US Navy destroyer, which was crippled on Oct. 12, 2000 by a blast detonated by a speedboat packed with explosives in the Yemeni port of Aden. The attack killed 17 American sailors and left 39 injured.

The former U.S. intelligence officials told the AP that Al-Nashiri was captured in Dubai in November 2002 and first taken to another CIA secret prison in Afghanistan known as the Salt Pit. After a brief stay, he was flown to a CIA prison in Thailand before being taken to Poland on Dec. 5, 2002, along with accused terrorist Abu Zubayda, the former officials said.

Details of the al-Nashiri petition to Polish prosecutors were not made public by the lawyers, but the move comes after a series of stories by the AP detailing new revelations about his four-year captivity and those of other terror suspects inside CIA black sites.

"The American justice system has failed Mr. al-Nashiri," said Nancy Hollander, his civilian lawyer in the United States. "The U.S. government has yet to provide any accountability for the illegal imprisonment or horrific torture to which U.S. agents have subjected him for almost a decade. Therefore, we are seeking to intervene in the investigation in Poland in the hopes that a court finally will recognize the injustice he has suffered."

According to the former intelligence officials and an internal CIA special review of the program, an agency officer named Albert revved a bitless power drill near the head of a naked and hooded al-Nashiri while he was held in the Polish prison. The CIA officer also took an unloaded semiautomatic handgun to the cell where al-Nashiri was shackled and racked the weapon's ammunition chamber once or twice next to his head, the review reported.

The Arabic-speaking Albert, who once worked for the FBI as a linguist, was not a trained interrogator or authorized to use enhanced interrogation techniques, the special review said.

A U.S. official said the special review, led by an inspector general, showed the agency had dealt with the reported abuses. "The fact that individuals inside the program surfaced these kinds of issues themselves with the inspector general speaks to a high level of rigor and concern about the care and treatment of detainees," said the official, who also spoke on condition of anonymity because details of the secret program remain classified.
During al-Nashiri's Poland detention, Albert also scoured him with a stiff brush and threatened his family, according to both former officials and the special review.

"We could get your mother in here," and "We can bring your family in here," Albert is quoted as saying in the CIA document. The stiff brush was "intended to induce pain on al-Nashiri," according to the special review.

The U.S. official said the use of the brush did not lead to injuries and had also been scrutinized by Justice prosecutors.

Albert and his superior in charge of the jail were both reprimanded. The CIA's inspector general referred the case to the Bush administration's Justice Department. Prosecutors declined in September 2003 to charge Albert with a crime but federal authorities are reviewing the case again. Albert has since returned to intelligence work as a contract employee.

Al-Nashiri was waterboarded in Thailand, according to previous accounts. The others subjected to the simulated drowning technique were Zubayda and Khalid Sheikh Mohammed, the accused overseer of the Sept. 11 terror attacks.

According to the former officials and flight records, al-Nashiri was moved from Poland to Rabat, Morocco, on June 6, 2003, where he stayed until Sept. 22, 2003 when he was flown to the Guantanamo Bay camp in Cuba. On March 27, 2004, he was flown from Guantanamo and back to Rabat. Eventually he was moved to another CIA prison in Bucharest, Romania, living with five other detainees before surfacing in Guantanamo again in September 2006.

Al-Nashiri's case is in limbo as the White House decides whether to prosecute him in a U.S. military or a federal civilian court. He is still detained in Guantanamo, his Polish lawyer says.

Efforts by human rights lawyers to learn more about the CIA secret prison network were set back earlier this month when the 9th U.S. Circuit Court of Appeals dismissed a lawsuit filed by five terrorism suspects against a Boeing Co. subsidiary.

The men said they were flown to secret prisons and tortured. They had sued the Jeppesen Dataplan aviation firm in 2007, claiming their flights amounted to illegal "forced disappearances," and the San Jose-based subsidiary conspired with the CIA to operate the program.

Hollander said it was standard Polish procedure not to make the petition public but that could change.

"We are giving the prosecutor an opportunity to provide an initial response before making the petition public," she said.
Written Comments, Jones v. United Kingdom Mitchell & Ors. V. UK
Redress, Amnesty International, Interights and Justice, App. No. 34356/06;
App. No. 40528/06 (February 2010)

Intervenor Brief, European Court of Human Rights: Alleged victims of torture brought a denial of access to justice claim under Article 6 of the European Convention on Human Rights after their attempts to sue a foreign state and its officials were blocked at the domestic level (UK courts) on immunity grounds. The intervenor brief argues that neither state nor subject matter immunity justified interference with the victims’ right to a fair trial, in light of, *inter alia*, the special status of the prohibition of torture in international law (Part A) and the disproportionate impact of immunity on the victims’ ability to obtain redress (Part D).

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
JONES v. UNITED KINGDOM (Application Number 34356/06)

MITCHELL AND OTHERS v. UNITED KINGDOM (Application Number 40528/06)

WRITTEN COMMENTS BY
REDRESS, AMNESTY INTERNATIONAL, INTERIGHTS AND JUSTICE

INTRODUCTION

1. The Redress Trust (‘REDRESS’), Amnesty International, the International Centre for the Legal Protection of Human Rights (‘INTERIGHTS’) and JUSTICE [collectively, ‘the Organisations’] make these submissions pursuant to leave granted by the President of the Chamber on 14 January 2010 in accordance with Rule 44§2 of the Rules of the Court.¹

2. These cases involve three nationals and one dual national of the respondent state who attempted to sue a foreign state and its officials allegedly responsible for their torture abroad and were denied access to a court in the respondent state on the basis that the defendants enjoyed immunity. These cases directly engage Article 6(1) of the European Convention on Human Rights [hereinafter the ‘Convention’] which requires an assessment as to whether the restriction on access to a court pursues a legitimate aim and is proportionate.

3. Without prejudice to the issue of state immunity, the Organisations intervene in these cases in order to address whether and to what extent immunity is enjoyed at the level of officials in these cases. In doing so, the intervention focuses on the following:

   a) The absolute prohibition of torture enjoys a special status under international law and gives rise to a positive obligation to provide an effective remedy and full and adequate reparation to all victims of torture, including access to a court;

   b) The only immunity potentially available to the officials in these cases is immunity *ratione materiae* (subject-matter immunity); the state is not impleaded in suits against officials in which torture is alleged;

   c) Subject-matter immunity does not apply in cases in which torture is alleged;

   d) The application of subject-matter immunity to cases involving allegations of torture does not pursue a legitimate aim and the restriction on access to a court is disproportionate, taking into account a number of factors, including the special status of torture and the lack of alternative means of redress in the foreign state and by way of diplomatic protection.

A. VICTIMS OF TORTURE HAVE A RIGHT TO AN EFFECTIVE REMEDY, INCLUDING ACCESS TO A COURT, UNDER INTERNATIONAL LAW

4. The present cases concern denial of access to justice in cases in which torture is alleged. As will be indicated in the sections that follow, the underlying nature of the wrong is relevant to an assessment of whether the immunities in question in these cases apply and to an assessment of whether any interference under Article 6(1) can be justified.

¹ Letters sent by the Section Registrar of the Court to L. McGregor of REDRESS on 14 and 25 Jan. 2010. Details of the Organisations are set out in the Annex to these comments.
5. The special status of the absolute prohibition of torture is well established in international law, including under the Convention.\(^2\) It is reinforced by the fact that the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (‘CAT’) has to date been ratified by 146 states, including all 47 member states of the Council of Europe. Torture is widely recognised as a crime under international law\(^3\) for which individuals, as well as states, have responsibility on the international level. This Court, together with other international bodies and domestic courts, has further recognised that the prohibition against torture has attained the status of a peremptory norm of international law.\(^4\)

6. The absolute prohibition of torture entails certain positive obligations which this Court has also held are of an absolute nature.\(^5\) Positive obligations in relation to torture, as emphasised by this Court, include the duty to provide victims with an effective remedy and full and adequate reparation.\(^6\) The importance of access to a court for torture is reflected across international norms and practice.\(^7\) For example, in 2005, the UN General Assembly adopted basic principles on the right to a remedy and reparation for human rights violations, including torture. It reaffirmed that the right of victims to equal and effective access to justice and redress mechanisms should be fully respected ‘irrespective of who may ultimately be the bearer of responsibility for the violation’.\(^8\) It has also been held that ‘judicial guarantees’ including access to a court are of a non-derogable nature where these are linked to ensuring the protection of non-derogable rights.\(^9\)

7. Article 13 of the CAT enshrines the right of every victim of torture to complain and to have his or her case promptly and impartially examined. The ‘right of complaint afforded to victims of torture or ill treatment’ under the CAT is ‘a fundamental guarantee that must be upheld in all circumstances’.\(^10\) Article 14 requires each State Party to ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. The UN Committee against Torture (‘UN Committee’) has found a breach of Article 14 in a number of cases where the absence of criminal investigations and proceedings has prevented victims from bringing a civil suit for compensation.\(^11\) The UN Committee has also criticised states which fail to provide or restrict civil remedies for torture, irrespective of where the torture was carried out.\(^12\) For example, the UN Committee recommended that Canada review its position under Article 14 to ensure the provision of compensation through its civil jurisdiction to all victim of torture.\(^13\)

8. The increased focus on access to justice is indicative of the international recognition of the link between the lack of accountability for torture and its continuing incidence. As the UN Special Rapporteur on Torture has noted ‘the single most important factor in the proliferation and continuation of torture is the persistence of impunity’ and that ‘measures relieving perpetrators of torture of legal liability’ are a key factor therein.\(^14\) The Inter-American Court of Human Rights

---

\(^2\) See, e.g., Shamuyev and Others v. Georgia and Russia, no. 36378/02 ECHR (2005), §335.

\(^3\) E.g., Arts. 4-9 of CAT and Arts. 7(1)(f) and 8(2)(a)(ii) of the Rome Statute Establishing the International Criminal Court (‘Rome Statute’).

\(^4\) See Demir and Baykara v Turkey [GC], no. 34503/07, ECHR (2008), § 73.


\(^6\) Ilhan v Turkey, no. 22277/93 (2000), § 97.

\(^7\) See, UN Human Rights Committee, General Comment 20 (1992).

\(^8\) See, 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, UN G.A. Res. 60/147 (2005), Principle II(3)(c).


\(^12\) See, e.g., Concluding Observations on Japan, CAT/C/JPN/CO/1 (2007), § 23 and Nicaragua CAT/C/NIC/CO/1 (2009), § 25.


has also noted that laws that lead to impunity, including by denying access to court, violate rights including Article 8 of the American Convention (comparable to Article 6) as they ‘lead to the defenselessness of victims and perpetuate impunity’ and ‘prevent victims and their next of kin from knowing the truth and receiving the corresponding reparation’.\textsuperscript{15}

9. This Court has consistently referred to the ‘living’ nature of the Convention, which must be interpreted in the light of present-day conditions. In so doing, it has taken account of evolving norms of national and international law in its interpretation of the Convention.\textsuperscript{16} The application of Article 6(1) in these cases should be viewed against a background of significant developments during the last two decades which have sought to combat impunity for torture\textsuperscript{17} and prioritise the rights of victims to an effective remedy, including through the rejection of procedural obstacles, such as amnesties\textsuperscript{18}, statutes of limitations\textsuperscript{19} and, as set out below, subject-matter immunity.

B. THE ONLY INDIVIDUAL IMMUNITY AT ISSUE IN THIS CASE IS SUBJECT-MATTER IMMUNITY

10. When making an Article 6(1) assessment in these cases, the only immunity that the Court must consider in relation to the officials in this case is immunity \textit{ratione materiae} (‘subject-matter immunity’). Immunity \textit{ratione personae} (‘personal immunity’) does not apply as it is a status-based immunity which can only be asserted by very senior officials, such as heads of state or heads of government or diplomats stationed abroad. None of the officials in these cases can make a claim to personal or diplomatic immunity.

11. Likewise, as set out below, the immunity of the state and subject-matter immunity are distinct legal issues that should be considered separately due to their different purposes and content. The rationale for state immunity is often cited as the sovereign equality and non-intervention in the affairs of other states; international relations, comity and reciprocity.\textsuperscript{20} By contrast, subject-matter immunity is purely functional. It is justified in situations in which responsibility for the commission of official acts is solely attributable to the state and not to the official personally,\textsuperscript{21} who acts as the ‘mere instrument’ or mouthpiece of the state. It can generally be asserted by all current and former officials for acts that are solely attributable to the state and that carry no individual responsibility. Where a suit is brought against the state and its officials, a separate determination of each immunity is required as they are not coterminous. Their different rationales and purposes mean that it does not logically follow that if the state enjoys immunity, the individual also enjoys immunity and vice versa.\textsuperscript{22}

12. In certain cases in which the state enjoys immunity, the official is also granted immunity in order to prevent any immunity that the state enjoys being circumvented. Some courts have determined that the state is impleaded if ‘a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly’.\textsuperscript{23} In order for a suit against an

\textsuperscript{15} Barrios Altos, supra note 9, §43.
\textsuperscript{16} See, e.g. Soering v. the United Kingdom, Series A no. 161 (1989), § 102.
\textsuperscript{17} This is one of the key objectives of the CAT, e.g. Arts. 4-9 concern universal jurisdiction over torture and Arts. 13 and 14 guarantee the right to complain and to a remedy.
\textsuperscript{19} See, e.g. Concluding Observations on Spain, CAT/C/ESP/C/5 (2009), § 22.
\textsuperscript{20} Al-Adsani v. the United Kingdom, no. 35763/01 (2001), § 54.
\textsuperscript{21} Prosecutor v. Blažič (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR108 (1997), 110 I.L.R 607, 707, §38 (finding that ‘officials cannot suffer the consequences of wrongful acts which are not attributable to them personally’).
\textsuperscript{23} See, e.g. Chuidian v. Philippine National Bank 912 F.2d 1095 (9th Cir. 1990).
official to constitute the ‘practical equivalent’ of a suit against the state itself, the state’s ‘property, rights, interest, or activities’ must be affected.24 The central cases in which impleading has arisen have involved claims against officials in possession or in control of the state’s assets.25 In such cases, immunity is provided not in order to protect the individual but in recognition that the state’s assets are the subject-matter of the dispute. In these cases, the state was therefore considered the proper or de facto defendant which could not be sued because of the availability of an immunity under the relevant national law. In contrast, courts have also previously found that where a claim only involves the assets of the individual and not the state, no question of impleading arises and therefore no immunity is afforded.26

13. These cases can also be distinguished from the cases presently before this Court as torture gives rise to both individual and state responsibility under international law; not just state responsibility.27 Thus, a claim against an official for his or her role in the commission of torture is in no way ‘the practical equivalent’ of a case against the state; it is precisely the opposite as it is about the personal responsibility of the official. In Pinochet, Lord Browne-Wilkinson affirmed this point by stating that, ‘[f]or international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal state and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice’.28

14. As regards any eventual award of compensation made against an individual, this will only be enforceable against that individual and not against the state or its assets as a matter of international law. While the state may choose to pay the damages awarded on behalf of the official, it is not obliged to do so as the decision only binds ‘the appellant personally’.29

15. Therefore, the only relevant immunity for the purposes of an Article 6(1) assessment is subject-matter immunity which as set out in the next section, does not apply in cases in which torture is alleged.

C. SUBJECT-MATTER IMMUNITY DOES NOT APPLY IN CASES IN WHICH TORTURE IS ALLEGED

16. The object and purpose of the CAT is to ensure accountability and to prevent impunity for torture. A grant of immunity to officials in cases in which torture is at issue is inconsistent with this object and purpose, particularly in situations such as the present cases where no alternative means of redress exist.30 The CAT arose out of the recognition that the state may not

25 See, e.g. Twycross v. Dreyfus (1877) LR 5 Ch D 605, p618 (where the defendants held bonds owned and issued by the state of Peru which were the subject of the litigation before the Court) and Rahimtoola v. Nizam of Hyderabad, [(1958) AC 379, 402 (involving litigation over funds held on the official’s bank account which he had been expressly authorized to hold on behalf of the state)).
26 Saorstat and Continental Steamship Co. v Rafael de las Morenas [1945] IR 291 reprinted in ILR 97 98 (SC). Other examples of a finding of impleading include Blaskic, supra note 21 (where the ICTY found that the state and not the individual was the proper defendant as the state would be subject to sanction for the official’s failure to comply with a subpoena). Propend Finance Pru Ltd & Ors v. Sing and Arr [1997] EWCA Civ 1433, often cited on impleading, is also distinguishable from the ones presently before the Court in that the commissioner was not sued in his personal capacity (he was not even in office at the time of the underlying wrong (contempt of court)). On this basis, the Court found that by suing the commissioner, the plaintiffs were actually attempting to sue the state which enjoyed immunity.
27 See developments since Art 7 of the Charter of the International Military Tribunal at Nuremberg (1945) 82 UNTS 279, e.g. Arts. 27(1) of the Rome Statute and Arts. 4(1), 5 and 7 of the CAT firmly establishing individual responsibility for crimes under international law. See also, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (noting that the articles are ‘without prejudice to the individual responsibility under international law of anyone acting on behalf of a State’).
29 Saorstat, supra note 26.
30 See Part D below.
take the same action under its criminal law in relation to torture ‘committed on behalf of, or at least tolerated by, the public authorities’ than in relation torture committed by private persons. If it is for this reason that the CAT imposes a range of positive obligations flowing from the absolute prohibition as set out in section A above in order to ensure that ‘no safe haven for torturers’ exists. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

31. It is for this reason that the CAT imposes a range of positive obligations flowing from the absolute prohibition as set out in section A above in order to ensure that ‘no safe haven for torturers’ exists.

32. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

33. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

34. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

35. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

36. If the element of official capacity within the definition of torture under Article 1 of the CAT was to be interpreted to extend subject-matter immunity to current and former officials, this would defeat the very purpose of Article 1 and the CAT as a whole.

17. The question of the application of subject-matter immunity to crimes under international law such as torture has most commonly arisen in the context of criminal trials. Many – but not all - of the cases in which subject-matter immunity has been denied are therefore criminal cases. The rationale that underpins the denial of subject-matter immunity in the criminal sphere - namely that subject-matter immunity only covers acts which are solely attributable to the state which torture is not - applies with equal force to civil suits against officials. This is particularly case in the majority of member states in which it is possible to bring a claim for damages within criminal proceedings demonstrating a lack of a clear dividing line between criminal and civil proceedings. Rather, all proceedings – both criminal and civil – are aimed at ensuring accountability for the underlying act of torture and providing an effective remedy for victims. Indeed, at common law, torts were considered the civil counterparts of crimes and both criminal and civil proceedings can contribute to the fulfilment of this objective. This is reflected by Lord Phillips’ separate opinion in these cases before the English Court of Appeal. He expressly departed from his previous obiter dicta comments in Pinochet that a state would be impleaded in civil but not criminal proceedings against a (former) official where torture was alleged. He found that the state would not be impleaded in civil proceedings involving an official as ‘[i]t is the personal responsibility of the individuals, not that of the state, which is in issue’.

(1) Subject-Matter Immunity does not Bar National Court Proceedings against Current or Former Officials for Crimes under International Law

18. Subject-matter immunity has not presented a barrier to proceedings in the significant number of national prosecutions in member states of current and former foreign state officials for crimes under international law committed since the Second World War. None of the cases in which courts have accepted claims of immunity from criminal prosecution have involved claims of subject-matter immunity, at issue here, but only claims of personal immunity by virtue of the official’s position as a head of state, head of government and minister of foreign affairs. As discussed below, in a number of these prosecutions, civil claims have been made and awarded against current or former officials.

19. In Pinochet, where Spain, Switzerland, France and Belgium sought the extradition of the former head of state of Chile, the House of Lords expressly determined that he could not assert

---

32 E/CN.4/1984/72
33 See also, Institut de Droit International, supra note 22.
34 See, subsection (2) below.
35 See Section B above.
38 See, Gaddafi case, Arrêt no. 1414 (2001), 125 I.L.R. 456; Castro (Spain: Audiencia Nacional, 1999); Re Sharon & Yaron, 42 I.L.M. 596 (2003); Democratic Republic of the Congo v. Belgium, ICJ Rep. (2002). Although the Paris prosecutor, misinterpreting this ICJ judgment, declined to investigate torture allegations against a former defence minister, Donald Rumsfeld, that decision has never been validated by a court.
subject-matter immunity with respect to torture (he could not claim personal immunity since he was out of office). Courts in France, Italy, the Netherlands and Spain have convicted current and former foreign officials of crimes under international law. Other courts in states such as France, Italy, Spain and Sweden have issued arrest warrants for current and former officials for such crimes without immunity presenting an obstacle to their issuance.

(2) The Same Rationale that Precludes Subject Matter Immunity for Criminal Prosecutions Applies to Civil Cases

20. As US Supreme Court Justice Breyer noted in Sosa v. Alvarez-Machain, many member states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden permit their courts to entertain civil claims in an action civile in criminal cases. In Spain, for example, this procedure operates as an alternative to initiating an independent civil suit once criminal proceedings have ended.

21. Courts in civil law countries have awarded civil reparations in the context of criminal prosecutions of current and former foreign officials in which subject-matter immunity has not presented an issue. For example, on 16 March 1990, a French court convicted and sentenced a serving Argentine naval officer in absentia to life imprisonment for torture and enforced disappearance and awarded the parties civiles damages. In March 1999, a French court sentenced six Libyan officials in absentia to life imprisonment for the bombing of a French plane and awarded the parties civiles up to FRF 200,000. On 1 July 2005, a French court convicted Ely Ould Dah of Mauritania for torture after a trial in absentia and awarded reparations to victims who had constituted themselves parties civiles. The case has since been referred to a civil court for a final determination of the civil damages. There have been numerous other pending or settled cases in which courts in civil law countries have permitted parties civiles to pursue civil claims in criminal prosecutions in France, Spain and Senegal.

39 Pinochet, supra note 28.
41 France: see footnote 47. Italy: Van Auken, ‘Italian judge sees trial of 140 over Operation Condor repression’ Global Research (2008) (arrest warrants issued for current and former officials in Argentina, Bolivia, Brazil, Chile, Peru and Uruguay suspected of committing torture and enforced disappearances); Spain: Spanish courts have issued arrest warrants for current and former officials from Argentina, Chile, Guatemala, Audiencia Nacional, Juzgado Central de Instruccion Uno, D. Previás 331/1999 (2008); Israel and Rwanda, Audiencia Nacional, Juzgado Central de Instruccion No. 4, Sumario 3/2008 – D. Auto (2008) (arrest warrants against 40 Rwandanese citizens, some of them current or former officials, for crimes against humanity, exempting President based on personal immunity); Sweden: International arrest warrant and extradition request issued in November 2001 for an Argentine naval officer for the enforced disappearance of a Swedish citizen, Decision by Chief Prosecutor, Tomas Lindstrand, (2001), C-9-1-405-01.
43 Spanish Criminal Code, Art. 109.2; Spanish Criminal Procedure Code, Arts 111, 112.1, and 114.1. See also, Amnesty International, Universal jurisdiction: The scope of universal civil jurisdiction (2007) for a discussion of some of the many other states beyond member states that routinely permit their courts to entertain civil claims in criminal cases.
44 See REDRESS, Universal Jurisdiction in Europe (2002).
47 France: Arrest warrant issued in November 2006 for eight current Rwandan officials (but not the President on the ground of personal immunity) and one former official for killings and various terrorist acts in case with eight parties civiles seeking civil reparations. Deliverance de mandats d’arrêt internationaux, Ordonnances de sort-communiqué, Tribunal de grande instance, Paris, Jean-Louis Bruguier, Premier Vice-Président, 17 novembre 2006, at 61. Germany arrested Rose Kabuye, the Rwandan chief of protocol, named in this warrant and extradited her to France. James Karuhanga and Felly Kimenyi, ‘Rwanda: Rose Kabuye Arrives in France’ (2008); Spain: Order issued in civil proceeding joined to criminal one freezing funds of former President Pinochet of Chile to
22. Civil judgments have also been obtained in common law countries against current and former foreign officials for crimes under international law without subject-matter immunity presenting a barrier to proceedings. In Al-Adsani v. Kuwait, a deputy High Court judge on 8 July 1993 ex parte gave the applicant leave to serve proceedings on the individual officials, which was confirmed in chambers on 2 August 1993, and after effecting service, a default judgment was obtained. Under US legislation, some of which dates back more than two centuries, civil suits have been possible for torts in violation of the law of nations, even where committed by officials. Although occasionally suits have been dismissed because of personal immunity, US courts have denied subject matter immunity for torture and extrajudicial killing, and have not found these suits to be barred by the US Foreign Sovereign Immunities Act (‘FSIA’). The US Supreme Court has endorsed the line of cases beginning with Filartiga v. Pena-Irala, which found a former Paraguayan official liable for torture committed in Paraguay.

D. SUBJECT-MATTER IMMUNITY DOES NOT PURSUE A LEGITIMATE AIM AND IS A DISPROPORTIONATE RESTRICTION IN THIS CASE

23. In cases such as the present in which Article 6(1) is engaged, the Court has held that any limitation on access to court must not impair the very essence of the right, must pursue a legitimate aim and must be proportionate. The Convention is not intended to guarantee rights that are theoretical or illusory, but those that are practical and effective. This is particularly true of the right of access to the courts, in view of the prominent place held in a democratic society by the right to access to justice. This Court will take a range of factors into account in making an Article 6(1) assessment, including the seriousness of the violations seeking to be addressed by the victims and whether alternative means of redress are available.

(1) Subject-Matter Immunity for Torture does not Pursue a Legitimate Aim

24. Subject-matter immunity serves no legitimate purpose, such as the attribution of privileges and immunities to international organisations as an essential means of ensuring their proper functioning. As the state is not impleaded through an action against an official, the arguments sometimes used to justify the application of state immunity also do not arise. It is the personal responsibility of the official that is at issue, regardless of any concurrent responsibility of the state. The purpose of subject-matter immunity is to prevent suits against officials when they incur no independent responsibility but merely act as the mouthpiece of the state. This aim does not apply in cases in which torture is alleged as it is the personal responsibility of the official permit recovery by victims. Proceedings Summary 19/1997 C, Crime: Terrorism and Genocide, Separate Proceeding III, Operation Condor, 16 September 2004 (resulting in a settlement of US $ 8 million to 22,073 victims on 25 February 2005) (http://www.elclarin.cl/fpa/pdf/p_250205.pdf); Senegal: See, e.g. Decision on the Hissene Habre case, Doc. Assembly/AU/12 (XIII) Rev. 1, adopted by the 13th Ord. Ses. Of the Assembly, Sirte, Libya, 3 July 2009 (requesting all AU member states to fund trial and Senegal, the African Commission and the European Union to consider holding a donors conference).

Al-Adsani v. Kuwait, supra note 20, § 15.


See, Sosa v. Alvarez Machain, supra note 42. The US Supreme Court has recently granted certiorari to decide whether the statutory immunity of states in US courts under the FSIA applies to current and former foreign officials Sambantar v. O’Brien, No. 08-1555 (2009).


Ernst and Ors v. Belgium, no. 33400/96 (2003), §48.

See Ait-Mouhoub v. France, no. 22924/93 (1998), §52. See also, Ahmed and others v HM Treasury [2010] UKSC 2 at para 146 (characterising [a]ccess to a court to protect one’s rights is the foundation of the rule of law)


Waite and Kennedy v. Germany, id., §63 and 72.
that is at issue. Therefore, the only role subject-matter immunity plays is to prevent the official being held to account which cannot be considered a legitimate aim under Article 6(1). By contrast, as highlighted in section A above, ensuring accountability and victims’ right to access to justice in respect of torture pursues a key aim of the international community and conforms to the object and purpose of the Convention and the CAT.

(2) Subject Matter Immunity for Torture and ‘Disproportionate’ Interference

25. Any interference that does pursue a legitimate aim, must also have a rational association to that aim, and be proportionate to it. This Court has emphasised that the broader an immunity, the more compelling must be its justification.57 It has adopted a narrow interpretation of the concept of proportionality in cases involving parliamentary immunity, asking whether ‘the immunity [was] kept within well-defined limits, apt to achieve the purposes for which it is required without erring into unnecessarily blanket protection.’58 It has gone on to hold that ‘it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities on categories of persons’.59

26. The nature of the wrong in respect of which access to a court is sought is relevant to the proportionality analysis under Article 6(1). Given the status of the prohibition of torture and as set out in Section A above, the positive obligations that flow from it and the broader object and purpose of the prohibition, where what is at stake is access to justice and accountability for torture, the importance of the Article 6(1) right is heightened and a restrictive approach to the permissibility of any interference with it justified.

(3) No Alternative Means of Redress Exist

27. In assessing proportionality under Article 6(1), an important factor to be taken into account is whether reasonable alternative means to effectively protect the applicants’ rights under the Convention exist.60 In the cases currently before this Court, there are no reasonable alternative means of redress available.

a) No Effective Remedies Exist for Foreign Nationals Tortured in Saudi Arabia

28. Before the English Court of Appeal in the cases presently before this Court, Mance LJ held that it would be disproportionate to automatically apply subject-matter immunity if the state in which the torture is alleged to have occurred does not provide an effective remedy in conformity with the requirements of Article 14 of the CAT. He found that, ‘this must on any view weaken its position in insisting on a claim to state immunity in respect of such a claim against one of its officials elsewhere’.61

29. In Saudi Arabia, the state in which the torture was allegedly committed, the Code of Criminal Procedures, which was issued by a Royal Decree No. M/39 of 16 October 2001

57 See Kart v. Turkey, no. 8917/05 (2009), § 83.
58 Zollman v. UK, App. No. 62902/00 (27 Nov. 2003) (Dec.) at section 2. See Cordova v. Italy (no. 1) no. 40877/98 (2003), No. 1, § 63-64; De Jorio v. Italy, supra note 55, §54.
59 See Fayed v. the United Kingdom, no. 37101/94 (1994), §65; Cordova v. Italy (No. 1), id, §58. .
60 Ernst and Ors v. Belgium, supra note 52, §53-57; Cordova v. Italy (No. 1) id, §65-66; Cordova v. Italy (No. 2), no. 45649/99 (2003), §66-67.
61 Court of Appeal, supra note 36 at §85 – 86.
prohibits torture and degrading treatment (Articles 2 and 35) and requires interrogations not to affect the will of the accused in making a statement (Article 102). The Code does not provide that torture, which is not defined at all and therefore is not consistent with Article 1 of the CAT (which Saudi Arabia has ratified), or other degrading treatment are crimes under Saudi Arabian law. There is no specific punishment for the crime of torture. Judges rely on Shari’a law, which is not all written, to decide if torture has been committed and to determine the punishment. This is further aggravated by the lack of openness and transparency of the criminal justice system and the lack of independence of judges and prosecutors.62

30. The Committee against Torture has found that there are no effective mechanisms for investigating claims of torture or ill-treatment in Saudi Arabia, including claims made before courts.63 Courts readily accept ‘confessions’ which a number of defendants allege they were forced to make under torture or other ill-treatment.64 The main avenue for complaints regarding human rights violations committed by the state and its public servants is a Court of Grievances established in 1982.65 The law establishing the Court provides for hearing claims for compensation in relation to actions by an administrative body (Article 13c) through the Court of Grievances, which can hear claims and give its ruling. However, it cannot hear claims that relate to acts of ‘sovereignty’ (Article 14), a concept that is used in the law without definition. The interveners are not aware of cases of torture being successfully investigated and prosecuted and punishment proportionate to the gravity of the crime of torture being imposed by the Court of Grievances.

31. The Committee against Torture has expressed concern over ‘[t]he different regimes applicable, in law and in practice, to nationals and foreigners in relation to their legal rights to be free from, and their ability to complain of, conduct in violation of the Convention’.66

32. Effectively, there is no independent and impartial avenue of launching a civil case against any member of government for compensation for cases of human rights violations, and therefore there is a de facto general state of impunity for human rights violations including torture.

b) Diplomatic Protection does not Constitute an Effective or Alternative Remedy in Conformity with Article 6(1)

33. In Al-Adsani v. United Kingdom, the respondent state submitted that, ‘[t]here were other, traditional means of redress for wrongs of this kind available to the applicant [a dual national of Kuwait and the UK], namely diplomatic representations or an inter-State claim.’67 As the claimant alleges that he was tortured in Kuwait, he could not access diplomatic protection from that state. To the knowledge of the Organisations there is no evidence that the UK has ever provided Mr. Al-Adsani with diplomatic protection or espoused his claim against Kuwait and he remains without a remedy.

---

64 See Amnesty International, supra note 62.
65 Royal Decree Number M/78, September/October 2007 (amending a previous law concerning the establishment of such a Court). The law provides that an administrative judicial system runs in parallel to the criminal court system which is connected to the Executive and under the direct authority of the King.
66 CAT, supra note 63, para. 4 (c).
67 Al-Adsani v. United Kingdom, supra note 20 §50.
34. Under current English\textsuperscript{68} and international law,\textsuperscript{69} diplomatic protection does not constitute an alternative means of redress as the state enjoys discretion as to whether and on what grounds to espouse a claim taking into account a range of factors, including but not limited to the situation of the individual, such as foreign policy interests, the broader relationship between the two governments and the underlying subject matter.\textsuperscript{70} A British citizen cannot compel the executive to espouse his or her claim. Even if the state does choose to take up the case, the claim becomes one of the state and not the individual\textsuperscript{71} and the state may but is not obliged to pass on any damages obtained to the individual.\textsuperscript{72} Accordingly, diplomatic protection does not present an alternative means of redress due to its discretionary nature and unpredictable availability and application.

**CONCLUSION**

35. The Organisations submit that the application of subject-matter immunity in the present cases does not pursue a legitimate aim. Alternatively, even if the restriction on access to a court is considered to pursue a legitimate aim, it is plainly disproportionate in light of: (i) the special status of torture in international law, reflecting the egregious nature of the violations it seeks to address; (ii) the importance associated with the positive obligations that flow from it including the right to access justice; (iii) the significant developments that have occurred during the last two decades in combating impunity, particularly in ensuring that no safe havens for torturers exist and restricting procedural obstacles to access to justice such as amnesties and immunities; (iv) the absence of any clear connection between the restriction and the aim it purports to serve and (v) the lack of any alternative means of securing redress for victims.

36. In circumstances where torture victims are precluded from bringing civil claims against individual perpetrators solely based on the latter’s claim to subject-matter immunity for torture and where there are no other means to secure redress then, it is submitted, there is a breach of the right to access court under Article 6(1).

Lorna McGregor, Widney Brown, Law Helen Duffy, Eric Metcalfe, Legal International Legal and Policy Director, Litigation Director, Director, JUSTICE Adviser, REDRESS Amnesty International INTERIGHTS

\textsuperscript{68} R (on the Application of Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs and another, [2002] EWCA Civ 1598.


\textsuperscript{70} Id. at para. 7; International Law Commission, Draft Articles on Diplomatic Protection (2006) art. 2.

\textsuperscript{71} PCIJ, Series A/B, No. 61, Appeal from a Judgment of the Hungaro-Czechoslovakia Mixed Arbitral Tribunal, 231 (1933).

\textsuperscript{72} Chorzow Factory Case (Pol v. FRG) 1927 PCIJ Series A, No. 9.
ANNEX 1: DETAILS OF ORGANISATIONS

REDRESS is an international human rights non-governmental organisation, based in London, with a mandate to assist torture survivors to seek justice and other forms of reparation. It fulfills its mandate through a variety of means, including casework, law reform, research and advocacy. It has accumulated a wide expertise on the various facets of the right to reparation for victims of torture under international law. REDRESS regularly takes up cases on behalf of individual torture survivors and has wide experience with interventions before national and international courts and tribunals. At the domestic level, REDRESS assists lawyers representing survivors of torture seeking some form of remedy such as civil damages, criminal prosecutions or other forms of reparation including public apologies. At the international level, REDRESS represents individuals who are challenging the effectiveness of domestic remedies for torture and other forms of ill-treatment, including the scope and consequences of the prohibition of torture in domestic law, the State’s obligation to investigate allegations, prosecute and punish perpetrators, as well as the obligation to afford adequate reparations to the victims.

AMNESTY INTERNATIONAL is a worldwide movement of people working for respect and protection of internationally-recognised human rights principles. The organisation has over 2.8 million members and supporters in more than 150 countries and territories and is independent of any government, political ideology, economic interest or religion.

INTERIGHTS is an international human rights law centre, based in London, which has held consultative status with the Council of Europe since 1993. It is a registered charity, independent of all governments. It works to promote the effective application of international human rights standards and procedures. A critical aspect of INTERIGHTS’ activities involves human rights litigation, including the filing of amicus curiae briefs before national and international courts and tribunals on points of law of key importance to human rights protection on which our knowledge of international and comparative practice might assist the court. INTERIGHTS has submitted amicus curiae briefs before this Court in many cases including Al-Skeini and Others v the United Kingdom (Appl. 55721/07), Izvebekhai v Ireland (Appl. 43408/08), and Baysakov v Ukraine (Appl. 54131/08).

JUSTICE, founded in 1957, is a UK-based human rights and law reform organisation. Its mission is to advance human rights, access to justice and the rule of law. It is also the UK section of the International Commission of Jurists. It has intervened in many of the leading UK cases concerning the domestic and international prohibition against torture, including A and others v Secretary of State for the Home Department (No 2) (2006) 2 AC 221, RB (Algeria) and others v Secretary of State for the Home Department (2009) UKHL 10, and Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs [2010] EWCA Civ 65.
Session Two: Accountability Litigation Outside the United States


Open Society Justice Initiative (September 2009)

Filing: This is the application in the European Court of Human Rights’s first scheduled case concerning a European member state’s liability for extraordinary rendition. The applicant claims that Macedonia violated Article 3 of the European Convention on Human Rights when it illegally detained and transferred Khaled El-Masri to Afghanistan, where he was subject to ill-treatment. The application notes that the Macedonian government has maintained “a total denial” of complicity in El Masri’s abuse in public, “while stating in private that the incident was a favour to the Americans.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
COUR EUROPÉENNE DES DROITS DE L’HOMME
EUROPEAN COURT OF HUMAN RIGHTS

Conseil de l’Europe – Council of Europe
Strasbourg, France

REQUÊTE
APPLICATION

El-Masri v Macedonia

présentée en application de l’article 34 de la Convention européenne des Droits de l’Homme,
ainsi que des articles 45 et 47 du règlement de la Court

under Article 34 of the European Convention on Human Rights
And Rules 45 and 47 of the Rules of the Court
I. THE PARTIES

A. THE APPLICANT

1. Surname: El-Masri
   2. First name(s): Khaled
   3. Sex: male
   4. Nationality: German
   5. Occupation: Unemployed
   6. Date and place of birth: 29 June 1963, Kuwait.
   7. Permanent Address: ------- ------- , ------- , -------
   8. Tel. No.: 
   9. Present address (if different from 6.):
   10. Name of Representatives:
   11. Occupation of Representatives:
   12. Address of Representatives:
   13. Tel No.
       James A. Goldston, Filip Medarski,
       Attorney, New York Bar, Executive Director Lawyer, Macedonia Bar
       Rupert Skilbeck,
       Barrister, England & Wales, Litigation Director
       Darian K. Pavli,
       LL.B, LL.M., Legal Officer
       Open Society Justice Initiative
       Vasil Glavinov Street 3/5-4
       400 West 59th Street 1000 Skopje
       New York, NY 10019, U.S.A. Macedonia
       Tel.: +1 212 548 0606 Tel: +389 2 329 0033

B. THE HIGH CONTRACTING PARTY

14. The former Yugoslav Republic of Macedonia
Outline of Application

II. STATEMENT OF THE FACTS

2-10 Abduction and Detention in Macedonia
11-19 Incommunicado Detention in the Skopski Merak Hotel
20 Transfer to Skopje Airport
21-27 Handover to CIA Rendition Team at Skopje Airport
28-33 Flight from Skopje to Afghanistan
34-38 The “Extraordinary Rendition” program of the U.S. Government
39-51 Detention and Interrogation in Afghanistan
52-61 Disguised “Reverse Rendition” to Albania
62-65 Arrival in Germany and Criminal Complaint
66-69 Internal Investigation in Macedonia
70-71 Criminal Process in Macedonia
72 Civil Process in Macedonia
73 Knowledge of Rendition in January 2004
74-77 Newspaper Reports
78-83 UN Reports
84 ICRC
85-92 Non-Governmental Organisations
93-95 Actions of other European governments and courts
96-99 Diplomatic Missions of Macedonia
100 International Inquiries
101-103 Council of Europe: Article 52 Procedure
104 Council of Europe: Venice Commission
105-113 Council of Europe: Parliamentary Assembly – the Marty Inquiry
114-120 European Parliament – the Fava Inquiry
121-125 German Prosecutor’s Investigation
126-129 German Parliamentary Inquiry
130 Spanish Prosecutor’s Investigation
131-132 Press Investigations
133-135 UN Committees
136-138 Legal Action in the United States
139-147 Submissions
### III. STATEMENT OF ALLEGED VIOLATIONS OF THE CONVENTION AND RELEVANT ARGUMENTS

<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>148-152</td>
<td>Introduction</td>
</tr>
<tr>
<td>153-154</td>
<td>ARTICLE 3</td>
</tr>
<tr>
<td>154-162</td>
<td>A. The Skopski Merak Hotel: Article 3</td>
</tr>
<tr>
<td>163-173</td>
<td>Relevant Legal Standards: Scope of Article 3</td>
</tr>
<tr>
<td>164-174</td>
<td>Violation of Article 3: The Skopski Merak Hotel</td>
</tr>
<tr>
<td>174-175</td>
<td>B. Skopje Airport Transfer and “Capture Shock”: Article 3</td>
</tr>
<tr>
<td>176-179</td>
<td>Relevant Legal Standards: The Obligation to Prevent Ill-Treatment</td>
</tr>
<tr>
<td>180-194</td>
<td>Violation of Article 3: Skopje Airport Transfer</td>
</tr>
<tr>
<td>195-196</td>
<td>C. The Salt Pit, Afghanistan: Article 3</td>
</tr>
<tr>
<td>197-199</td>
<td>Relevant Legal Standards: Transfer in breach of the Convention – <em>Soering</em></td>
</tr>
<tr>
<td>200-207</td>
<td>Violation of Article 3: The Salt Pit, Afghanistan</td>
</tr>
<tr>
<td>208-209</td>
<td>D. Prompt and Effective Investigation</td>
</tr>
<tr>
<td>210-214</td>
<td>Relevant Legal Standards</td>
</tr>
<tr>
<td>215-218</td>
<td>No Effective Investigation</td>
</tr>
<tr>
<td>219-220</td>
<td>ARTICLE 5</td>
</tr>
<tr>
<td>221-225</td>
<td>Relevant Principles</td>
</tr>
<tr>
<td>226-229</td>
<td>Disappearance</td>
</tr>
<tr>
<td>230-234</td>
<td>Consular Access</td>
</tr>
<tr>
<td>235-239</td>
<td>A. The Skopski Merak Hotel and Skopje Airport Transfer: Article 5</td>
</tr>
<tr>
<td>240-242</td>
<td>C. The Salt Pit, Afghanistan: Article 5</td>
</tr>
<tr>
<td>243-244</td>
<td>ARTICLE 8</td>
</tr>
<tr>
<td>245-246</td>
<td>Scope of Article 8</td>
</tr>
<tr>
<td>247-248</td>
<td>In accordance with the law</td>
</tr>
<tr>
<td>249-250</td>
<td>Submissions</td>
</tr>
<tr>
<td>251-255</td>
<td>ARTICLE 13</td>
</tr>
<tr>
<td>256-257</td>
<td>National Security</td>
</tr>
<tr>
<td>258-260</td>
<td>Relationship with Article 3</td>
</tr>
<tr>
<td>261-262</td>
<td>THE RIGHT TO THE TRUTH</td>
</tr>
<tr>
<td>263-266</td>
<td>Missing persons and forced disappearances</td>
</tr>
<tr>
<td>267-270</td>
<td>Other Serious or gross human rights violations</td>
</tr>
</tbody>
</table>

---

*Note: The content is extracted from a legal document and includes various articles and sections related to violations of the Convention.*
SUMMARY

i. For more than four months during the first half of 2004, Khaled El-Masri, a German national traveling to Macedonia, was unlawfully detained, tortured and transferred to the custody of the CIA in Afghanistan as part of a U.S. government rendition program which has since been repudiated, on the basis of information since shown to be incorrect. Mr. El Masr asks this Court to find that Macedonia breached his rights under the Convention for its substantial role in his ill-treatment, and to order just satisfaction.

ii. On 31 December 2003, Mr. El-Masri, who was carrying a German passport, was detained when he crossed into Macedonia by border guards who questioned him for several hours. He was then driven to the Skopski Merak hotel in Skopje where he was detained for 23 days under armed guard, during which time he was denied access to a lawyer, his family or anyone else. He was continuously interrogated with information obtained from his home town of Ulm in Germany, about his acquaintances, his Muslim faith, and his Lebanese descent. He was threatened with a gun when he attempted to leave. For the last ten days of his captivity, he refused to eat.
iii. On 23 January 2004, Mr. El-Masri was handcuffed, blindfolded and driven to Skopje airport where he was handed to a CIA rendition team. He was beaten, stripped, sodomised and humiliated. He was then blindfolded, shackled, hooded and forcibly marched across the tarmac to a waiting CIA plane surrounded by a detail of armed Macedonian security guards. On the plane he was thrown to the floor, chained down, and injected with a substance that made him lose consciousness.

iv. The plane flew to Afghanistan, where he was detained for a further four months in appalling conditions. He was kept through the Afghan winter in a filthy cell, with no bed or proper bedding, no fresh water, little light and no contact with the outside world. He was constantly interrogated about his life in Ulm by American interrogators who were fully briefed with detailed information from Germany. He went on a hunger strike to protest against his treatment for 37 days, after which he was humiliatingly force fed. He was constantly in fear of his life, and told that he was in a country with no laws and that no-one knew where he was. He may have been seized because his name is similar to that of a man connected with the “Hamburg cell” of Al-Qaeda. Long after senior U.S. officials were informed that he was innocent, he was finally ordered to be released. In order to cover up the mistake, he was flown back to Albania in a “reverse rendition;” from where he made his way home to Germany.

v. The entire process, conducted and/or facilitated by Macedonia, was illegal, secret and wholly outside the law, further aggravating the human rights violations suffered by Mr. El-Masri. The process was carefully designed to inflict the greatest psychological damage in order to terrify and debase him for the purposes of interrogation. His detention in close confinement under armed guards in the Skopski Merak hotel, where he was threatened with a gun, violated Article 3. The brutal transfer at the airport conducted jointly by Macedonia and U.S. agents was designed to humiliate him and amounts to torture. His subsequent ill-treatment in Afghanistan was entirely foreseeable by Macedonia, as the excesses of the U.S. “extraordinary rendition” programme were by then common knowledge, such that Macedonia is also responsible for the subsequent Article 3 violation.
vi. The Government of Macedonia also colluded in directly facilitating a violation of Article 5. From the moment that he left the border crossing, Mr. El-Masri was illegally detained. There was never a warrant of arrest, he was never brought before a judge and he never saw a lawyer or a German consular official. Despite his requests to contact them, his family had no idea where he was. Macedonia effected this violation for 23 days in the Skopski Merak hotel, for several hours in Skopje airport and in giving him to the CIA so that the Article 5 violation would continue. As such, they are directly responsible for the entire period of unlawful detention.

vii. Although Mr. El-Masri has sought legal redress in Macedonia, Germany, and the United States, no-one has ever been held to account for these violations of the Convention. Despite substantial inquiries by the Parliamentary Assembly of the Council of Europe and the European Parliament, the full truth of what occurred remains shrouded in secrecy. In the face of convincing evidence documenting Macedonia’s complicity in Mr. El-Masri’s abuse, the government maintains a total denial in public, while stating in private that the incident was “a favour” to the Americans. Senior U.S. officials have on several occasions privately admitted that the rendition was a “mistake.”

viii. Khaled El-Masri has the right to an effective and impartial investigation under Article 3 and Article 5, the right to a remedy and an apology under Article 13, and the right to the truth and to the rule of law under Article 10, together with Articles 3, 5 and 13. More than that, the public in Macedonia and in Europe has the right to the truth and to be reassured of the rule of law.
Session 3: Roundtable Discussion – Challenges in the U.S.: Litigation Barriers, Emerging Issues and New Strategies

Overview

14. HRI Background Briefing Paper

Executive Detention

18. “A Trial Within A Trial: Justice, Guantánamo-Style”

Accountability for Torture

19. “Counter-Counter-Terrorism Via Lawsuit: The Bivens Impasse”

Emerging Litigation Issues

23. “U.S. Debates Response to Targeted Killing Lawsuit”

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices

Challenges in the U.S.: Litigation Barriers, Emerging Issues and New Strategies

Background Paper, September 24, 2010

On October 1, 2010, the Human Rights Institute at Columbia Law School (HRI) will bring together key litigators and advocates involved in shaping post-9/11 civil liberties and human rights litigation strategies. In a roundtable discussion (Session 3), we will reflect on the state of the litigation in U.S. courts, address current challenges and emerging issues, and strategize about how to proceed on multiple fronts of litigation and advocacy. The purpose of this discussion, which will cover diverse types of post-9/11 litigation challenges, is not to reach a consensus or develop a unified approach. Instead, the goal is to provide a space in which participants can share information and insights, take up concerns and brainstorm together.

As a foundation for the roundtable discussion, this paper provides a brief overview of recent developments in U.S. litigation involving national security and civil liberties issues, and outlines some emerging issues in this field that may be litigated in the coming months. HRI has prepared this paper as a background briefing for participants who may be less familiar with the litigation developments in the U.S.; the paper does not offer an exhaustive list of all recent developments, nor does it provide a comprehensive analysis of the U.S. litigation.

I. Recent Developments in the U.S. Courts

In recent months, litigators and advocates in the United States have expressed increasing disappointment with the Obama Administration’s positions concerning a range of issues related to counterterrorism practices. The U.S. courts have adopted the Administration’s positions in several significant cases involving challenges to post-9/11 human rights violations. For example, the courts have sided with the government in upholding the executive’s authority to detain militarily individuals captured far from a conventional battlefield; to transfer detainees (even against their will) to the custody of other countries; and to assert evidentiary immunities and privileges to evade judicial review of past and current practices. Taken together, the Administration’s positions and the courts’ rulings create what the American Civil Liberties Union (ACLU) describes as “a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration.”

U.S. litigators thus stand at a critical juncture, in which they must find ways to reverse this situation while confronting a growing number of obstacles in the courts. This section discusses recent developments in the litigation of several different types of challenges.

A. Executive Detention

Within days of taking office, in January 2009, President Obama issued three executive orders relating to the government’s detention and interrogation policy. The first order directed the closure of the detention facility at Guantánamo Bay by January 2010, and created an interagency task force to review the case of every detainee at Guantánamo. The second order created a special task force to review the government’s detention policy going forward. The third order banned coercive interrogation methods and required that all interrogations of detainees in armed conflict follow the Army Field Manual guidelines.2

As with many issues involving national security and civil liberties, however, the Obama Administration has followed this significant step forward with several steps back. For example, the Administration has continued its predecessor’s aggressive opposition to petitions for writ of habeas corpus filed by Guantánamo detainees, even where there is little evidence of wrongdoing or the evidence is tainted by allegations of torture or abuse.3 The government has lost the vast majority of the habeas cases that have reached decision on the merits. Since 2008, when the Supreme Court decided in Boumediene v. Bush, 128 S. Ct. 2229 (2008) that the constitutional writ of habeas corpus extends to individuals held in military detention at the U.S. Naval Base at Guantánamo Bay, the U.S. District Court for the District of Columbia has considered and decided habeas petitions filed by some 54 Guantánamo detainees and has granted the writ in 37 of these cases. Numerous other habeas cases remain pending.

The detainees’ record in the U.S. Court of Appeals for the D.C. Circuit has been less successful.4 Thus far, the D.C. Circuit has ruled on six merits appeals of Guantánamo habeas cases, five of which were brought by detainees challenging the denial of habeas relief and one of which was brought by the government challenging the grant of the writ. The D.C. Circuit affirmed four of the five denials, and vacated and remanded the fifth denial for further proceedings; and in the one appeal brought by the government, the D.C. Circuit sided with the Administration and reversed the district court’s grant of the writ.5 Further, in Kiyemba v. Obama

---


3 The habeas cases challenge the legality of detention under the 2001 Authorization for the Use of Military Force against Terrorists (“AUMF”), in which Congress granted the President the authority to use all “necessary and appropriate force” against those he determined “planned, authorized, committed or aided” the September 11th attacks, or who harbored said persons or groups. The Obama Administration has interpreted its detention authority under the AUMF to apply to those persons who “planned, authorized or committed or aided” the September 11 attacks, “harbored those responsible for those attacks,” or “were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in to hostilities against the United States or its coalition partners.” See Gov’t Filing, In re: Guantánamo Bay Detainee Litigation, Misc. No. 08-442 (D.D.C. March 13, 2009).


5 See Al-Adahi v. Obama, No. 09-5333 (D.C. Cir. July 13, 2010) at 8 (finding that “[h]aving tossed aside the government’s evidence, one piece at a time, the [district] court came to the manifestly incorrect – indeed startling –
(“Kiyemba I”), 555 F.3d 1022, (D.C. Cir. 2009) the D.C. Circuit sided with the Administration and held that courts do not have the power to order the release into the U.S. of Guantánamo detainees who have won their habeas petitions but who cannot be transferred to a third country.\(^6\)

The D.C. Circuit has also adopted the Obama Administration’s arguments against the extraterritorial applicability of the writ of habeas corpus. In Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010), the D.C. Circuit reversed a ruling by the district court and held that that the constitutional writ of habeas corpus does not extend to Afghanistan. The D.C. Circuit found that the prison at Bagram effectively lies beyond the reach of the federal courts. While this decision remains subject to appeal, some Administration officials reportedly view the decision as a source of authority for using Afghan prisons to detain without charge and interrogate individuals captured anywhere in the world.\(^7\)

**B. Transfer**

In a decision issued on the same day as Boumediene, the Supreme Court ruled in Munaf v. Geren, 128 S. Ct. 2207 (2008) that two American citizens detained in Iraq by U.S. forces were entitled to file a habeas petition challenging their detention, but were not entitled to an injunction barring their transfer to Iraqi authorities for prosecution in the Iraqi courts based on crimes allegedly committed in Iraq. The Obama Administration has successfully used the Munaf ruling to avoid judicial review of its decisions to transfer detainees to the custody of other countries.

For example, in Kiyemba v. Obama (“Kiyemba II”), 605 F.3d 1046 (D.C. Cir. 2010), the D.C. Circuit held in May 2010 that an executive branch determination that a detainee will not be tortured if transferred to a particular country is binding on the court, and a habeas court may not second-guess the executive’s assessment. In a troubling application of this deference to the executive, the Supreme Court in July 2010 refused to stay the transfer of an Algerian detainee at Guantánamo, Abdul Aziz Naji, who had consistently argued that he would face certain torture if returned to Algeria. Three days later, Mr. Naji was transferred against his will to Algeria, where he was quickly indicted by the government and placed under judicial supervision.

**C. Torture and Accountability**

During his first days in office, President Obama disavowed the use of torture and took steps to dismantle the Bush Administration’s torture program. At the same, the Obama Administration has failed to hold accountable those who authorized the use of torture. In fact, in many cases the Obama Administration has actively sought to prevent accountability by opposing lawsuits brought by victims of torture and abuse.

\(^6\) See Kiyemba v. Obama, 555 F.3d 1022, 1025 (D.C. Cir. 2009) (“Kiyemba I”) (finding that 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.”).

\(^7\) See Julian E. Barnes, U.S. Hopes to Share Prison with Afghanistan, L.A. TIMES (June 9, 2010); see also ACLU, supra note 1, at 12.
Several individuals who were subject to detention and interrogation have filed lawsuits based on the *Bivens* doctrine, which allows individuals to seek damages for constitutional violations committed by federal government officials.\(^8\) The Administration has achieved the dismissal of many of these cases by invoking several defenses, including qualified immunity, which shields government officials from liability where their actions, even if later found to be unlawful, did not violate “clearly established law.”\(^9\) In other cases, the Administration has successfully argued that the need for deference to the executive in matters of foreign policy and national security constitutes a “special factor” that counsels against judicial interference.\(^10\)

The Administration has blocked other types of accountability lawsuits by raising the “state secrets” privilege. When properly invoked, this privilege allows the government to block the release of any information in a lawsuit that, if disclosed, would cause harm to national security. In contrast, the Bush Administration used this privilege to argue that entire cases should be dismissed at the outset and the Obama Administration has successfully adopted its predecessors’ approach.\(^11\) For example, the U.S. Court of Appeals for the Ninth Circuit recently held for the government in *Mohammed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. Sept. 8, 2010), finding that former prisoners of the CIA’s rendition program could not sue over their alleged torture in overseas prisons because such a lawsuit might expose secret government information.

II. Emerging Issues in U.S. Litigation

During the summer of 2010, HRI consulted more than twenty practitioners who are involved in shaping post-9/11 civil liberties litigation and advocacy strategies in the U.S. and asked these individuals to identify emerging issues that may be the subject of new litigation in the coming months, and issues about which there is still room for gains through litigation. This section sets forth some of the issues that were most often referenced in the consultations.

A. Preventive Detention

In 2009, a joint task force convened by the Administration reviewed the detentions of all prisoners still held at Guantánamo Bay, pursuant to this interpretation of the AUMF detention standard. The task force purportedly reviewed each individual case according to guidelines providing that “a detainee should be considered eligible for continued detention under the

---

\(^8\) See George D. Brown, “Counter-Counter-Terrorism via Lawsuit”—*The Bivens Impasse*, Research Paper No. 176, Boston College Law School Legal Studies Research Paper Series (Sept. 23, 2009) at 871-881 (providing overview of *Bivens* actions filed in connection with the “war on terror”).

\(^9\) See, e.g., *Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009) (dismissing claims brought by former Guantánamo detainees seeking redress for torture, abuse and religious discrimination, on the grounds that the government was immune from suit because the courts had not clearly established that the torture and abuse of Guantánamo detainees was prohibited at the time that the abuse occurred).

\(^10\) See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009), *cert. denied*, 2010 WL 390379 (2010) (declining to extend the scope of *Bivens* to cover extraordinary renditions claims, and finding that “the foreign policy and national-security concerns raised here are properly left to the political branches of government”).

AUMF only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by federal government is not feasible in any forum; and (3) continued detention without criminal charges is lawful.’’ The task force concluded that 48 detainees at Guantánamo met these guidelines and were legally subject to ‘‘preventive detention.’’ The Administration has yet to release the identities of these individuals. Meanwhile, the commander of the Guantánamo detention facility has stated that the prison staff is still operating under the assumption that the facility will close, and is therefore making no special preparation for the indefinite detention of the 48 individuals described in the task force report.13

The forum and procedures by which detainees designated for preventive detention will be able to seek judicial review is unknown. Habeas review should still be a viable option for those detainees who have filed habeas petitions and have yet to receive a ruling. Detainees who have lost their habeas petitions, however, are arguably also subject to preventive detention—regardless of whether the Task Force originally placed them in this category. Obama Administration officials have stated that they are working on some sort of administrative review procedures for individuals designated for preventive detention, but these procedures have not yet been established.

B. Military Commissions

On November 13, 2001, President Bush issued his original Military Order authorizing the use of military commissions to try non-citizen terrorism suspects. The first military commissions pursuant to this Order began in 2004, but in 2006, in Hamdan v. Rumsfeld, the Supreme Court invalidated these commissions as improper under the Uniform Code of Military Justice (UCMJ). Shortly thereafter, Congress approved the Military Commissions Act of 2006 (MCA 2006), which authorized the Department of Defense to promulgate rules for the commissions that departed from the UCMJ and possibly U.S. obligations under international law. The proceedings were reinstated and the Bush Administration achieved three convictions.

In January 2009, within days of taking office, President Obama ordered a temporary halt to the military commissions, as part of the Administration’s review of the detention program at Guantánamo. In May 2009, the Obama Administration announced that it was considering reinstating the military commissions, albeit with some changes to the procedural rules. Congress subsequently approved the Military Commissions Act of 2009 (MCA 2009), which amended the MCA 2006 to provide some reforms supported by the Obama Administration. 14 In November 2009, Attorney General Holder announced that the Department of Justice would pursue the prosecution in federal court of the five individuals accused of conspiring to commit the 9/11


attacks, and would refer back to the Department of Defense five defendants to face trial by military commission. In January 2010, the Guantanamo Review Task Force referred 44 detainees for prosecution either in a military commission or in federal court. (This number includes the cases about which the Administration had already announced a decision to prosecute.)

In practice, though, the Obama Administration has moved slowly to restart the military commissions under the MCA 2009. Since President Obama took office, no new military commission charges have been filed, charges in several cases have been withdrawn or even dismissed, and the Administration has moved forward with the proceedings in only a handful of cases that originally began under the Bush Administration. In August 2010, the Obama Administration achieved its first conviction in the case of Ibrahim Al Qosi, a Sudanese man who pled guilty to the crime of providing material support for terrorism in exchange for a secret plea agreement that reportedly requires him to serve only two years at Guantánamo.

Military commission defendants have already begun filing challenges to the legality of the MCA 2009, including on constitutional grounds, in both the federal courts and the military commissions themselves. Decisions in military commission cases are ultimately appealable to the Article III courts. However, the D.C. District Court has repeatedly found that military commission defendants must exhaust all of their military remedies before they can file federal court challenges regarding the legality of the military commissions. It thus remains to be seen when, and whether, the federal courts will take up these challenges.

C. Targeted Killing

The so-called “targeted killing” program entails the deliberate assassination of “known” terrorists outside U.S. territory. Since 9/11, the U.S. military has reportedly employed Predator drones dozens of times to fire on “known” terrorists in Afghanistan, Iraq, Pakistan, Yemen and elsewhere. Commentators have reported that there were more such strikes during the first year of the Obama Administration than during the last three years of the Bush Administration. Additionally, President Obama has left intact the authority granted by his predecessor to the CIA and the military to kill American citizens abroad, if they are involved in terrorism against the U.S.

---

18 See Khadr v. Obama, Civil Action No. 04-1136 (JDB), Mem. Op. (July 20, 2010) (finding that a federal court is required to abstain from hearing a habeas petition by military petitioner until all available military remedies have been exhausted).
19 See ACLU, Establishing a New Normal at 13.
On August 30, 2010, the ACLU and the Center for Constitutional Rights (CCR) filed a lawsuit on behalf of Nasser Al-Aulaqi, the father of Anwar Al-Aulaqi, a U.S. citizen residing in Yemen whose targeted killing has been authorized by the Obama Administration. The complaint challenges the executive’s asserted authority to carry out targeted killings of U.S. citizens located far from any armed conflict zone and seeks an injunction to prevent the killing of Anwar Al-Aulaqi, a Muslim cleric who is accused of playing a leading role in Al-Qaeda in Yemen. Additionally, the complaint asserts that the government has violated the Constitution by failing to disclose the standard it uses for authorizing targeted killings. As of this writing, the Administration is due to submit its initial response to the lawsuit on September 24, 2010. Reports suggest that officials in the Administration are divided about how best to respond.21

D. Material Support Statute

In the recent Supreme Court case Holder v. Humanitarian Law Project, 561 U.S. ___ (2010), the Obama Administration asserted its authority to restrict freedom of speech and association in the interest of protecting national security. Siding with the Administration, the Supreme Court held that the First Amendment permitted applying the criminal “material support” statute (18 U.S.C. § 2339B) to a group which sought to train members of an organization designated by the State Department as “terrorist” to use international law peacefully. As noted by David Cole, who argued the case for the Humanitarian Law Project, the Supreme Court thus ruled for the first time in its history “that speech advocating only lawful, nonviolent activity can be subject to criminal penalty.”22 This decision may have significant implications for litigators’ work with certain clients and organizations.

E. Transfer and Diplomatic Assurances

The U.S. continues to rely on diplomatic assurances, or promises not to torture, in transferring individuals to countries where they are at risk of torture. Under the Obama administration, the U.S. government has maintained a policy of non-disclosure about its standards for the use of assurances and its practices, including in immigration removals, repatriations from Guantánamo and custodial transfers of prisoners in Iraq and Afghanistan. It continues to avoid judicial review for its transfer decisions regarding “War on Terrorism” detainees, due to Munaf and Kiyemba II. (In Fall 2010, HRI will publish a report on diplomatic assurances comparing the U.S. government’s lack of disclosure, evasion of judicial review and ad hoc monitoring arrangements to the practices of other countries and human rights standards).

President Obama initially signaled an interest in reforming practices, and established an interagency task force on transfer and interrogation on entering office in January 2009. More than a year since the task force issued its August 2009 report and recommendations, the government has not published either a full or redacted version of the report or announced any steps to implement its recommendations. The government did issue a press release noting, with little elaboration, that the task force had issued recommendations to improve transfers by seeking better monitoring and establishing internal, interagency oversight. But the press release did not describe a timeline for

these improvements, and it is unclear whether the multiple agencies involved will agree to any decrease in their decision-making authority.  

F. Effects of Counterterrorism Measures on Communities in the U.S.

Practices justified on national security grounds continue to have a disproportionate impact on Muslim, Arab, South Asian and other communities in the U.S. For instance, in June 2010 the Center for Constitutional Rights submitted comments to the Bureau of Prisons challenging practices and conditions at Communication Management Units (CMUs), units which are designed to isolate and segregate certain prisoners in the federal prison system; in practice, the “overwhelming majority of individuals detained in the CMUs are Muslim.” Recently filed lawsuits challenge discrimination against Muslims, including on-the-job harassment, harassment of students in public schools, and a ban on religious practice in prison. In recent months, new programs have been established to address the unmet legal needs of impacted communities through a combination of strategies that includes education, documentation and litigation.

---


Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“Establishing a New Normal: National Security, Civil Liberties and Human Rights Under the Obama Administration”
American Civil Liberties Union (July 2010)

Public Report: The ACLU reviews the Obama Administration’s record on major issues related to civil liberties and national security, including transparency, torture and accountability, detention and the use of lethal force against civilians. At best, the ACLU concludes, the Administration’s record on these issues has been mixed; at worse, the ACLU suggests that “there is a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
ESTABLISHING A NEW NORMAL

National Security, Civil Liberties, and Human Rights
Under the Obama Administration

AN 18-MONTH REVIEW

JULY 2010

AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004
www.aclu.org
INTRODUCTION

On January 22, 2009—his second full day in office—President Obama signed a series of executive orders that squarely repudiated some of the most egregious abuses of the Bush administration. The new orders categorically prohibited torture and limited all interrogations, including those conducted by the CIA, to techniques authorized by the Army Field Manual. They outlawed the CIA’s practice of secret detention and shut down the CIA’s overseas prisons. And they mandated the closure of the Guantánamo prison within one year. These auspicious first steps towards fulfilling candidate Obama’s promise of change were more than symbolic gestures: they carried the force of law, they placed the power and prestige of the presidency behind restoration of the rule of law, and they gave weight to the President’s oft-stated view that adherence to our nation’s fundamental principles makes us safer, not less safe.

But in the eighteen months since the issuance of those executive orders, the administration’s record on issues related to civil liberties and national security has been, at best, mixed. Indeed, on a range of issues including accountability for torture, detention of terrorism suspects, and use of lethal force against civilians, there is a very real danger that the Obama administration will enshrine permanently within the law policies and practices that were widely considered extreme and unlawful during the Bush administration. There is a real danger, in other words, that the Obama administration will preside over the creation of a “new normal.”

This report examines the Obama administration’s record to date on a range of national security policies that implicate human rights and civil liberties. It concludes that the administration has taken positive steps and made genuine progress in some areas. Perhaps most notably, the administration’s release of Justice Department memoranda that purported to authorize the Bush administration’s torture regime, as well as a CIA report describing how even those lax limits were exceeded, evinced a commitment to transparency of truly historic significance, and the administration deserves high praise for making those critical documents available for public scrutiny. Regrettably, in a pattern that has repeated itself throughout the administration’s first eighteen months, a significant achievement was followed by a step back: the administration reversed its decision to comply with a court decision ordering the release of photos depicting the abuse of prisoners in Iraq and Afghanistan, and it supported legislation granting the Secretary of Defense unprecedented authority to conceal evidence of misconduct.

Similarly, the administration’s admirable commitment to dismantle the Guantánamo prison has been undermined by its unwillingness to dismantle the legal architecture of the Bush-era detention regime: the Obama administration has continued to assert the authority to detain militarily, without charge or trial, Guantánamo detainees (and others) captured far from any conventional battlefield, and there is a genuine danger that the administration will close the prison but enshrine the principle of widespread military detention without trial. Equally disappointing, the
administration’s unequivocal prohibition against torture has been fundamentally weakened by its continuation of the Bush administration’s efforts to stymie meaningful accountability: the administration has adopted the same sweeping theory of “state secrets” to prevent torture victims from seeking justice and compensation in U.S. courts, and the President himself has publicly opposed criminal investigations of the architects of the torture regime.

The ACLU will continue to monitor the impact of the administration’s national security policies on fundamental civil liberties and human rights. We hope that this report, published less than halfway through the President’s first term, will serve as a vehicle for reflection and further dialogue; we hope that the administration will renew its commitment to the principle that the nation’s fundamental values are the very foundation of its strength and security.
Many of the Bush administration’s most controversial national security policies—the warrantless wiretapping program, the torture program, the rendition program—were conceived, developed, and authorized in secret. The American public found out about these policies long after they were put into place, and after a great deal of damage had already been done. Too often, Americans had to rely on leaks to the news media, or litigation by public interest organizations, in order to find out about consequential national security policies that had been adopted in their name. Too often, national security policies that should have been subject to public debate were implemented secretly. And too often, this secrecy shielded government officials from accountability for decisions that violated the public’s trust and the law.

President Obama signaled a break from this past in his first days in office. In a Memorandum on Transparency and Open Government, the President acknowledged that transparency would “strengthen our democracy,” and he pledged that his administration would commit itself to “creating an unprecedented level of openness in Government.”

In a Memorandum on the Freedom of Information Act, the President declared that “[a] democracy requires accountability, and accountability requires transparency,” and he ordered all federal agencies to institute a “presumption in favor of disclosure,” thereby reversing the so-called “Ashcroft rule” that had governed during the Bush administration. The President cautioned federal agencies that “[t]he Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”

Over the next weeks, the Obama administration made modest—though nonetheless important—improvements to the rules governing classification. It funded a FOIA ombudsman. And it required agencies to release some information proactively and in formats usable by the general public.

Most significantly, the Obama administration agreed to release the Justice Department memos that had been the basis of the Bush administration’s torture program—memos that the ACLU and other public interest organizations had long been seeking under the Freedom of Information Act. The decision to release the memos was of historic importance. The memos allowed Americans to evaluate for themselves the legal arguments that were the foundation of the torture
program, and to decide for themselves whether the architects of the program had acted lawfully and in good faith. And in the weeks and months after the release of the memos, the Obama administration released official reports that shed further light on these questions. In August 2009, it released a report by the CIA’s Inspector General assessing the CIA’s interrogation and detention program. In February 2010, it released a report by the Justice Department’s Office of Professional Responsibility assessing the conduct of the lawyers who wrote the torture memos.

The administration’s commitment to transparency, however, has been inconsistent, and it has waned over time. Although the administration initially stated that it would comply with an appellate court decision requiring it to release abuse photographs from detention facilities in Afghanistan and Iraq, it later reversed course and declared that it would seek Supreme Court review, and it supported an invidious amendment to the FOIA intended to retroactively exempt the photos from release under the statute. In addition to thwarting the decision of the appellate court, the legislation invested the Secretary of Defense with sweeping authority to withhold any visual images depicting the government’s “treatment of individuals engaged, captured, or detained” by U.S. forces—no matter how egregious the conduct depicted or how compelling the public’s interest in disclosure. As the ACLU noted at the time, the legislation essentially gave the greatest protection from disclosure to records depicting the worst forms of government misconduct.

Since its change of heart on the abuse photographs, the administration has fought to keep secret hundreds of records relating to the Bush administration’s rendition, detention, and interrogation policies. To take just a few of many possible examples, it has fought to keep secret a directive in which President Bush authorized the CIA to establish secret prisons overseas; the Combatant Status Review Transcripts in which former CIA prisoners describe the abuse they suffered in the CIA’s secret prisons; records relating to the CIA’s destruction of videotapes that depicted some prisoners being waterboarded; and cables containing communications between

“A democracy requires accountability, and accountability requires transparency.”

—PRESIDENT BARACK OBAMA
in a 2009 memorandum to executive departments and agencies
the CIA’s secret prisons and officials at CIA headquarters. It has argued that the CIA’s authority to withhold information concerning “intelligence sources and methods” extends even to methods that are illegal. The administration has also fought to withhold information about prisoners held at Bagram Air Base in Afghanistan. Indeed, the Obama administration has released less information about prisoners held at Bagram Air Base than the Bush administration released about prisoners held at Guantánamo.

One topic that the Obama administration has shrouded in secrecy warrants particular attention. Over the last few months, many media organizations have reported about the administration’s “targeted killing” program—a program under which the administration asserts the authority to kill suspected terrorists anywhere in the world. At least one of the program’s targets is a United States citizen. Even the program’s proponents concede that the program raises serious questions of law and public policy. (We discuss the program at more length below.) Yet the information available to the public about the program is extremely limited. Stonewalling a FOIA request filed by the ACLU, the CIA has refused even to confirm or deny whether it has records about the program. There is no legitimate basis for the administration’s refusal to disclose the legal basis for the program and basic information about the program’s scope.

Also of grave concern to us is the administration’s aggressive pursuit of government whistleblowers. During his campaign, candidate Obama said that he knew “a little bit about whistleblowing, and making sure those folks get protection.” Rather than protect whistleblowers, however, the administration has been prosecuting them. It has charged Thomas Drake, a former official of the National Security Agency, for allegedly leaking information about waste and incompetence at that agency. (Notably, it was only because of a leak to the media that the public learned of the NSA’s warrantless wiretapping program.) It has charged Bradley Manning, a 22-year-old Army intelligence analyst, for allegedly leaking a video showing the killing of two Reuters news staff and several other civilians by U.S. helicopter gunships in Iraq. (Reuters had spent nearly three years trying to obtain the video through FOIA; now that the video is in the public domain, it is clear that there was no basis for withholding it.)

In its first months, the Obama administration pledged a new era of transparency, and it took substantial and historic steps to make good on that pledge. Over the next eighteen months, we urge the administration to recommit itself to the ideals that the President himself invoked in his first days in office. Our democracy cannot survive if crucial public policy decisions are made behind closed doors, implemented in secret, and never subjected to meaningful public oversight and debate. It cannot survive if the public does not know what policies have been adopted in its name.
TORTURE AND ACCOUNTABILITY

The Justice Department memos that the Obama administration released in April 2009 related to a torture program that was conceived and developed at the highest levels of the Bush administration. Justice Department lawyers wrote legal opinions meant to justify torture; senior civilian and military officials authorized torture; and CIA and military interrogators used torture—at Guantánamo, in the CIA’s black sites, and elsewhere. Government documents show that hundreds of prisoners were tortured in U.S.-run detention facilities, and that more than one hundred were killed, many in the course of interrogations.

In his first days in office, President Obama unambiguously rejected this legacy. In an executive order, President Obama categorically disavowed torture and directed that all prisoners in U.S. custody be afforded the protection of Common Article 3 of the Geneva Conventions (in compliance with the Supreme Court’s 2006 ruling in *Hamdan v. Rumsfeld*); that all interrogations of prisoners in U.S. custody conform to the Army Field Manual; that the CIA close its secret prisons; and that the International Committee of the Red Cross be promptly notified of any person detained by the United States.\(^\text{10}\) When the administration released the Bush administration’s torture memos in April 2009, the Justice Department withdrew all of the legal memos that had undergirded the Bush administration’s torture program,\(^\text{11}\) and in a public statement President Obama declared:

I prohibited the use of these interrogation techniques by the United States because they undermine our moral authority and do not make us safer. Enlisting our values in the protection of our people makes us stronger and more secure. A democracy as resilient as ours must reject the false choice between our security and our ideals, and that is why these methods of interrogation are already a thing of the past.\(^\text{12}\)

The decision to dismantle the Bush administration’s torture program was a crucial one, not just for the United States but for the world. President
Obama deserves credit for the decision, and for his vigorous defense of it.

But while the administration has disavowed torture, it has made little effort to hold accountable those who authorized it. In recent years, many other countries—including some of America’s closest allies, like the United Kingdom, Germany, Spain, and Canada—have begun to examine their responsibility for the abuse and torture of prisoners in U.S. custody. The United States is increasingly isolated in its unwillingness to investigate the roots of the torture program, its refusal to compensate torture survivors, and its failure to hold accountable the senior government officials who authorized interrogators to use torture.

The truth is that the Obama administration has gradually become an obstacle to accountability for torture. It is not simply that, as discussed above, the administration has fought to keep secret some of the documents that would allow the public to better understand how the torture program was conceived, developed, and implemented. It has also sought to extinguish lawsuits brought by torture survivors—denying them recognition as victims, compensation for their injuries, and even the opportunity to present their cases.

_Mohamed v. Jeppesen Dataplan, Inc._, for example, is a suit brought by five survivors of the CIA’s rendition program. In the district court, the Bush administration argued that the case could not be litigated without the disclosure of state secrets, and that it should therefore be dismissed at the outset. The district court agreed. To the surprise of many, the Obama administration defended that district court decision in the Court of Appeals for the Ninth Circuit, arguing that the district court was correct to deny the plaintiffs any opportunity to present their case in court. Even after a three-judge panel of the Ninth Circuit court sided with the ACLU and vacated the lower court decision, the Obama administration persisted in its argument that the case should not be litigated at all. It asked the full Ninth Circuit to reconsider the decision of the three-judge panel, and the court did so. A ruling is expected in the next few months.

The state secrets doctrine is not the only mechanism the Obama administration has invoked to extinguish civil suits by torture survivors. In _Rasul v. Rumsfeld_, a suit brought by former Guantánamo detainees seeking redress for torture, abuse, and religious discrimination, the Obama administration argued, remarkably, that the government defendants were immune from suit because, at the time that the abuse occurred, established law did not clearly prohibit torture and religious discrimination at Guantánamo. In _Arar v. Ashcroft_, the administration argued that the Constitution provided no cause of action to an innocent man who had been identified by the United States as a terrorist, rendered to Syria for torture, and not released until ten months later.
when it was determined that he was not a terrorist after all. In that case, the administration also argued to the courts that affording Arar a judicial remedy “would offend the separation of powers and inhibit this country’s foreign policy,” and impermissibly involve the courts in assessing “the motives and sincerity” of the officials who authorized Arar’s rendition.\(^\text{13}\)

The administration has sometimes suggested that civil suits are unnecessary because the Justice Department has the authority to investigate allegations that government agents violated the law.\(^\text{14}\) But civil suits, of course, serve purposes that criminal investigations do not: they allow victims their day in court, and they provide an avenue through which victims can seek compensation from perpetrators.

In any event, there is little evidence that the administration is committed to a comprehensive criminal investigation into the Bush administration’s torture program. In August 2009, Attorney General Eric Holder announced that he had ordered an investigation into incidents involving CIA interrogations. The Attorney General characterized the investigation, however, as a “preliminary review” meant “to gather information to determine whether there is sufficient predication to warrant a full investigation of a matter.” He also made clear that the investigation was focused not on the architects of the torture program but on incidents in which interrogators exceeded their authority. It is conceivable that what began as a narrowly circumscribed preliminary review will grow into a broader investigation, but we have no reason to have confidence that the investigation will expand in this way. The Special Prosecutor’s torture investigation has already dragged on for nearly a year, and a related investigation into the CIA’s destruction of videotapes depicting brutal interrogations has been ongoing for almost three. And President Obama has made clear that his own preference is to “look forward, not back.”

In fact the choice between “looking forward” and “looking back” is a false one. While it’s crucial that the Obama administration adopt new policies for the future, we cannot ignore the abuses of the past. And while President Obama has disavowed torture, a strong democracy rests not on the goodwill of its leaders but on the impartial enforcement of the laws. Sanctioning impunity for government officials who authorized torture sends a problematic message to the world, invites abuses by future administrations, and further undermines the rule of law that is the basis of any democracy.

---

The Obama administration has gradually become an obstacle to accountability for torture.
DETENTION

While campaigning for the presidency, then-Senator Obama declared that in “the detention cells of Guantánamo, we have compromised our most precious values.”

He rejected unequivocally the practices “of detaining thousands without charge or trial” and “of maintaining a network of secret prisons to jail people beyond the reach of law.”

His bottom-line was clear: “As President, I will close Guantánamo.”

On his second full day in office, President Obama ordered the CIA to close its secret prisons, set a one-year deadline for closing the Guantánamo prison, and established an interagency task force to review the cases of everyone detained at Guantánamo.

Soon thereafter, the administration abandoned the Bush administration’s dubious legal argument that lawful U.S. resident (and ACLU client) Ali Al-Marri, who had been arrested by civilian authorities in Illinois, could be detained indefinitely by the military without charge or trial. Al-Marri was transferred to civilian custody where he pled guilty to specified offenses and was sentenced to a term of eight years.

It was a promising beginning, but eighteen months later Guantánamo is still open and some 180 prisoners remain there. The administration is not solely responsible for missing this one-year deadline; Congress has obstructed any possible relocation of even indisputably innocent detainees like the Chinese Uighurs to the United States, thereby rendering diplomatic efforts to relocate detainees in Europe and elsewhere far more difficult. And the administration deserves credit for releasing some 67 detainees from Guantánamo. But the Obama administration’s unjust decision to halt all detainee releases to Yemen—even when the detainees have been cleared for release after years of harsh detention—has been a major factor in the prison’s remaining open; a majority of the remaining detainees are Yemeni. Moreover, the administration bears responsibility for opposing in court the release of detainees against whom the government has scant evidence of wrongdoing.

In one recent case, the Obama administration vigorously opposed the release of Hassan al-Odaini—who was 17 years old when arrested and spent eight years imprisoned without charge. The federal court’s decision, which emphatically ordered Mr. Odaini’s release, revealed that the government itself had repeatedly concluded that he was not a threat, but had instead simply been in the wrong place at the wrong time when Pakistani officials arrested him during a surprise

Former Guantánamo detainees
raid of a classmate’s home. While the Obama administration complied with the court’s order and released Mr. Odaini, the case wholly refutes the claim that the administration would indefinitely detain only those “who pose a clear danger to the American people.” It also suggests that the Guantánamo review task force, which completed its work months ago, has not resulted in the release of all innocent prisoners still held at Guantánamo Bay.

Of far greater significance than the administration’s failure to meet its own one-year deadline is its embrace of the theory underlying the Guantánamo detention regime: that the Executive Branch can detain militarily—without charge or trial—terrorism suspects captured far from a conventional battlefield. President Obama first expressly endorsed this claim of authority in May of 2009, in a major speech at the National Archives. The President stated that Guantánamo detainees whom the administration deemed dangerous, but who “could not be prosecuted” because of a lack of reliable evidence, would be held indefinitely without trial, and he proposed that Congress provide legislative authority for a new detention regime.

Although, to its credit, the administration has now publicly stated that it will not support any new legislation expanding detention authority, it has continued to assert, in habeas corpus proceedings involving Guantánamo and Bagram detainees, a dangerously overbroad authority to detain civilian terrorism suspects militarily. And its task force has identified 48 Guantánamo detainees who will be held indefinitely without charge or trial.

Perhaps the most troubling iteration of this sweeping theory of detention authority occurred in legal proceedings in which the Obama administration defended the detention without judicial review of detainees in the Bagram prison in Afghanistan. While the Obama administration has improved the military screening procedures in place at Bagram, those procedures still fall far short of basic due process standards. In response to habeas corpus petitions filed by prisoners who had been captured outside of Afghanistan and transferred by the Bush administration to military detention at Bagram Air Base, the government argued that the courts lacked jurisdiction even to hear the prisoners’ challenges, let alone
decide their merits, because the prisoners were being detained in a war zone. This was disingenuous bootstrapping: the prisoners had been captured outside the war zone and transferred into it; the government thereafter relied on their presence in the war zone as a basis for avoiding any judicial scrutiny.

The Court of Appeals for the D.C. Circuit sided with the administration, effectively giving the government carte blanche to operate the prison at Bagram without any judicial oversight. Armed with this decision, Obama administration officials have reportedly begun debating whether to use the Bagram prison as a place to send individuals captured anywhere in the world for imprisonment and interrogation without charge or trial.\textsuperscript{22}

Finally, the Obama administration has advocated for the transfer of some Guantánamo prisoners to a prison in Thomson, Illinois, where they would be detained by the military without charge or trial. The ACLU will continue to oppose this effort to transfer the Guantánamo detention regime to the heartland of America; we fear that if a precedent is established that terrorism suspects can be held without trial within the United States, this administration and future administrations will be tempted to bypass routinely the constitutional restraints of the criminal justice system in favor of indefinite military detention. This is a danger that far exceeds the disappointment of seeing the Guantánamo prison stay open past the one-year deadline. To be sure, Guantánamo should be closed, but not at the cost of enshrining the principle of indefinite detention in a global war without end.
TARGETED KILLING

Of all of the national security policies introduced by the Obama administration, none raises human rights concerns as grave as those raised by the so-called “targeted killing” program. According to news reports, President Obama has authorized a program that contemplates the killing of suspected terrorists—including U.S. citizens—located far away from zones of actual armed conflict. If accurately described, this program violates international law and, at least insofar as it affects U.S. citizens, it is also unconstitutional.

The entire world is not a war zone. Outside of armed conflict, lethal force may be used only as a last resort, and only to prevent imminent attacks that are likely to cause death or serious physical injury. According to news reports, the program the administration has authorized is based on “kill lists” to which names are added, sometimes for months at a time, after a secret internal process. Such a program of long-premeditated and bureaucratized killing is plainly not limited to targeting genuinely imminent threats. Any such program is far more sweeping than the law allows and raises grave constitutional and human rights concerns. As applied to U.S. citizens, it is a grave violation of the constitutional guarantee of due process.

The program also risks the deaths of innocent people. Over the last eight years, we have seen the government over and over again detain men as “terrorists,” only to discover later that the evidence was weak, wrong, or non-existent. Of the many hundreds of individuals previously detained at Guantánamo, the vast majority have been released or are awaiting release. Furthermore, the government has failed to prove the lawfulness of imprisoning individual Guantánamo detainees in some three quarters of the cases that have been reviewed by the federal courts thus far, even though the government had years to gather and analyze evidence for those cases and had itself determined that those prisoners were detainable. This experience should lead the administration—and all Americans—to reject out of hand a program that would invest the CIA or the U.S. military with the unchecked authority to impose an extrajudicial death sentence on U.S. citizens and others found far from any actual battlefield.
MILITARY COMMISSIONS

While campaigning for the presidency, then-Senator Obama made cogent arguments against military commission trials at Guantánamo on both principled and pragmatic grounds. He professed “faith in America’s courts” and pledged to “reject the Military Commissions Act.” In 2007 he pointed out the practical inferiority of the military commissions, noting that there had been “only one conviction at Guantánamo. It was for a guilty plea on material support for terrorism. The sentence was 9 months. There has not been one conviction of a terrorist act.”

The administration’s embrace of military commission trials at Guantánamo, albeit with procedural improvements, has been a major disappointment. Instead of calling a permanent halt to the failed effort to create an entirely new court system for Guantánamo detainees, President Obama encouraged an effort to redraft the legislation creating the commissions and signed that bill into law. To be sure, the reformed Military Commissions Act contains improvements, but there is still a very real danger that defendants might be convicted on the basis of hearsay evidence obtained coercively from other detainees who will not be available for cross-examination.

More fundamentally, the existence of a second-class system of justice with a poor track record and no international legitimacy undermines the entire enterprise of prosecuting terrorism suspects. So long as the federal government can choose between two systems of justice, one of which [the federal criminal courts] is fair and legitimate, while the other [the military commissions] tips the scales in favor of the prosecution, both systems will be tainted by the likelihood that the government will use the federal courts only in cases in which conviction seems virtually assured, while reserving the military commissions for cases with weaker evidence or where there are credible allegations that the defendants were abused in U.S. custody.

Handwritten statement by Guantánamo detainee Omar Khadr condemning his military commissions trial (Photo Credit: Carol Rosenberg/The Miami Herald)
The error in continuing with a flawed military commission system is perhaps most starkly illustrated by the first prosecution to go forward at Guantánamo under President Obama’s watch. The defendant, accused child soldier Omar Khadr, is a Canadian citizen who was only 15 years old when he was captured after a firefight in Afghanistan. Khadr is alleged to have thrown a grenade that killed a U.S. soldier. If the allegations are true—and they have been cast into serious doubt by subsequent revelations—then Khadr was a child soldier brought to the battlefield by adults. In any event, Khadr has been subjected to cruel and humiliating interrogations during his eight years at Guantánamo. These interrogations began almost immediately after his capture, while Khadr was in serious pain, being treated for life-threatening wounds in a military field hospital. The very first hearing at the revamped military commissions concerned whether Khadr’s statements to interrogators could be used against him, despite this torture and abuse. It was marred by the same chaotic lack of regular process that characterized other hearings in the military commissions. Proceeding with this prosecution or any other in so flawed a system would be not only unjust but unnecessary: the federal criminal courts are both fairer and more effective. It is long past time to end the failed experiment of military commission trials at Guantánamo.

“Part of my job as the next president is to break the fever of fear that has been exploited by this administration.”

—SENATOR BARACK OBAMA
in a November 14, 2007 interview
SPEECH AND SURVEILLANCE

With limited exceptions, the Obama administration’s positions on national security issues relating to speech and surveillance have mirrored those taken by the Bush administration in its second term.

Early in his campaign, candidate Obama declared that he disagreed with President Bush’s decision to authorize the National Security Agency to conduct warrantless surveillance of Americans’ international telephone and email communications. He later voted in favor of the FISA Amendments Act, however, a statute that granted immunity to the telecommunications corporations that had facilitated the NSA’s program, limited the role of the court that oversees government surveillance in national security cases, and authorized the NSA to continue—and even expand—its warrantless surveillance of Americans’ international communications. In effect, candidate Obama made clear that his objection was not to warrantless surveillance, but rather to warrantless surveillance without congressional approval. And over the last eighteen months, President Obama’s administration has defended the FISA Amendments Act in the same way that the last administration did so: by insisting that the statute is effectively immune from judicial review. Individuals can challenge the statute’s constitutionality, the administration has proposed, only if they can prove that their own communications were monitored under the statute; since the administration refuses to disclose whose communications have been monitored, the statute cannot be challenged at all. In some ways, the administration’s defense of the statute is as troubling as the statute itself.

The Obama administration has been reluctant to yield any of the expansive surveillance powers claimed by the last administration. It has pushed for the reauthorization of some of the Patriot Act’s most problematic surveillance provisions. And like the Bush administration, the Obama administration has invested border agents with the authority to engage in suspicionless searches of Americans’ laptops and cell phones at the border; Americans who return home from abroad may now find themselves confronted with a border agent who, rather than welcoming them home, insists on copying their electronic records—including emails, address books, photos, and videos—before allowing them to enter the country. (Through FOIA, the ACLU has learned that in the last 20 months alone, border agents have used this power thousands of times.)

The Obama administration has also adopted...
some of the Bush administration’s arguments on issues relating to free speech. In an important case that reached the Supreme Court, the Obama administration took the position that it could prosecute individuals under a statute that bars the provision of “material support” to terrorist organizations even if the support in question consists solely of speech—advice on issues relating to international law, for example, or on peaceful resolution of conflicts. In a dispiriting oral argument, Solicitor General Elena Kagan even proposed that lawyers could be sent to prison for filing friend-of-the-court briefs on behalf of designated terrorist organizations. The Supreme Court ultimately adopted many of the administration’s arguments and issued a decision that can fairly be described as a catastrophe for the First Amendment.

There is one area in which the Obama administration has made a notable break with the policies of the last administration. During the last administration, dozens of foreign writers, scholars, and artists were denied visas to visit the United States because they held political views that the administration disfavored. Many of the excluded individuals were critics of American foreign policy. Early this year, the Obama administration ended the exclusions of two particularly prominent foreign intellectuals—Tariq Ramadan, a professor at the University of Oxford, and Adam Habib, the Vice-Chancellor of Research at the University of Johannesburg in South Africa. The decision to end these exclusions represented an important victory for free speech and the free exchange of ideas across international borders.
The national security establishment’s record in creating and managing watch lists of suspected terrorists has been a disaster that too often implicates the rights of innocent persons while allowing true threats to proceed unabated. This regrettable outcome is partly a result of mismanagement and partly due to the deceptive difficulty of creating identity-based systems for providing security. These failures have been documented in a long string of government reports, which are consistent in their identification of persistent design flaws and ongoing, unacceptably high error rates. In May 2009 the Department of Justice Inspector General found that many subjects of closed FBI investigations were not taken off the list in a timely manner, and tens of thousands of names were placed on the list without appropriate basis. A 2009 report by the Inspector General of DHS detailed extensive problems with the redress process for people improperly identified on watch lists. Further, because of outmoded information technology systems, the method for clearing the names of people who pose no threat to national security from watch lists is plagued by delays, and DHS can’t even monitor how many cases it resolves. Yet in the wake of Umar Farouk Abdulmutallab’s failed Christmas Day bombing, National Counter-Terrorism Center Deputy Director Russell Travers told Congress that the watch list architecture “is fundamentally sound,” and suggested that the lists would soon be getting bigger: “The entire federal government is leaning very far forward on putting people on lists.”

Indeed, rather than reform the watch lists the Obama administration has expanded their use and resisted the introduction of minimal due process safeguards to prevent abuse and protect civil liberties. The Obama administration has added thousands of names to the No Fly List, sweeping up many innocent individuals. As a result, U.S. citizens and lawful permanent residents have been stranded abroad, unable to return to the United States. Others are unable to visit family on the opposite end of the country or abroad. Individuals on the list are not told why they are on the list and thus have no meaningful opportunity to object or to rebut the government’s allegations. The result is an unconstitutional scheme under which an individual’s right to travel and, in some cases, a citizen’s ability to return to the United States, is under the complete control of entirely unaccountable bureaucrats relying on secret evi-

From left to right: Ayman Latif, Adama Bah, Raymond Earl Knaeble, Halime Sat, and Steven Washburn; plaintiffs in an ACLU challenge to the “No Fly List”
The ACLU has also challenged the government’s authority to freeze the assets of U.S. charities “pending investigation” without any judicial process and on mere suspicion that they engaged in prohibited transactions. In *Kindhearts v. Geithner*, a federal district court recently held that the government cannot simply freeze a charity’s assets now, and ask questions later. Rather, the court ruled that the government must first at least establish probable cause that some violation occurred, and that the charity must have an opportunity to rebut the government’s allegations. The Obama administration continues to oppose even this small measure of due process, insisting in court filings that the protections of the Fourth Amendment are inapplicable to the wholesale freezing of a U.S. entity’s property. Instead of appealing a sensible court decision, the administration should settle this litigation and work with Congress to enact a constitutional scheme that combats terrorist financing while respecting the constitutional rights of American citizens and charitable entities.
CONCLUSION

President Obama will be in office at least through 2012, and perhaps through 2016. But the policies the Obama administration pursues on the issues discussed in this report will have implications that will extend far beyond this presidency. That is why it is so critical that the administration right its course and keep faith with our nation’s highest ideals and aspirations.

There can be no doubt that the Obama administration inherited a legal and moral morass, and that in important respects it has endeavored to restore the nation’s historic commitment to the rule of law. But if the Obama administration does not effect a fundamental break with the Bush administration’s policies on detention, accountability, and other issues, but instead creates a lasting legal architecture in support of those policies, then it will have ratified, rather than rejected, the dangerous notion that America is in a permanent state of emergency and that core liberties must be surrendered forever.

The ACLU will continue to monitor the impact of the administration’s national security policies on civil liberties and human rights. Our hope is that this report, published less than half-way through the President’s first term, will serve as a vehicle for reflection and further dialogue.
ENDNOTES


13 Brief in Opposition to Petition for Certiorari, Arar v. Ashcroft, No. 09-923 [May 12, 2010].

14 See, e.g., Brief of the United States, Padilla v. Yoo, No. 09-16478 [9th Cir. Dec. 3, 2009].

15 Senator Barack Obama, Remarks at the Wilson Center, The War We Need to Win [Aug. 1, 2007], http://www.barackobama.com/2007/08/01/the_war_we_need_to_win.php


17 Obama, The War We Need to Win, supra note 14.


21 Id.


23 Obama, The War We Need to Win, supra note 14.

24 Id.


“Tackling Prisons Beyond the Law: Guantánamo Revisited”
Jonathan Hafetz, excerpted from [[TITLE]] (forthcoming in 2011) (not to be reproduced without the permission of the publisher)

Book: In this excerpt from his forthcoming book, Hafetz provides a comprehensive analysis of the major U.S. detention cases decided since 2006 and assesses the impact of these cases on the government’s detention policy. He concludes that although habeas corpus provides a vehicle for the courts to address fundamental legal questions in individual detention cases, the scope of habeas review and its impact on detention policy is potentially quite limited.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
Tackling Prisons beyond the Law

Guantánamo Revisited

On September 6, 2006, President Bush delivered a nationally televised speech describing the current state of U.S. detention policy. He began by recalling the tragic events that had occurred almost five years to the date and reiterating his promise to do everything within his power—and “within America’s laws”—to prevent another terrorist attack. The president then publicly acknowledged for the first time that the CIA operated a “separate program” of secret imprisonment, although the program’s existence had been widely reported for years. The president said that the program targeted so-called high-value detainees like Abu Zubaydah, Khalid Sheikh Mohammed (KSM), and Ramzi bin al-Shibh. He also said that information wrested from these men through the CIA’s secret detention program had helped prevent terrorist attacks and saved American lives. Now that the questioning had been completed, Bush explained, the program’s remaining fourteen prisoners could be moved “into the open.” They would be transferred to Guantánamo and brought “to justice.” The president acknowledged that aggressive interrogation methods had been used. But, he assured the American public, “the United States does not torture. It’s against our laws, and it’s against our values.”

The president then told the country that the Supreme Court’s decision in Hamdan v. Rumsfeld had imposed constraints on the United States’ ability to confront terrorism and put the nation at risk. So Bush announced that he was sending new legislation to Congress to “clarify the rules for our personnel fighting the war on terror.” This legislation not only would establish new military commissions but also would reinterpret the United States’ obligations under the Geneva Conventions to allow the government to resume the secret CIA detention program without fear of exposing officials to criminal liability. And the legislation would seek—once again—to eliminate habeas corpus rights for those the administration designated as “enemy combatants.”
As political propaganda, the president’s speech was a success. In one stroke, he put opponents on the defensive, seizing the high ground in the fight against terrorism and telling the American public that he was protecting both its values and its safety. Secret detention and harsh interrogation methods, he suggested, not only were vital to the nation’s security; they also were legal. The United States did not engage in torture but merely in aggressive tactics that were necessary to produce valuable information and that remained within the letter, if not the spirit, of the law. Also, by transferring to Guantánamo the handful of detainees allegedly responsible for the 9/11 attacks, such as KSM, Bush breathed new life into the myth that most prisoners at Guantánamo were dangerous terrorists.

But Bush’s speech was inaccurate and misleading. Guantánamo did not “bring prisoners to justice.” Of the nearly eight hundred men imprisoned there since 2002, only a handful had ever been charged with any crime, and most would never be brought to trial in any court, let alone in a legitimate forum. Also, even based on the government’s own untested allegations, most prisoners were not dangerous terrorists, and many were wholly innocent.

The speech also misled the American people about torture. Bush suggested that the government needed to keep “specific [interrogation] methods secret”; otherwise, terrorists would “learn how to resist questioning.” But the United States’ use of waterboarding, cold cell, and other forms of torture was already widely known. The real reason for the secrecy was to cover up conduct that was not only embarrassing but potentially criminal.

In addition, the speech created the false impression that the Bush administration had terminated the secret CIA detention program. But just days before Bush’s speech, the Justice Department had issued secret legal opinions concluding that the conditions of confinement in CIA prisons complied with both federal law and Common Article 3 of the Geneva Conventions. And the president reserved the right to continue the program, which he continued to defend as “small, carefully run, lawful, and highly productive,” and to use “enhanced interrogation techniques” in the future.

The Bush administration, in short, transformed its defeat in Hamdan into an opportunity to justify to the American public extrajudicial detention, military commissions, and torture and to institutionalize those practices through new legislation. Following Bush’s speech, the focus shifted to Capitol Hill, as lawmakers began to debate the administration’s proposals to restrict habeas corpus, establish new military commissions, rewrite America’s obligations under the Geneva Conventions, and insulate government officials from liability for past abuses. On September 29, Congress passed the Milit-
tary Commissions Act (MCA), and the next month the president signed the bill into law.5

The MCA resurrected military commissions to try foreign nationals in the “war on terror,” providing the congressional sanction that the Supreme Court in *Hamdan* had said was lacking. The new commissions were authorized to try a wide range of offenses that traditionally had been treated as criminal offenses and not war crimes, such as conspiracy and “material support” for terrorism.6 The MCA did improve on the previous commissions, for example, by giving a defendant a partial right to be present at his trial and by affording him a greater opportunity to examine and respond to the government’s evidence.7 But the commissions continued to suffer from flaws that undermined their fairness and integrity. For example, the commissions still limited a defendant’s access to exculpatory information.8 They also allowed for the admission of coerced evidence, including evidence gained by cruel, inhuman, or degrading treatment, as long as the evidence was obtained before the passage of the Detainee Treatment Act of 2005—precisely the period during which the worst abuses had occurred.9 Furthermore, even though the commissions now formally prohibited evidence gained by torture, the Bush administration continued to define torture so narrowly as to render that prohibition all but meaningless. Statements wrung from other detainees by means of physical and mental abuse also could be laundered through lax evidentiary rules or could escape scrutiny altogether if classified as intelligence “sources” or “methods.”10

The MCA, however, did more than revive military commissions; it sought to legitimize and institutionalize other key features of the post-9/11 global detention system. While the MCA paid lip service to the United States’ Geneva Convention obligations, it gave the president unilateral authority to interpret the conventions while hindering their enforcement in the courts by prohibiting individuals from invoking them in habeas corpus or other judicial proceedings.11 The MCA also sought to foreclose criminal prosecution for past breaches of the Geneva Conventions and to limit the risk of prosecutions in the future by confining liability under the War Crimes Act to a specific list of “grave breaches” of Common Article 3 set forth in the legislation. Even though that list included cruel and inhuman treatment as well as torture, the MCA limited the definition of such treatment to conduct that caused substantial risk of death, physical disfigurement, and organ loss or impairment. It also excluded degrading and humiliating treatment entirely.12 The Bush administration, meanwhile, continued to maintain that interrogation methods such as stress positions, religious and sexual humiliation, and
sleep deprivation did not violate Common Article 3.13 The MCA thus helped prepare the groundwork for a subsequent presidential order that both reinitiated the CIA’s secret detention program and sanctioned the continued use of highly coercive interrogation methods.14 Once again, the Justice Department supplied legal cover, concluding that the CIA’s use of various “enhanced interrogation techniques,” including prolonged sleep deprivation (of up to ninety-six hours), dietary manipulation, and physical force, did not violate Common Article 3 or the War Crimes Act.15

The MCA also sought to eliminate habeas corpus, which had proved to be the single most effective check against arbitrary detention and abuse. Unlike the DTA, however, the MCA did not limit the habeas repeal to Guantánamo. Instead, it purported to eliminate habeas corpus for any foreign national the president designated an “enemy combatant.”16 The Bush administration subsequently interpreted the repeal in the broadest manner possible, arguing that its bar on habeas jurisdiction extended not only to foreign nationals at Guantánamo and other prisons outside the United States but also to those arrested and detained inside the country. In the administration’s view, a legal immigrant could be seized by the military at home, at school, his or her place of work and be imprisoned without access to a lawyer or a court if the president determined that he or she was an “enemy combatant.” In addition, the MCA barred “any other action” by an alleged “enemy combatant,” thus preventing detainees from receiving any compensation for illegal detention or torture they had suffered in the past.17

Lawmakers once again justified the restrictions on habeas corpus by distorting the truth. They portrayed the Guantánamo prisoners as soldiers “captured on the battlefield,” even though many had not been captured on or near a battlefield.18 The familiar rhetoric about legal proceedings wasting government resources and interfering with the “day-to-day operation” of the military attempted to mask a much darker theme: that courts and lawyers had no place in “war on terrorism” and that the president must have unfettered power to detain and interrogate in the name of national security.19 Or as one senator candidly explained, the purpose of the MCA was “to get the lawyers out of Guantánamo Bay.”20

Opponents denounced the MCA as a violation of cherished principles. Senator Russ Feingold (D-WI) lamented that America would look back on the MCA as “a stain on our nation’s history.”21 The New York Times called it “our generation’s version of the Alien and Sedition Acts.”22 After the MCA’s passage, several bills were introduced in Congress to repeal the provisions of the act eliminating habeas corpus. But none gained sufficient support to
overcome an expected filibuster or a presidential veto, and the focus shifted again to the courts.23

The first four years after the 9/11 attacks had largely pitted the executive branch against the judiciary in the battle over habeas corpus, other constitutional safeguards, and America’s compliance with international law. The Detainee Treatment and Military Commissions Acts altered that dynamic. By 2006, majorities in Congress had twice approved key aspects of the post-9/11 detention regime. Some supporters of that regime even argued that it was the Supreme Court, and not the executive, that had engaged in a “stunning power grab,” which Congress rectified in the MCA by restoring the president’s command over the conduct of the “war on terrorism.”24 If previous Supreme Court decisions like Rasul and Hamdan had emphasized the president’s unilateral action in defiance of Congress, post-MCA legal challenges would have to take on Congress and the executive by showing that both branches had exceeded the limits that the Constitution placed on their respective powers.

As lawyers for the government and the detainees prepared for another legal showdown, the situation at Guantánamo continued to worsen. Prisoners increasingly turned to hunger strikes to protest the denial of due process, inhumane living conditions, isolation, religious degradation, and other mistreatment. One strike in mid-2005 involved more than two hundred detainees, approximately fifty of whom were given intravenous treatment for dehydration. The government responded with heavy-handed measures, including strapping detainees into restraint chairs to facilitate force-feeding through nasal tube insertions, placing them in uncomfortably cold air-conditioned isolation cells, and withholding “comfort items” like blankets and books.25

In June 2006, Guantánamo experienced its first reported prisoner suicide: the Bush administration announced that three detainees had hanged themselves from the mesh walls of their cells with nooses made of bed sheets. The three detainees had been on hunger strikes and had been force-fed. An article later published in Harper’s questioned the truth of the government’s account, describing how the men had been moved after their deaths from a secret prison within Guantánamo called “Camp No” (as in “No,” it doesn’t exist) and explaining how the government’s investigation into the deaths had been a cover-up.26 Another detainee reportedly committed suicide the following year. By 2007, twenty-five different prisoners had made more than forty suicide attempts.27
The Bush administration denied any responsibility for the deteriorating situation at Guantánamo. Instead, it said a detainee who attempted to take his own life was committing an act of “asymmetrical warfare.” Suicides were relabeled “PR stunts” intended to create support for the plight of the detainees, and attempted suicides were dismissed as “manipulative, self-injurious behavior.” The administration completely ignored its role in creating a detention system in which individuals were held for years without due process, subjected to torture and other abuse, and isolated from the rest of the world, including from their own families.

Public criticism of Guantánamo, meanwhile, continued to mount. The president of the ICRC took the unprecedented step of condemning the United States for imprisoning individuals for years without charge or an adequate process. Amnesty International labeled Guantánamo “the gulag of our time.” Calls to close Guantánamo also came from America’s closest allies. Lord Steyn, a justice on Britain’s highest court, castigated Guantánamo as a “monstrous failure of justice.” By 2007, some high-level officials within the Bush administration, including Defense Secretary Robert M. Gates, were pressing for the prison’s closure. Guantánamo, Senator John McCain declared, was “an image throughout the world which has hurt [America’s] reputation.” The Bush administration’s flagship prison in the “war on terrorism” had become a political and public relations liability that outweighed any benefits it provided.

Simply closing Guantánamo and moving the prisoners to the United States, however, would not address the underlying problem of detention without trial or the use of second-class tribunals like military commissions. Instead, it would only replicate Guantánamo within the United States. It also would do nothing to address the continued potential for lawless detentions beyond America’s shores, whether at other military prisons like Bagram or secret CIA “black sites.” Indeed, simply closing Guantánamo without confronting the larger detention system Guantánamo embodied could increase the government’s incentive to bring prisoners to other U.S.-run offshore jails or to render them to foreign governments to avoid scrutiny and accountability.

Guantánamo’s future thus remained linked to the United States’ broader detention policy. At the same time, if the battle for habeas corpus and other fundamental constitutional safeguards could not be won at Guantánamo, where the United States had long exercised complete, exclusive, and permanent control, it could not be won at prisons farther from America’s shores and over which U.S. control might be less clear or complete.
The legal challenge to the latest court-stripping measure thus headed to the Supreme Court laden with significance. Ironically, though, the Supreme Court almost never heard it.

In February 2007, a federal appeals court in Washington D.C. upheld the MCAs elimination of habeas corpus. In a two-to-one decision, the court determined that the Guantánamo detainees were not protected by the suspension clause or any other provision of the Constitution because they were foreign nationals held outside the United States. Writing for the majority, Judge A. Raymond Randolph contended that habeas corpus had never been available to enemy aliens detained abroad and that when the Constitution was written, it would “not have been available to aliens held at an overseas military base leased from a foreign government” such as Guantánamo. Furthermore, Randolph said, the Supreme Court’s decision in Johnson v. Eisentrager foreclosed any claim of a constitutional entitlement to habeas corpus by prisoners at Guantánamo because it established a bright-line rule prohibiting the suspension clause’s reach to noncitizens held outside the United States. The Court’s more recent decision in Rasul, he said, addressed only the Guantánamo detainees’ statutory right to habeas corpus—a right Congress was free to revoke, as it had done twice since Rasul, first through the DTA and then through the MCA. Randolph also distinguished the Insular Cases, arguing that these decisions involved territory over which the United States exercised political sovereignty—a *sine qua non* for extending the Constitution’s protections to noncitizens abroad, no matter how extensive or complete the United States’ control over the territory or prisoner in question. Randolph’s opinion did not merely affirm the denial of habeas corpus for Guantánamo detainees. It also endorsed a central premise of the post-9/11 global detention system: that at least with respect to noncitizens, the president was not constrained by the Constitution as long as he acted outside the borders of the United States.

The habeas petitioners who had brought the appeal—a group of approximately thirty Guantánamo detainees—sought Supreme Court review. But the Court declined to hear the case, as the petitioners fell one vote shy of the four votes necessary to grant certiorari. In an unusual step, Justices John Paul Stevens and Anthony M. Kennedy issued an opinion explaining their vote to deny certiorari. “Despite the obvious importance of the issues raised,” they said, the Court should adhere to its usual practice of avoiding unnecessary adjudication of constitutional questions and of requiring the “exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus.” That meant the Guantánamo detainees first had to seek review of their respective Combatant Status Review Tribu-
nal (CSRT) findings in the D.C. Circuit Court of Appeals—the same court that had just ruled that they had no constitutional rights—through the procedure Congress created in the DTA to replace habeas corpus, despite that procedure’s manifest shortcomings. The Guantánamo detainees would thus remain imprisoned without a meaningful hearing while they exhausted this seemingly futile review process, even though many were already well into their sixth year of confinement.

The detainees asked the Supreme Court to reconsider its decision. Such rehearing petitions are invariably denied; the Court had not granted one in approximately forty years. But this time, the Supreme Court reversed course and agreed to hear the case. Although the Court gave no explanation, many suspected that Justice Kennedy—the critical swing vote—had been moved by a new and devastating critique of Guantánamo’s CSRT process from within the military itself.

In a sworn declaration provided to the Supreme Court with the rehearing petition, Lieutenant Colonel Stephen Abraham, a twenty-six-year veteran of military intelligence, offered an inside account of how the CSRT actually functioned. Abraham had previously served in the Office for Administrative Review of the Detention of Enemy Combatants (OARDEC), the division of the Defense Department responsible for implementing the CSRT-ARB process. Abraham’s description shattered any remaining pretense this process had to legitimacy. The OARDEC, Abraham explained, had no intelligence-gathering capabilities. Instead, its efforts were confined to making arbitrary and incomplete requests to outside agencies for information about particular detainees. In turn, those agencies could, and often did, withhold exculpatory evidence about the detainees in question. Moreover, the OARDEC’s staff lacked training and experience in collecting and using intelligence information and was under tremendous time pressure to complete hundreds of CSRTs within four months. Another military official who sat on forty-nine CSRT panels provided additional details about the CSRT’s inadequacy. The tribunal’s officers, for example, did not understand the difference between conclusory statements, which constituted the bulk of the material presented, and actual evidence.

As Abraham explained, detention decisions were instead based on summaries of interrogations and boilerplate intelligence information. Rather than carefully assessing the evidence (or lack thereof), the OARDEC’s members would “cast broad nets for any information, no matter how marginal, no matter how tenuous, no matter how dated, no matter how generic, no matter how dubious the source, so long as it could be connected to the detainee.”
That information would be “cut and pasted” into documents given to CSRT panels, without any critical assessment of its accuracy or reliability. When no information about a detainee was available, as was often the case, the search would shift to broad-brushed categories, such as the region from which the detainee came, his ethnic group or country of origin, or the organization with which the detainee was alleged to have been associated. The CSRT would then label the detainees “enemy combatants” based on this hap-hazard and incomplete collection of generic information that “lacked even the most fundamental earmarks of objectively credible evidence.”

Command influence exacerbated these problems. On the few occasions that a CSRT panel determined a detainee should not be classified as an “enemy combatant,” Abraham said, the OARDEC’s director and deputy director questioned the validity of the finding. They ordered that a new CSRT hearing be conducted to allow for the presentation of new evidence. The only “new” information presented at these do-over hearings, however, was “a different conclusory intelligence finding, which was not justified by the underlying evidence.” If the panel failed to alter its conclusion, the OARDEC would conduct an inquiry into “what went wrong.” Insider accounts like Abraham’s made the point more powerfully than any legal brief could: Guantánamo detainees had been imprisoned for years based on a process that was rotten to the core, and they should not have to wait any longer for the Supreme Court to decide whether they were entitled to habeas review under the Constitution.

In December 2007, the Supreme Court heard argument in the Guantánamo detainees’ challenge to the MCA. The following June, the Court issued its decision in Boumediene v. Bush, ruling that Guantánamo detainees had a constitutional right to habeas corpus. This meant that neither the president nor Congress could deprive Guantánamo detainees of habeas corpus without a valid invocation of the limited emergency powers provided under the suspension clause. The Court also determined that the mechanism the Bush administration and Congress had created to replace habeas corpus—limited appellate review of CSRT decisions via the DTA—failed to provide a constitutionally adequate substitute. As result, the Court invalidated the MCA’s elimination of habeas corpus and directed district judges to conduct prompt hearings into the legality of the prisoners’ confinement.

The Court’s ruling in Boumediene transcended Guantánamo and the fate of the approximately 265 detainees who remained there at the time of the decision. Above all, the Court rejected the proposition—urged by the government—that formal constructs like political sovereignty determined whether
the habeas corpus suspension clause and other constitutional protections extended to foreign nationals held beyond America’s borders. In place of any bright-line rule, the Court adopted a functional test that examined not only the prisoner’s citizenship but also the nature of the detention, the surrounding circumstances, and the adequacy of the process the prisoner had received in determining whether a given constitutional provision applied abroad. While this test did not guarantee habeas corpus wherever the United States detained a prisoner, it nonetheless rejected the idea that the president could avoid judicial review simply by choosing to hold that prisoner outside the country.

Justice Kennedy’s opinion for the Court emphasized the critical role of habeas corpus in America’s Constitution and system of government. “The Framers,” Kennedy explained, “viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” Habeas corpus, he pointed out, not only protects individuals from the arbitrary and unlawful exercise of state power; it also serves as “an essential mechanism in the [Constitution’s] separation-of-powers.”

Kennedy looked to English history to determine whether under English common law precedents, detainees held in circumstances similar to Guantánamo would have had access to habeas corpus. Although history provided no direct analogies, Kennedy said, it also did not support the government’s argument that habeas corpus was available only in territory over which the executive exercised political sovereignty. Thus, from a historical perspective, the fact that Cuba retained formal ownership over the U.S. naval base at Guantánamo offered “scant support” for the government’s contention that this territory was necessarily beyond the reach of the Constitution’s suspension clause.

Kennedy next examined the Court’s own precedents addressing the Constitution’s extraterritorial application. During the first century of the nation’s history, he noted, there was no need to address this issue, since the United States extended its laws and Constitution to new territory acquired during its westward expansion. The question of whether the Constitution also followed the flag to territories that were not incorporated into the United States first arose after the United States began acquiring overseas possessions in the late nineteenth century. In the Insular Cases, discussed in chapter 6, the Supreme Court ruled that the Constitution had independent force in these so-called unincorporated territories even if Congress had not made the political decision to extend its protections there. But, Kennedy observed, the Insular Cases also recognized some potential obstacles to applying the Constitution
in its entirety and displacing the existing legal systems in these territories. The question, therefore, was not whether the Constitution applied but “which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.” And the answer turned not on formal constructs like “political sovereignty” but on other, more pragmatic considerations.

The Supreme Court, Kennedy said, had employed a similar approach a half century later in *Reid v. Covert.* While Justice Hugo Black’s plurality opinion in *Reid* focused on U.S. citizenship in concluding that the Constitution’s jury trial guarantee applied to American civilians tried by an American military court in a foreign country, Justices John Marshall Harlan’s and Felix Frankfurter’s concurring opinions emphasized other, more practical, considerations related to the place of the prisoners’ confinement and trial. Kennedy’s reading of *Reid* aligned the Court more closely with the Harlan-Frankfurter position. Citizenship, Kennedy said, was merely one factor considered in *Reid* in determining whether the right to a jury trial extended extraterritorially. If this diminished the importance of citizenship, it also strengthened the idea that the Constitution could extend more widely to foreign nationals in U.S. custody, regardless of location. It thus moved the Court closer to the idea that freedom from arbitrary and unlawful detention was a human right and not just a right of American citizens.

Justice Kennedy also distinguished *Johnson v. Eisentrager*, the World War II–era decision that had been the linchpin in the government’s effort to resist habeas corpus review for Guantánamo detainees. As Kennedy explained, *Eisentrager* did not in fact establish “a formalistic, sovereignty-based test for determining the reach of the Suspension Clause.” *Eisentrager* instead turned on its unique factors, including the absence of plenary U.S. control over Landsberg Prison in Germany, which Kennedy contrasted with the total, exclusive, and permanent U.S. control over Guantánamo. *Eisentrager* thus did not mean what the Bush administration had been arguing since the first Guantánamo habeas petitions were filed: that the United States could deny prisoners access to its courts by detaining them beyond its borders.

*Boumediene* thus turned the government’s separation of powers argument on its head. In recognizing that Guantánamo detainees had a constitutional right to habeas corpus protected by the suspension clause, the judiciary was not interfering with executive prerogative but was preventing executive manipulation of the judiciary and the Constitution itself. Accepting the government’s political sovereignty test meant that the United States could act at will and without constraint whenever it exercised power outside the country.
And if the United States could do this at a place like Guantánamo, a territory under its permanent, total, and exclusive control, it could do so anywhere beyond its shores. *Boumediene* rejected this argument in no uncertain terms. The actions of the United States, the Court maintained, are always subject to constitutional constraints, even when those actions concern foreign nationals and occur abroad. The political branches did not have the power to "switch the Constitution on or off at will" by altering the locus of detention.59 "The test for determining the scope of [the suspension clause]," the Court said, "must not be subject to manipulation by those whose power it is designed to restrain."580

In place of formal constructs like political sovereignty, *Boumediene* set forth a multifactored test to determine whether the habeas corpus suspension clause applied abroad. In addition to the citizenship of the detainee, the test also factored in the adequacy of any previous process the detainee had received, the nature of the sites where his apprehension and detention took place, and the practical obstacles inherent in resolving his entitlement to the writ.61 Applying this test, the conclusion that the suspension clause reached Guantánamo was a virtual slam dunk. Although they were not American citizens, the Guantánamo detainees had been detained for years based on a determination by the woefully inadequate CSRT process. The prison where they were held was under the total and exclusive control of the United States. And the government had presented "no credible arguments that the military mission at Guantánamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."62

The question remained, however, whether appellate review under the DTA could cure the problem by providing an adequate substitute for habeas corpus. If so, there would be no constitutional violation, since the detainees would effectively be receiving what habeas guaranteed them, only under a different name. The Supreme Court, however, found that the DTA was no substitute for habeas. Instead, in enacting the DTA, Congress had deliberately sought to create an inferior remedy for individuals who it believed had no right to habeas in the first place.63 Congress’s elimination of habeas corpus for Guantánamo detainees thus differed significantly from earlier amendments to the federal habeas corpus statute, which were intended to create a similar remedy in a different forum, for example, by requiring federal prisoners to challenge their criminal convictions in the district court that sentenced them rather than in the jurisdiction where they were imprisoned after sentencing.64 More important, the Court concluded that Congress had in fact created an inferior remedy. It highlighted three points about habeas corpus: first, that the court’s role is most important in cases of executive detention without

Guantánamo Revisited | 161
prior judicial review; second, that habeas review is more searching where the underlying process lacks rigorous safeguards; and third, that habeas is itself a flexible remedy that can be adapted to the circumstances and tailored to achieve its underlying purpose: relief from unlawful imprisonment.

Measured in light of these standards, DTA review of CSRT hearings fell short. The CSRT was patently deficient as a remedy for executive imprisonment: it denied detainees access to a lawyer, relied largely on secret evidence, limited detainees' ability to present evidence in their favor and to confront the evidence against them, and contained virtually no restrictions on the use of hearsay. Such a "closed and accusatorial" proceeding, the Court said, carries "considerable risk of error"—a "risk too significant to ignore" given the potential length of the prisoners' confinement, which the Court recognized could last a generation or more. And appellate review under the DTA could not compensate for these deficiencies. As the Supreme Court explained, one flaw of the DTA could not be overcome no matter how creatively the statute was read: the absence of any meaningful opportunity for a detainee to rebut the allegations against him. The DTA, for example, barred courts from considering new evidence or conducting a hearing to resolve the factual disputes around which so many cases turned. A *sine qua non* of habeas corpus, the Court said, was the authority it gave a judge to "conduct a meaningful review of both the cause for detention and the Executive's power to detain." The DTA substantially curtailed that authority and undermined a judge's power to correct errors, a power that was even more critical given the CSRT's manifest flaws. In brief, no substitute for habeas corpus could allow a prisoner to be locked away—potentially for life— unless it provided him a meaningful opportunity to test the legal and factual basis for his detention before a neutral decision maker.

But even though the victory was momentous, the margin was narrow, resting on a five-to-four vote. Chief Justice John Roberts and Justice Antonin Scalia each filed dissenting opinions, which Justices Clarence Thomas and Samuel Alito joined. "The Court," Roberts said, "strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants." Its decision, Roberts continued, also contradicts previous statements in *Hamdi* that a military status tribunal, coupled with judicial review, could satisfy even an American citizen's right to due process—precisely what the Bush administration and Congress had created via the DTA-CSRT review scheme. Roberts thus chastised the Court for failing to defer to this alternative process and undercutting the considered judgment of the political branches.
But Roberts ignored both the larger context of the Guantánamo detentions and the specific flaws of the DTA-CSRT review scheme. Unlike prisoners of war from past conflicts, Guantánamo detainees were being held in connection with a loosely defined armed conflict of perpetual duration and under a definition of “enemy combatant” that vastly exceeded all recognized military detention authority in its breadth and scope. To be sure, the Court in *Hamdi* had referred to a legally sanctioned military status tribunal acting pursuant to Army Regulation 190–8 and the Geneva Conventions in describing the process Hamdi had failed to receive. But it did so only for individuals seized on a battlefield where they were fighting alongside enemy armed forces (in Hamdi’s case, the Taliban). *Hamdi* never considered whether such tribunals could be used to justify the prolonged detention of individuals—many of whom were seized outside any battlefield or hostilities—based solely on their suspected affiliation with, or activity on behalf of, a terrorist organization. *Hamdi* also assumed that habeas corpus would be available to correct errors when the regular military process had not been provided in the first instance. Moreover, Roberts looked only at the CSRT process on paper, not how it functioned in practice, and ignored the unrefuted evidence of the CSRT’s excessive reliance on secret evidence, its pervasive command influence, and its kangaroo-court style “hearings.” CSRT determinations sanctioned potentially lifelong detention; yet, they provided fewer protections than a person in the United States ordinarily receives in contesting a speeding ticket.

Whereas Roberts focused on the DTA-CSRT scheme as a substitute for habeas review, Scalia denied that any substitute was necessary, since the Guantánamo detainees had no constitutional right to habeas in the first place. Building on his dissent in *Rasul*, Scalia sought to limit the suspension clause to its original meaning, which, he maintained, excluded from its protections foreign nationals seized and detained outside the United States. The suspension clause’s unprecedented extension to Guantánamo detainees, Scalia insisted, not only contradicted the intent of the Constitution’s framers but also undermined the separation of powers by ceding too much authority to judges.69 What the Court’s majority saw as executive manipulation in bringing prisoners to Guantánamo to avoid habeas corpus, Scalia viewed as unwarranted judicial interference with the president’s wartime prerogative to detain alien prisoners seized abroad without court review. “‘Manipulation’ of the territorial reach of the writ by the Judiciary,” Scalia charged, “poses just as much a threat to the proper separation of powers as ‘manipulation’ by the Executive.”70
Scalia, however, misunderstood the tradition and precedents he cited. Power and control over the jailer and a judge’s ability to enforce the writ’s command, not formal notions of sovereignty, had traditionally guided determinations about the writ’s territorial reach. The availability of habeas corpus also had never turned on a prisoner’s citizenship status—a limitation that contradicted the writ’s role as a safeguard against arbitrary and unlawful executive action. Elevating citizenship or territorial sovereignty to a bright-line rule or “litmus test” was a modern invention. Such a rule, moreover, ultimately could not be reconciled with a system of government predicated on the idea of checks and balances and commitment to the rule of law. Guantánamo itself demonstrated how tethering the Constitution’s reach to formal constructs like political sovereignty opened the door to the creation of lawless enclaves, arbitrary detention, and torture.

*Boumediene* thus rejected one of the animating ideas behind the post-9/11 global detention system: that prisoners could necessarily be denied habeas corpus review as long as they were held beyond America’s shores. The right to habeas corpus secured by the suspension clause, the Court said, was not limited to American citizens or the mainland United States. Instead, it could apply to any U.S. detention anywhere in the world, from Guantánamo (where the Court found it applied) to Bagram in Afghanistan and CIA “black sites” (where the Court might one day reach the same conclusion).

Yet *Boumediene* also contained several important qualifications. The Supreme Court did not rule that the suspension clause necessarily reached all prisoners held by the United States abroad. *Boumediene*’s functional test implicitly recognized that some prisoners would not have a right to habeas corpus and left open exactly where the writ might extend beyond Guantánamo. The Court acknowledged that in “cases involving foreign citizens detained abroad by the Executive, it likely would be both an impractical and unprecedented extension of judicial power to assume that habeas corpus would be available at the moment the prisoner is taken into custody.” This reinforced the idea that there remained some undefined realm of extraterritorial detention—temporally, if not spatially—that habeas corpus would not reach. Furthermore, the Court cautioned that in assessing where the habeas right applied, “proper deference can be accorded to reasonable procedures for screening and initial detention under lawful and proper conditions of confinement and treatment for a reasonable period of time.” Thus, an adequate military process might delay or foreclose habeas review altogether. The Court’s functional test also meant that where and when habeas was available depended partly on an individual judge’s assessment of what was appropriate
and practicable—an assessment that was, by its nature, subjective and malleable. How long was too long? How much process was enough? How much control over the detention site or the prisoner was necessary? The prolonged detention of several hundred individuals at a U.S. enclave like Guantánamo based solely on a determination by a tribunal as deeply flawed as the CSRT provided a relatively easy answer. But other overseas detentions—when U.S. control over the territory was less complete, when the detentions were shorter and the military process more robust, and when the prison was in or nearer to a theater of armed conflict—might present a closer call. Boumediene thus not only created future uncertainty but also implied that the political branches could still act in some places without legal constraint, a result in tension with the decision’s stated purpose.

A sign of Boumediene’s potential reach as well as its potential limitations first came in litigation challenging U.S. detentions at Bagram. In April 2009, a district judge handed down a decision in al-Maqaileh v. Gates, the first jurisdictional ruling in a Bagram habeas corpus case. The challenge involved four prisoners, at least three of whom had been seized outside Afghanistan, including in places as distant as Thailand and Dubai. All four had been imprisoned at Bagram as “enemy combatants” for more than six years.

The district judge, John D. Bates, rejected the government’s effort to limit Boumediene to Guantánamo, finding that the Supreme Court had definitively rejected any bright-line test for determining the reach of habeas corpus and other constitutional protections. Applying Boumediene’s functional test, Bates instead looked at the nature and degree of U.S. control over Bagram, the adequacy of the process afforded the detainees there, and the practical obstacles, if any, to habeas review. He acknowledged that the United States’ control over Bagram was not as complete as its control over Guantánamo and that Bagram was located in an active theater of war. But he also found that the degree of U.S. control at Bagram was not appreciably different from that at Guantánamo and was “practically absolute.” It also was significantly greater than U.S. control over Landsberg Prison during post–World War II Germany, when the Supreme Court decided Eisentrager. In addition, Bates found that ongoing military operations in Afghanistan did not present a significant obstacle to habeas review and that any practical barriers to such review were “largely of the Executive’s choosing” where the prisoners had been apprehended elsewhere and brought to Bagram. He also found that the process used to determine the status of Bagram detainees fell “well short” of the process that the Supreme Court had declared unconstitutional.
at Guantánamo and failed to provide meaningful access to the government’s evidence, an opportunity to be heard, or a neutral decision maker.\(^7^6\)

Judge Bates therefore ruled that three of the petitioners before him had a constitutional entitlement to habeas review. However, he rejected habeas rights for the fourth prisoner on the ground that he was an Afghan national. Bates explained that for Afghan nationals, as well as for detainees apprehended in Afghanistan, the balance of factors cut against habeas review. He focused on the possible friction with the Afghan government, since according to the United States, a significant percentage of Afghan detainees at Bagram were expected to be transferred to Afghan custody. Tensions could arise, he said, if a U.S. court were to entertain an Afghan detainee’s habeas petition and reach a different result than an Afghan court did, for example, by ordering the detainee’s release.\(^7^7\) Bates also suggested that for detainees apprehended inside Afghanistan, there might be greater practical obstacles to habeas review because of the ongoing military hostilities there.

On the one hand, \textit{al-Maqaleh} showed how the Supreme Court’s rejection of categorical limits on habeas jurisdiction could help prevent the creation of “new Guantánamos” in other parts of the world, with the executive free to transport prisoners across geographic lines to avoid court review. On the other hand, \textit{al-Maqaleh} highlighted \textit{Boumediene}’s potential limits as the district court’s application of the Supreme Court’s malleable, multifactored test afforded habeas rights to only some Bagram detainees. Under Judge Bates’s ruling, prisoners brought to Bagram from other countries could contest their detention in U.S. courts (at least if they were not Afghans), but those seized inside Afghanistan—the overwhelming majority of detainees at Bagram—could not, even though their detention might be based on the same flimsy evidence, the same inadequate military hearing, and the same overbroad definition of “enemy combatant.” Furthermore, nothing required that the United States transfer any prisoner to Afghan custody, and until such transfer, which could take years to be carried out (if ever carried out at all), that prisoner had no access to Afghan or U.S. courts.

\textit{Boumediene}’s potential limitations became more apparent in the government’s appeal of Judge Bates’s decision granting some Bagram detainees habeas rights. The three-judge panel—which included liberal judges David S. Tatel and Harry T. Edwards—ruled that none of the petitioners should have access to habeas corpus and ordered that their cases be dismissed.\(^7^8\) The D.C. Circuit panel acknowledged that the Supreme Court had rejected any bright-line test for determining the application of the suspension clause and other constitutional rights outside the United States and had refused to limit its
decision in Boumediene to territories over which the United States exercised de facto sovereignty, such as Guantánamo. In applying Boumediene’s multifactored test, the panel also agreed with Judge Bates that the military process that the Bagram detainees had received was even more flawed than the process used for Guantánamo detainees. The panel nevertheless held that Bagram’s location in an active theater of war and the practical obstacles to habeas review over detentions there trumped the factors favoring jurisdiction. Notably, the Court said it was only “speculation” that the United States had brought prisoners from other countries to Bagram to avoid habeas corpus review, even though it appeared that, at least from the time of the Supreme Court’s decision in Rasul, the United States had been confining prisoners at Bagram rather than bringing them to Guantánamo for precisely this reason. The panel also pointed to a risk that habeas review might cause friction with Afghanistan, even though U.S. detentions at Bagram violated Afghan law, which does not authorize indefinite detention without charge and which prohibits detention without due process.

The D.C. Circuit’s decision in al-Maqaleh made clear that the malleability of the Boumediene test was both a strength and a weakness: while it created the possibility that extraterritorial detentions by the United States would be subject to habeas review, it by no means ensured that review. To the contrary, it gave judges wide discretion to balance various factors and decline to exercise jurisdiction based on what they perceived as practical concerns. Without a reversal of al-Maqaleh, no Bagram detainee would have access to habeas corpus, no matter how long he had been held or how inadequate the process he had received, at least without additional evidence that he had been brought to Bagram deliberately to avoid habeas review.

The same day that it issued Boumediene, the Supreme Court handed down Munaf v. Geren, which involved habeas corpus challenges filed on behalf of two American citizens detained in Iraq. Both men—Mohammad Munaf and Shawqi Omar—had been seized by U.S. forces in Iraq and held at U.S.-run facilities there for more than two years. Munaf, like the Bagram litigation, thus grappled with the lurking issue of U.S. overseas detentions beyond Guantánamo. It also raised the question of whether habeas corpus reached U.S. detentions conducted as a part of an international force—in this case, as part of the Multi-National Force-Iraq (MNF–I)—but answerable to U.S. authority. While the Supreme Court ruled that the federal courts had jurisdiction to review the two petitions, it placed potentially significant limits on the scope and intensity of that review.
In upholding habeas jurisdiction, the Court distinguished *Hirota v. MacArthur*, the World War II-era case involving war criminals convicted and sentenced by the International Military Tribunal for the Far East. There, the Supreme Court had ruled that the tribunal was “not a tribunal of the United States” and that “the courts of the United States ha[d] no power or authority to review, to affirm, set aside or annul [its] judgments and sentences.”84 The government invoked *Hirota* in *Munaf* just as it had invoked *Eisentrager* in the Guantánamo detainee litigation: as a categorical bar to habeas jurisdiction. It argued that the international character of the MNF–I, like the multinational character of the tribunal in *Hirota*, meant that the MNF–I was “not a United States entity subject to habeas.”85 But *Hirota*, the Supreme Court said, differed from *Munaf*. It involved enemy aliens, not U.S. citizens. More important, the tribunal that convicted and sentenced the petitioners in *Hirota* was not clearly subject to U.S. authority. *Munaf* thus confirmed that habeas corpus could reach U.S. detentions overseas and that the executive could not evade judicial scrutiny simply by acting as part of a multinational force or pursuant to an international source of authority, such as a UN Security Council Resolution.

The Supreme Court nevertheless also concluded in *Munaf* that the habeas petitions should be dismissed because a U.S. judge could provide no relief.86 As framed by the Court, *Munaf* concerned the exercise of habeas jurisdiction over individuals detained by the United States in another country for criminal prosecution under the laws of that country. The Court therefore evaluated the actual exercise of habeas review against the long-standing rule that “the jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute.”87 A host country may cede that jurisdiction in certain instances, the Court reasoned, through measures like status-of-forces agreements that give a foreign government primary jurisdiction over offenses committed by its troops stationed in the host country. But without such provisions allocating jurisdiction to the foreign government, the host nation retains an absolute right to enforce its criminal law within its territory. In light of these principles, the Court concluded that “prudential concerns,” such as comity and the orderly administration of criminal justice, require a habeas court to forgo its usual inquiry when the United States is detaining a prisoner for prosecution by the host state.88

The Supreme Court also rejected the petitioners’ alternative claim, that their threatened transfer to Iraqi jailers lacked the requisite legal authorization and impermissibly exposed them to a risk of torture. The Court acknowledged that habeas corpus jurisdiction can provide for review of a
prisoner’s transfer from U.S. custody to another government. In extradition cases, for example, such transfers require legal authorization, such as a treaty, and habeas courts routinely review the prisoner’s transfer to ensure compliance with the treaty’s terms and with applicable statutory requirements. But when the transfer occurs solely within the territory of a host government for purposes of criminal prosecution, the Court stated, no specific authorization is necessary. To the contrary, without a law, treaty, or agreement restricting the transfer, the executive is free to hand the prisoner over to the host government for prosecution under the host government’s laws.

The Court thus approved Munaf’s and Omar’s transfer to Iraqi custody without a hearing, even though both men had presented evidence that they faced possible torture there. The Court pointed to a U.S. policy against transferring American citizens in Iraq to likely torture. “The Judiciary,” it said, “is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government’s ability to speak with one voice in this area.” The Court’s decision, however, did not foreclose all review of transfer-to-torture claims. It left open the possibility that in implementing the Convention against Torture through the Foreign Affairs Reform and Restructuring Act, Congress had authorized the courts to consider such claims. Justice David Souter suggested another important qualification in a concurring opinion. He insisted that a judge could prohibit a prisoner’s transfer when “the probability of torture is well documented, even if the Executive fails to acknowledge it.”

Munaf, together with Boumediene, demonstrates the broad ambit of habeas corpus and its ability to reach U.S. detentions overseas. Just as the absence of American citizenship and political sovereignty did not foreclose habeas jurisdiction in Boumediene, U.S. participation in a multinational operation did not preclude habeas review in Munaf. And the reason that this review was so circumscribed in Munaf, the Court explained, was that the prisoners were subject to criminal prosecution for violating the laws of the foreign nation (Iraq) where they had been seized and were being detained. If the prisoners were instead being held for other purposes, such as for continued detention by the United States for its own security interests rather than for prosecution by the host nation, habeas review would not be subject to this limitation.

But Munaf also suggested that there might be other, more significant restrictions on habeas corpus. The Court ordered that the habeas petitions be dismissed without any factual inquiry into the basis for the prisoners’
detention or the risk of torture following transfer to Iraqi authorities. The United States avoided this scrutiny in *Munaf* by successfully characterizing the prisoners’ cases as U.S. detentions for the purpose of prosecution by the host government whose criminal laws the United States was helping enforce, and not continued U.S. detention without charge in an extraterritorial U.S. enclave. Yet this rationale was in tension with the record in the case and underscored the risk that the United States could simply circumvent habeas review by invoking the specter of another nation’s criminal process to shield its own detentions from review. In *Munaf*’s and *Omar*’s cases, Iraqi criminal proceedings were initiated only after habeas relief had been sought from a U.S. court. Furthermore, at least in *Omar*’s case, the United States suggested that it could still detain the petitioner even if he were acquitted by Iraqi courts, based on the theory that he was not only a security detainee subject to criminal prosecution by Iraq but was also an “enemy combatant” in America’s global “war on terrorism.” This U.S.-based detention interest was shielded, however, from habeas review by the specter of Iraqi proceedings.

*Munaf*’s impact was soon felt in other habeas cases challenging prisoner transfers. Relying on *Munaf*, a divided three-judge panel of the D.C. Circuit Court of Appeals subsequently ruled that Guantánamo detainees had no right to contest their transfer to another country. As long as the executive could point to a policy forbidding transfers to likely torture, the appeals court said, a judge could not second-guess the executive’s decision to transfer a particular prisoner. Nor, the appeals court said, could a judge examine a prisoner’s claim that he was being transferred for the purpose of further detention in the receiving country. If the prisoner was held pursuant to another sovereign’s laws, a U.S. court could not question the decision or inquire whether the continued detention was at the United States’ behest. As the dissent correctly noted, the panel’s decision undermined habeas corpus because it allowed transfers intended to remove a prisoner from the court’s reach by handing the prisoner over to another sovereign. The Supreme Court, however, declined to hear the prisoners’ appeal of the panel decision, leaving that decision in place.

*Boumediene* and *Munaf* were the Supreme Court’s last two “war on terrorism” decisions during Bush’s presidency. Both decisions rejected the Bush administration’s effort to avoid habeas review by invoking formalistic or bright-line tests: political sovereignty and citizenship status in *Boumediene* and U.S. participation in a multinational force in *Munaf*. *Boumediene* further demonstrated that habeas corpus remained an important means of cutting
through sham proceedings like the CSRT and providing a meaningful examination of the basis for a prisoner’s confinement.

The decisions, however, also pointed to some potential limitations on habeas corpus: Boumediene employed a malleable and functional test that left open the possibility that at least some overseas U.S. detentions would remain beyond judicial review; Munaf, in contrast, served as a reminder that habeas review itself could be exceedingly narrow, especially if the United States successfully tied the prisoner’s detention to possible criminal prosecution by another state. Moreover, habeas corpus review did not itself determine the permissible scope of the president’s detention authority. The availability of habeas thus did not resolve the circumstances under which the United States could imprison an individual indefinitely without charge or prosecute that person in a military commission rather than in the regular federal courts. Nor did it determine what other constitutional or legal rights a detainee might claim in challenging his confinement. Habeas did provide a vehicle for courts to address these questions through the exercise of their jurisdiction over individual cases. But as recent history has shown, habeas review of important legal questions, such as the scope of the president’s military detention power, could be avoided by eleventh-hour machinations by the executive through the transfer or release of the prisoner, thereby leaving those questions unresolved and the government free to engage in the same unlawful conduct again in the future.

The availability of habeas corpus also did not answer the question of what remedy a court could order if it found the prisoner’s detention unlawful but the prisoner could not be safely returned to his home country and could not be repatriated to a third country. Could, for example, a habeas court in Washington, D.C., order the prisoner’s release into the United States? If not, what could the court do to remedy illegal detention? Part 4 addresses these and other issues.
Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“Habeas Works: Federal Courts’ Proven Capacity to Handle Guantanamo Cases” p. 1-4
Human Rights First and the Constitution Project (June 2010)

Report: In a report endorsed by numerous formal federal judges, Human Rights First and the Constitution Project review the D.C. federal courts’ jurisprudence following Boumediene. They conclude that the courts are steadily developing a “coherent and rational jurisprudence” on habeas corpus, and there is therefore no need for Congress to intervene to establish a new legal standard for executive detention or to prescribe new procedural rules to govern litigation of habeas cases.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
I. Executive Summary

Habeas is working. The judges of the U.S. District Court for the District of Columbia have ably responded to the Supreme Court’s call to review the detention of individuals at Guantánamo Bay, Cuba. As former federal judges, many of us expressed our confidence as amici in Boumediene v. Bush1 that courts are competent to resolve these cases.2 We write now to affirm that our confidence has been vindicated. While we take no position on particular cases, a review of the District Court’s treatment of the Guantánamo litigation convinces us that the court has effectively developed a consistent, coherent, and stable jurisprudence.

The government began to detain individuals at Guantánamo in January 2002. After a series of storied decisions culminating in Boumediene v. Bush,3 the Supreme Court charged the judges of the District Court with developing the framework for reviewing the habeas cases of individuals detained at Guantánamo in order to determine whether their detentions are lawful. Some commentators, including some judges and legislators, have suggested that the courts are struggling to take on an essentially legislative project, and that the courts are in desperate need of further instruction from Congress. On the contrary, courts are well suited to meet this challenge. Their competence in developing evidentiary and procedural rules comes from hard-won experience. District Court judges are on the front lines, applying the law to complex facts and balancing the competing needs of litigants. Because of their institutional competence, courts have historically developed rules of procedure and evidence. This was true under the common law, and is true of the Federal Rules.

In their “time-honored and constitutionally mandated roles of reviewing and resolving [habeas] claims,”4 courts are also uniquely competent to determine the lawfulness of a prisoner’s detention. In Guantánamo cases, courts make this determination by assessing whether the detention standard advanced by the government comports with the law, and then applying the standard to the particular facts of the case presented by a prisoner’s habeas petition. Assessing the law, and applying it to facts. This is the core of what courts do. This is judging.

It comes as no surprise, then, that the District Court has capably answered the Supreme Court’s charge. The bench has moved judiciously and cautiously to apply the pertinent law and develop the procedural rules governing habeas cases. In that way, the courts have gradually forged an effective jurisprudence that seeks to address the government’s interest in national security while protecting the right of prisoners to fairly challenge their detention.

A. Detention Standard

In Boumediene v. Bush,5 on remand from the Supreme Court, Judge Richard Leon adopted the detention standard used by the Department of Defense in Combatant Status Review Tribunals and endorsed by Congress. When the Obama Administration took office, the government modified the proposed detention standard based on the authority conferred by the Authorization for the Use of Military Forces (AUMF). Judge Reggie Walton adopted the new detention standard in Gherebi v. Obama,6 under which the government claimed the right to detain individuals who “planned, authorized, committed, or aided” in the attacks of 9/11, or who “were part of, or substantially
I. Executive Summary

The Constitution Project supported the Taliban, al Qaeda, or associated forces. The Administration conceded that its detention authority must comport with the Constitution and the law of war. Judge Walton found the government’s standard met those requirements so long as "the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces." In accordance with the principles of the common law, Judge Walton recognized that the contours of the standard would be developed as the standard was applied to the facts on a case-by-case basis. Subsequently, other judges of the District Court adopted and applied this standard.

The common law process has continued to refine the detention standard. In *Hamlily v. Obama*, Judge John Bates agreed with Judge Walton’s reasoning, but rejected “substantial support” as a basis of the government’s detention authority. The implication of this rejection is modest: While it produced a superficial divergence in the language used by the two courts, the substantive standard was largely the same. What the Gherebi standard accomplished by narrowly interpreting “substantial support,” the Hamlily court did by rejecting “substantial support” as a basis for detention. Under both standards, the courts consider circumstantial evidence of membership, not just a petitioner’s self-identification. Under both standards, the government must justify a prisoner’s detention by demonstrating the prisoner was functionally a member of the Taliban, al Qaeda, or an associated force. Judge Bates recognized the functional equivalence of the two standards, asserting that any difference in the application of the standards “should not be great” because what qualifies as “substantial support” under Gherebi qualifies as “part of” under Hamlily. Again, consistent with the tradition of the common law, other judges of the District Court have followed Hamlily, and found the standard “not inconsistent with Judge Walton’s opinion in Gherebi.”

In *Al-Bihani v. Obama*, involving an acknowledged member of a Taliban brigade, the U.S. Court of Appeals for the District of Columbia Circuit returned to the detention standard originally offered by the Bush Administration. The court also rejected the law of war as a constraint on the government’s detention authority, contrary to the view of the Supreme Court in *Hamdi* and both the Bush and Obama Administrations. While we express no view on the D.C. Circuit’s substantive opinion, we agree that the work of the U.S. District Court for the District of Columbia demonstrates that courts are competent to move carefully and incrementally in the application and refinement of a substantive detention standard. In the process, they have produced a body of law that provides a predictive framework for litigants and useful guidance for the government and intelligence agencies in the current military campaigns.

B. Procedural and Evidentiary Rules

The District Court has also developed effective rules of evidence and procedure that seek to balance the government’s interest in protecting national security against the detainees’ interest in his liberty. Shortly after the decision in *Boumediene*, Judge Thomas Hogan drafted a Case Management Order (CMO) to govern the Guantánamo litigation. The result is a cautious and coherent set of procedural and evidentiary rules. The CMO established a model for the District Court, which has now applied the CMO to numerous cases, creating a common law interpreting its provisions. The government and detainees at Guantánamo look to these interpretations for guidance. What is more, the rules provide the essential flexibility required for addressing the new and complex factual scenarios presented by Guantánamo cases.

*Boumediene* established that prisoners at Guantánamo have a right to mount a meaningful challenge to their detention. The CMO protects that right by giving prisoners access to three categories of evidence: 1) exculpatory
Habeas Works

3

Evidence; 2) evidence relied on by the government to justify its detention; and 3) additional evidence if and only if the detainee can show good cause. For the first category, the CMO directs the government to disclose to the petitioner “all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government’s justification for detaining the petitioner.” Over a series of cases, the District Court has settled on the interpretation that “reasonably available” means information in one of three databases compiled by the government. The District Court judges have also arrived at uniform interpretations of what evidence “tends materially to undermine” the government’s case. They agree, for instance, that it includes evidence that a witness was subjected to “abusive treatment [or] torture.”

The second category, evidence on which the government relies, includes “(1) any documents and objects in the government’s possession that the government relies on to justify detention; (2) all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.” The District Court judges interpret this language narrowly, and defer to assertions by the government that it did not rely on information requested by a detainee.

Under the CMO, disclosure of exculpatory evidence and evidence upon which the government relies is automatic. Disclosure of any additional evidence, however, requires a showing of good cause by the detainee. Such requests must be narrow and specific, must explain why the requested evidence is likely to show the prisoner’s detention is unlawful, and must establish why production will not “unfairly disrupt [] or unduly burden [] the government.” The court is quick to reject broad requests and “fishing expeditions,” but has granted narrow and specific requests, such as requests for medical records and evidence of torture.

Beyond discovery, the courts have developed a host of procedural and evidentiary rules to assist in the orderly and judicious resolution of these cases, which evolve with experience. Foremost, the court has imposed a strict set of procedures that guard against the misuse or disclosure of classified evidence. On the merits, the courts have held the government must establish its case by a preponderance of the evidence—the standard proposed by the government. The government generally enjoys a rebuttable presumption that its evidence is authentic, but not that its evidence is accurate. Hearsay is admissible, with the weight given to a particular piece of hearsay determined by the court based on the entire record. Similarly, statements procured by torture or undue coercion are generally accorded no weight. The court designed these rules in an effort to avoid unduly burdening the government or compromising security, while still requiring it to justify the individual’s detention.

C. The Results

Although the District Court has granted the writ of habeas corpus to 36 of the 50 individuals whose cases have reached final decisions, the raw numbers do not tell the whole story. One case in which the writ was granted involved 17 Uighurs, whom the government had already conceded were “no longer” enemy combatants and had agreed posed no threat to the United States. Controling for these 17 individuals, the government has prevailed in more than 40% of the habeas petitions that it has actually contested. Of the habeas cases that have reached resolution in the District Court, 18 appeals are pending, 12 by detainees and six by the United States. One of the cases on appeal, Al Bihani v. Obama, was affirmed, but the appellants are seeking en banc review.

Thus, a careful study of the D.C. federal courts’ post-Boumediene jurisprudence shows that attacks on the
judiciary’s role are entirely unfounded. We fully recognize that Congress has the power, within constitutional limits, to set a detention standard of its own, and to prescribe rules of evidence and procedure to govern habeas cases. But in our considered judgment, reflecting our many years of experience on the bench, and based on our study of the available data, there is no need for Congress to do so here. Moreover, even if Congress were to legislate new standards, the courts will still have to interpret and apply the new law. Asking Congress to legislate an entirely new set of substantive or procedural rules to govern these cases would simply destabilize the emerging jurisprudence.
Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“A Trial Within A Trial: Justice, Guantanamo-Style”  
Andrea Prasow, JURIST-Forum (August 2010)

Op-Ed: Andrea Prasow reports on the military commission proceedings for Ibrahim Al Qosi, a Sudanese man who pled guilty to the crime of providing material support for terrorism and thus became the first person that the Obama Administration has successfully prosecuted in a military commission. While the jury publicly sentenced Al Qosi to 14 years in prison, the judge, counsel, defendant and Convening Authority had already agreed on what sentence the defendant would actually serve, and further agreed that this actual sentence would not be revealed to the jury or to the public. Prasow suggests that by negotiating this secret deal, the players in Al Qosi’s case created “their own mini-justice system” to replace the broken system of the military commissions.

“Next Generation” Strategies  
Challenging Abuse in Transnational Counterterrorism Practices
A Trial Within A Trial: Justice, Guantanamo-Style

JURIST Special Guest Columnist Andrea Prasow, senior counter-terrorism counsel at Human Rights Watch, says that the players constituting the military commission that tried Ibrahim al Qosi in Guantanamo last week created their own "mini-justice system" to replace the broken system they had originally been handed....

Last week at Guantanamo, while much of the media's attention was focused on the trial of Canadian Omar Khadr, two other less-noticed trials were also underway, both of them for Ibrahim al Qosi, a Sudanese man who once worked as a cook and driver for Osama bin Laden. One of al Qosi's trials was public and that trial looked like a victory for the Obama administration, which is hoping to legitimize the use of military commissions. But al Qosi's other trial - the one that really mattered - was secret, and it was a demonstration of how broken the military commission system is.

Al Qosi pled guilty to the crime of providing material support for terrorism, making him the first person that the Obama administration has successfully prosecuted in a military commission. Al Qosi's public trial was, quite literally, a show trial. It had the trappings of a trial, but its verdict had no meaning. Al Qosi pled guilty to the crimes of providing material support for terrorism and conspiracy to provide material support for terrorism, and signed a statement detailing the logistical support he had provided bin Laden and al Qaeda. The military jury was carefully questioned for bias by the judge, prosecution, and defense; challenges were raised; and the jury was presented with evidence and advised of the law. In the end, after deliberating for an hour and 20 minutes, the jury issued its sentence, sentencing al Qosi to 14 years in prison, on top of the eight and half years he had already spent in US custody.

But the jury's sentence was irrelevant. Al Qosi's real trial was secret. The judge, counsel, defendant, and the Convening Authority (the Department of Defense official in charge of military commissions) had already agreed...
on what sentence al Qosi would serve. They had also agreed that the sentence would be kept secret, not only from the jury but also from the public. The news outlet Al Arabiya has reported that al Qosi will only serve two more years before he is repatriated back to his native Sudan. If true, the sentence is a stunning victory - for the defense.

It is difficult to convey the bewilderment that even I - a seasoned observer and former military commissions defense lawyer - experienced watching these events unfold in Guantanamo last week. I was amazed as defense counsel vigorously urged the jury to sentence al Qosi to the minimum sentence the judge said they could issue - 12 years - instead of the maximum sentence allowed by the judge - 15 years. The prosecution in turn argued that al Qosi deserved the maximum 15-year sentence, although it put on virtually no evidence other than testimony by a special agent with the Naval Criminal Investigative Service (NCIS) about the structure of al Qaeda. Even the jury members must have wondered why they had been called down to the island to make such narrow decision. The observers frantically flipped through the rulebook for military commissions - the one that had been issued only a few months ago - and confirmed that the charges have no minimum sentence, and the maximum sentence is life imprisonment.

Why the range of 12-15 years then? The cynical observer would think it was to ensure the prosecution was able to celebrate a harsh sentence. I'm not sure what other kind of observer there could have been at these proceedings.

Of course, the jury members, unlike the media and observers, had no idea that al Qosi had a prearranged sentence agreement. They also did not know that the prosecution's expert on al Qaeda - NCIS Special Agent Robert McFadden - was actually one of al Qosi's key interrogators. Only once they left the island would they have discovered that their service was moot, and was intended to be all along.

The proceedings had begun on an even stranger note. At the start of the hearing that was supposed to lead to sentencing, the parties jointly requested an order from the judge, Air Force Lt. Colonel Nancy Paul. It seems an integral term of al Qosi's plea bargain is that he not be kept in isolation following sentencing, and instead be permitted to stay in the communal-living camp at Guantanamo called Camp 4, where he has resided for several years. According to the prosecution, as of the day prior to the hearing, the authorities in Guantanamo had declared that they intended to move al Qosi to isolation as soon as he was sentenced. The prosecution and the defense both implored the judge to order the authorities to keep al Qosi in Camp 4, claiming that the (secret) written plea agreement virtually required it. The prosecutor stated that it was the US government's "promise" to keep him in Camp 4 and that there was no regulation or law that prohibited it. Judge Paul accordingly did issue an order, holding that the term was "crucial" and "a substantial factor" in the defendant's agreement to plead guilty. She said that failure to place al Qosi in Camp 4 or comparable conditions (which do not currently exist) would nullify the plea agreement.

Several hours later, as the case was well into jury selection, the
prosecution requested a private meeting with the defense and judge, and the trial was suddenly recessed, not to start again for another two days. Rumor had it that the Department of Defense did not appreciate the judge's order. So when proceedings resumed, the prosecutor began by repeatedly apologizing for having misspoken; defense counsel agreed that al Qosi had all along known that he might not end up in Camp 4; and Judge Paul revised her order to say that she "highly recommend[ed]" that al Qosi be placed in Camp 4, but that failure to do so would not nullify the plea agreement. She noted that the Convening Authority had agreed to defer imposition of al Qosi's sentence for 60 days to give him (yes, al Qosi himself) time to negotiate with the Guantánamo authorities, as well as for US Southern Command to create a policy that would permit him to serve his time in Camp 4. The deferral, the prosecutor asserted, was "an act of grace" by the Convening Authority but in no way represented any obligation. What was the lynchpin of the plea agreement two days earlier had been converted into a footnote.

Where al Qosi will serve his sentence remains unclear. Perhaps he will be free so soon that it hardly matters. It is difficult to assess what really happened without knowing the terms of the plea bargain but it appears that all parties - prosecution, defense and judge - wanted so badly for the agreement to be accepted that they were comfortable setting aside anything that got in the way, including rumored refusal by the Defense Department to comply with the court order.

After sentencing, I found myself having dinner a few feet away from a curious gathering. Judge Paul was scheduled to retire the following day (technically, to begin "terminal leave" on her way to military retirement). The judge, defense counsel, prosecution counsel, members of the clerk's office, court reporters, and others all enjoyed dinner, replete with wine and gifts for the judge. They had a lot to celebrate. Together, they had created their own mini-justice system. The one they were given was so broken that they simply couldn't operate within its parameters. The prosecution walked away with a political success - a 14-year sentence for a man who cooked for al Qaeda; the defense likely negotiated a dream deal for their client; and the judge walked into retirement knowing that she had closed the chapter on another military commission case.

As Judge Paul said before closing the proceedings, "We have made law, and we have made history."

Andrea Prasow is senior counter-terrorism counsel at Human Rights Watch.

Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“Counter-Counter-Terrorism Via Lawsuit: The Bivens Impasse” (p. 843-849, 871-881)

Journal Article: Brown reviews the procedural obstacles confronted by victims of the “war on terror” who seek to bring lawsuits in the U.S. courts based on the Bivens doctrine, which permits damages actions for constitutional torts committed by federal officials. He argues that the application of the Bivens doctrine presents an impasse in cases concerning the war on terror because courts may not feel competent determining the appropriate balance between individual liberty and national security. In the excerpt, Brown considers the types of fact patterns likely to be found in war on terror Bivens suits, the serious hurdles that such suits face in moving forward, and the initial matter in which the lower courts are handling these cases.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
The war on terror has put the American legal system to a severe test. Issues as diverse as the legitimacy and procedures of nontraditional
military tribunals,\(^1\) the availability of and procedures for habeas corpus,\(^2\) and the power of Congress over the “Great Writ”\(^3\) have generated substantial, widely publicized litigation. Until now, attention has focused on terrorism suspects who seek to block the government actions to which they are subjected. The most dramatic examples have been habeas corpus petitions seeking outright release.\(^4\)

These suits are not about to go away,\(^5\) but a new form of litigation will become increasingly important: damages suits claiming violations of constitutional and other rights brought against the federal officials who participated in the contested measures, either at the operational or higher levels. One commentator calls this phenomenon “counter-counter-terrorism via lawsuit.”\(^6\) High profile examples have already emerged\(^7\): the suit by Jose Padilla against former Justice Department official John Yoo\(^8\) and the damages action by Canadian citizen Maher Arar based on his “extraordinary rendition” to Syria.\(^9\)

A cornerstone of these suits is the *Bivens* doctrine, often referred to as the federal analogue of 42 U.S.C. § 1983.\(^10\) *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*\(^11\) arose out of alleged Fourth Amendment violations by federal law enforcement officials. The Supreme Court ruled that federal officials who violate individuals’ constitutional

---

5. The Supreme Court’s 2008 decision in *Boumediene v. Bush* adopts a flexible approach to the availability of habeas corpus to aliens not on U.S. soil. *Boumediene*, 128 S. Ct. at 2267. It is likely that this approach will generate future litigation.
rights can be held liable for damages. This holding might seem little more than an application of Chief Justice Marshall’s famous statement in *Marbury v. Madison* that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” Yet from the outset, the *Bivens* doctrine has contained an equally important, diametrically opposed strand: a high degree of judicial discretion coupled with deference to Congress—both its expertise in the particular subject matter of the suit and its role in making the basic remedial decision of whether damages are available for constitutional violations. Over the last two decades, the latter strand has prevailed. The Supreme Court has rejected the last seven attempts to fashion a *Bivens* action in new contexts. Commentators have declared *Bivens* moribund, if not dead.

In this Article, I contend that things are not so simple. The terrorism-based cases will force the judiciary, and ultimately the Supreme Court, to reexamine the status of *Bivens*. It may well be that efforts to fashion damages remedies for possible constitutional violations will fail. At the general level, the Court’s apparent hostility to *Bivens*—or at least the Court’s emphasis on the discretionary-deferential nature of the doctrine—is there for all to see. At a specific level, some lower court judges have seized on one aspect—what might be called the “political question” dimension of *Bivens*—to justify refusals to hear cases where claims of constitutional violations seem strong. These judges may see terrorism-based *Bivens*
cases as forcing them not just to evaluate individual conduct, but also to evaluate entire government programs in the sensitive area of national security. On the other hand, many of the cases present what might be called “heartland” Bivens issues—egregious conduct by law enforcement or similar officials. Even if confined to its original facts, as Justices Scalia and Thomas have advocated, the doctrine would arguably allow these damages actions to proceed. Its Marbury roots point in this direction. So do the Supreme Court’s recent terrorism cases. Thus, a rebirth of Bivens is a distinct possibility, as seemingly arcane points of federal jurisdiction play a central role in the world of counter-counter-terrorism litigation.

The Article proceeds as follows. In Part II, I trace the evolution of Bivens and its inherent duality. I contend that there is not one single model of Bivens, but two contrasting ones that have coexisted since the original decision. I label these the Marbury-rights model and the prudential-deferential model. The former encourages constitutional damages litigation; the latter discourages it. The Supreme Court’s Bivens decisions are examined in depth in order to develop these models. Part III takes a preliminary look at possible war on terror constitutional damages suits. I focus on Arar v. Ashcroft, an extraordinary rendition case. That case is a good example of the prudential-deferential model in action and shows its close relationship to the political question doctrine. Part IV presents a proposed general analysis for future war on terror Bivens suits. It also considers the impact of the recent Supreme Court decisions on habeas corpus. These cases appear to support the Marbury-rights model but do not provide a definitive answer. This part also considers (and rejects) balancing as a possible compromise approach to the impasse. Part V concludes with a consideration of steps Congress might take as a way out of the Bivens impasse.

The war on terror cases will force the Supreme Court to confront several issues. The first is whether to retain its current position on Bivens—

---

17. See Rasul, 512 F.3d at 673 (“Judicial involvement in this delicate area could undermine these military and diplomatic efforts and lead to ‘embarrassment of our government abroad.’” (quoting Baker v. Carr, 369 U.S. 186, 226 (1962))).

18. In Malesko, Justice Stevens referred to an alleged Eighth Amendment violation by a prison guard as falling “in the heartland of substantive Bivens claims.” Malesko, 534 U.S. at 78 (Stevens, J., dissenting).

19. See Wilkie, 551 U.S. at 568 (Thomas, J., concurring) (quoting Malesko, 534 U.S. at 75 (Scalia, J., concurring)) (arguing that Bivens should be limited “to the precise circumstances” it involved); Malesko, 534 U.S. at 75 (Scalia, J., concurring) (same).

the prudential-deferential model. As an alternative, it might return to the Marbury-rights model or seek a compromise approach that allows some suits to proceed. 21 Deterring rogue agents is one thing, but individual liability for those who are protecting the nation in accordance with government policy should give us pause. While it would be consistent with our constitutional tradition for the judiciary to use Bivens constitutional tort actions as a means of “checking” official policy, 22 there may be a lack of fit between the “A v. B” tort configuration of suits like the original Bivens case and broad challenges to government programs. Yet individual suits will often be the only available vehicle. They also highlight the issue of supervisory liability, including the potential for holding liable officials at the highest level. In such a case, the individual non-official-capacity suit becomes an attack on the policy itself.

The Court must confront an additional issue: the extent to which its recent habeas corpus decisions portend a broader judicial role in the war on terror. The cases certainly point in this direction. In her plurality opinion in Hamdi v. Rumsfeld, Justice O’Connor stated:

While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. 23

Thus, a question arises as to how much this approach, with its strong tilt toward the Marbury-rights model, will carry over to the Bivens doctrine when the inevitable war on terror suits arise.

21. This possibility is discussed and rejected in Part IV.B infra.
22. See BENJAMIN WITTES, LAW AND THE LONG WAR 113 (2008) (“The broad vision of judicial power in the overseas fight against terrorists has two interconnected sources. One involves the right of individuals detained to their day in court. The other involves the power of the courts themselves to review administrative action for compliance with legal norms the administration may be flouting.”); Bandes, supra note 15, at 317–19 (noting the importance of the Court’s checking function). David Zaring states that “[p]ersonal liability has become an important alternative to administrative procedure.” David Zaring, Personal Liability as Administrative Law, 66 WASH. & LEE L. REV. 313, 316 (2009). Cornelia Pillard argues that government practice concerning defense costs and possible indemnification has made the government “the real defendant party in interest in Bivens litigation.” Cornelia T. L. Pillard, Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens, 88 GEO. L.J. 65, 67 (1999). Yet the Court continues to insist that Bivens actions are aimed at the individual defendants.
In the end, one must ask whether *Bivens* suits are the best method of responding to the constitutional questions that the war on terror litigation brings before the courts. This is a hard question. The *Bivens* action is a valuable component of the legal order, even if it is used sparingly under the prudential-deferential model. This Article contends that precedent and policy argue for a generally negative answer in the war on terror context. This context provides a strong example of the need for judicial deference to the political branches and judicial recognition of the danger of a situation that Benjamin Wittes describes as “one in which legalisms pervasively hamper governmental pursuit of a goal that nearly all Americans support.”

My rejection of a broad role for *Bivens* also rests on the view that war on terror litigation cannot just be shoehorned into the “law enforcement” model, in which a *Bivens* action looks like a typical police misconduct case. The issues raised by these actions must be viewed through the lenses of the intelligence and military models as well. On the other hand, I recognize that there is a real risk that constitutional violations will not be redressed. Furthermore, the judiciary’s checking function will be circumscribed in an area where it may be essential.

This is the *Bivens* impasse that confronts the courts and that the courts may not be able to resolve. One approach would be for Congress to pass legislation to provide non-*Bivens* relief to those aggrieved by actions against them as terrorism suspects. Indeed, the ultimate impact of *Bivens* suits may be to prod Congress into actions that reflect its view on how best to strike the balance between individual liberty and national security and that represent a more assertive congressional role in the war on terror. Wittes writes that Congress “has sat on its hands and refused to assert its own proper role in designing a coherent legal structure for the war; to this day, America’s national legislature continues to avoid addressing the questions only it can usefully answer.” Wittes views both the executive and the judiciary as incapable of developing “a stable long-term architecture for a war that defies all of the usual norms of war. The only institution capable of delivering such a body of law is the Congress of the

---

26. See generally Seamon, *supra* note 7, at 757–62 (emphasizing the possibility of holding the United States, as well as individual officials, liable, at least in the torture context). This Article discusses alternative possibilities for compensating aggrieved suspects in Part V infra.
27. *Wittes, supra* note 22, at 8. But see infra text accompanying notes 303–06 (noting that “Congress has enacted a broad array of statutes to deal with terrorism, both before and after September 11, 2001”).
II. BIVENS—DUALITY FROM THE OUTSET

A. THE ORIGINAL DECISION AND THE TWO EXCEPTIONS

The plaintiff in Bivens sought damages from federal narcotics agents based on an alleged warrantless search and seizure in violation of the Fourth Amendment. The Supreme Court’s 1971 decision, by a 6-3 margin, gave an affirmative answer to the previously unresolved question of whether a damages remedy was available in such a case. Justice Brennan’s majority opinion treated the case as somewhat unremarkable, dismissing possible federalism issues, and making the Marbury-based assertion that the fact “[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly come as a surprising proposition.”

He brushed aside the dissenters’ suggestion that congressional authorization of such a remedy was necessary. He quoted Bell v. Hood to the effect that “it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.” However, in the course of his analysis he posited two exceptions that might suffice to take away the judicially created remedy. Justice Brennan first noted that “[t]he present case involves no special factors counselling hesitation in the absence of affirmative action by Congress.” He then noted that “we have here no explicit congressional declaration that persons injured by a federal officer’s violation of the

28. WITTES, supra note 22, at 10.
30. See id. at 388.
31. See id. at 391–95.
32. Id. at 395. See also id. at 397 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.” (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803))).
33. See id. at 396 (“Of course, the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation.”). Writing in dissent, both Chief Justice Burger and Justice Black contended that the Court could not authorize a damages remedy absent explicit congressional authorization. See, e.g., id. at 412 (Burger, C.J., dissenting) (“ Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”).
34. Id. at 396 (majority opinion) (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
35. Id.
particularly with respect to Bivens. However, overt reference and recourse to common law processes have long been present in Bivens cases. Wilkie is the most recent example. Its approach, building on the earlier cases, suggests a wide-ranging judicial discretion that permits a court to consider any relevant factor—what Justice Harlan in Bivens termed “a range of policy considerations . . . at least as broad as the range of those a legislature would consider.” Moreover, the Court has made it clear that Congress can alter Bivens results.

III. WAR ON TERROR BIVENS SUITS—A GROWING PHENOMENON

As might be expected, the war on terror has already generated a number of Bivens suits. Many are moving through the court system; the first grant of certiorari by the Supreme Court occurred in June 2008. This section of the Article covers three areas: the types of fact patterns likely to be found in the cases, the serious hurdles that a Bivens action faces, and the initial manner in which the lower courts are handling the cases. There is a lot at stake. These suits put the courts in the position not just of judging individual acts, but also of judging the war on terror itself.

A. THE TYPES OF SUIT

Many suits will be generated by the detention and interrogation of suspects. Obviously, that activity is at the heart of the government’s antiterrorism efforts, whether carried out by law enforcement officials,
intelligence agents, the military, or personnel from other federal agencies. Arrests, conditions of detention, allegations of torture, and claims of religious and racial discrimination will all arise. A good example are the claims set forth in the complaint in \textit{Elmaghraby v. Ashcroft}, a case arising out of confinement in a highly restrictive “administrative maximum” unit.\textsuperscript{196} The complaint alleged numerous potential constitutional violations including beatings, interference with access to counsel, denial of adequate medical care, unreasonable strip and body-cavity searches, harsh confinement because of religious beliefs, and harsh confinement because of race.\textsuperscript{197} The plaintiffs based their claims, in part, on the First, Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution.\textsuperscript{198}

Such suits challenging conditions of detention and methods of confinement are frequent.\textsuperscript{199} There are two aspects of these cases that deserve additional mention. They frequently include as defendants high-ranking federal officials on the ground that these officials authorized or directed the challenged practices. For example, the defendants in \textit{Elmaghraby} ranged from the Attorney General of the United States to “John Doe” corrections officers. The Supreme Court’s first treatment of a war on terror \textit{Bivens} case came in \textit{Ashcroft v. Iqbal}, the successor to \textit{Elmaghraby}.\textsuperscript{200} One of the questions presented was “[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.”\textsuperscript{201} The majority’s resolution of the case cast doubt on theories of supervisory liability under \textit{Bivens}.\textsuperscript{202}

The notion of high-level liability is taken further in the well-publicized suit brought by Jose Padilla against former Justice Department official John Yoo. The complaint alleged “conscience-shocking interrogation techniques and conditions of confinement . . . intended to destroy Mr. Padilla’s ordinary emotional and cognitive functioning in order

\begin{footnotes}
\item[197] See id. at *2–*7.
\item[198] See id. at *7–*9.
\item[199] See Seamon, \textit{supra} note 7, at 715 (“[T]he victims of . . . torture have begun to sue.”).
\item[200] Iqbal, 129 S. Ct. 1937.
\item[201] Id. at 1956 (Souter, J. dissenting) (quoting the petition for writ of certiorari).
\item[202] See id. at 1955 (stating that the majority opinion “does away with supervisory liability under \textit{Bivens}”).
\end{footnotes}
to extract from him potentially self-incriminating information." Yoo, however, was not a superior officer in the chain of command of those who allegedly mistreated Padilla. He was Deputy Assistant Attorney General in the Justice Department’s Office of Legal Counsel. The suit alleges that the conduct was the product of several legal memoranda authorizing it, written by Yoo.

A second important aspect of the detention and interrogation suits is that they can put the courts in the position of judging policies such as “extraordinary rendition.” This controversial program involves sending terrorism suspects to countries that permit harsher interrogation techniques than the United States. The best known case is that of Maher Arar, who brought a Bivens suit seeking damages for extraordinary rendition, which put the courts in the middle of one of the most hotly debated issues of the entire war on terror.

Bivens suits can arise in other contexts as well. For example, various forms of surveillance are likely to be a fruitful source of litigation. In a widely publicized suit in which the American Civil Liberties Union was the lead plaintiff, a federal district court enjoined the National Security Agency’s Terrorist Surveillance Program. The Court of Appeals for the Sixth Circuit reversed and dismissed the case on standing grounds. A different form of surveillance claim was presented in Tabbaa v. Chertoff, in which plaintiffs challenged a border search that occurred after they returned from an Islamic conference in Canada.

Although the Fourth

---


204. Complaint, supra note 203, ¶¶ 16, 20. These memoranda have become quite controversial, particularly the joint Bybee-Yoo Memorandum, referred to as the “Torture Memorandum.” See WAYNE MCCORMACK, LEGAL RESPONSES TO TERRORISM 551–55 (2d ed. 2008). Yoo has criticized the suit in the following terms: “The lawsuit by Padilla and his Yale Law School lawyers is an effort to open another front against U.S. anti-terrorism policies. If he succeeds, it won’t be long before opponents of the war on terror use the courtroom to reverse the wartime measures needed to defeat those responsible for killing 3,000 Americans on 9/11.” John Yoo, Terrorist Tort Travesty, WALL ST. J., Jan. 19, 2008, at A13.


207. ACLU, 493 F.3d 644.

208. Tabbaa v. Chertoff, 509 F.3d 89, 93–96 (2d Cir. 2007).
Amendment played a prominent role in the plaintiffs’ claims in both cases, neither suit requested damages. These are, however, the kinds of government activities which can lead to a Bivens action.

Bivens is indeed at the center of counter-counter-terrorism litigation. The underlying policies of the war on terror and the zeal of those who prosecute it inevitably lead to potential violations of constitutional rights. Those who oppose the war on terror, as well as those who view their rights as having been infringed (and their lawyers), have seized on Bivens as a key to fighting back. Peter Margulies describes damages suits against federal officers as part of a range of initiatives that drive campaigns of what he calls “crossover advocacy.”

David Zaring has stated that “in these high-profile cases, winning the lawsuit is less precisely the point than is practicing increasingly personal politics while calling attention to a policy and a plight,” and that “[t]hese suits are more symbolic than likely to succeed, in that they rely not on the verdict, but on the ability to make a claim against a policy-maker.” As Zaring admits, some, perhaps many, of the plaintiffs will have suffered real injuries of the sort at which Bivens was aimed. The distinction is not easy to draw and may lead to downgrading the importance of serious lawsuits that are not publicity stunts. There is still, as noted, a lot at stake. Bivens suits could derail the war on terror, or at least seriously impede it. Therefore, it is not surprising that the government and individual officials have available a range of defenses to stop the suits short of the merits.

B. DEFENSES—OTHER THAN SPECIAL FACTORS

In this section, I will examine briefly two possible defenses to a war on terror Bivens action, other than the special factors exception. Before considering that defense, it is important to realize that it is by no means the only one available. If one has reservations about these suits and is tempted to regard the special factors analysis as an important threshold limit, it may be relevant that there are other potential avenues of limiting them. It may

209. See id. at 92; ACLU, 493 F.3d at 650–51.
210. See In re Sealed Case, 494 F.3d 139 (D.C. Cir. 2007) (refusing to dismiss a Bivens action alleging surveillance in violation of the Fourth Amendment).
211. See Peter Margulies, The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror, 57 BUFF. L. REV. 347, 348–49 (2009).
212. Zaring, supra note 22, at 332.
213. Id. at 335.
214. See id. at 340.
215. It must be noted, however, that Padilla sought only one dollar in damages against Yoo. Complaint, supra note 203, ¶ 109b.
not be necessary to push the prudential-deferential model to the point that
Bivens really does lose all force in war on terror contexts.

The two most prominent defenses are the state secrets privilege\textsuperscript{216} and
the qualified immunity defense. Both defenses can be viewed as protecting
the effectiveness of government programs, whether by shielding an official
from the burdens of litigation or by keeping secret information regarding
that program. In El-Masri \textit{v. United States}, the Fourth Circuit stated the
essence of the privilege as follows: “Under the state secrets doctrine, the
United States may prevent disclosure of information in a judicial
proceeding if ‘there is a reasonable danger’ that such disclosure ‘will
expose military matters which, in the interest of national security, should
not be divulged.’”\textsuperscript{217}

If the privilege is successfully invoked, it is sometimes possible for
the litigation to continue, but if an attempt to proceed would threaten
disclosure of protected matters, the suit must be dismissed.\textsuperscript{218} In El-Masri,
the court dismissed on state secrets grounds the plaintiff’s \textit{Bivens} challenge
to his extraordinary rendition, even though the general existence of the
program was a matter of public knowledge.\textsuperscript{219} State secrets dismissals are a
real risk for plaintiffs in war on terror suits, including \textit{Bivens} actions.\textsuperscript{220} At
the moment, the privilege is under serious attack, with critics suggesting
various ways of limiting it, including giving Congress a role in pending
litigation.\textsuperscript{221}

The immunity defense is well known, both in suits brought under
\$ 1983 and those involving federal officials.\textsuperscript{222} Most \textit{Bivens} defendants can

\begin{small}
\begin{footnotes}
\item[217] El-Masri \textit{v. United States}, 479 F.3d 296, 302 (4th Cir. 2007) (quoting United States \textit{v. Reynolds}, 345 U.S. 1, 10 (1953)).
\item[218] See id. at 306.
\item[219] See id. at 308–11.
\item[220] See Al-Haramain Islamic Found., Inc. \textit{v. Bush}, 507 F.3d 1190, 1205 (9th Cir. 2007) (finding that the plaintiff in a \textit{Bivens} suit could not establish standing because the sealed document necessary to demonstrate its standing was covered by the state secrets privilege). Further proceedings on remand in this complicated litigation are reported at \textit{In re National Security Agency Telecommunications Records Litigation}, 564 F. Supp. 2d 1109 (N.D. Cal. 2009).
\item[221] See, e.g., Chesney, supra note 216, at 1312.
\end{footnotes}
\end{small}
claim qualified immunity. The federal courts’ approach has been to first determine whether the defendant violated a constitutional right. If so, the court considers whether the right was clearly established at the time of the alleged violation and “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”\textsuperscript{223} The Supreme Court recently revisited the issue of the test for qualified immunity.\textsuperscript{224} It is not clear what effect its decision might have on war on terror \textit{Bivens} actions. Many of these cases will involve rights that were clearly established at the time of the government action and will survive preliminary motions to dismiss on immunity grounds.\textsuperscript{225} On the other hand, some rights may not have been apparent to a reasonable official. The immunity defense will prevent some suits from being brought. In \textit{Iqbal}, however, the Second Circuit rejected the defendants’ argument that the post–September 11 context created extraordinary circumstances that could alter a right’s status as clearly established.\textsuperscript{226} The Supreme Court’s decision in \textit{Iqbal} did not decide this issue but did express the view that those circumstances were relevant to the state of mind of officials accused of discrimination when they were dealing with suspected terrorists.\textsuperscript{227}

Thus, the narrow approach to \textit{Bivens} does not stand alone. Other doctrines are available to keep counter-counter-terrorism litigation in check. Furthermore, there is an analytical kinship between the special factors exception, the immunity defense, and the state secrets privilege. Immunity protects the official from the burden of litigation and also furthers the government’s interest in having zealous officials. The state secrets privilege operates to shield government programs from judicial oversight generated by lawsuits. Immunity, if upheld, stops litigation at an early stage. Successful invocation of the privilege can sometimes halt litigation as well. The prudential-deferential model furthers similar interests and leads to dismissal before the merits. Does the application of this approach to \textit{Bivens} suits in a “strong” manner amount to overkill? One’s answer probably depends on how one views counter-counter-terrorism suits in the first place. Their compensation function can be accomplished by other means. The core issue is the desirable extent of judicial oversight of

\textsuperscript{224} \textit{See} \textit{Pearson}, 129 S. Ct. 808.
\textsuperscript{225} John Yoo himself has questioned whether immunity doctrine will be of much help to \textit{Bivens} defendants. \textit{See} Yoo, \textit{supra} note 204.
\textsuperscript{227} \textit{See} \textit{Iqbal}, 129 S. Ct. at 1951–52.
executive actions in the war on terror. In its present form, *Bivens* points toward a very narrow role.

C. THE WAR ON TERROR AS A SPECIAL FACTOR

In this section, I consider several lower court opinions on special factors analysis as a prelude to a general treatment of the issue in Part IV. The most in-depth discussions are found in the district court and court of appeals opinions in *Arar v. Ashcroft*.228 The plaintiff, a dual citizen of Syria and Canada, was initially detained by federal agents at John F. Kennedy Airport in New York. After approximately two weeks he was “rendered” to Syria, where he was confined for ten months.229 He alleged coercive and involuntary interrogation in New York, and torture and other cruelty in Syria. His action against a range of federal officials was based in part on *Bivens*, claiming deprivation of due process rights. The district court expressed uncertainty as to “whether substantive due process would erect a *per se* bar to coercive investigations, including torture, for the purpose of preventing a terrorist attack.”230 For purposes of the *Bivens* inquiry, however, it assumed an affirmative answer.231 The court also concluded that cases such as *Rasul v. Bush*,232 and the fact that the conduct either occurred or was initiated on U.S. soil, might vest Arar with “some substantive protection”233 despite arguments for dismissing on foreign territory or nationality grounds. This led it to the special factors exception to *Bivens*. The opinion is a classic example of the prudential-deferential model.

The district court treated the special factors analysis as a separation of powers issue: “the question of who should decide whether . . . a remedy should be provided.”234 In terms that evoke the political question doctrine,235 it repeated its view that “the foreign policy and national-security concerns raised here are properly left to the political branches of

---

228. *Arar v. Ashcroft*, 532 F.3d 157 (2d Cir. 2008), aff'g 414 F. Supp. 2d 250 (E.D.N.Y. 2006), reh'g en banc granted (Aug. 12, 2008). Although the en banc decision may change the result, the district court and court of appeals panel decisions present a full discussion of the issues on both sides.


230. Id. at 274.

231. See id. at 275.


234. Id. (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

235. The court treated the *Bivens* and political question doctrines as separate. See id. at 283 n.14.
government.” It raised the possibility of embarrassment of the government through “multifarious pronouncements” by different branches. It stressed that judicial involvement might present a lack of expertise problem and called for “explicit legislation.” Thus, the court dismissed the counts based on extraordinary rendition.

On appeal, the Court of Appeals for the Second Circuit affirmed the district court by a 2-1 margin. The split is a classic example of the difference between the two models discussed here. The majority utilized the prudential-deferential model. It expressed reluctance to “probe deeply into the inner workings of the national security apparatus of at least three foreign countries, as well as that of the United States.” The majority went so far as to state that the government’s invocation of the state secrets privilege was itself a special factor counseling hesitation. It also expressed concern about diminishing the federal government’s ability “to speak with one voice” to foreign governments and concluded that Congress should be the branch to decide “the availability of a damages remedy in circumstances where the adjudication of the claim at issue would necessarily intrude on the implementation of national security policies and interfere with our country’s relations with foreign powers.” Thus, the prudential-deferential model showed the broad reach of its logic. The court deferred to Congress with respect to the remedial decision because adjudication could have harmful effects within a particular context: the war on terror.

The dissenting opinion by Judge Sack is an equally classic example of the Marbury-rights model. It emphasized that “there is a long history of

236. Id. at 280. The court also noted the argument that government policy toward aliens is closely related to other fields, such as foreign affairs and exercise of the war power. See id. at 282.
237. Id. at 282.
238. Id. at 283. The court stated that “the task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches, in whom the Constitution imposes responsibility for our foreign affairs and national security.” Id.
239. See id. at 283–85. The court permitted the plaintiff to amend his complaint concerning the detention and interrogation within the United States. See id.
241. Id. at 181.
242. See id. at 183.
243. Id. at 182.
244. Id. at 181. Seamon cites the district court opinion in Arar as support for the following proposition: “The Court might be particularly reluctant to recognize a Bivens claim when doing so would require judicial review of the executive branch’s conduct of foreign affairs and military strategy, as may be true of torture claims arising from the war on terrorism.” Seamon, supra note 7, at 778.
judicial review of Executive and Legislative decisions related to the conduct of foreign relations and national security. In support of this proposition, Judge Sack drew on the Supreme Court’s decision in Hamdi v. Rumsfeld. The Second Circuit has heard Arar en banc. One can anticipate a split decision, as well as a substantial likelihood of Supreme Court review.

The same arguments appear in other cases. One circuit court judge initially found special factors in a detention case. Judge Brown of the District of Columbia Circuit described “the method of detaining and interrogating alleged enemy combatants during a war [as] a matter with grave national security implications.” After remand from the Supreme Court on other grounds, a panel of the circuit court adopted Judge Brown’s special factors position as an alternative holding. One district court has found that the Federal Privacy Act provides a comprehensive remedy that constitutes a special factor counseling hesitation. Naturally, the government officials argue special factors vigorously in defending Bivens cases.

Not all courts have been as receptive to the special factors defense, as illustrated by the district court opinion in Elmaghraby v. Ashcroft. As discussed previously, this case raised a wide range of issues based on

245. Arar, 532 F.3d at 213 (Sack, J., concurring in part, dissenting in part). The dissent also discussed the question of when it is proper to treat a Bivens complaint as seeking to extend that remedy to a new context. Id. at 208.

246. See id. at 213 (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004))).


249. See Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam).


detention and interrogation of a terrorist suspect shortly after September 11, 2001. The government argued that the extraordinary context of the September 11 attacks constituted a special factor. The court recognized the “unique and complex law enforcement and security challenges” posed by terrorism threats, but it insisted that constitutional protections must remain in effect. Like Judge Sack in *Arar*, it drew on Justice O’Connor’s opinion in *Hamdi v. Rumsfeld* in which she emphasized the particular importance of the judiciary’s *Marbury*-based, rights-protective role during the war on terror.  

A similar rejection of special factors arguments can be found in the district court decision largely denying the defendant’s motion to dismiss in *Padilla v. Yoo*. Jose Padilla, an American citizen, brought a *Bivens* action against former Justice Department official John Yoo, claiming in part that Yoo’s legal advice had laid the groundwork for unconstitutional interrogation tactics used against Padilla after his designation as an enemy combatant. In moving to dismiss the complaint, Yoo relied heavily on the special factors defense. The court first rejected any notion of special factors based on an alternative remedy. It distinguished many of the Supreme Court cases discussed above on the ground that the “special factors” in those cases were the alternative remedies available. The court then turned to the possibility of context-based special factors, considering such potential issues as military considerations, national security, and foreign relations concerns.

The court rejected all of these possible grounds for a special factors dismissal. In doing so, it engaged in a highly fact-specific analysis. For example, any military concerns disappeared because Padilla’s “detention was not a necessary removal from the battlefield.” As for foreign affairs considerations, the court distinguished *Arar* on the ground that it involved a foreign national and interactions with foreign governments. It noted

---

254. *See id.* (“[I]t is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested.” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004))).
256. *See id.* at *2–*7.
257. *See id.* at *10 (finding that other than a *Bivens* suit, “Padilla has no other means of redress for the alleged injuries he sustained as a result of his detention and interrogation”).
258. *See id.* at *12–*14 (distinguishing *Bush* and *Schweiker*).
259. *See id.* at *15–*19.
260. *Id.* at *17.
261. *See id.* at *18–*19. “The treatment of an American citizen on American soil does not raise the same specter of issues relating to foreign relations.” *Id.* at *19.
courts’ concerns about “intrusion” into these areas but saw no general problem with intrusion into the conduct of the war or terror, at least where a citizen’s individual liberties were at stake.

IV. SPECIAL FACTORS AND THE WAR ON TERROR BIVENS ACTIONS—A PROPOSED ANALYSIS

A. THE PRUDENTIAL-DEFERENTIAL MODEL AND WAR ON TERROR BIVENS ACTIONS

1. The General Problem of Shared Competence

The Supreme Court’s Bivens precedents do not deal with this new context. The lower court cases are helpful but not dispositive. One way to look at the issue is to view Bivens as having changed substantially over four decades. The Court has moved from a presumption in favor of a constitutional damages remedy (with two specific exceptions) to a presumption against. Bivens has even been portrayed by a lower court as “disfavored.” At the time, this portrayal by the district court might have seemed an overstatement. In Iqbal, however, the Supreme Court itself offered the following assessment on the state of Bivens: “Because implied causes of action are disfavored, the Court has been reluctant to extend Bivens liability ‘to any new context or new category of defendants.’”

Perhaps the most accurate assessment is the Wilkie v. Robbins Court’s statement that the remedy “is not an automatic entitlement.” Why is it so hard to make an accurate assessment of Bivens? The answer is not that the Court has completely reversed its position on the whole subject of constitutional remedies. The Court made it clear from the beginning that Congress has the upper hand in deciding whether to provide such remedies. This is apparent in the second exception, which refers explicitly to a

262. See id. at *16, *19.
263. See id. at *17, *19.
267. But see Malesko, 534 U.S. at 75 (Scalia, J., concurring) (“Bivens is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreesing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition.”).
Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“‘Rendition’ challenge scuttled”
Lyle Denniston, SCOTUSblog (September 2010)

*Legal Article:* This article discusses the recent ruling by the U.S. Court of Appeals for the Ninth Circuit in *Mohammed, et al., v. Jeppesen Dataplan, Inc.*, in which the court invoked the “state secrets” doctrine to dismiss a lawsuit filed on behalf of five victims of extraordinary rendition.

“Next Generation” Strategies
*Challenging Abuse in Transnational Counterterrorism Practices*
“Rendition” challenge scuttled
Posted By Lyle Denniston On September 8, 2010 @ 9:37 pm In Cases in the Pipeline, Detainee Litigation, Featured | Comments Disabled

Raising further the prospect that the courts may never rule on the legality of the Central Intelligence Agency's alleged program of "rendition" of terrorism suspects to other countries for questioning and perhaps for torture, the en banc Ninth Circuit Court on Wednesday dismissed the latest challenge. Dividing 6-5, the Court relied on a broad "state secrets" theory to put a stop — before any evidence was offered — to a case against a small air flight planning firm that allegedly worked with the CIA to arrange those trips.

Together with the Fourth Circuit Court's 2007 decision in the case of Khaled el-Masri (which the Supreme Court refused to hear that year, in case 06-1613), the Ninth Circuit's ruling in Mohamed, et al., v. Jeppesen Dataplan, Inc. (Circuit docket 08-15694) goes far toward insulating the "rendition" program from judicial review — unless the Supreme Court took on that case and reversed the result.

Given how vigorously the Jeppesen case has been pursued by both sides, it seems highly likely that it will be appealed to the Supreme Court.

It was difficult to assess just what dangers to state secrets the Ninth Circuit majority found would arise if the case went further, since the majority said explicitly that it had relied heavily upon classified statements that government officials had submitted in calling for dismissal. It did say it was satisfied that the Obama Administration, which took over the effort to block the case from the Bush Administration, did not claim the “state secrets privilege” in order “to avoid embarrassment or to escape scrutiny” of the once-secret program.

The majority’s broadest holding was that a court rule that supposedly focuses only on whether specific evidence is to be excluded as a trial proceeds can actually be used to end a case before it goes beyond its mere filing and no disputes had yet arisen over what would be allowed in or kept out.

The five dissenting judges argued that this “evidentiary privilege” — traced to the Supreme Court's 1953 decision in United States v. Reynolds — can never be used to stop a case, barring every legal claim, even before the other side has filed a reply and before one item of evidence has been put forth. The dissenters, however, lost on that point because there were six votes for the majority opinion.

The case, in summary, involves claims by five non-citizens that the Jeppesen Dataplan Inc. contracted with the CIA to provide plans for what a Jeppesen executive later called “torture flights” or “ghost flights.” According to the lawsuit, the company’s executives knew full well that the trips were arranged to transport detainees to foreign countries known for torture and severe interrogation techniques, and thus knew that they would suffer terrible abuse as authorities sought evidence of terrorist acts or links.

Before Jeppesen could even answer the lawsuit’s claims, the U.S. government stepped in, invoked the “state secrets privilege,” and urged the federal courts to end the case at the outset because of its perception that secrets about intelligence-gathering techniques would inevitably come out if the case went forward.

The Circuit Court, in upholding the “state secrets” claim, said it was doing so on the basis of the Reynolds decision’s creation of an evidentiary privilege, rather than a supposedly broader doctrine that a case must be dismissed if the very subject matter of the claims was a government secret. By making what the majority said was a thorough and skeptical review of the two sides’ written and oral arguments on the privilege issue, the majority said it was persuaded that the case could not go even one step further without posing a serious risk of forcing secrets into the open.

In fact, the majority concluded that, even if the detainees’ lawyers could pursue their claims by relying entirely on information that was already public about the “rendition” program —
that is, even if those lawyers used only evidence not covered by the “state secrets” protection — the case still could not go forward, because of the risk that secrets might come out either in pre-trial “discovery” or in questioning at the trial.

Because of the public disclosures that have been made about the CIA program, the majority concluded that the fact of that program is no longer a secret. “The program has been publicly acknowledge by numerous government officials including the President of the United States,” the main opinion said.

The majority also found that there simply are no procedures that a District Court judge could adopt that would head off the risk that some secrets would come out. Because the facts underlying the detainees’ claims “are so infused with secrets,” the majority said, “any plausible effort by Jeppesen to defend against them would create an unjustifiable risk of revealing state secrets, even if [the detainees] could make a prima face case on one or more claims with non-privileged evidence.”

Circuit Judge Raymond C. Fisher wrote the majority opinion, joined by Chief Judge Alex Kozinski and Circuit Judges Richard C. Tallman, Johnnie B. Rawlinson and Consuelo M. Callahan. Circuit Judge Carlos T. Bea said in his brief separate opinion that he joined the result. While Bea said he would have based the ruling on a broader ban on trials involving “state secrets,” he specifically supported the majority’s treatment of the Reynolds evidentiary privilege.

Circuit Judge Michael Daly Hawkins wrote the dissenting opinion, joined by Circuit Judges Mary M. Schroeder, William C. Canby, Sidney R. Thomas and Richard A. Paez. The dissenters would have sent the case back to District Court for the judge there to examine whether any part of the case could go forward, with disputes over specific evidence and its admission to be worked out, item by item.

The majority, while seeking to remove the case entirely from the courts, suggested that there might be other remedies for those claiming harms from the CIA program. Among the suggestions were a compensation scheme, some chance to sue the government for damages in a special claims court, and possibly bills in Congress to provide individual compensation to the detainees.

Article printed from SCOTUSblog: http://www.scotusblog.com
URL to article: http://www.scotusblog.com/2010/09/rendition-challenge-scuttled/
URLs in this post:
Session Three: Discussion Roundtable - Challenges in the U.S.: Litigation Barriers, Emerging Issues, and New Strategies

“Final Report: Guantanamo Review Task Force” (p. i-ii, 15-25.)
Department of Justice, et al. (Jan. 22, 2010)

Government Report: This report summarizes the findings of an interagency government task force appointed to evaluate each of the 240 individuals detained at Guantanamo at the time President Obama took office in January 2009. In the report, which was made public in May 2010, the task force recommends transferring 126 detainees home or to a third country, prosecuting 36 for crimes and holding 48 without trial under the laws of war because they are deemed to be “too dangerous to transfer but not feasible for prosecution.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
EXECUTIVE SUMMARY

On January 22, 2009, the President issued Executive Order 13492, calling for a prompt and comprehensive interagency review of the status of all individuals currently detained at the Guantanamo Bay Naval Base and requiring the closure of the detention facilities there. The Executive Order was based on the finding that the appropriate disposition of all individuals detained at Guantanamo would further the national security and foreign policy interests of the United States and the interests of justice.

One year after the issuance of the Executive Order, the review ordered by the President is now complete. After evaluating all of the detainees, the review participants have decided on the proper disposition—transfer, prosecution, or continued detention—of all 240 detainees subject to the review.

Each of these decisions was reached by the unanimous agreement of the agencies responsible for the review: the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff.

Review Process

To implement the President’s order, the Attorney General, as the coordinator of the review, established the Guantanamo Review Task Force and a senior-level Review Panel. The Task Force was responsible for assembling and examining relevant information on the Guantanamo detainees and making recommendations on their proper dispositions. The Review Panel, consisting of officials with delegated authority from their respective agencies to decide the disposition of each detainee, reviewed the Task Force’s recommendations and made disposition decisions on a rolling basis. Where the Review Panel did not reach consensus, or where higher-level review was appropriate, the agency heads (“Principals”) named in the Executive Order determined the proper disposition of the detainee.

Key features of the review process included:

- **Comprehensive Interagency Review.** The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the intelligence community.

- **Rigorous Examination of Information.** The Task Force assembled large volumes of information from across the government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.
• **Unanimous Decision-Making by Senior Officials.** Based on the Task Force’s evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

**Results of the Review**

The decisions reached on the 240 detainees subject to the review are as follows:

• **126 detainees** were approved for transfer. To date, 44 of these detainees have been transferred from Guantanamo to countries outside the United States.

• **44 detainees** over the course of the review were referred for prosecution either in federal court or a military commission, and **36 of these detainees** remain the subject of active cases or investigations. The Attorney General has announced that the government will pursue prosecutions against six of these detainees in federal court and will pursue prosecutions against six others in military commissions.

• **48 detainees** were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government’s authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.

• **30 detainees** from Yemen were designated for “conditional” detention based on the current security environment in that country. They are not approved for repatriation to Yemen at this time, but may be transferred to third countries, or repatriated to Yemen in the future if the current moratorium on transfers to Yemen is lifted and other security conditions are met.

**Looking Ahead**

With the completion of the review, an essential component of the effort to close the Guantanamo detention facilities has been accomplished. Beyond the review, additional work remains to be done to implement the review decisions and to resolve other issues relating to detainees. The Task Force has ensured that its analyses of the detainees and the information collected in the course of the review are properly preserved to assist in the resolution of these issues going forward.
**Point of Capture.** The large majority of the detainees in the population reviewed—approximately 60 percent—were captured inside Afghanistan or in the Afghanistan-Pakistan border area. Approximately 30 percent of the detainees were captured inside Pakistan. The remaining 10 percent were captured in countries other than Afghanistan or Pakistan.

**Arrival at Guantanamo.** Most of the detainees reviewed—approximately 80 percent—arrived at Guantanamo in 2002, having been captured during the early months of operations in Afghanistan. The remaining detainees arrived in small numbers over succeeding years.

---

**VII. Transfer Decisions**

**A. Background**

As the first step in the review process, the Executive Order required the review participants to determine which Guantanamo detainees could be transferred or released consistent with the national security and foreign policy interests of the United States. The Executive Order further required the Secretary of Defense, the Secretary of State, and other review participants as appropriate, to “work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.”

Prior to the initiation of the review, 59 of the 240 detainees subject to review were approved for transfer or release by the prior administration but remained at Guantanamo by the time the Executive Order was issued. One reason for their continued detention was that more than half of the 59 detainees could not be returned to their home countries consistent with U.S. policy due to post-transfer treatment concerns. Thus, many of the 59 detainees required resettlement in a third country, a process that takes time and requires extensive diplomatic efforts.

In addition, 29 of the detainees subject to review were ordered released by a federal district court as the result of habeas litigation. Of these 29 detainees, 18 were

---

11 It is the longstanding policy of the United States not to transfer a person to a country if the United States determines that the person is more likely than not to be tortured upon return or, in appropriate cases, that the person has a well-founded fear of persecution and is entitled to persecution protection. This policy is consistent with the approach taken by the United States in implementing the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Protocol Relating to the Status of Refugees. Accordingly, prior to any transfer, the Department of State works closely with relevant agencies to advise on the likelihood of persecution or torture in the given country and the adequacy and credibility of assurances obtained from the foreign government.
ordered released after the government conceded the case.\textsuperscript{12} The remaining 11 detainees were ordered released after a court reached the merits of the case and ruled, based on a preponderance of the evidence, that the detainee was not lawfully held because he was not part of, or did not substantially support, al-Qaida, the Taliban, or associated forces.\textsuperscript{13} Of the 29 detainees ordered released, 18 were among the 59 who had been approved by the prior administration for transfer or release. Thus, a total of 70 detainees subject to the review were either approved for transfer during the prior administration or ordered released by a federal court.

\textbf{B. Decisions}

Based on interagency reviews and case-by-case threat evaluations, 126 of the 240 detainees were approved for transfer by agreement of senior officials from the agencies named in the Executive Order.

The 126 detainees unanimously approved for transfer include 44 who have been transferred to date—24 to their home countries,\textsuperscript{14} 18 to third countries for resettlement,\textsuperscript{15} and two to Italy for prosecution. Of the 82 detainees who remain at Guantanamo and who have been approved for transfer, 16 may be repatriated to their home countries (other than Yemen) consistent with U.S. policies concerning humane treatment, 38 cannot be repatriated due to humane treatment or related concerns in their home countries (other than Yemen) and thus need to be resettled in a third country, and 29 are from Yemen. Half of all detainees approved for transfer—63 of the 126—also had been approved for transfer during the prior administration, ordered released by a federal court, or both.\textsuperscript{16}

There were considerable variations among the detainees approved for transfer. For a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan. However, for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan. Thousands of such individuals are believed to have passed

\textsuperscript{12} Of the 18 cases conceded by the government, 17 were brought by the Uighur detainees and were conceded by the prior administration. Eleven of the 18 detainees have been transferred to date.

\textsuperscript{13} A total of 14 detainees have won their habeas cases on the merits in district court. The government transferred three of these detainees in December 2008; thus, they were not subject to the review. Of the 11 remaining detainees who were reviewed under the Executive Order, seven have been transferred to date. Of the four who have not been transferred, the United States is appealing the district court’s ruling in two of the cases, and is still within the time period to appeal the remaining two cases.

\textsuperscript{14} The 24 detainees transferred to their home countries were repatriated to Afghanistan (5), Algeria (2), Chad (1), Iraq (1), Kuwait (2), Saudi Arabia (3), Somalia (Somaliland) (2), the United Kingdom (1), and Yemen (7).

\textsuperscript{15} The 18 detainees transferred to third countries for resettlement were transferred to Belgium (1), Bermuda (4), France (2), Hungary (1), Ireland (2), Portugal (2), and Palau (6).

\textsuperscript{16} The review participants reviewed the detainees who had been approved for transfer by the prior Administration and designated seven such detainees (all of whom were from Yemen) for conditional detention instead of transfer.
through Afghanistan from the mid-1990s through 2001, recruited through networks in various countries in the Middle East, North Africa, and Europe. These individuals varied in their motivations, but they typically sought to obtain military training at one of the many camps operating in Afghanistan; many subsequently headed to the front lines to assist the Taliban in their fight against the Northern Alliance. For the most part, these individuals were uneducated and unskilled. At the camps, they typically received limited weapons training. While al-Qaeda used its camps to vet individuals for more advanced training geared toward terrorist operations against civilian targets, only a small percentage of camp attendees were deemed suitable for such operations. The low-level fighters approved for transfer were typically assessed by the review participants not to have been selected for such training. Many were relatively recent recruits to the camps, arriving in Afghanistan in the summer of 2001. After the camps closed in anticipation of the arrival of U.S. forces in October 2001, some of these individuals were transported by camp personnel or otherwise made their way to the Tora Bora mountain range, where they joined fighting units, but subsequently dispersed in the face of U.S. air attacks.

It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and extensive discussions are conducted with the receiving country about such security measures before any transfer is implemented. Some detainees were approved for transfer only to specific countries or under specific conditions, and a few were approved for transfer only to countries with pending prosecutions against the detainee (or an interest in pursuing a future prosecution). Each decision was made on a case-by-case basis, taking into account all of the information about the detainee and the receiving country’s ability to mitigate any threat posed by the detainee. For certain detainees, the review participants considered the availability of rehabilitation programs and mental health treatment in the receiving country. The review participants also were kept informed of intelligence assessments concerning recidivism trends among former detainees.

It is also important to emphasize that a decision to approve a detainee for transfer does not equate to a judgment that the government lacked legal authority to hold the detainee. To be sure, in some cases the review participants had concerns about the strength of the evidence against a detainee and the government’s ability to defend his detention in court, and considered those factors, among others, in deciding whether to approve the detainee for transfer. For many of the detainees approved for transfer, however, the review participants found there to be reliable evidence that the detainee had engaged in conduct providing a lawful basis for his detention. The review participants nonetheless considered these detainees appropriate candidates for transfer from a threat perspective, in light of their limited skills, minor organizational roles, or other factors.
C. Yemeni Detainees

From the outset of the review, it was clear that the Yemeni detainees posed a unique challenge: there were 97 Yemenis subject to the review, by far the largest group in the Guantanamo population, and the security situation in Yemen had deteriorated. Al-Qaida was gaining strongholds in certain regions of the country, and the government of Yemen was facing a rebellion in other regions. Potential options for rehabilitation programs and other security measures were carefully considered throughout the course of the review, but conditions in Yemen remained a primary concern.

Taking into account the current intelligence regarding conditions in Yemen, and the individual backgrounds of each detainee, the review participants unanimously approved 36 of the 97 Yemeni detainees for transfer subject to appropriate security measures. The decision to approve these detainees for transfer, however, did not require immediate implementation. Rather, by making each transfer decision contingent on the implementation of appropriate security measures, the review participants allowed for necessary flexibility in the timing of these transfers. Under these transfer decisions, detainees would be returned to Yemen only at a time, and only under conditions, deemed appropriate from a security perspective.

To date, only seven of the 36 Yemeni detainees approved for transfer have been transferred to Yemen. One was transferred in September 2009 pursuant to a court order, and six were transferred in December 2009. The six who were repatriated in December 2009 were selected by the unanimous agreement of high-level officials in the agencies named in the Executive Order, after further individualized reviews of the detainees, including consideration of threat-related information, the evidence against the detainees, and the government’s ability to successfully defend the lawfulness of their detentions in court. This decision involved high-level coordination within the government and reflected a determination that these six specific detainees should be returned to Yemen at that time.

There are 29 Yemenis approved for transfer who remain at Guantanamo. The involvement of Al-Qaida in the Arabian Peninsula—the branch of al-Qaida based in Yemen—in the recent attempted bombing of an airplane headed to Detroit underscored the continued need for a deliberate approach toward any further effort to repatriate Yemeni detainees. In the wake of the attempted plot, the President publicly announced a moratorium on the transfer of detainees to Yemen. Accordingly, none of the 29 Yemeni detainees remaining at Guantanamo who are approved for transfer will be repatriated to Yemen until the moratorium is lifted. These detainees may be considered for resettlement in third countries subject to appropriate security measures, if such options become available.

---

17 During the last administration, 14 detainees were returned to Yemen, and an additional 15 Yemeni detainees were among the 59 approved for (but still awaiting) transfer as of January 20, 2009.
VIII. Prosecution Decisions

A. Background

The Executive Order provides that “[i]n accordance with United States law, the cases of individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution [i.e., federal court].” In a speech at the National Archives on May 21, 2009, the President reiterated that “when feasible, we will try those who have violated American criminal laws in federal courts.” As the President noted in his speech, federal prosecutors have a long history of successfully prosecuting all manner of terrorism offenses in the federal courts:

Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear. Ramzi Yousef tried to blow up the World Trade Center—he was convicted in our courts, and is serving a life sentence in U.S. prison. Zacarias Moussaoui has been identified as the 20th 9/11 hijacker—he was convicted in our courts, and he too is serving a life sentence in prison. If we can try those terrorists in our courts and hold them in our prisons, then we can do the same with detainees from Guantanamo.

The President also stressed that military commissions “have a history in the United States dating back to George Washington and the Revolutionary War” and remained “an appropriate venue for trying detainees for violations of the laws of war.” Accordingly, the administration proposed, and Congress has since enacted, reforms to the military commissions system to ensure that the commissions are fair, legitimate, and effective.

In accordance with the President’s guidance, the Task Force evaluated detainees for possible prosecution wherever there was any basis to conclude that prosecution in either federal court or a military commission was appropriate and potentially feasible. The Task Force prosecutors focused their review at first on the 23 detainees who, as of the issuance of the Executive Order, were facing charges in the military commissions, as well as several other uncharged detainees whose cases were related to those of charged detainees. The Task Force then evaluated for possible prosecution the approximately 40 additional detainees whom OMC had designated for potential prosecution. Finally, the Task Force reviewed every detainee for prosecution who was deemed ineligible for transfer.

---

18 As of January 22, 2009, there were 12 detainees whose cases had been referred to a military commission, including the defendants in the September 11 prosecution. In compliance with the Executive Order, their cases were halted.
In conducting its reviews, the Task Force worked closely with OMC. Task Force members had access to OMC files, and OMC prosecutors briefed the Task Force on their cases. Upon request, Department of Defense investigators and FBI agents who had worked on investigations met with Task Force members to answer their questions. The Task Force also reviewed original source information pertaining to the detainees and was able to identify previously unexploited sources of evidence.

As the Task Force completed its prosecution reviews, it identified those cases that appeared feasible for prosecution in federal court, or at least potentially feasible, if certain investigative steps were pursued with success. In this regard, the Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution. Given the limited resources of the Task Force to pursue this additional work, the Review Panel referred cases that appeared potentially feasible for federal prosecution to the Department of Justice for further investigation and prosecutorial review.

The Department of Justice and Department of Defense agreed upon a joint protocol to establish a process for determining whether prosecution of a referred case should be pursued in a federal court or before a military commission. Under the protocol—titled Determination of Guantanamo Cases Referred for Prosecution—there is a presumption that prosecution will be pursued in a federal court wherever feasible, unless other compelling factors make it more appropriate to pursue prosecution before a military commission. The evaluations called for under the protocol are conducted by teams of both federal and military prosecutors. Among the criteria they apply are: the nature of the offenses to be charged; the identity of the victims; the location of the crime; the context in which the defendant was apprehended; and the manner in which the case was investigated and by which investigative agency. The Attorney General, in consultation with the Secretary of Defense, makes the ultimate decision as to where a prosecution will be pursued.

B. Decisions

As a result of the Task Force’s review, the Review Panel referred 44 cases to the Department of Justice for potential prosecution and a decision regarding the forum for any prosecution. Decisions to seek prosecution have been announced in 12 of these cases; 24 remain pending under the protocol; and eight of the detainees initially referred were subsequently designated for other dispositions.

19 The review participants did not determine that any additional detainees were potentially feasible for prosecution solely before a military commission at this time.
On May 21, 2009, the Department of Justice announced that Ahmed Ghailani, who had previously been indicted in the United States District Court for the Southern District of New York for his alleged role in the 1998 bombings of the U.S. embassies in Kenya and Tanzania, would be prosecuted in federal court.\(^\text{20}\) On June 9, 2009, Ghailani was transferred from Guantanamo to the Southern District of New York, where his case is pending.

On November 13, 2009, the Attorney General announced that the government would pursue prosecution in federal court in the Southern District of New York against the five detainees who had previously been charged before a military commission for their roles in the September 11 attacks. They are:

- Khalid Sheikh Mohammed, the alleged mastermind of the September 11 plot;
- Ramzi bin al-Shibh, the alleged coordinator of the September 11 plot who acted as intermediary between Khalid Sheikh Mohammed and the hijackers in the United States;
- Walid Muhammed Salih Mubarak Bin Attash (a.k.a. Khallad Bin Attash), an alleged early member of the September 11 plot who tested airline security on United Airlines flights between Bangkok and Hong Kong;
- Mustafa Ahmed al-Hawsawi, an alleged facilitator of hijackers and money to the United States from his base in Dubai; and
- Ali Abdul Aziz Ali (a.k.a. Ammar Baluchi), a second alleged facilitator of hijackers and money to the United States from his base in Dubai.

On the same day, the Attorney General also announced that the prosecution against Abd al-Rahim al-Nashiri, the alleged mastermind of the bombing of the U.S.S. Cole, would be pursued before a military commission. The Attorney General further decided that four other detainees whose cases were pending before military commissions when the Executive Order was issued would remain before the commissions: Ahmed al-Darbi, Noor Uthman, Omar Khadr, and Ibrahim al-Qosi. In January 2010, the Department of Justice announced that Obaidullah, whom OMC had charged but whose case had not yet been referred to a military commission, will remain in the military commission system.

Twenty-four of the referred cases remain pending with the Department of Justice under the protocol. No final decision has been made regarding whether or in what forum these detainees will be prosecuted.

\(^{20}\) The decision to pursue prosecution against Ghailani in federal court was made before the joint prosecution protocol was in effect.
Eight of the referred detainees are no longer under active consideration for prosecution. One detainee who had been referred for prosecution was transferred pursuant to a court order in his habeas case. Seven additional detainees who had been referred for prosecution were ultimately referred back to the Task Force, based on a determination that the cases were not feasible for prosecution in either federal court or the military commission system at this time. Six of these detainees were subsequently approved for continued detention under the AUMF without criminal charges, and one was approved for transfer. As a result of these subsequent decisions, there are currently 36 cases with active prosecution referrals.

C. Detainees Who Cannot Be Prosecuted

The Task Force concluded that for many detainees at Guantanamo, prosecution is not feasible in either federal court or a military commission. There are several reasons for these conclusions.

First, the vast majority of the detainees were captured in active zones of combat in Afghanistan or the Pakistani border regions. The focus at the time of their capture was the gathering of intelligence and their removal from the fight. They were not the subjects of formal criminal investigations, and evidence was neither gathered nor preserved with an eye toward prosecuting them. While the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court. One common problem is that, for many of the detainees, there are no witnesses who are available to testify in any proceeding against them.

Second, many of the detainees cannot be prosecuted because of jurisdictional limitations. In many cases, even though the Task Force found evidence that a detainee was lawfully detenable as part of al-Qaida—e.g., based on information that he attended a training camp, or played some role in the hierarchy of the organization—the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission. While the federal material support statutes have been used to convict persons who have merely provided services to a terrorist organization, e.g., by attending a terrorist training camp, there are potential limitations to pursuing such a charge against the detainees.21

---

21 Among these limitations: First, the two relevant statutes—18 U.S.C. §§ 2339A and 2339B—were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively. Thus, material support may not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest. Second, the statute of limitations for these offenses is typically eight years (see 18 U.S.C. § 3286), which may bar prosecution for offenses that occurred well before the detainee’s capture. Third, because the statutory maximum sentence for material support is 15 years (where death does not result from the offense), sentencing considerations may weigh against pursuing prosecution in certain cases. Some of these considerations would not apply to material support charges brought in the military commissions; however, the legal viability of material support as a charge in the military commission system has been challenged on appeal in commission proceedings.
Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations tied to the demands of a criminal forum, as described above.

Significantly, the Executive Order does not preclude the government from prosecuting at a later date someone who is presently designated for continued detention. Work on these cases continues. Further exploitation of the forensic evidence could strengthen the prosecution against some detainees. Other detainees may cooperate with prosecutors. If either the Department of Justice or the Department of Defense concludes in the future that prosecution of a detainee held without charges has become feasible in federal court or in a military commission, the detention decisions made in the course of this review would permit the prosecution to go forward.

IX. Detention Decisions

A. Background

Under the Executive Order, the review participants were required first to consider whether it was possible to transfer, release, or prosecute each detainee. With respect to any detainees who were not deemed appropriate for transfer, release, or prosecution, the review participants were required to “select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals.”

In accordance with this framework, detainees were first reviewed to determine whether transfer or release was consistent with the national security and foreign policy interests of the United States and whether they could be prosecuted. If those options did not appear feasible, the review participants then considered whether the detainee’s national security threat justified continued detention under the AUMF without criminal charges, and, if so, whether the detainee met the legal requirements for detention.

B. Decisions

As the result of this review, 48 detainees were unanimously approved for continued detention under the AUMF.

Although each detainee presented unique issues, all of the detainees ultimately designated for continued detention satisfied three core criteria: First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee’s detention under the AUMF.
Broadly speaking, the detainees designated for continued detention were characterized by one or more of the following factors:

- **Significant organizational role within al-Qaida, the Taliban, or associated forces.** In contrast to the majority of detainees held at Guantanamo, many of the detainees approved for detention held a leadership or other specialized role within al-Qaida, the Taliban, or associated forces. Some provided operational, logistical, financial, or fundraising support for al-Qaida. Others were al-Qaida members who were selected to serve as bodyguards for Usama bin Laden based on their loyalty to the organization. Others were Taliban military commanders or senior officials, or played significant roles in insurgent groups in Afghanistan allied with the Taliban, such as Hezb-e-Islami Gulbuddin.

- **Advanced training or experience.** The detainees approved for detention tended to have more extensive training or combat experience than those approved for transfer. Some of these detainees were veteran *jihadists* with lengthy involvement in the training camps in Afghanistan. Several had expertise in explosives or other tactics geared toward terrorist operations.

- **Expressed recidivist intent.** Some detainees designated for detention have, while at Guantanamo, expressly stated or otherwise exhibited an intent to reengage in extremist activity upon release.

- **History of associations with extremist activity.** Some of the detainees approved for detention have a history of engaging in extremist activities or particularly strong ties (either directly or through family members) to extremist organizations.

**Lawful basis for detention.** Under the Executive Order, every detainee’s disposition must be lawful. Accordingly, the Task Force consulted closely with the Department of Justice regarding every detainee approved for continued detention to ensure that the detainee fell within the bounds of the Government’s detention authority under the AUMF, as described above.

**Prosecution not currently feasible.** Although dangerous and lawfully held, the detainees designated for detention currently cannot be prosecuted in either a federal court or a military commission. While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee’s guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee’s conduct does not constitute a chargeable offense in either a federal court or military commission. Though prosecution currently is not feasible for these detainees, designating a detainee for detention does not preclude future prosecution in either a federal court or a military commission should new evidence or other developments make a prosecution viable.

**Transfer or release not currently feasible.** Finally, none of the detainees approved for detention can be safely transferred to a third country at this time. This does
not mean that the detainee could never be safely transferred to a third country. Rather, designating the detainee for continued detention at this time indicates only that given the detainee’s current threat and the current willingness or ability of potential destination countries to mitigate the threat, the detainee is not currently eligible for transfer or release. Should circumstances change (e.g., should potential receiving countries implement appropriate security measures), transfer might be appropriate in the future.

C. Continued Reviews

Detainees approved for continued detention under the AUMF will be subject to further reviews. First, in accordance with the Supreme Court’s decision in Boumediene v. Bush, each detainee has the opportunity to seek judicial review of their detention by filing a petition for a writ of habeas corpus in federal court. In such cases, the court reviews whether the detainee falls within the government’s lawful detention authority. In cases where courts have concluded that the detainee is not lawfully held, the courts have issued orders requiring the government to take diplomatic steps to achieve the detainee’s release. Thus far, federal district courts have ruled on cases brought by four of the 48 detainees approved for continued detention. In each of the four cases, the district court denied the habeas petition and upheld the lawfulness of the detention. Many other cases are pending in district court, and some are pending on appeal.

Second, as the President stated in his speech at the National Archives, “a thorough process of periodic review” is needed to ensure that “any prolonged detention is carefully evaluated and justified.” Thus, in addition to the judicial review afforded through habeas litigation, each detainee approved for continued detention will be subject to periodic Executive Branch review.

X. Conditional Detention Decisions: Yemeni Detainees

As discussed above, the review of the 97 Yemeni detainees posed particular challenges from the outset given the security situation in Yemen. After conducting a case-by-case review of the Yemeni detainees, the review participants unanimously agreed that 36 Yemenis (29 of whom remain at Guantanamo) are appropriate for transfer, subject to security measures, and that 26 Yemenis should continue to be detained under the AUMF in light of their individual threat. In addition, there are currently five Yemenis with active prosecution referrals, two of whom the Attorney General announced will be prosecuted in federal court for their roles in the September 11 attacks (Ramzi bin al-Shibh and Walid Muhammad Salih Mubarak Bin Attash).

The remaining 30 Yemeni detainees were determined to pose a lower threat than the group of detainees designated for continued detention under the AUMF. Nonetheless, the review participants determined, based on a number of factors, that these 30 detainees should not be transferred to Yemen in the near future and should not be among the first groups of transfers to Yemen even if the current moratorium on such transfers is lifted.

“U.S. Debates Response to Targeted Killing Lawsuit”

*Media Account:* This article describes the considerations by the Obama Administration’s legal team in developing its response to the August 2010 lawsuit, filed by the ACLU and CCR, that seeks to block the targeted killing of Anwar al-Aulaqi.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
U.S. Debates Response to Targeted Killing Lawsuit

By CHARLIE SAVAGE

WASHINGTON — The Obama administration, fresh off a victory in persuading federal judges to dismiss a torture case for fear of revealing state secrets, is divided over using similar tactics to try to block a lawsuit over government efforts to kill an American citizen accused of ties to Al Qaeda.

The administration’s legal team is debating how aggressive it should be in a brief responding to the lawsuit, which is due Sept. 24. The suit, filed last month, seeks an injunction that would prevent the targeted killing of Anwar al-Awlaki, a radical Muslim cleric who is accused of playing a leading role for Al Qaeda’s branch in Yemen.

Justice Department lawyers are circulating a draft brief with several potential arguments for dismissing the case, and lawyers from national security agencies have met to discuss what should go into the final version. But they have not reached a consensus, according to officials familiar with the discussions, because the arguments seen as strongest also carry significant political and legal risks.

“There are a lot of cross-cutting things going on here, and they have to be very careful about how they litigate this,” said Jack Goldsmith, who was a senior Justice Department lawyer in the Bush administration. “It’s not just a question of winning the case. There is the public diplomacy side, and there are implications for everything else they are doing in the war on terrorism: detention and targeting and other things, too, I imagine.”

The lawsuit was filed by Mr. Awlaki’s father, Nasser al-Awlaki, who is represented by the American Civil Liberties Union and the Center for Constitutional Rights. It contends that designating a United States citizen for killing outside of a war zone, without an imminent threat, amounts to an extrajudicial execution, and it disputes the notion that battlefield law applies far from Afghanistan.
There is widespread agreement among the administration’s legal team that it is lawful for President Obama to authorize the killing of someone like Mr. Awlaki — regardless of his citizenship — if he is found in an ungoverned place or in a country that grants permission. (The details of any arrangement with Yemen are unclear.)

Mr. Awlaki has not been indicted or gone to trial to prove that he played an operational role in terrorist attacks. Still, he has released videos calling on Muslims to kill Americans, and the Treasury Department has labeled him a “specially designated global terrorist.” The man who tried to blow up a Detroit-bound jet on Dec. 25 is believed to have told interrogators that Mr. Awlaki directed him to do so.

Nevertheless, many in the administration are reluctant to air in court the case that Mr. Awlaki is waging war against the United States, in part because they do not want to concede that judicial review is appropriate for executive branch decisions on targeted killings.

Instead, they are seeking to have the lawsuit dismissed without discussing its merits. For example, officials say, the brief is virtually certain to argue that Mr. Awlaki's father has no legal standing to file a lawsuit on behalf of his son.

To strengthen the case, they are considering at least two other potential arguments, each with a downside.

The first would involve asking the judge to dismiss the case because it could reveal classified information. Under the “state secrets doctrine,” the government can seek to withhold evidence or block lawsuits related to national security.

The doctrine was the focus of the 6-to-5 ruling by an appeals court in California last week. Reversing an earlier decision, it threw out a lawsuit by former C.I.A. prisoners who contended that they had been tortured after the agency flew them to other countries for interrogation.

The government’s increasing use of the state secrets doctrine to shield its actions from judicial review has been contentious. Some officials have argued that invoking it in the Awlaki matter, about which so much is already public, would risk a backlash. David Rivkin, a lawyer in the White House of President George H. W. Bush, echoed that concern.

“I’m a huge fan of executive power, but if someone came up to you and said the government wants to target you and you can’t even talk about it in court to try to stop it, that’s too harsh even for me,” he said.
But other officials have cited last week’s ruling as a reason to invoke the state secrets doctrine in the Awlaki lawsuit. They have also argued that few people are likely to perceive its use in this case as covering up an injustice.

Mr. Rivkin said he favored a different argument: a declaration that in war who can be targeted — and where — is a “political question” for the executive branch to decide, not judges.

Inside the administration, that argument is also seen as attractive. But invoking it could give the court an opportunity to reject the idea that an armed conflict with Al Qaeda exists in Yemen, said Matthew Waxman, who was the Pentagon’s top detainee affairs official under the second President Bush.

“The more forcefully the administration urges a court to stay out because this is warfare, the more it puts itself in the uncomfortable position of arguing we’re at war even in Yemen,” he said. “The worst outcome would be if the court rules that the president is not authorized to wage war against Al Qaeda beyond combat zones like Afghanistan.”

Still, Mr. Goldsmith, the former senior Justice Department official, noted that risking such a ruling would be nothing new: the administration has long argued, in response to habeas corpus lawsuits filed by Guantánamo Bay prisoners, that it can detain Qaeda suspects captured far from Afghanistan, in places like Bosnia and Mauritania.

Justice Department litigators have advocated making all potential arguments to maximize the chance of success. But other lawyers have urged caution, arguing that the government could win with a narrower approach. Many are ambivalent and have not yet taken a clear position.

Heightening the lawyers’ concerns, the lawsuit is before a federal district judge, John D. Bates, who has disagreed with the Justice Department’s assertions of executive power in several detention cases.

Whatever the final government brief says, Robert M. Chesney, a University of Texas law professor, said the lawsuit might force onto the table greater discussion of what the administration is doing and why it believes its actions are lawful.

“Of course, that defense doesn’t have to take place in a courtroom,” he said. “But where U.S. citizens are involved as targets, you have to anticipate that it may not be possible to entirely avoid putting the question before a judge to some extent.”
Session 4A: Challenging U.S. Detention and Transfer Decisions Through Transnational Litigation and Advocacy

*Canada and the U.S.: Omar Khadr*
26. “Comment: Canada (Prime Minister) v. Khadr, 2010 SCC 3”
27. “Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v Canada”

Additional Readings on Khadr

*Afghanistan and the U.S.: U.S. v. Jawad*

“Next Generation” Strategies

*Challenging Abuse in Transnational Counterterrorism Practices*
Session Four A: Challenging U.S. Detention and Transfer Decisions through Transnational Litigation and Advocacy

Comment: Canada (Prime Minister) v. Khadr, 2010 SCC 3 (excerpted pages)
Audrey Macklin (forthcoming, Supreme Court Law Review)

Journal Article: Macklin describes the abuse of Guantanamo detainee Omar Khadr and litigation filed on his behalf in Canada. Through litigation, Khadr sought to compel the Canadian government to request his repatriation from Guantanamo. The Canadian Supreme Court declined to order the executive to do so, citing executive prerogative. Macklin describes the Canadian Supreme Court’s analysis as similar but distinct from the U.S. political question doctrine. Canadian and UK courts have performed a “prerogative two-step”: although (1) the executive is not exempt from constitutional scrutiny, (2) the courts will defer to the executive given its authority and expertise in foreign affairs. The full article argues that the Supreme Court’s analysis steers the government toward “a specious remedial option of a diplomatic note requesting the exclusion of Canadian evidence.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
Comment on Canada (Prime Minister) v. Khadr (2010)

Audrey Macklin

ABSTRACT

The Supreme Court of Canada judgment in Khadr rules that the Charter applies to the actions of Canadian officials who interrogated Omar Khadr in Guantanamo Bay. It rules that their conduct violated s. 7 of the Charter. Although the Court acknowledges that a request for repatriation would be an effective remedy, it declines to order the government to take any specific action to remedy the violation, and simply declares that Omar’s rights were and are being violated. This comment develops two points: The timidity of the remedial aspect of the judgment is presaged and enabled by a narrow and convoluted characterization of how the government violated Omar’s s. 7 right to life, liberty and security of the person. Secondly, the significance of the Court’s remedial ruling in terms of its institutional responsibility to protect human rights must be read against a political context in which the government had repeatedly and unequivocally asserted that it would not seek Omar’s repatriation on its own accord.

Early in 2010, the Supreme Court of Canada declared that Canada was violating the rights of Omar Khadr, the lone Canadian citizen detained at Guantánamo Bay. Unlike the Federal Court and the majority of the Federal Court of Appeal, the Supreme Court of Canada declined to order the Prime Minister to request Omar Khadr’s repatriation to Canada. The Court neither absolved the government of the obligation to remedy the violation, nor stipulated any specific remedial action, nor reserved jurisdiction to adjudicate a failure by the government to provide an adequate remedy.

Canadian citizen Omar Khadr was fifteen years old when he was severely wounded and captured by US forces in Afghanistan in July 2002. US forces detained, treated and interrogated him at Bagram Air Base for about three months, then transferred him to Guantánamo Bay, Cuba.

1 Faculty of Law, University of Toronto, co-counsel for interveners, Human Rights Watch, University of Toronto International Human Rights Program, Asper Centre for Constitutional Rights
in September 2002, where he remains. Omar alleges in affidavit that in Bagram and later in Guantánamo Bay, he was subject to interrogations methods that constituted torture, and cruel, inhuman or degrading treatment. Omar’s allegations of abuse are consistent with documentation from human rights organizations, media reports, other detainees, a few former US interrogators, and the so-called “torture memos” issued by the Office of the Legal Counsel of the President of the United States.2

Omar Khadr was held for five years without charge. He was detained for significant periods in solitary confinement. Although a minor, he was detained with adults. He received no education or treatment that took his youth into account. During his detention, the Canadian government made various inquiries and requests, most of which elicited no response from the United States. However, in 2003 and 2004, Canada requested and obtained permission to

interrogate Omar Khadr on several occasions for purposes of intelligence gathering. In 2004, Omar Khadr’s Canadian counsel sought an injunction to prevent further interrogation, on the grounds that Canadian officials were acting unconstitutionally. Canadian officials managed to squeeze in one more before the application was heard and granted in 2005.

Omar was charged with war crimes in 2007 by the Office of the Convening Authority for the Military Commissions that were created under the Military Commissions Act subsequent to his capture and applied retroactively, and which remain unknown to international humanitarian law. The charges of “murder by an alien unprivileged combatant” and “providing material assistance to terrorism” arise from two main allegations. First, that he threw a grenade that killed one US soldier and wounded another on the battlefield on 27 July 2002; secondly, that he participated in the assembly of improvised explosive devices (IEDs) in Afghanistan. Omar’s case is scheduled to be the first case to go before the Military Commissions since President Barack Obama took office in 2008. It will also be the first case post-World War II in which an accused is tried for war crimes based on acts allegedly committed while a minor. Even if acquitted of the offences, the United States claims authority to detain him indefinitely.

Omar Khadr was 15 years old when captured, and 23 when his appeal to the Supreme Court of Canada was heard in November 2009. He has spent a third of his life in US custody, mostly without charge, and all without trial. Omar’s US military defense team from 2007-9 (Lt. Cmr. William Kuebler and Rebecca Snyder), and his Canadian counsel (Nathan Whitling and Dennis Edney), waged an unsuccessful public advocacy campaign to press the Canadian government to request Omar’s repatriation. Among other things, they devised detailed re-integration schemes - involving separation from family, close supervision, as well as support and rehabilitation programs - in order to assuage any public anxiety that Omar Khadr might pose a
security risk to Canadians. A similar strategy succeeded in gaining widespread public support for the repatriation of Australian David Hicks from Guantánamo Bay. Election campaign pressure induced Prime Minister John Howard to seek and obtain Hicks’ repatriation. In the face of divided public opinion in Canada, Prime Minister Harper remains implacably opposed to seeking Omar’s repatriation, even in the face of evidence of United States’ willingness to do so if asked.

Who is Omar Khadr? His identity in law is a function of multiple jurisdictional claims: under international humanitarian law (the laws of war), Omar Khadr is a combatant, possibly an unprivileged combatant, perhaps a child soldier. According to international human rights law, Omar Khadr is not only a human being, but was also a child – possibly a child soldier -- at the time of his engagement in conflict, his capture and his detention. Under the United States domestic laws of war, as formulated in the Military Commissions Act, Omar Khadr is an alien unlawful enemy combatant and accused war criminal. An alien to the United States, Omar Khadr is a citizen to Canada. And according to s. 7 of the Canadian Charter of Rights and Freedoms, Omar Khadr is everyone. As in “Everyone has the right to life, liberty, and security of the person, and the right not to be deprived thereof, except in accordance with fundamental justice”. Nicely put although the Court’s ruling in Hape creates some barriers to being seen as everyone for purposes of extraterritorial application.

The dimensions of this s. 7 claim were addressed by the Supreme Court of Canada’s recent judgment in Canada (Prime Minister) v. Khadr (Khadr 2010). Omar Khadr’s lawyers and various interveners argued that Canada had violated Omar Khadr’s right to liberty and

---

4 2010 SCC 3.
security of the person by conduct consisting of a sequence of actions and inactions in respect of Omar, that the government’s conduct did not accord with fundamental justice, and that the appropriate remedy under s. 24(1) of the *Charter* was an order that the Prime Minister request from his US counterpart that the United States repatriate Omar Khadr. The government denied the violations and, in the alternative, argued that any violation had already been remedied by the disclosure order in *Khadr 2008*.

It argued strenuously that the exercise of executive prerogative over foreign affairs effectively lay beyond the grasp of the constitution, whether as a matter of substantive *Charter* provisions or under the remedial provision of s. 24(1). Khadr thus surfaced the recurrent tension between the powers of elected officials to act in the name of the public will, as against the authority of the Supreme Court of Canada to restrain that power within the constitutional obligation to respect individual rights. Omar Khadr’s vilified status as son of a pariah family (dubbed “Canada’s first family of terror”) means that the risk of majoritarian tyranny is particularly high. There is no doubt that the government’s refusal to request Omar’s repatriation enjoys a measure of vocal popular support. Apart from ideological motives for refusing to request repatriation, the Prime Minister could confidently calculate that inaction would not cost him votes, and action would be unlikely to net him additional votes. With no political motive to intercede, the only domestic incentive would be an order from the Supreme Court of Canada. From an institutional perspective, the question was whether the Supreme Court of Canada would put its own legitimacy to the test by requiring the Prime Minister to vindicate the rights of a person carrying the toxic label “terrorist”.

Almost two years prior to *Khadr 2010*, the Supreme Court of Canada ruled in *Khadr 2008* that the *Charter* applied to the interrogations by Canadian officials in Guantánamo Bay.

---

because it amounted to participation in a process that violated Canada’s international legal obligations under the Geneva Conventions. Section 7 required disclosure to Omar of the records of the interviews, subject to vetting by a Federal Court judge on grounds of national security.

Following the Court’s decision in Khadr 2008, Mr. Justice Mosley reviewed the documents and ordered disclosure to Omar’s counsel. Among the disclosed documents was email correspondence within the Department of Foreign Affairs indicating knowledge that in the weeks prior to the last interrogation by Canadian officials, his US captors subjected him to torture in the form of extended sleep deprivation (“frequent flier program”). This confirmation of Canadian knowledge became a springboard into Khadr 2010, which confronted directly the question of Canada’s constitutional obligation to seek Omar’s repatriation.

Before one even engages with the content of the Supreme Court’s decision in Khadr 2010, the Court’s reveals it institutional diffidence through form: first, the judges conceal authorship behind the depersonalized eponym of The Court. Secondly, the judgment is very brief, only 48 short paragraphs. Thirdly, against a jurisprudence that makes Canada’s adherence to its international legal obligations crucial in the context of extraterritoriality, the Court does not engage with a single international legal instrument, norm or decision. Instead, it reproduces from Khadr 2008 a morsel of international humanitarian law pre-digested by the US Supreme Court in Hamdan v. Rumsfeld for purposes of assessing US compliance with US constitutional obligations concerning habeas corpus. The Court refused to conduct its own evaluation of the conformity of the Military Commissions process with international law in relation to aspects directly pertinent to Omar Khadr, that were not addressed in the US Supreme Court judgments in

---

7 See Hape, supra note 3.
Hamdan v. Rumsfeld. Nor did it address possible violations of international law committed by Canadian officials in their interactions with Omar Khadr. Similarly, the Court did not advert to international law or jurisprudence regarding remedies for violations of international human rights. In fairness to the Court, Omar’s lawyers requested an expedited hearing and judgment. The Court released the judgment less than three months after hearing the appeal.

[OMMISSION-EXCERPT CONTINUES BELOW]

Rather than follow through on the implications of its own analysis and oblige the Prime Minister to request exclusion of evidence obtained by Canadian officials, the Court recoiled from ordering any remedy. The Court invoked the Crown prerogative over foreign affairs to justify why the Court will declare that Canadian officials have violated Omar Khadr’s rights, but will not order the Prime Minister to do anything in particular about it. The prerogative refers to those powers reserved to the executive (formally, the Governor-General; practically, the Prime Minister and the Cabinet) that the legislature has not (yet) circumscribed or supplanted. The perennial debate about the prerogative turns on whether, in Dicey’s words, the “residue of discretionary or arbitrary authority … legally left in the hands of the Crown”, is accountable in substance to the rule of law and institutionally to the courts on judicial review.

The Court’s analysis can best be summarized as a Canadian performance of what, in UK jurisprudence, legal scholar Thomas Poole dubs the “prerogative two-step”:

[S]tep 1, the refusal to countenance the idea of a gap in the normal framework of the law and the assertion that ordinary principles apply to prerogative law-making;

---

9 Although as I argue below, the Court’s s. 7 analysis hints at the minimum that the government can get away with doing.
10 Quoted in Khadr 2010, supra note 4 at para. 34.
Step 2, the accommodation of government interests (‘act of state’; ‘national security’) and equivocation or uncertainty in the application of those principles.\(^{11}\)

In Step 1, the Court gestures in the direction of its own *dicta*, to the effect that the “executive is not exempt from constitutional scrutiny”, citing *Operation Dismantle*.\(^{12}\) It gestures broadly at the rule of law in a constitutional democracy wherein “all government power must be exercised in accordance with the Constitution”.\(^{13}\)

Consistent with Poole’s depiction of the UK courts, the Court does not formally repudiate its earlier jurisprudence and replace it with a US style political question doctrine that immunizes foreign relations from judicial scrutiny. On the contrary, the Court cites the extradition case of *U.S. v. Burns* for the proposition that “in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government’s foreign affairs prerogative is exercised in accordance with the constitution”.\(^{14}\) In *Burns*, the Court ordered the Minister of Justice to seek assurances that the death penalty would neither be sought nor imposed on a fugitive as a precondition to extradition.

In Step 2, the Court bows to its executive partner in the separation of powers: each assertion of the rule of law in step 1 is met with the equal and opposite assertion in Step 2 that the executive possesses the authority and the expertise over the conduct of foreign relations. The government is “better placed [than the judiciary] to make such decisions within a range of

---


\(^{12}\) *Khadr 2010, supra* note 4 at para. 36.

\(^{13}\) *Id.* at para. 37.

\(^{14}\) *Id.*
constitutional options” and must retain “flexibility in deciding how its duties under the power are to be discharged”.\(^{15}\)

The Court diffuses the tension by retaining the substantive idea that the executive prerogative must be exercised in conformity with the *Charter*, and jettisoning the Court’s institutional responsibility for ensuring that it does so. This in turns requires a means of rationalizing why the Court should resile from its remedial jurisdiction in this case, unlike prior cases. The judgment relies explicitly on two traditional jurisprudential techniques for isolating and distinguishing Khadr’s situation.

First, it distinguishes its precedent in *R. v. Burns* in the following concise passage:

The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada’s power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada’s good relations with other states: *Burns*, at paras. 125 and 136.

The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.\(^{16}\)

The Court here indulges in the classic tactic of invoking a distinction that makes no difference. Burns was under the control of Canadian officials, whereas Khadr is not. True, but so what? The Court seems to attach significance to the fact that Canada can fully protect fugitives from the death penalty by securing assurances, or by refusing to extradite in the absence of assurances. In Khadr’s case, Canada can only protect Omar if the US agrees to repatriate. With

\(^{15}\) *Id.*  
\(^{16}\) *Id.* at paras. 42-43.
neither warning nor explanation, the Court here introduces a legal rule for constitutional remedies that the perfect shall be the enemy of the good: an effective remedy is one that fully vindicates the rights of the individual; therefore, the Court should do nothing rather than grant a remedy that may only have that effect. This would seem inconsistent with any plausible account of the Court’s remedial jurisdiction under s. 24(1) of the Charter. Remedial efficacy must be calibrated to the options available where the state enjoys nationality but not territorial jurisdiction over the person concerned. A deeper flaw in the reasoning is that the Court conflates the US’ violations of Omar’s international human rights with Canada’s violation of Omar’s Charter rights. A request for repatriation may indeed fail to terminate US violations if the request is refused, but the task is to conclude Canada’s ongoing complicity in those rights violations. Of course, the open secret is that the Canadian government does not fear that a genuine repatriation request, made in good faith, with a view to negotiating a mutually acceptable outcome, will cause friction with a recalcitrant United States; what the government has really and realistically feared all along is that the request would be granted. The risk that the Prime Minister would not execute his legal duty in good faith, and that the Court would be called upon to engage in the task of evaluating executive compliance, hardly amounts to an intrusion into executive conduct of foreign affairs so inevitable as to warrant pre-emptive denial of the remedy.

The Court’s reference to public purpose is directed at the specific remedy of repatriation (as opposed to judicial constraints on the foreign affairs prerogative), but beyond that, it is ambiguous. The Court does not identify a public purpose that would be served by refusing to request Omar’s repatriation. In Kindler,17 the government successfully argued that mandatory

assurances created a pressing and substantial risk that “Canada might become a safe haven for criminals in the United States seeking to avoid the death penalty”.\(^{18}\) Less than a decade later, the Court in *Burns* repudiated what the Kindler dissent described as an “*in terrorem* argument put forward without any evidentiary basis.”\(^{19}\) In *Khadr 2010*, the government made no submissions, tendered no evidence, and received no questions from the bench about any public purpose that would be served by denying Omar a judicial remedy. The Court did not ask the government to explain why it refused to request repatriation and the government supplied no reasons for its refusal to request repatriation and the Court did not insist upon them.\(^{20}\)

The Court remarks that there was no evidence in *Burns* to suggest that requests for death penalty assurances would damage foreign relations with the United States, whereas the Court in *Khadr 2010* was putatively unable to properly assess the impact of a repatriation request on Canada-US relations. The evidence before the Court in *Burns* was that other countries systematically requested and obtained death penalty assurances prior to extradition, and Canada had twice requested and twice obtained such assurances, with no adverse diplomatic consequences. The evidence before the Court in *Khadr 2010* was that all other western states had already requested and obtained repatriation of their citizens (and even permanent residents). The Court’s precedent in *Burns* belies rather than confirms its institutional incapacity to assess the diplomatic impact of a request for repatriation. The government adduced no evidence indicating

\(^{18}\) *Id.* at para. 188.

\(^{19}\) *Id.* at para. 112.

\(^{20}\) If the public purpose is to subject Omar Khadr to “justice” before a US court, the Court’s starting proposition that the entire Military Commission apparatus constitutes a breach of international humanitarian law, invalidates that purpose. If the public purpose is to obstruct Omar Khadr’s return to his country of citizenship in the name of Canadian security, the Court chose not to validate it explicitly, leaving it instead as a blank to be filled in by the workings of a post-9/11 imagination. Of course, the Supreme Court of Canada has travelled down this road in *Suresh, supra* note 59 at para. 78, where it concluded that in exceptional circumstances, it may be constitutionally permissible for a non-citizen to be deported to face a serious risk of torture.
that a request for repatriation would damage diplomatic relations and, as the Federal Court of Appeal observed “when pressed in oral argument, counsel for the Crown conceded that the Crown was not alleging that requiring Canada to make such a request would damage its relations with the United States.”21

The Court’s professed inability to assess the evidence before it segues smoothly into the second concern, namely the inadequacy of the evidentiary record. Here, the Court emphasizes that it possesses an “incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr’s request.”22 According to the Court, Omar is trapped on unstable and shifting legal terrain, and the Court is ignorant of past and ongoing negotiations between Canada and the United States in relation to Omar’s evolving “legal predicament”.23 These factors “signal caution in the exercise of the Court’s remedial jurisdiction.”24

The Court does not indicate that it would be impossible or inappropriate for the government to furnish an adequate evidentiary record because of diplomatic or foreign relations concerns. Nor does it elaborate on what the Court would need to know about the range of considerations at play. One wonders if it overstates the inadequacy of the record for the purposes of a repatriation request. After all, the fact that every other US ally successfully obtained repatriation of their citizens (and, in some cases, permanent residents), suggests that it overestimates the legal relevance of what might be contained in the evidentiary record. More importantly, for the Court to cite the inadequacy of the record as a reason to deny a remedy,

21 Supra note 10 at para. 59. One cannot but suspect that a combined in personem, in terrorem argument (“Omar Khadr is a terrorist, and his presence in Canada would jeopardize national security”) is so powerful that the government need not (indeed could not) utter it in order for the Court to succumb to it.  
22 Khadr 2010, supra note 4 at para. 44.  
23 Id. at para. 45.  
24 Id.
when the government alone is responsible for this deficiency, is to reward the government for withholding evidence. This seems perverse.

This attention to the record seems like a diversionary tactic in any case. The situation of other Canadians abroad seeking Canada’s assistance may raise a range of potential considerations and possible responses, but the Court could easily and appropriately have confined its examination to the specific facts of Omar’s case: The Court knew enough of the facts to make a finding that the Canadian government is violating Omar’s Charter rights. Omar asked the Canadian government to request his repatriation, the government refused, and Omar seeks a judicial remedy that would compel the government to seek his return.

For purposes of exercising remedial discretion, the relevant “unknown” in the record before the Court was not evidence but reasons. Why did the Prime Minister refuse to request repatriation? The script, from which the government never strays, declares only that “Omar Khadr faces very serious charges, including murder, attempted murder, conspiracy, material support for terrorism, and spying. The Government of Canada continues to provide consular services to Mr. Khadr.” These are not reasons.

Before the Court, the government took the position that the decision to refuse to seek Omar’s repatriation fell outside the purview of constitutional review; in oral argument, the government disavowed any obligation to explain the refusal. After all, if the Charter does not hold government accountable for how it exercises the foreign affairs prerogative, principles of legality should not require the government to explain when or how it exercises that power in a given case.
The Court evidently rejected the proposition of unfettered and unaccountable executive prerogative for purposes of constitutional review, yet neglected to consider an ensuing burden of justification on the government at the remedial stage. The Supreme Court of Canada has, for over a decade, oriented its administrative law doctrine toward a “culture of justification” as a normative baseline for testing the legality of government action.\(^\text{25}\) Thus, in Baker, the Supreme Court of Canada recognized a common law procedural duty to give reasons for decisions where important individual interests were at stake.\(^\text{26}\) In Dunsmuir, the Court ruled that when judicially reviewing the substance of a decision, be it the exercise of discretion or the application of a legal rule, a court should examine the existence of “justification, transparency and intelligibility within the decision-making process”, in addition to evaluating the outcome itself.\(^\text{27}\) In 1999, Chief Justice McLachlin elaborated on her understanding of the connection between the rule of law and a culture of justification as follows:

Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of rationality and fairness. . . Rule by fiat is unaccepted. . . Indeed, most importantly, the ability to call for such a justification as a precondition to the legitimate exercise of public power is regarded by citizens as their right, a right which only illegitimate institutions and laws venture to infringe. The prevalence of such a cultural expectation is, in my view, the definitive marker of a mature Rule of Law.\(^\text{28}\)

In Suresh, the Supreme Court of Canada imposed upon the Minister of Citizenship and Immigration a reasons requirement in relation to a decision to deport a non-citizen deemed a

\(^{25}\) The phrase comes from South African scholar Etienne Mureinik, but the concept is most associated with, and most thoroughly elaborated by, David Dyzenhaus. See, e.g., David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture”, (1998) 14 SAHR 11.

\(^{26}\) Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paras. 35-44.


threat to national security back to a country where he would face a substantial risk of torture. So, the Supreme Court of Canada’s *dicta* sustain *Charter* accountability for the exercise of the foreign affairs prerogative and a reasons requirement upon Ministers in the exercise of statutory discretion. One could thereby infer that a prerogative decision by a Minister to abandon a citizen to a regime that has already subjected him to torture, and/or cruel, inhuman and degrading treatment, and where he faces an unfair trial, would attract no less a requirement of principled reasons. In the context of a s. 24(1) remedy, the fact that the government offered neither reasons for its refusal to request repatriation, nor a proposal of an alternative remedy, would logically support a negative inference against the government. The absence of justification for denial of the remedy should operate as a factor militating in favour of granting the remedy sought. The Court’s reliance upon the inadequacy of the evidentiary record as a factor militating against any remedial order has it precisely backwards.

It requires no effort to understand the political motivation behind the government’s preference for letting Omar Khadr languish in Guantánamo Bay. Why request the return of a man whose surname is synonymous with terrorism? However, articulating legally valid reasons for inertia in the face of grotesque and ongoing human rights violations is rather more difficult. Indeed, the inability to discharge the burden of justification is the sole means by which the *Suresh* exception (permitting deportation to torture “in exceptional circumstances”) has been

---

29 *Suresh*, *supra* note 59, at para. 126: “The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(b) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister. . . .”

30 I mean by this that reasons based on self-regarding political interests of elected officials would not satisfy the requirement of reasoned justification. One could also refer to this as “public reason”.

15
neutralized in practice: The government has been unable to come up with reasons capable of
satisfying a court that the level or nature of the national security risk posed to Canada by a
specific non-citizen in a given case warrants deporting that person to a substantial risk of
torture. The Prime Minister’s calculus is thoroughly comprehensible and within a realist
account of role morality. The Court in *Khadr 2010* permits the government to indulge these
impulses by exempting the government from the requirement to justify its rights violations. Since
the Court has elsewhere indicated that the culture of justification encompasses the executive in
relation to the *Charter*, even in matters of foreign relations, the only other available explanation
is that Omar Khadr is undeserving of reasons: he resides outside of the culture of justification,
somewhere in the state of exception.

CONCLUSION

The Court stated in *Dunedin* (and reiterated in *Doucet Boudreau*) that “a right, no matter
how expansive in theory, is only as meaningful as the remedy provided for its breach”. One
might transpose the point to say that the Court’s declaration that Omar Khadr’s *Charter* rights
are being breached, no matter how sincere in theory, is only as meaningful as the remedy it
engenders.

Although the Court coyly insisted that it was leaving the choice of remedial options to the
executive, legal commentators in the media were instantly able to connect the dots between the
Court’s account of the s. 7 violation and a remedy consisting of a request for exclusion of
Canadian evidence from the Military Commission proceedings. It was, therefore, predictable that

31 See *Re Jaballah*, 2006 FC 1230, per Mackay J. (no exceptional circumstances warranting deportation to
Egypt).
the Canadian government would eventually deliver such a request to the United States government. It was equally predictable that the US government would reject it. After all, attempting to tamper with the trial process of another state (by excluding evidence that the judge would otherwise deem admissible) constitutes a significantly greater intrusion into the sovereignty of another state than a request from one executive branch to another to repatriate the accused before a trial commences. So, a remedy consisting of a request for the exclusion of evidence managed – predictably -- to be both unresponsive and ineffective from Omar’s perspective, and unacceptable from the US perspective. This is not an undesirable outcome for a government with no political motive to do anything that might benefit, or even appear to benefit, Omar Khadr. The videotape of Canadian officials’ interrogation of Omar at Guantánamo Bay was entered into evidence at a pre-trial hearing before the Military Commission in May 2010.

A more sympathetic reader of the Court’s judgment in Khadr 2010 might defend the decision as an exemplar of Cass Sunstein’s model of judicial minimalism, whereby the Court decided the case in appropriately narrow and shallow terms, leaving it to the executive to determine a suitable appropriate course of action. For instance, the Court did not indicate what role (if any) Khadr’s citizenship played in the existence or scope of the Charter obligations owed to him. The Court adverted to the fact that Omar is a citizen, but his status did not do any explicit normative work in the judgment. The Court thus avoided ruling on the relevance of citizenship. One might endorse the Court’s reticence, and insist that resolution should await a

---

34 Even a request for assurances that the death penalty neither be sought nor imposed as a precondition to extradition does not purport to interfere in the process by which guilt or innocence is determined.
35 Since Omar Khadr was interrogated hundreds of times by US officials, it seems unlikely that the Canadian interviews yielded relevant evidence otherwise unavailable to US prosecutors.
case actually involving non-citizens, except for the fact that the Court denied leave in two cases involving appellants denied extraterritorial Charter protection on precisely that basis.37

The judgment in Khadr 2010 also avoids the question of whether Canada owes a positive duty under s. 7 of the Charter to protect its citizens – including citizens abroad – and the contours and scope of any such duty. Again, a predilection for minimalism can explain the Court’s silence. Since Canadian officials had affirmatively acted by interrogating Omar in Guantánamo Bay, the Court could confine its inquiry to whether the conduct constituted a Charter violation. In order to resolve the case, the Court did not have to rule on whether Canada would also have violated Omar’s Charter rights had it simply chosen not to intervene in any way while the United States violated Omar’s rights.

Whatever the merits of judicial minimalism as a theory of constitutional adjudication, minimalism is ultimately unhelpful in characterizing (or defending) the remedial portion of the judgment. As I have argued, the Court’s express acknowledgment that a repatriation request would be a viable remedy, as well as its abstention from imposing a remedy, both mask the

remedy invited by the s. 7 analysis. This complicates an attempt to describe the Court’s handling of the remedial issue in the simplified typology of minimalism versus maximalism.

From another vantage point, one might also recognize the Khadr 2010 judgment as creating what David Dyzenhaus describes as a legal “grey hole”, which he defines as

a legal space in which there are some legal constraints on executive action – it is not a lawless void – but the constraints are so insubstantial that they pretty well permit government to do as it pleases. In addition, since such grey holes permit government to have its cake and eat it too, to seem to be governing not only by law but in accordance with the rule of law, they and their endorsement by judges and academics might be even more dangerous from the perspective of the substantive conception of the rule of law than true black holes.\footnote{David Dyzenhaus, The Constitution of Law: Legality in a Time of Emergency (Cambridge: CUP, 2006) at 42. Elsewhere, Dyzenhaus observes that a grey hole is in substance a black hole. See p. 50.}

Here is how the judgment in Khadr 2010 creates a “grey hole”: first, the Court insists that the Charter does apply to Canadian officials in Guantánamo Bay. Secondly, it devises a s. 7 analysis capable of extruding a specious remedy of a request for evidence exclusion. Thirdly, it issues a declaration of unconstitutionality, but also indicates that it expects the government to take some kind of unspecified remedial action. After all, the rule of law binds the executive, even if a Court declines to use its authority to enforce it. The Court thus lets the government have its cake and eat it too: the executive can claim to be compliant with the rule of law because it has provided a remedy in the face of a declaration of unconstitutionality, even though not compelled to do so by court order. And it doesn’t have to request Omar Khadr’s repatriation.

Khadr 2010 exposed the dual character of the Supreme Court of Canada as a forum of principle and as an actor in institutional politics. The conventional wisdom is that as the events of September 11 recede, Anglo-European courts grow more willing to cast critical judgment on the executive’s extravagant assertions that that the war on terror and protecting national security
trumps everything. But the track record of the Supreme Court of Canada post-9/11 is consistent in its relative timidity: wherever possible, the Supreme Court of Canada has resolved constitutional challenges on procedural grounds and evaded any substantive determination of unconstitutionality. In 2002, the Court did not prohibit deportation to torture; in 2007, it did not prohibit indefinite detention; and in 2010, it refused to issue a meaningful remedy for a citizen who was both tortured and indefinitely detained.

In *Khadr 2010*, the Court was asked to assert its jurisdiction to retrieve the most fundamental human rights of a single vilified individual from forfeiture by the institutions of majoritarian politics. No doubt the Prime Minister would have sharply criticized the Court had it actually done so, and some segment of the Canadian population would have agreed with the Prime Minister. Perhaps the Prime Minister would have flouted a Court’s order to request repatriation, and with it the executive’s fidelity to the rule of law. Or maybe not. We will never know. The only things we know for certain are that the government can act and will not (unless

---

40 *Suresh*, *id*.
41 *Charkaoui*, *supra* note 102.
42 Days after the release of *Khadr 2010*, the Prime Minister’s spokespeople announced on 3 February 2010 that the government planned to do nothing in response to the judgment. Two weeks later, on 16 February 2010, the government elected to send a diplomatic note requesting exclusion of the Canadian-obtained evidence from trial. On 27 April 2010, the US government rejected this request, saying that decisions about the admission of evidence will be made by prosecutors in accordance with the *Military Commissions Act*. As this article was going to press, on 5 July 2010, Justice Russel Zinn of the Federal Court issued a ruling finding that the government had failed to respect Omar Khadr’s right to procedural fairness in considering how best to remedy the ongoing violation of his *Charter* rights in accordance with the Supreme Court’s ruling in *Khadr 2010*. See *Khadr v. Canada*, 2010 FC 715. Justice Zinn reminded the government that it has a continuing constitutional obligation to find an effective remedy: “the option of doing nothing was not an option that was legally available to Canada”. *Id.* at para. 70. He ordered the government to advise Omar within a week of “all untried remedies that it maintains would potentially cure or ameliorate its breach of Mr. Khadr’s *Charter* rights”. *Id.*, clause 3 of the order. At the deadline set by Zinn J., rather than comply with the order, the government filed an appeal notice and sought a stay of the order pending appeal. On 22 July 2010, Chief Justice Blais of the Federal Court of Appeal granted the stay. It appears that the government, with judicial assistance, has managed to avoid taking any further steps to remedy the breach of Omar’s *Charter* rights before his Military Commission trial at Guantánamo Bay commences in August 2010.
compelled by external pressure), the Supreme Court of Canada could have compelled the government and did not, and Omar Khadr’s rights are still being violated. For purposes of Canadian law, Omar has been dumped into the mother of all legal grey holes, a place of right without remedy. And a legal grey hole is really little more than a black hole decorated with judicial wallpaper.
Are Declaratory Orders Appropriate for Continuing Human Rights Violations? The Case of Khadr v. Canada (Pages 494-502)
Lorna McGregor, Human Rights Law Review 10:3 (September 2010)

Journal Article: Using as an example the case of Omar Khadr, a Guantanamo detainee and Canadian national who sought his repatriation through Canadian courts, Lorna McGregor (Redress) describes the inadequacy of declaratory judgments for human rights violations. In the excerpt, she applies the international law “obligation of cessation,” i.e., the requirement that a state bring the violation to an end, to argue that Canada should formally request that information it provided to the U.S. is not used as a basis for Khadr’s continued detention. Moreover, Canada’s “duty of restitution” under international law requires it to take concrete steps “to restore the status quo ante.” The full article describes the Khadr litigation.
3. The Ill-fit of a Declaratory Order in a Case Requiring Cessation and Restitution

As set out in the introduction, the remedy sought in this case—namely, a request for the repatriation of Mr Khadr—would have required the Executive to use its diplomatic offices to make the request to the US. While the remedy sought bears similarities to a case in which a national seeks the diplomatic protection of his or her state of nationality, the cause of action is markedly different. In a diplomatic protection case, the national does not allege wrongdoing by the Executive but requests the Executive to espouse his or her claim against a foreign state by virtue of the link of nationality. Even where a court finds that a national has a legitimate expectation of protection, as the Federal Court did in the case of Mr Khadr, the Executive retains discretion and can factor in considerations external to the individual in deciding whether or not to act.  

By contrast, in Khadr v Canada, the use of diplomatic offices was sought as the remedy to the violation of section 7 by the Executive. Under international law, a state does not enjoy discretion as to whether or not to remedy a wrong.

The request for the use of Canada’s diplomatic offices as a remedy for the violation of section 7 rather than diplomatic protection per se therefore required an analysis of the appropriate action from a remedial perspective. However, in justifying its decision to issue a declaratory decision, the Supreme Court cited jurisprudence on diplomatic protection and factored in considerations such as the Crown prerogative to conduct foreign affairs which are more relevant to the decision-making process in diplomatic protection cases than a case involving a Charter violation. This is despite the Federal Court’s clear distinction between the two types of cases when the case was before it. In blurring the two processes, the Supreme Court missed two important analytical steps. First, it failed to address the obligation to bring the violation to an end through cessation which arises as a result of an ongoing violation of international law. Second, it failed to address the type of remedies required, particularly restitution. Had the Supreme Court undertaken these intermediary steps, it could not have issued an open-ended declaratory judgment but would have had to limit the remedies available to those which could meet the obligations of cessation and restitution. It is suggested that at a minimum this required making formal requests to ensure that the information provided was not used as a basis for detention or trial and the trial of Mr Khadr in


51 See, for example, Khadr v Canada, supra n. 10 at para. 44 citing Kaunda v President of the Republic of South Africa [2004] ZACC 5, a diplomatic protection case.

52 Khadr v Canada, supra n. 40 at para. 51.
compliance with international law, including juvenile justice standards or repatriation to Canada.

A. The Obligation of Cessation due to the Continuing Nature of the Section 7 Violation

As set out above, the Supreme Court characterised the violation of section 7 as a continuing violation. Under international law, a continuing violation requires the state to bring the violation to an end through cessation.\(^{53}\) Cessation arises independently of the law on remedies;\(^ {54}\) it ‘is the first requirement in eliminating the consequences of wrongful conduct’\(^ {55}\) and cannot be waived by the victim.\(^ {56}\) It is an ‘automatic’ obligation and not subject to a proportionality assessment,\(^ {57}\) even when a ‘literal return to the status quo ante is excluded or can only be achieved in an approximate way’.\(^ {58}\)

In this respect, the ‘content’ of the continuing nature of the violation of section 7 is of key relevance in understanding what the Executive must do in order to meet its duty of cessation.\(^ {59}\) The acts which brought about the violation have long since ceased as the last visit by CSIS and DFAIT to Guantanamo Bay took place in 2004 and the Canadian courts subsequently granted an application for a temporary injunction prohibiting further visits by

---

54 International Law Commission, Draft Articles on the Responsibility of States for International Wrongful Acts with Commentaries, A/56/10 (2001) at 87 (‘ILC Commentaries’), pointing out that ‘[t]he core legal consequences of an internationally wrongful act . . . are the obligations of the responsible state to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act.’ Cessation is also referred to in the law of remedies, see, for example, ‘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’ (‘Basic Principles on a Remedy and Reparation’), GA Res.60/147, 21 March 2006, A/RES/60/147 at para. 22; and Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed on State Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13; 1 IHRR 905 (2004) at para. 15.
55 ILC Commentaries, ibid. at 89.
56 Shelton, ‘The United Nations Principles and Guidelines on Reparations: Context and Contents’, in De Feyter, Parmentier, Bossuyt and Lemmens (eds), Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations (Antwerpen-Oxford: Intersentia, 2005) at 22, criticising the inclusion of cessation within the ‘notion of reparation’ in the Basic Principles on a Right to a Remedy and Reparation, supra n. 54, and arguing that it seems ‘to imply that in the absence of a victim there is no duty of cessation. It undermines the rule of law which is the basis of the obligation to cease any conduct that is not in conformity with an international duty.’
58 ICL Commentaries, supra n. 54 at 89.
59 Article 14, Articles on State Responsibility, supra n. 53.
these agencies pending the outcome of Mr Khadr’s trial.\textsuperscript{60} However, the Supreme Court framed the violation as continuing on the basis that,

Mr. Khadr’s \textit{Charter} rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or \textit{habeas corpus} at that time and, at the time of the interview in March 2004 had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr the effect of the breaches cannot be said to have been spent. It continues to this day.\textsuperscript{61}

At other points in the decision, the Court refers to the continuing nature of the violation of section 7 due to the contribution of the statements taken by CSIS and DFAIT to Mr Khadr’s continued detention\textsuperscript{62} and their potential to ‘redound into the future’.\textsuperscript{63} At a minimum, therefore, the Supreme Court decision establishes that the provision of information to the US authorities which could be used in the trial of Mr Khadr constitutes a continuing violation. In order to comply with the duty of cessation, the only choice Canada has is to bring the violation to an end by ensuring that the information given to the US is not used as a basis for Mr Khadr’s present or future detention or for any future legal proceedings against him. Since Canada has handed this information over to the US authorities, the only way it can achieve cessation is by making formal request(s) to them to ensure that it is not used. As cessation allows for no limitation, Canada will remain under this obligation until the result is achieved, regardless of the difficulties it encounters in so doing. Accordingly, as no scope for discretion in the means employed to meet the duty of cessation is available, a declaratory order is inappropriate in these circumstances.

A case may also be made that by virtue of Canada’s contribution to Mr Khadr’s detention at Guantanamo Bay, the violation of section 7 is of a continuing nature for as long as Mr Khadr is held within a detention system which fails to comport with standards of fundamental justice and international law.\textsuperscript{64} This broader reading appears to be in keeping with the Supreme Court’s finding of a single continuing violation of section 7 rather than a series of individual violations. If this broader reading stands, in order to

\begin{itemize}
  \item \textsuperscript{60} See discussion infra.
  \item \textsuperscript{61} \textit{Khadr v Canada}, supra n. 10 at para. 30.
  \item \textsuperscript{62} Ibid. at para. 21.
  \item \textsuperscript{63} Ibid. at para. 31. See also ILC Commentaries, supra n. 54 at 89, noting that the Article 30 notion of a continuing violation ‘also encompasses situations where a State has violated an obligation on a series of occasions, implying the possibility of further repetitions.’
  \item \textsuperscript{64} Article 48, Articles on State Responsibility, supra n. 53, providing that each state is separately responsible for the violation of international law.
\end{itemize}
comply with the duty of cessation, Canada would be required to take greater action than the withdrawal of the information given to the United States; it would be required to pursue Mr Khadr’s removal from the system entirely.

In terms of the options available for removal, both the UN Special Representative for Children and Armed Conflict and UNICEF have advocated the treatment of Mr Khadr as a child soldier since both the acts he is alleged to have committed and the beginning of his detention occurred when he was a minor and he was detained as a minor. In this respect, they have both called for his treatment as a victim and his repatriation to Canada for rehabilitation.\(^65\) In the event that he is subject to prosecution, UNICEF has noted that such action must not only be in compliance with international law generally but also international law on juvenile justice.\(^66\) Again, this would significantly limit the options available to the Executive to comply with the Supreme Court’s decision. In seeking his removal from the system entirely Canada would have to request either his repatriation or a trial compliant with international law generally and international juvenile justice standards.

The only possible argument against this broader reading lies in the Supreme Court’s references to the changed nature of the detention regime at Guantanamo Bay since Mr Khadr was first detained. For example, at different points in the decision, the Court refers to Canada’s participation ‘in what was at the time an illegal regime’\(^67\) and notes that, ‘the regime under which Mr. Khadr is currently detained has changed significantly in recent years’.\(^68\) However, the Supreme Court does not appear to be willing to go as far as to suggest that the detention system as a whole now comports with international law. Notably, the Supreme Court acknowledged that developments such as the enactment of the Military Commissions Act of 2006 which it characterised as aimed at ‘bringing the military processes at Guantanamo Bay in line with international law’ was later found to be incompatible with US constitutional law in so far as it suspended detainees’ right to *habeas corpus* under the Constitution. In the absence of an express finding, this article suggests that the decision cannot be interpreted as finding that the detention regime at Guantanamo Bay now comports with international law generally and the detention and prosecution of a minor specifically. As such, these *obiter dicta*


\(^{67}\) *Khadr v Canada*, supra n. 10 at paras 21 and 24.

\(^{68}\) Ibid. at para. 17.
comments by the Court have no impact upon the broader reading of the continuing nature of the section 7 violation.

B. The Duty of Restitution

Beyond the duty of cessation, as the Supreme Court noted, a violation of section 7 also requires the provision of a remedy which under international law includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In the Case Concerning the Factory at Chorzow (Germany v Poland), the Permanent Court of International Justice held that ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’ Within this context, restitution is framed as the primary form of reparation under international law due to its function to restore the status quo ante and is particularly relevant in cases such as Khadr v Canada in which the violation of the right to liberty and security of the person is at issue.

In a case such as that of Mr Khadr, the requirements of cessation and restitution may produce the same result. Nonetheless, as noted above, the two obligations are different: cessation is not subject to any considerations of proportionality and restitution is not dependent on the continuing nature of a violation. Therefore, even if a narrow reading of the nature of the continuing violation of section 7 prevailed, restitution would still apply to any of the aspects of the section 7 violation that were deemed to have ceased. From this perspective, the Executive would still be required to take concrete steps to restore the status quo ante. The inadmissibility of the information provided to the US at trial would not repair Canada’s contribution to the detention of a minor for seven years in the knowledge that he had been subjected to the ‘frequent-flyer program’ in a system offensive to Canada’s notion of fundamental justice.

69 See Basic Principles on the Right to a Remedy and Reparation, supra n. 54.
70 1928 PCIJ Ser. A No. 17 at 47.
71 ICL Commentaries, supra n. 54 at 96.
72 Feyter et al., supra n. 56 at 395–396, refer to the ‘primacy of “restitution” as a form of reparation.
73 The ICL Commentaries, supra n. 54 at 96, characterise ‘the release of persons wrongly detained’ as restitution [i]n its simplest form.
74 ICL Commentaries, supra n. 54 at 89, noting that ‘the result of cessation may be indistinguishable from restitution.’ See also Antkowiak, Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond, (2007) 46 Columbia Journal of Transnational Law 351 at 374, noting that ‘where a victim has been arbitrarily detained, a restoration of liberty ceases the ongoing violation . . . Depending upon one’s definition of an ‘ongoing violation’ then a restitutionary remedy could instead be considered a cessation order.’
75 ICL Commentaries, supra n. 54 at 98, although the Commentaries also note that restitution ‘is of particular importance where the obligation breached is of a continuing character.’
Complete restitution is, of course, not possible in relation to human rights violations. However, where concrete steps are available to (partially) remedy the wrong, performance is the preferred route under international law. Damages cannot substitute for restitution as this would suggest tolerance of the wrong but should be applied, as in the current case, to those aspects of the wrong that cannot be remedied through specific performance. This is well-illustrated by the case of Loayza-Tamaya v Peru which was the first Inter-American Court case to order restitution as a remedy. In this case, that Court ordered the release of the applicant (who had been arbitrarily detained, tortured and tried before ‘faceless’ judges) as a measure of restitution, largely because she was one of ‘the few living victims’ to appear before the Court and thus ‘there were concrete steps that could be taken to restore her rights.’

In a number of cases in which the right to liberty and security of the person has been at issue, courts have ordered measures of restitution. For example, in the case of a person convicted but already released, the Inter-American Court ordered the nullification of ‘all judicial or administrative, criminal or police proceedings’ and the expunging of ‘the corresponding records’ due to the incompatibility of the law upon which the applicant was convicted and the proceedings themselves with the American Convention on Human Rights. Where an investigation or prosecution is defective, courts have found that ‘the failure to fulfill the requirements of due process renders the proceedings invalid’ and have also ordered the retrial of individuals in accordance with the due process of law as required by international law. In other cases, the release of a convicted person has been ordered. In these cases, restitution is ordered as the preferred remedy due to the concrete steps available to partially restore the status quo ante.

As Canada does not have control of Mr Khadr, the only routes available to it to provide restitution are through making formal requests to the US for, as set out above, his repatriation or, if admissible evidence exists, trial compliant not

---

76 Shelton, supra n. 1 at 292.
77 Antkowiak, supra n. 74 at 371, discussing Loayza-Tamayo v Peru (Merits) IACtHR Series C 33 (1997) at para. 84.
78 Cantoral Benavides (Reparations) IACtHR Series C 88 (2001); 11 IHRR 469 (2004) at para. 77.
79 Ibid. See also Principles 19 and 22, Basic Principles on the Right to a Remedy and Reparation, supra n. 54.
80 Castillo Petruzzi v Peru IACtHR Series C 52 (1999); 7 IHHR 691 (2000) at paras 219–226.
81 See, for example, Fermin Ramirez v Guatemala Merits, Reparations and Costs, IACtHR Series C 126 (2005) at para. 138(7). See also Öcalan v Turkey 2005-IV; 41 EHRR 985 at para. 210, where the Grand Chamber stated that it: ‘considers that where an individual, as in the instant case, has been convicted by a court that did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents in principle an appropriate way of redressing the violation.’
82 Loayza-Tamayo v Peru, supra n. 77. See also Pinto v Trinidad and Tobago (232/1987), CCPR/C/39/D/232/1987 (1990) at para. 13.2; and Reece v Jamaica (796/1998), CCPR/C/78/D/796/1998 (2003); 11 IHRR 72 (2004) at para. 9; Assandize v Georgia, supra n. 6; and Iluşcu and Others v Moldova and Russia 2004-VII; 40 EHRR 1030 at para. 490.
only with fair trial standards but also juvenile justice standards under international law. As these steps can be taken immediately, the Federal Court of Appeal rejected the Executive’s argument in favour of deferral of the decision until after Mr Khadr’s trial, finding that ‘[w]hile Canada may have preferred to stand by and let the proceedings against Mr. Khadr in the US run their course, the violation of his Charter rights by Canadian officials has removed that option’. Viewed from this perspective, the options for complying with the duty to provide restitution are again limited and thus the appropriateness of a declaratory order constricted.

C. The Inapplicability of the Limitations to Restitution

As noted above, unlike cessation, restitution is subject to the limitations of material possibility and proportionality. Thus, should the requirements of cessation differ from those of restitution, this is the only point at which any possible limitation to the type of reparation to be afforded could have been considered. The two key limitations identified by the Supreme Court are first, the impact of an order on international relations and second, the enforceability of the decision.

As the commentary to the Draft Articles on State Responsibility points out ‘restitution is excluded if it would involve a burden out of all proportion to the benefit gained by the injured State or other party. The burden at issue must be ‘grave’. In this respect, the potential impact on Canada’s international relations would not seem to reach the threshold of grave disproportionality required to justify a failure to provide restitution. This is particularly the case as Justice Mosley had already discounted the potential threat to foreign relations as a sufficient reason for non-disclosure of the interview records, as did the Federal Court in the present case. Moreover, if Canada was the detaining authority, as Kirgis notes ‘[r]estitution would not impose a burden out of all proportion when it simply involves releasing a wrongfully abducted person or suppressing self-incriminating evidence’. Thus, the proportionality exception would not appear persuasive in the circumstances of contribution to a continuing violation of the right to liberty and security of the person.

83 Canada (Prime Minister) v Khadr, supra n. 14 at para. 62.
84 Ibid. at para. 73.
85 Article 35(a)–(b), Articles on State Responsibility, supra n. 53.
86 ILC Commentaries, supra n. 54 at 96.
87 Ibid. at 98.
88 See text infra.
89 Khadr v Canada (Attorney General), supra n. 40 at paras 47–51.
particularly in a case such as the present involving a former child soldier whom Canada was aware had been subject to the 'frequent flyer programme'.

The second exception appears to have been the most influential in the Supreme Court’s decision to issue a general declaratory order. The Supreme Court placed significant emphasis on the enforceability of issuing a decision requiring the Executive to seek repatriation. In the cases cited above, the reversal of a conviction, retrial or release of the person was within the control of the respondent state. This is clearly not the situation in this case. At the same time, a request for the repatriation or trial of a detainee at Guantanamo Bay in compliance with international standards has a proven track-record. As one of the *amici* in *Khadr v Canada* before the Supreme Court noted, ‘a request for repatriation was the determining factor in the cessation of ongoing rights deprivations of detainees who were citizens or permanent residents of other Western states’.91 Thus, enforceability was not unforeseeable but the Supreme Court only appeared prepared to consider making such an order if the result could be guaranteed. Such an approach does not appear warranted within the available limitations to restitution. The commentaries to the Draft Articles on State Responsibility note that ‘restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these’.92 As Shelton argues, ‘[w]hen . . . a court considers the likelihood of obedience in adjudicating remedies, it improperly places the victim’s rights at the mercy of defendant’s obduracy’.93

Notably, even the European Court with its preference for broad declaratory orders does not appear to have given weight to this argument as a means to resort to the material possibility exception to restitution. For example, in *Ilaşcu and Others v Moldova and Russia*, the European Court held that even though Moldova was not in control of the territory on which the violations were being committed, it ‘must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention’.94 As noted above, the Court ordered Moldova to take ‘every measure to put an end to the arbitrary detention of the applicants still detained

91 Factum of Human Rights Watch, University of Toronto Faculty of Law—Human Rights Clinic Program and the David Asper Centre for Constitutional Rights, 19 October 2009.
92 ICL Commentaries, supra n. 54 at 98. See also Scheuer, ‘Non-Pecuniary Remedies in ICSID Arbitration’, (2004) 20 Arbitration International 325 at 329 (citing Texaco Overseas Petroleum Co. and California Asiatic Oil Co. v The Government of Libyan Arab Republic Merits, (1979) 53 ILR 297, as having found that ‘the primary remedy would be *restitutio in integrum*. The fact that in the majority of cases restitution was impossible or impracticable and that pecuniary compensation was much more frequent did not alter this fact . . . “[A]ny possible award of damages should necessarily be subsidiary to the principal remedy of performance itself.”’.
93 Shelton, supra n. 1 at 290.
94 Supra n. 82 at para. 333.
and to secure their immediate release’. Thus, the material possibility exception also does not appear to stand in these circumstances.

4. Conclusion

As argued throughout this article, the appropriateness of a declaratory order in the case of Mr Khadr appears limited due to the constriction on the range of means available to remedy the violation. In Öcalan v Turkey, the Grand Chamber of the European Court, while acknowledging the general practice to issue declaratory orders, noted that exceptionally it ‘may propose various options and leave the choice of measure and its implementation at the discretion of the State concerned’ or ‘the Court may decide to indicate only one such measure’ due to the nature of the violation which ‘may be such as to leave no real choice as the measures required to remedy it’. For example, in Slawomir Musial v Poland, the Court noted that ‘by its very nature, the violation in the instance case does not leave any real choice as to the individual measures required to remedy it’. Similarly, in Assanidze v Georgia, the Court held that ‘the respondent State must secure the applicant’s release at the earliest possible date’. In his partly concurring opinion, Judge Costa held that regardless of the practical or political difficulties in obtaining the release of the applicant, ‘[a]s regards principle, which is the most important factor, it would have been illogical and even immoral to leave Georgia with a choice of (legal) means, when the sole method of bringing arbitrary detention to an end is to release the prisoner’. The same reasoning would apply in the case of Mr Khadr.

Yet, the Supreme Court’s failure to order specific performance or identify the limited range of options available to remedy the section 7 violation means that the interpretation and enforcement of its decision will now need to be re-litigated if the Executive fails to comply with the decision. This is particularly problematic as in addition to providing no direction on the content of the remedy required, the Supreme Court also failed to explicitly retain its supervisory jurisdiction. This is not a necessary result. Indeed, the Khadr case stands in sharp contrast to the recent case of Abdulrazik v Ministry of Foreign Affairs and Attorney-General which concerned a dual Canadian–Sudanese national who had taken refuge in the Canadian Embassy following periods of detention in Sudan. The applicant alleged that he had been subjected to torture and other ill-treatment. He had been unable to return to Canada as his passport

95 Ibid. at para. 490.
97 Ibid. (citing Broniowski v Poland 2004-V; 43 EHRR 495 at para. 194).
98 Ibid.
99 Ibid. (citing Assanidze v Georgia, supra n. 6).
101 Supra n. 6 at para. 203. See also discussion on Ilascu, infra.
102 Supra n. 7 at Partly Concurring Opinion, para. 9.
PRESS RELEASE:
U.S. v. Jawad
Kabul, Afghanistan
Monday 25 May 2009

Mr. Mohammad Jawad, a child of Afghanistan, was arrested along with at least one other person by Kabul Police during December, 2002 in connection with a grenade attack which injured two U.S. soldiers and an Afghan interpreter. After being tortured and abused by Afghan police at District 2 police station in Kabul, U.S. Forces tried to obtain Jawad at the police station, however, Jawad was moved to the Interior Minister’s office. U.S. Forces then aggressively requested and obtained custody of Mr. Jawad, who was approximately 12 years old at the time of his detention. This began a six year long journey of torture, abuse, and isolation while in U.S. custody for this young boy as reflected in numerous court filings and rulings. The United States then unilaterally removed Mr. Jawad from Bagram, Afghanistan in February 2003 and transferred him to Guantanamo Bay, Cuba where he has remained since. Jawad has been continuously deprived of age-appropriate conditions or rehabilitative opportunities as required by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol) of which the United States and Afghanistan are signatories.

U.S. Marines Major Eric S. Montalvo* and Captain Christopher L. Kannady* assigned to the Office of Military Commissions—Defense in Washington D.C., plan to file a petition in the Supreme Court of Afghanistan Monday, May 25, 2009, with Afghanistan Independent Human Rights Commission (AIHRC) to challenge what they believe to be an unlawful extradition of a falsely accused Afghan child. The Afghanistan Independent Human Rights Commission (AIHRC)* have been carrying its independent investigation into the case and have previously called for the Afghan government to employ appropriate measures in the case to facilitate Jawad’s return.

The basis lies within the violation of National sovereignty by the U.S., the Constitution of Afghanistan (1964) in place at the time as well as the current Constitution of Afghanistan (2004), which explicitly prohibits extradition to a foreign country. The remedy they are seeking is a writ of mandamus to be issued to the Afghan government requiring them to seek the immediate repatriation of Jawad based on sound legal doctrine and to fully investigate the Afghanistan police conduct surrounding this case. This would be an unprecedented filing in the Supreme Court of Afghanistan.

Montalvo and Kannady recently met with the Minister of Defense General Wardak. He is fully supportive of efforts to return Jawad back to Afghanistan. Montalvo has also met with UNICEF personnel to coordinate
repatriation efforts should Jawad be released. This lawsuit is also supported by the Afghan Bar Association.

For more information please contact:

Major Eric S. Montalvo, U.S. Marine Corps
In Afghanistan:
Eric.S.Montalvo@swa.army.mil
TEL: 0796668077

Ah. Nader Nadery
Commissioner
Afghanistan Independent Human Rights Commission
nadery@aihrc.org.af
Tell 0093700276784

In United States:
Office of the Chief Defense Counsel
Office of Military Commissions
Franklin Court Building
1099 14th Street NW #2000E
Washington, DC 20005
TEL: 1.202.761.0648
FAX: 1.202.761.0510
eric.montalvo@osd.mil

*Major Eric Montalvo, current detailed counsel in the case, holds a JD from Temple University, Beasley School of Law. He is a prior enlisted Marine who has served on active duty since 1988. He has served in Desert Storm, Operation Iraqi Freedom, and has deployed to Afghanistan twice.

*Captain Christopher Kannady, current assistant counsel in the case, holds a JD/MBA from the University of Oklahoma College of Law. He has served on active duty since 2004. He has served in Operation Iraqi Freedom and has deployed to Afghanistan twice.
Session 4B: Challenging Inter-State Cooperation: Detention by Proxy, Renditions and Drone Killings in Pakistan

**Yemen: Sharif Mobley Case**
30. “Re: FOIA/Privacy Act Request of Sharif Mobley”

**East Africa: Secret Detention and Renditions**
   Additional Reading: “Kenya and Counter-terrorism: A Time for Change”

**Pakistan: Drone Killings and Secret Detention**

**Drone Killings**
33. Study on Targeted Killings, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

**Secret Detention and Torture in Pakistan**
34. UN Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism
35. “Cruel Brittania: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
On the morning of Jan. 26, Sharif Mobley stepped out of his apartment in Sanaa, the capital of Yemen, to buy some cereal for his sleeping 3-year-old daughter. The young American from New Jersey was quickly surrounded by eight black-clad, masked operatives from the country's secret police. Mobley turned to run, but he was shot in the leg and bundled into the back of a white van. When Mobley shouted "I'm an American," he was hit in the face. As the van sped away, Mobley later told his lawyers, one of his Yemeni captors made a call. The man said only one word, in English: "Easy."

Eight months later, the 26-year-old is set to go on trial this month for killing a prison guard, a crime punishable by death. In Yemen, the condemned are executed in a public square with a single bullet to the heart.

U.S. officials see Mobley as one of a growing cadre of native-born Americans who are drawn to violent jihad. "This doesn't seem to be a case of the accidental extremist," said one U.S. official who would speak only on the condition of anonymity because the matter is before the courts in Yemen. "He sought out bad actors before leaving the United States and certainly joined up with terrorists after moving to Yemen. That includes, among other things, putting his ideas for terrorist attacks on the table."

Mobley's defenders acknowledge that he associated in Yemen with individuals hostile to the United States but say he never conspired to commit an act of terrorism. They say they believe that U.S. interrogators, trawling for intelligence, pushed Mobley into a moment of madness that allegedly resulted in the murder of one guard and the wounding of another.

"This is a man who had been kidnapped and shot, spent six weeks being variously shackled, blindfolded and beaten, and who was terrified that the same was awaiting his wife and two babies," said Cori Crider, one of Mobley's attorneys, who works with the London-based human rights group Reprieve and has met with Mobley in prison. "U.S. agents preyed on those fears."

This account of the coming-of-age of a young Muslim in the post-9/11 era is based on exclusive interviews with Mobley's father and wife; his lawyers; friends, relatives and former acquaintances; and with U.S. and Yemeni officials. It provides the first complete portrait of Mobley's journey to violent jihad and includes new details about his contacts with a radical cleric, Anwar al-Aulaqi, who is on a U.S. capture-or-kill list for his role in terrorist attacks. American investigators suspected that Mobley could lead them to Aulaqi.

The FBI declined to comment on the case or Crider's allegations. A spokesman for the Yemeni
Embassy in Washington said his government would have no official comment.

Mobley's lawyers, who include counsel from a leading Yemeni human rights organization, note that Yemeni authorities have dropped all terrorism-related charges and moved Mobley's case into the criminal courts. Dismissing the U.S. allegation that Mobley actively plotted with a group affiliated with al-Qaeda, they say that at the first hint of trouble, Mobley sought to return to the United States.

"This is just a false excuse for a botched job," said Crider, referring to Mobley's arrest and interrogation. "If Sharif Mobley was plotting to hurt a single soul, why didn't the U.S. arrest him when he - repeatedly - presented himself at the U.S. Embassy, asking their help to see his family safely home."

A devout teenager

Mobley was the youngest of five children who were raised partly in a spacious home on five acres in the South Jersey farming community of Buena. His father, Charles, originally from Brooklyn, N.Y., had joined the Nation of Islam in 1966. His mother, Cynthia, who was born in Philadelphia, converted when the couple married. Both sides of Mobley's family have deep roots in the United States.

When Nation of Islam leader Elijah Muhammad died in 1975, the Mobleys gravitated to an orthodox Sunni branch of Islam, attending a largely African American mosque in Philadelphia. The family moved to New Jersey in 1983, shortly before Sharif was born, in January 1984. "Kids grow fast in the city," said Charles Mobley, a retired construction worker, explaining the decision to move out of Philadelphia.

Former students at Buena Regional High School remember Mobley as very religious, with a small circle of friends. "He was always devout. Always trying to convert friends, always being so literal to the point that even if he kissed a girl, he asked friends to whip him," said Roman Castro, a former classmate who was friends with Mobley in high school. "He was 100 percent into everything he did."

Charles Mobley remembers him as deeply committed to his faith. "He was stronger into the religion than I was," his father said.

Mobley was also becoming more political. Castro, who enlisted in the military following graduation, said Mobley and some other friends from high school visited him in North Carolina on the July 4 weekend in 2003, before Castro left for Iraq. But the visit ended badly, and Mobley returned early and alone to New Jersey.

"He was very Sharif-esque; it was only a matter of time before he would get into political discussions and religious discussions, and arguments got heated," Castro said. "We had a falling out."

Mobley's father acknowledged the tension among the old school friends. "Sharif didn't believe in fighting in the war," he said. "He had the same view as Muhammad Ali had about fighting other people."

But if some of Mobley's friends saw increasing rigidity, his family and friends saw a much lighter side of his personality. "If he were in a classroom, he would be the class clown," said Zaki Bey,
Mobley's brother-in-law. Bey recalled that once when he visited Mobley, his brother-in-law back-flipped off a second-story balcony and landed on his feet. "He was that kind of adventurous, goofball type of guy," Bey said.

After high school, Mobley's father got him a union card, and he got spot work as an unskilled laborer, including at nuclear power plants in New Jersey and Pennsylvania.

Much of the early reporting of Mobley's arrest focused on his employment at the plants, suggesting that he might have had access to sensitive material.

"The Nuclear Regulatory Commission has completed its review of the dates Mr. Mobley worked as a general laborer at several U.S. nuclear power plants, including the types of job duties he performed. To date, there has been no evidence of any security-related concerns or incidents related to his employment at these plants," said Neil Sheehan, a spokesman for the NRC.

The early reports also erroneously said his family had immigrated from Somalia.

Interest in Yemen

In 2004, Mobley made his first pilgrimage to Mecca. "You could see him maturing into adulthood, still personable, still humorous, but not giddy all the time," said Mervin Khalil Ghani, who owns a bookstore specializing in Islamic and African American literature in Philadelphia and who accompanied Mobley to Mecca.

A black belt in Taekwondo who had excelled in martial arts and wrestling in high school, Mobley lost his interest in competition after the pilgrimage. The many trophies he won in his youth still crowd a corner of his bedroom in his parents' house.

Mobley went on the hajj two more times as a guide with groups from the Philadelphia area. His religious observance became stricter.

Gregory Marisseau, who worked with Mobley, said his friend would always try to say his prayers at the mosque, including the first prayer before dawn.

Around this time, Castro returned from his tour in Iraq and ran into Mobley on the street. His old friend treated him with disdain, Castro said, calling him a "Muslim killer."

In the summer of 2005, Mobley was introduced to Nzinga Saba Islam, a Philadelphia native who had just graduated from Philadelphia High School for Girls, and three months later they were married. The couple's first child, a girl, was born in January 2007.

In July 2007, the couple moved to Newark, Delaware, where Mobley began attending a mosque whose congregation was largely made up of immigrants, a community different from the mosques of his youth. Islam said the couple had talked for some time about moving to an Arab country to learn the language and deepen their knowledge of their religion. She said they began to consider moving to Yemen after striking up a friendship with a family from Yemen they met in Delaware.

They also contacted an American in Yemen whose teachings they had heard on religious CDs: Aulaqi.

Mobley's wife said that her husband e-mailed the cleric, seeking advice on where he should study
in Yemen.

Aulaqi's CDs and tapes can be found in many Muslim homes, and in the aftermath of the Sept. 11, 2001, attacks he seemed to be a moderate voice, appearing, for instance, on a video on washingtonpost.com to explain Ramadan. Islam said she and her husband knew of Aulaqi only as a popular preacher.

But by 2008, after leaving the United States and being jailed for a time in Yemen, Aulaqi was sounding a call for violent jihad, attacking the West and predicting a global clash between Muslims and non-believers. U.S. officials say they believe Mobley wanted to volunteer for the fight, and hid his true intent under the guise of attending language school in Yemen.

**Questioned by FBI agents**

Mobley and his wife and daughter left for Yemen in July 2008, but didn't last long in the country. Islam was pregnant and experienced complications. She said her husband met with Aulaqi to discuss where she might get medical care. In October, following Islam's surgery for an ectopic pregnancy, the couple returned to the United States.

Against the wishes of their families, they were determined to go back to Yemen.

"We didn't start what we intended to do. We said, 'let's try one more time,'" said Islam, 22, who wears pastel scarves to cover her hair but does not veil her face. "Our parents wanted to kill us. They didn't want us to go."

In December, the couple made it back to Yemen, and Islam became pregnant again. She spent much of the year on bed rest, and in November 2009 gave birth to their son.

The U.S. official said that Mobley only infrequently attended language class through 2009 and was instead "doing things like facilitating the movement of extremists to Yemen on behalf of" al-Qaeda in the Arabian Peninsula.

On Christmas Day 2009, a Nigerian passenger allegedly attempted to down a U.S. airliner by igniting explosives hidden in his underwear, an attack that was quickly traced to the al-Qaeda affiliate in Yemen.

Mobley's wife said that the atmosphere in the country soured rapidly for the couple, and that they resolved to go home as quickly as possible. They made an appointment for early February to get a passport for the newborn. Mobley also went to the U.S. Embassy to get extra pages in his passport for an exit visa, and was interviewed by FBI agents in the legal attache's office during several visits.

A second U.S. official, who also insisted on anonymity to discuss an open case, said that Mobley was "circular" and "uncooperative" when he met with the FBI.

"He got himself into this," the official said. "He's a very difficult guy who creates most of his own problems."

Islam said that her husband felt he was being followed, and soon enough she also saw surveillance by unknown Yemenis. "We were scared," she said. "We said, 'let's just go home.'"
Until they could get on a plane out of Yemen, they decided not to leave their apartment except to go to the embassy or get food.

**Frightened for his family**

After being shot during his arrest by members of Yemen's Political Security Organization, Mobley was taken to a secure, third-floor ward of a hospital that a German company runs for Yemen's Interior Ministry. Mobley's femur was shattered, and doctors operated on his leg on Jan. 26, according to a letter the hospital sent to Mobley's lawyers.

Mobley asked to speak to his wife and the U.S. Embassy, Crider, one of his attorneys, said. His request was ignored, and after four days, he said he would stop eating until someone came to help him.

That is when two U.S. agents showed up, according to Crider. They introduced themselves as Matt from the FBI and Khan from the Department of Defense. And over the next several weeks, they questioned Mobley six times. One or two Yemenis were always in the room, but took almost no part in the questioning, Crider said.

They had one major focus. "Aulaqi. You help us find him, and you'll go home," said Crider, describing the interrogations. She said Mobley said he had spoken to Aulaqi, but didn't know where he was and so was unable to help.

"They held up the keys to his house in front of his face," Crider said. "They told him his wife would go to prison and the kids would go to an orphanage. He was terrified that she was going to be assaulted."

When Mobley did not come home with the cereal, his wife grew frantic. She called the U.S. Embassy, where officials told her to go to her local police station and report him missing. That night, she recalled, four Yemeni men in suits and about 15 soldiers searched the couple's apartment, taking away their computer. Islam said she saw one of the men in suits the next morning at the U.S. Embassy, wearing a visitor's badge. She said one U.S. official dismissed her concerns about the search.

"You should be used to that. You're from Philly," he told her.

Islam said she pressed U.S. officials for information for weeks until family members decided she should bring the children home.

After three to four weeks, Mobley's Yemeni captors told him he would be moved to a prison. On the day he was transferred, a catheter was removed, but badly, and Mobley started to bleed again during the transport.

"When they unload him, he falls, and they kick him and call him a dog," Crider said. "They drag him down some stairs and toss him on a table, and he loses consciousness."

After just a few hours in the prison, she said, the profusely bleeding Mobley was moved to a general hospital.

There his treatment improved. He wasn't always blindfolded and shackled, and the guards, some of whom seemed to warm to him, would put their guns down in the room.
The two U.S. agents also visited. But after weeks of questioning, they appeared frustrated with Mobley, repeating the suggestion that his wife could end up in prison but getting nowhere.

"His behavior was not very helpful to his cause," said the second U.S. official.

"I think at that point the plan was to wait for him to be deported," Crider said. "They realized he was a dead end."

On the evening of March 6, Mobley and his guards watched the Mel Gibson movie "Braveheart," Crider said. In one scene, a soldier attempts to rape the wife of the character played by Gibson, and the woman is later executed. The events help propel the Gibson character into a vengeful rampage against his oppressors.

Mobley "is going crazy about his family," Crider said. "He is begging everyone to call his family."

The next day, March 7, according to Yemeni officials, Mobley grabbed a gun and killed a guard in an unsuccessful attempt to free himself. A second guard was wounded.

What no one had told Mobley was that his wife and two children had left for the United States 72 hours earlier.

*Staff researcher Julie Tate contributed to this report.*
Re: FOIA/Privacy Act Request of Sharif Mobley (Pages 1-7)
Cori Crider, Reprieve (July 2010)

Filing: This FOIA request to multiple U.S. agencies seeks information on their involvement in the January 2010 disappearance and incommunicado detention of U.S. national Sharif Mobley in Yemen. The full filing includes an affidavit describing Mobley’s abduction and detention.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
July 22, 2010

Re: FOIA/Privacy Act Request on behalf of Sharif Mobley
Expedited Processing Requested

To Whom it May Concern:


The request is submitted on behalf of Sharif Mobley ("Mobley"), born January 19, 1984 in Vineland, New Jersey, through his undersigned counsel at Reprieve. Mr. Mobley is currently held in the Political Security (PSO) Prison in Sana’a, Yemen.

The purpose of this request is twofold: one, to reunite Mr. Mobley with his due process rights; and two, to educate the public about US proxy detention practices by making relevant documents publicly available on the Reprieve website.

Broadly, the request seeks records relating to:

1. Mr. Mobley's abduction from the streets of Sana’a, Yemen on January 26, 2010.
2. U.S. agencies’ involvement in that disappearance.
3. U.S. agencies' interrogation of Mr. Mobley in incommunicado detention in Yemen, at a time when he was suffering torture and/or cruel, inhuman, and degrading treatment (CIDT).
4. The wider pattern of U.S.-sponsored sweeps and proxy detention in Yemen from January 2010, of which Mr. Mobley’s seizure is a part.

Expedited processing and a fee waiver are sought. The grounds for these requests are set out at Parts B and C to this letter and are supported by the attached declaration of counsel.

A. Requested Records

Please provide the records in electronic form where the record is either a) maintained in electronic format or b) readily reproducible in electronic form.

Please ensure that the search encompasses documents held by agency offices in Sana’a, Yemen, and Washington, D.C., as well as any other relevant repository.

In general, Mr. Mobley requests all records in any way relating to, pertaining to, or mentioning himself by any and all persons or entities, including all persons acting on behalf of the United States. The further requests, outlined below, are made to elucidate the sorts of records in the likely possession of the target agencies. They should not be

---

1 Reprieve is a London-based legal nonprofit that acts for prisoners held beyond the law in the “war on terror”. Mr. Mobley has authorized Reprieve to act for him.
construed to limit the full record production to which the requester is entitled.

1. Specifically, all records created after January 1, 2010, relating to the Mobley family’s dealings at the U.S. Embassy – Sana’a, including, but not limited to, records regarding:
   a. The family’s registration at the Embassy;
   b. The family’s indication to officials at the Embassy that they wished to leave Yemen and were seeking assistance in doing so;
   c. Any request by Mr. Mobley or his wife, Nzinga Saba Islam, to have documents processed necessary for the family to leave Yemen;
   d. Discussions regarding the processing of these papers, including, but not limited to, any discussion that they were to be delayed so that U.S. officials could interrogate Mr. Mobley or his wife;
   e. The identity and contact details of individuals who interrogated Sharif Mobley at the U.S. Embassy from January 1, 2010, until January 26, 2010, when he vanished;
   f. Interrogations of Mr. Mobley at the U.S. Embassy, by individuals including, but not limited to, Dennis Brady, Vincent Lisi, ‘Jared’, and any other ‘legats’), including, without limitation, statements by Mr. Mobley, transcriptions of interrogations, photo, video, digital or other contemporaneous recordings of the interrogations, FBI 302s and CIA reports;
   g. Nzinga Islam’s call to the U.S. Embassy Emergency Hotline on January 26, 2010, and any discussion thereof or response thereto;
   h. Nzinga Islam’s call to Michael Meszaros on January 26, 2010, and any discussion thereof or response thereto;
   i. Nzinga Islam’s visit to the U.S. Embassy on January 27, 2010, her request for consular assistance, and any discussion thereof or response thereto;
   j. Interrogation reports of Nzinga Islam at the U.S. Embassy (including, but not limited to, interrogations by Dennis Brady, Vincent Lisi, ‘Jared’, and any other ‘legats’), including, without limitation, statements by Mrs. Islam, transcriptions of interrogations, photo, video, digital or other contemporaneous recordings of the interrogations, FBI 302s and CIA reports;
   k. Mrs. Islam’s query as to the identity of the apparently Yemeni agent she witnessed, wearing a badge, on Embassy premises on January 27, 2010, and any discussion thereof or response thereto;
   l. The identity of this Yemeni agent, his relationship with any U.S. agency or official, and his role in Mr. Mobley’s abduction or interrogations;
   m. Any request by Mrs. Islam for processing of her baby Charles Mobley’s passport, and any response thereto;
   n. All subsequent visits of Mrs. Islam to the U.S. Embassy, including, but
not limited to, records discussing her queries as to her husband’s whereabouts, and any response thereto.

2. Records concerning U.S. or Yemeni officials following Mr. Mobley between January 1 and 26, 2010.

3. Records concerning visits by federal officials (including, but not limited to, visits by Dennis Brady, Vincent Lisi, and ‘Jared’) to the Mobley family residence.

4. Records concerning Mrs. Islam’s travel back to the United States with her children.

5. Records concerning Mrs. Islam’s interrogation at the US airport on her return to the US in early March, including, without limitation, statements by Mrs. Islam, transcriptions of interrogations, photo, video, digital or other contemporaneous recordings of the interrogations, FBI 302s and CIA reports.

6. All records created after January 2009 relating to the legal justification for interviewing U.S. citizens in custody abroad, including, but not limited to, the extent to which the U.S. Constitution constrains U.S. agents’ actions with respect to their citizens in detention, the application of the Fourth, Fifth, Sixth, and/or Eighth amendments to U.S. citizens in custody abroad; and any affirmative duties on U.S. agencies to ensure that U.S. citizens are not subjected to torture or CIDT in custody.

7. Any records (incl. correspondence) created from November 2009 (including, but not limited to, notes, e-mail, and telephone records) between the federal government and the government of Yemen regarding Mr. Mobley, including, but not limited to, records regarding:
   a. Records discussing whether Mr. Mobley was a target of intelligence interest;
   b. Whether Mr. Mobley and/or his family were to be followed;
   c. Whether Mr. Mobley was to be seized, and how;
   d. Whether force was to be used in the seizure of Mr. Mobley;
   e. Whether and when deadly force was permissible;
   f. Whether Mr. Mobley was to be interrogated, and how;
   g. Whether U.S. agents were to be permitted to access Mr. Mobley, and how;
   h. Whether Mr. Mobley’s home was to be searched, and how;
   i. Whether Mr. Mobley was to be transferred from one site to another, and how.

8. All records created after January 21, 2009, discussing whether money is to be paid to Yemeni officials or other individuals in Yemen on the understanding that individuals will be seized and will be accessible by U.S. officials, or for any other detention- or interrogation-related reason.

9. All records created after January 1, 2010, discussing whether money is to be paid in exchange for the seizure, detention or interrogation of Mr. Mobley.

10. Records concerning the identities and addresses of ‘Matt and Khan’, the US
agents who interrogated Mr. Mobley in *incommunicado* detention in Yemen.

11. Records concerning the identities of the doctors, nurses, or other medical personnel who saw Mr. Mobley from January 26, 2010 onwards.

12. Medical or psychiatric records concerning Mr. Mobley from January 26, 2010 onwards, or other records concerning his health and psychiatric condition.

13. Records concerning the identities of any Yemeni guards, interrogators, or other officials who saw Mr. Mobley in custody from January 26, 2010 onwards.

14. All records created after January 1, 2010, relating to visits of U.S. agents (including, but not limited to, the individuals who identified themselves as ‘Matt’ or ‘Khan’), to Mr. Mobley in hospital, including without limitation:
   a. Statements of Mr. Mobley;
   b. Interrogation reports;
   c. Transcriptions of interrogations;
   d. Notes, photographs, memoranda, observations of the conditions in which Mr. Mobley was kept;
   e. Records of any medical and/or psychiatric treatments provided, requested, or denied;
   f. Records of the mental health and psychological condition of Mr. Mobley.

15. All records created after January 1, 2010, relating to visits of U.S. officials (including, but not limited to, the individuals who identified themselves as ‘Matt’ or ‘Khan’), to Mr. Mobley in prison, including without limitation:
   a. Statements of Mr. Mobley;
   b. Interrogation reports;
   c. Transcriptions of interrogations;
   d. Notes, photographs, memoranda, observations of the conditions in which Mr. Mobley was kept;
   e. Records of any medical and/or psychiatric treatments provided, requested, or denied;
   f. Records of the mental health and psychological condition of Mr. Mobley.

16. All records created after January 1, 2010, relating to visits of consular officials to Mr. Mobley anywhere in custody, including without limitation the date of the first such visit, and identities and addresses of any consular officials present, and of any other U.S. agents present simultaneously with consular officials.

**B. Application for Expedited Processing**
Mr. Mobley requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E); 22 C.F.R. § 171.12(b); 28 C.F.R. § 16.5(d); 32 C.F.R. § 286.4(d)(3); and 32 C.F.R. § 1900.34(c).

Generally, expedition is warranted where failure to expedite could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. 5 U.S.C. § 552(a)(6)(E)(v)(I). It is also warranted when it involves "the loss of substantial due process rights." 28 C.F.R. § 16.5(d)(iii).

Both situations obtain here. Mr. Mobley is in the Political Security Prison in Sana’a. He may face a trial in Yemen, in a court that international observers have repeatedly found does not meet minimum fair trial standards. Meaningful disclosure of exculpatory information in that process is unavailable. The penalty facing the requester may be death.

Counsel for Mr. Mobley is an organization in the business of disseminating information of high public interest regarding U.S. counterterrorism practices. Expedited disclosure of the material would, in addition to serving Mr. Mobley’s interests in seeking due process, serve the strong public interest in knowing whether the security services of their nation are complying with their legal obligations.

His defense is impossible without the exculpatory information sought in this request.

C. Request for Fee Waiver

The undersigned does not seek these records for any commercial use, and thus understands that the first two hours of search time and the first 100 pages of duplication will be performed free of charge. 5 U.S.C. § 552(a)(4)(A)(iv)(II).

As to any additional search expenses, please waive any fees because disclosure of this information is in the public interest and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

The four-factor test for a public interest waiver is generally:

1. whether the subject of the requested records concerns the operations or activities of government;
2. whether disclosure of the requested records is likely to contribute to an understanding of government operations or activities;
3. whether disclosure of the requested records will contribute to a "reasonably broad" audience and whether the requester has the "ability and intention to disseminate the information to the public; and
4. whether disclosure of the requested record will contribute "significantly" to the public understanding.

Mr. Mobley’s case forms part of a pattern that is of manifest public interest. The proxy detention regime the U.S. is increasingly operating abroad has, to date, been discussed little and reported less.

Disclosure here will contribute significantly to the public’s understanding of the operations and activities of government—it will help the public understand whether the security services of their nation are having U.S. citizens seized by foreign intelligence agencies. It will also shed light on how U.S. agencies are currently applying, or failing to apply, their legal obligation not to commit, condone, solicit, or be complicit in, torture and CIDT.

Publication of this information via Reprieve, Mr. Mobley’s pro bono legal representatives, will educate the broad audience of individuals, civil society members, journalists, and others who follow the organization’s work on the war on terror.

* * *

Please construe this as an ongoing FOIA request, encompassing any reports or documents that come within the possession of the agency subsequent to your response.

If all or part of this request is denied, please specify which exemption(s) are claimed for withholding each page or passage. Please also state the number of documents or portions thereof, and the number of pages and dates of each document withheld. Where part of a document is determined to be exempt, please provide the non-exempt portions. 5 U.S.C. § 552(b). To the extent that this requires redaction, please "black out" these materials, rather than "whiting out" or "cutting out" these materials so that redactions can be recognized as such.

The undersigned reserves the right to appeal any decision(s) to withhold information and expects that you will list the address and office to which such an appeal may be directed. 5 U.S.C. §552(a)(6)(A)(i).

Thanks for your attention to this request. Please direct all future responses to my attention at the below address. You may also reach me by telephone at +44 207 353 4640.

Sincerely,

Cori Crider
Legal Director
Reprieve
cori@reprieve.org.uk
Enclosures (1)
“Blindfolded, Handcuffed and Carted Off: An Appraisal of Unlawful Transfers as a Response to Security Threats in Africa” p. 11-13

Judy Oder, INTERIGHTS Bulletin 16:1 (November 2010)

Legal Article: Oder, a lawyer at Interights, describes cases of unlawful transfer and detention in several African countries which involved interrogation by or at the behest of U.S. or UK officials. In 2007, more than 100 terror suspects were arrested in Somalia and Kenya and transferred to Ethiopia to face interrogation by U.S. officials. There, they were subject to “secret military tribunals” and both psychological and physical abuse. The government produced some of the detainees in response to habeas applications in Kenyan courts, but defied other court orders. Oder also describes detention and transfer to Afghanistan of individuals detained in Gambia and Malawi. Finally, Oder describes the case of al-Asad, a Yemeni national detained in Tanzania and unlawfully transferred multiple times (reportedly to Afghanistan and eastern Europe) before being detained and ultimately released in Yemen. The full article describes other cases and the regional and international legal framework governing transfer and detention.

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
Blindfolded, Handcuffed and Carted Off: An Appraisal of Unlawful Transfers as a Response to Security Threats in Africa

Judy Oder

Unlawful transfers refer to the handover of persons in custody between states which do not observe legal processes envisaged in legal transfers. These kind of removals have, since the 11 September 2001 attacks, been adopted by states in response to international terrorism and national security threats.

They include abductions and extraordinary renditions – when terror suspects are transferred for interrogation by security officials in other countries where they have no legal protection or rights in practice. Unlawful transfers do not follow the procedures envisaged for deportations, removals, expulsions, extraditions and the transfer of prisoners. Summary extractions which may, on the surface, seem legal, but generally flout due process guarantees also fall under this category.

This piece looks at the practice of unlawful transfers in Africa. The first part considers specific examples of this practice and assesses legal challenges brought on behalf of the detainees before national courts. The next section looks at states’ regional and international obligations in respect of these removals and considers legal alternatives to unlawful transfers.

The Practice of Illegal Transfers and Petitions Filed Before African Courts

Although there were incidences of illegal transfers in Africa before the 11 September 2001 attacks, the practice of transferring persons outside the ambit of existing legal frameworks escalated after these attacks. The transfer of persons outside legal processes illustrates a worrying trend that some African states adopted in their overzealous alliance with the USA Government in response to alleged terror threats. Some of the reported transfers and the violations arising from them are considered below.

The Horn of Africa Extraordinary Renditions: From Kenya to Somalia and Ethiopia

While most unlawful transfers have been of individuals or a handful of people, several people were implicated in the 2007 wave of counter-terrorism measures that took place in the Horn of Africa. At least 140 men, women and children fleeing the conflict in Somalia were arrested by Kenyan authorities between 30 December 2006 and February 2007 as they tried to enter Kenya.

Most detainees were held for weeks without charge and some were reportedly tortured or otherwise ill-treated. Some were allegedly beaten by the Kenyan police and forced to undress before being photographed. The detainees did not have access to their relatives or to lawyers. Some of the detainees were questioned – their interrogators included USA agents. They were also denied access to the United Nations Refugee Agency and to asylum procedures.2

In total, more than 100 terror suspects are thought to have been arrested in Somalia and Kenya and transferred to Ethiopia to face interrogation by USA officials. The released detainees corroborated evidence that they were tortured on numerous occasions to confess to either being ‘terrorists’ or to conspiring and associating with ‘known terrorists’.

They suffered both psychological torture and physical abuse, including severe beatings by guards which resulted in many ending up badly wounded due to violent interrogation techniques.3

Prisoners were subject to secret military tribunals where they were not shown evidence against them, were not provided with lawyers or an opportunity to present a defence, and were told a determination would be made as to whether or not they were ‘illegal combatants’.4 Prisoners also reported being held in chicken-wire cages and being abused. They were subjected to repeated visits by foreign security and intelligence agents, notably American, British and Swedish personnel.5

At least 15 out of the 81 people rendered to Ethiopia were women. Many had their children with them and some were pregnant. Two reportedly gave birth in custody in Ethiopia. Many of these women were held solely because they are family members of suspected members of al Qaida or of the Council of Somali Islamic Courts.6

By May 2007, interrogations by foreign intelligence officials had reportedly ended. Within a few months, almost all of the detained foreign nationals had been sent home.7 In October 2008 a further ten rendition victims known to be in Ethiopian jails were released to Kenya. The whereabouts of 22 others remains unknown.8

Legal challenges were filed before the Kenyan courts in respect of the detainees. The Muslim Human Rights Forum (MHRF) filed 34 habeas corpus applications in the High Court in Nairobi, while another six were filed in Mombasa by families of Kenyan detainees. However, apart from Said Sheikh Abdullahi and Sheikh Mohamed Salat (both Kenyans) and Sheikh Abubakar Omar Adan and his son Omar Abubakar Omar (both Somalis), who were taken to court, no one else was formally charged in Kenya.9
The High Court in Mombasa gave orders for the production of six prisoners. These orders were defied by the State which released only Salmin Mohamed Khamis before the Court’s deadline elapsed. Two others, Fatuma Ahmed Abdurahman and her four year old daughter Hafshah Swaleh Ali were released six days later than the date they should have been produced in Court following a successful campaign by human rights groups focusing on the child. Said Khamis Mohamed and Salim Awadh Salim were rendered to Mogadishu on 27 January 2007 while the matter was still in Court. MHRF initiated contempt of court proceedings against the Commissioner of Police and commandant of the Anti-Terrorism Police Unit, which were thrown out by the Court on the grounds that the Commissioner had not been served with these summons.10

More recently, Amir Meshal, an American who was captured by Kenyan forces in January 2007, filed suit in the USA District Court in Washington on 10 November 2009, arguing that FBI agents allegedly involved in his interrogation and transfer to other countries violated his constitutional rights. He also alleged that he was threatened with torture and death. He is seeking damages for the practice of rendition.11

The Gambia Experience

On 2 November 2002, Abdullah el Janoudi (a British citizen) was arrested alongside Bisher al-Rawi and Jamil al-Banna (both British residents) at Gatwick airport in London, UK. They had intended to travel to Gambia where they hoped to establish a business venture for a mobile peanut-oil processing factory.

The three men were questioned for two days on suspicion of links with terrorist groups, as well as on suspicion of carrying an explosive device, which turned out to be a normal battery charger. They were all released without charge.12

On 8 November 2002, the three men left the UK for Banjul, the Gambian capital, and were arrested on arrival, together with Bisher’s brother, Wahab al-Rawi, who had come to meet them at the airport. After an initial period of questioning by the Gambian National Intelligence Agency (NIA), they were then questioned by USA investigators. During this time, the men were held in several undisclosed locations in Banjul.

At least one of the men was allegedly threatened by USA investigators who told him that unless he cooperated he would be handed over to the Gambian police who would beat and rape him. One of the men sustained injuries from what USA investigators later described as a ‘scuffle with Gambian guards’.13

Four days after their arrest in Banjul, the four men were taken to a secret location in the suburbs. Separated from one another, Wahab al-Rawi said he was accused by the USA officers of coming to Gambia to start a terrorist training camp. Wahab al-Rawi and el Janoudi were released without charge in December 2002 and returned to the UK.

As neither Bisher al-Rawi nor al-Banna had British citizenship they were flown to Bagram air base in Afghanistan before being transferred to Guantánamo, where they were held for three years. Intelligence reports made by MI5 support Wahab al-Rawi’s testimony and indicate the fabricated nature of the case against the four men.14 The Gambian officials made it clear to the four men that the Americans were in charge.15

Bisher al-Rawi was released from Guantánamo in 30 March 2007, Jamil al-Banna was released from Guantánamo on 19 December 2007.

The Unlawful Transfer of Laid Saidi: Tanzania to Malawi and Unknown Countries

Laid Saidi, an Algerian who lived and worked in Tanzania, was arrested and expelled through the border between Tanzania and Malawi.16

According to Saidi, after being held for a week in a prison in the mountains of Malawi, a group of people arrived in a sport utility vehicle: a gray-haired Caucasian woman and five men dressed in black wearing black masks revealing only their eyes. His Malawian captors blindfolded him, and his clothes were cut away and photographs taken. They covered his eyes with cotton and tape, inserted a plug in his anus and put a disposable diaper on him before dressing him. His ears were covered and his hands and feet shackled. He was driven to an airplane where they put him on the floor. It was an all night journey to his next destination – Afghanistan.17

On arrival he was detained in inhumane conditions and chained to the wall. At the prison where he was first taken to in Afghanistan, there was deafening Western music being played and the lights were rarely turned on. He was left chained for five days without clothes or food. He was beaten, spat on and had cold water thrown on him. He was given dirty water to drink.

In addition he was told by an interrogator that he would die at this facility. His legs and feet became painfully swollen because he was forced to stand for so long with his wrists chained to the ceiling. According to Saidi the cells at this facility were filthy and not even suitable for animals. He was released eighteen months after his arrest; no explanation was ever given to him for the reasons for his arrest.18

Rendered From Tanzania to Djibouti and Beyond: Mohammed Abdullah Saleh al-Asad

Mohammed Abdullah Saleh al-Asad is a Yemeni national who had lived in Tanzania for 18 years; he ran a small business dealing in tires, tubes, and car batteries. On the night of 26 December 2003, Tanzanian officials came to Mohammed al-Asad’s house and arrested him. He was hooded, cuffed and taken to a flat where he was interrogated about his passport. He was placed on a plane and he estimates
that he spent a few hours on this plane before being detained for two weeks. Confused and scared, he did not know where he was being taken, but one of his guards told him that he was in Djibouti and there was a photograph of President Guelleh on the wall of the detention facility. Sources from Tanzania also indicate that he was flown to Djibouti on a small USA plane.

In habeas proceedings filed by al-Asad’s father before the courts in Tanzania, Tanzania acknowledged that he was sent to Djibouti and the only issue of consideration before the Court was whether the immigration authorities were still holding him or whether he had been deported to Djibouti. The High Court found that there was no prima facie evidence to suggest that al-Asad was in the custody of the Director of Immigration Services or even that he was within the limits of mainland Tanzania. For this reason the Court held that it could not order a direction of habeas corpus.

At the end of the two weeks he was hooded and cuffed again and placed on what he thought was a larger plane. He was flown for several hours, stopped for a short period of time, and then flown for several additional hours. He felt that the weather was much cooler at his destination, which is believed to be Afghanistan.

He was held in a cell for approximately two weeks, and was then transferred again to a facility at which he was held for approximately three months in a cell. He was only irregularly taken to be interrogated. His interrogators, as well as the questions, were the same.

In April 2004, al-Asad was put on yet another flight and then transferred to a helicopter and taken to a new USA run facility, believed to be in Eastern Europe. He was subjected to a regime of interrogation and sensory deprivation: constant white noise was played through loudspeakers, artificial light was kept on 24 hours a day and he was allowed a shower once a week.

On 5 May 2005, al-Asad was taken from the secret detention facility and returned to Yemen, where he was imprisoned in Yemeni prisons in Sana’a and al-Ghaydah. When Amnesty International asked Yemeni officials about the status of Mohammed al-Asad and two others they replied that they had been given explicit instructions on the continued detention of the men, and that they were ‘awaiting files’ from the USA so that they could try them. He was released in March 2006.

Al-Asad still awaits a remedy for the violations committed against him due to his extraordinary rendition and secret detention.

Rendered from South Africa to Pakistan: Khalid Mehmood Rashid

Pakistani national, Khalid Mehmood Rashid and his house mate, Indian-born Moulana Mohammed Ali Jeebhai, were abducted by heavily armed police and Home Affairs officials on 31 October 2005 and locked up at an unknown place thought to be in Cullinan outside Pretoria, South Africa. This was only confirmed three months afterwards when their names were found in the cell register of Cullinan police station.

On 2 November 2005 Rashid was handed a notice of deportation because he was an illegal immigrant. He was informed of his right to appeal against the decision to deport him and to have his detention confirmed by a warrant of the Court. He indicated his wish to be deported at the first reasonable opportunity, whilst remaining in custody. He also signified that he did not wish to appeal the decision or have his detention confirmed by a warrant of the court.

On 6 November 2005 Rashid was handed over to five Pakistani law enforcement officials at Waterkloof Military Airbase in Pretoria from where he was flown to Islamabad Airport in Pakistan and held in custody. His removal from the country was apparently effected secretly – without his relatives or friends having been apprised of what had happened to him.

Rashid was released from the custody of Pakistani authorities in December 2007 and later filed a petition challenging his detention and removal.

This petition progressed through the South African court system and on 31 March 2009, the Supreme Court of Appeal of South Africa declared the detention of Khalid Mahmood Rashid at Cullinan Police Station and his subsequent removal and deportation unlawful.

In its analysis, the Supreme Court of Appeal observed that for a deportation to be carried out lawfully, the action or procedure used to facilitate an illegal foreigner’s removal from the country must be done in terms of the Immigration Act. The Court opined that:

a decision to deport someone often carries far-reaching consequences – it concerns that person’s livelihood, security, freedom and sometimes, his or her very survival. This is why immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights.

According to the Court the authorities bore the onus to adduce sufficient facts to justify their actions.

The Court stressed that the Act and regulations contain safeguards to protect that person’s rights which must be respected and that illegal foreigners are beneficiaries of certain rights under the Constitution, namely the right to freedom and security of the person and the rights of detainees.

The Court found that the fact that Rashid was detained at the Cullinan police station without a warrant and then removed from this facility, also without a warrant, meant that both his detention there and his deportation were unlawful.

It concluded that Rashid’s arrest was lawful but his subsequent detention
and deportation were not because they were carried out without compliance with the preemptory procedures prescribed by the Immigration Act.  

**From Pakistan to Morocco: Abou Al Kassim Britel**  
Abou Al Kassim Britel was initially apprehended and detained in Pakistan by Pakistani authorities on alleged immigration violations in February 2002. After a period of detention and interrogation there, he was handed over to USA officials.  

In May 2002, USA officials stripped and beat Britel before dressing him in a diaper and overalls, shackling and blindfolding him and flying him to Morocco for detention and interrogation. Once in Morocco, USA officials handed him over to Moroccan intelligence officials who detained him incommunicado at the Temara detention centre, where he was interrogated, beaten, deprived of sleep and food and threatened with sexual torture.  

After being released from custody by Moroccan authorities in February 2003, Britel was again arrested and detained in May 2003 as he attempted to leave Morocco for his home in Italy. While detained incommunicado in the detention facility where he had been brutally tortured only months earlier, Britel falsely confessed, under torture, to his involvement in terrorism.  

He was later tried and convicted by a Moroccan court on terrorism-related charges and is currently serving a nine-year sentence in a Moroccan prison.  

The conviction was obtained through torture; no evidence had been gathered in Italy on which to charge Britel. In Morocco, he was refused access to his lawyer prior to trial so was unable to provide him with instructions. He was also refused access to the Italian Embassy and no prosecution witnesses were produced for cross-examination. No witnesses or documentary evidence were allowed to be presented on behalf of the defence.  

In 2006, an Italian investigating judge dismissed a six-year long investigation into Britel’s alleged involvement in terrorism after the judge found a complete lack of evidence linking him with any terrorist-related or criminal activity.  

**The Regional and International Legal Framework**  
Efforts to respond to the impact of counter terrorism on human rights in Africa have been limited. Developments have, to a large extent, focused on combating terrorism and there has not been much debate, at the regional level, of the impact of these efforts on human rights.  

The African Commission on Human and Peoples’ Rights adopted a Resolution on the Protection of Human Rights and the Rule of Law in the Fight Against Terrorism in which it emphasised that measures taken to combat terrorism must fully comply with states’ obligations under the African Charter on Human and Peoples’ Rights. As a consequence, each counter-terrorism measure involving removal or transfer will have to comply with the obligations of states to observe the right to life, freedom from torture and inhuman and degrading treatment, the right to liberty and security of the person and due process guarantees.  

The Convention Governing the Specific Aspects of Refugee Problems in Africa protects individuals from rejection at the frontier, return or expulsion, which would compel them to return to or remain in a territory where their life, physical integrity or liberty would be threatened.  

---  

**Efforts to respond to the impact of counter terrorism on human rights in Africa have been limited. Developments have, to a large extent, focused on combating terrorism and there has not been much debate, at the regional level, of the impact of these efforts on human rights.**  

At the international level, the United Nations Human Rights Committee in General Comment No. 31 states that the Article 2 obligation of the International Covenant on Civil and Political Rights (ICCPR) requires states to respect and ensure rights for persons in their territory and all persons in their control and ‘entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm...either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’. The protections against removal are applicable to all human beings irrespective of the particular status of the individual in question and regardless of the particular circumstances of the individual.  

The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention for the Protection of all Persons from Enforced Disappearance prescribe removal where the individual in question would face a risk of violation of a particular right in the state they are transferred to.  

Some human rights treaties contain provisions formulated in a manner similar to the prohibition of *refoulement* in refugee law, based on a risk of persecution on particular grounds.  

**Torture and Non-Refoulement**  
Under international human rights law, transfers are proscribed where there exists a risk of torture or cruel, inhuman or degrading treatment or punishment in the receiving state.  

According to the United Nations Special Rapporteur on Torture:  

> [T]he principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ‘ill-treatment’ which imposes on
states the ‘essential responsibility...to prevent acts of torture and other forms of ill-treatment being committed, not only against persons within any territory under their own jurisdiction...but also to prevent such acts by not bringing persons under the control of other states if there are substantial grounds for believing that they would be in danger of being subjected to torture.’

The prohibition of torture or ill-treatment also only applies to cases where the individual would be removed to another country where such a risk existed.

**Violations of the Right to Life**

A second, clearly established, prohibition of removal under international human rights law concerns cases wherever the individual faces a risk of violation of his or her right to life in the state of the destination.

This principle was affirmed by the South African Constitutional Court in a case where it found that in handing the applicant, Mohamed, over to the USA without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed’s right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.

The European Court of Human Rights has held in a number of cases that it cannot be excluded that considerations similar to those in relation to Article 3 of the European Convention on Human Rights (ECHR) ‘might apply to Article 2 of the Convention...where the return of an alien puts his or her life in danger’.

The Court also appears to have recognised that the real risk of extra-judicial killing by state authorities in the state of destination might give rise to an obstacle to extradition under Article 2, as well as that an obstacle may be posed by the existence of a real risk emanating from persons or groups of persons who are not public officials, if it has been shown that the authorities of the receiving state are not able to obviate the risk by providing appropriate protection.

The obligation not to transfer if there are ‘substantial grounds’ for believing that a risk of torture or other non-derogable right is an absolute obligation that cannot be offset against any risk to national security and is not affected by the alleged conduct of the individual in question.

**Fair Trial Violations**

States may not remove an individual from their territory where there exists a real risk that the individual will be the victim of certain violations of his or her right to a fair trial in the receiving state. Although in relation to this type of situation the jurisprudence of human rights bodies is less well-established, it is clear that in some circumstances the existence of a risk of a serious violation of the right to a fair trial constitutes an obstacle to removal.

The United Nations Human Rights Committee has refused to accept arguments, urged upon it by some states, that the prohibition of removal ‘only arises in cases involving violations of the most fundamental rights and not in relation to possible violations of due process guarantees.’

Before removal, detainees ought to be allowed to access legal counsel. The importance of legal advice to those slated for removal was highlighted by the South African Constitutional Court when it held that that the election Mohamed allegedly made to accompany the FBI agent to the USA (where he would face the death penalty) must have been to some extent influenced by his being cut off from legal advice. According to the Constitutional Court, the circumstances supported the finding that there was a material impairment of Mohamed’s ability to waive validly any of his rights.

Article 13 of the ICCPR and Article 1 of Protocol No. 7 to the ECHR provide for the right to be given reasons for expulsion, to have one’s case reviewed, and to be represented for these reasons before the competent authority, although exceptions for ‘compelling reasons of national security’ raise questions as to how they would have been interpreted as encompassing basic due process rights in the context of transfer cases.

The United Nations Committee against Torture (CAT) has for its part held that the remedy against refoulement requires ‘an opportunity for effective, independent, and impartial review of the decision to expel or remove.’

**Unlawful Transfers as Enforced Disappearance**

Unlawful transfers amount to disappearance of persons as the manner in which they are carried out removes the person from the protection of the law and, together with their family, they are denied relevant information regarding the state’s actions. The United Nations Convention for the Protection of all Persons from Enforced Disappearance defines the practice as the:

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

Under this Convention enforced disappearance is a crime against humanity as recognised in the 1998 Statute of the International Criminal Court.

**The Right to a Remedy and Reparation**

The right to a remedy and the right to reparation in the face of serious violations as a fundamental human right are recognised under international law.
Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and return of property. States are obliged to undertake thorough investigations and prosecute those responsible and impose appropriate penalties.

Legal Alternatives to Unlawful Transfers
While it is clear that provisions of regional and international human rights are engaged when illegal transfers occur, it is also important to briefly reflect on their impact on society and lessons which can be learned.

The arrests considered above were in response to alleged national security or terror threats, yet in almost all cases the allegations against the detainees were not based on any concrete evidence that implicated the suspects in acts that threatened the national security of the countries they were arrested in or of other countries.

There are other alternatives that states could consider using instead of resorting to unlawful transfers.

Legal processes like deportation, expulsion and extradition should be resorted to where these exist within domestic frameworks. Non-custodial options that could be considered by states include assigning individuals to compulsory residence and surveillance; periodic reporting to the police and other non-criminal sanctions are lawful options that can be considered. States should respect their international human rights obligations by ensuring that national legal frameworks proscribe and adequately deal with violations arising from unlawful transfers.

Conclusion
The repercussions of illegal transfers are still being felt today as many questions relating to these unlawful transfers remain answered; families have been torn apart, and livelihoods destroyed. Detainees had their rights violated and hardly anyone has been held accountable for these transgressions. For those still detained the nightmare goes on. Where they have not been currently undertaken, states must undertake full investigations into the circumstances surrounding unlawful transfers that have been carried out within their territories.

Any transfers must be carried out within legal frameworks that respect due process guarantees including access to court, equality of arms and the right to representation. Where detentions are secret, there will always be issues around the use of such evidence in criminal trials; information obtained through torture should not be tendered as evidence in court.

Persons facing removal should be allowed to stay in the country until courts reach a final decision. When unlawful transfers occur, beyond filing habeas corpus applications, lawyers should also challenge the detention and legality of such actions as was done in the Khalid Rashid case in South Africa.

States should respect their international human rights obligations by ensuring that national legal frameworks proscribe and adequately deal with violations arising from unlawful transfers.

Rendition is not a neutral process driven by some objective standard. As far as can be determined, renditions in the past seven years have only been of Muslims, mostly Arabs. Numerous other groups on the USA State Department’s terrorism roster are apparently immune from rendition, suggesting that the procedure is less about eliminating terrorists than about eliminating what has been described as ‘Islamofascism’. Unlawful transfers discriminate between citizens and non-citizens, the former who as a matter of principle cannot be deported. Targeted as it is predominantly at non-citizens from Muslim backgrounds, this unequal treatment leads to more rather than less extremism and therefore can create more dangers for the state.

Aside from being counter productive, the policy of removals raises moral questions, particularly with regard to removals of non-citizens who have lived all or a significant part of their life in the sending country. It is unfair for the sending state to relieve itself from the responsibility for the dangerous individual who is a product of that society and it is also unjust to send him or her to a community which had nothing to do with his or her upbringing but has to bear his or her destructive influence.

As information obtained from renditions carried out during the past seven years is classified, it is difficult for the public to judge the validity of the arguments justifying it and to assess its effectiveness. It is doubtful that carrying out unlawful transfers can lead to greater security; their effectiveness as responses to terrorism and threats to national security remains to be seen.

Judy Oder is a Lawyer on the Africa programme at INTERIGHTS.


5 Ibid. p. 8.


Endnotes continued on page 33


Book: The author, a law professor, argues that under jus ad bellum principles of necessity and proportionality, the U.S. does not have the right to resort to drone killings in Pakistan. Next, she applies core international humanitarian law principles of targeting, concluding that in western Pakistan, “using drones lawfully may be an insurmountable challenge.” The full chapter provides a history of U.S. use of drones based in part on interviews with U.S. officials. It also describes emerging ethical issues.

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
Besides the risky legal situation the U.S. is in, the United States wants Pakistan’s civilian, elected government to succeed. The U.S. needs to treat that government with respect and defer to its policies aimed at extending its authority in Pakistan. It can hardly do so as it continues to send drones in the face of the government’s protests.

Equally the Security Council has not authorized attacks, and the U.S. has no right on that basis to use drones. In the wake of the 9/11 attacks, the Security Council did find in Resolution 1368 that the attacks triggered Article 51 self-defense. The Council did not, however, authorize the use of force against any particular state. Even if it did, such action would have to comply with the principles of necessity and proportionality. Necessity in the *jus ad bellum* refers to the decision to resort to force as a last resort and that the use of major force can accomplish the purpose of defense. Apparently U.S. drone attacks in Pakistan aim at militants who attack U.S. troops in Afghanistan or join with al-Qaeda to plot future 9/11-type attacks in the U.S. One of the leading experts on counter-terrorism does not believe this will be the result of the drone attacks. In Congressional testimony in March 2009, David Kilcullen, said,

> I think one of the things we could do that would send a strong message right now is we could call off the drone strikes that have been mounted in the western part of Pakistan.

> I realize that they do damage to al Qaeda leadership. Since 2006 we’ve killed 14 senior al Qaeda leaders using drone strikes. In the same time period we’ve killed 700 Pakistani civilians in the same area. The drone strikes are highly unpopular.

> They are deeply aggravating to the population. And they’ve given rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks.

> Inside the FATA [Federally Administered Tribal Areas] itself some people like the attacks because they do actually target the bad guys. But in the rest of the country there’s an immense anger about them. And there’s anger about them in the military and the intelligence service. I realize it might seem counterintuitive, but we need to take our foot off the necks of these people so they feel that there’s a degree of trust. Saying we want to build a permanent relationship, a friendship with them whilst continuing to bomb their population from the air, even if you do it with robot drones, is something that they see through straight away.\(^\text{91}\)

\(^{91}\) Hearing of the House Armed Services Committee, Effective Counterinsurgency: the Future of the U.S. Pakistan Military Partnership, April 23, 2009 (Testimony of David Kilcullen).
The views of Kilcullen and others raise serious questions as to whether drone strikes can be defended as accomplishing the military objective in any meaningful way. Moreover, the difficulty of accomplishing the military objective is compounded by the disproportionate loss of civilian lives. In Western Pakistan missile strikes are inevitably going to kill far more unintended than intended targets. Even with improvements in the technology, high numbers of civilians are going to be killed using missiles and bombs in places where no hostilities are occurring and, thus, civilians are living and working normally. In armed conflict zones, civilians will evacuate or take some precautions.

The media have reported on another attempt at a legal argument to justify drone attacks: “hot pursuit”. There is, however, no right of hot pursuit on land. Even attempting to extrapolate from the hot pursuit permitted under the law of the sea, the use of drones bear almost no resemblance to that right. Hot pursuit at sea provides a narrow right of coastal state law enforcement to extend the exercise of jurisdiction when a crime is suspected in the state’s territorial sea or contiguous zone. Coastal law enforcement agents may pursue a suspect on the high seas when attempting to make an arrest if the pursuit began in maritime zone where law enforcement agents have jurisdiction and the agents remain in visual contact with the suspect until the arrest.

Related to the hot pursuit argument is an argument that U.S. commando or special operation forces may cross from Afghanistan into Pakistan to kill or capture suspected militants or terrorists using drones or other weapons. There appears to be no international law authority directly on point for this view, although the author has written that the law of countermeasures might support cross-border police action where a state has failed to exercise due diligence. The argument is at its strongest in a failed state situation. However, the U.S. does not recognize Pakistan as a failed state. The U.S. has urged Pakistan to make greater efforts to control lawlessness on its territory. To some extent, the U.S. and Pakistan disagree as a matter of policy as to what steps Pakistan should take. The situation does not appear to be an example where the U.S. may disregard Pakistan sovereignty to carry out its own police actions. Moreover, the U.S.

---

92 See also, n. 63 supra but see views of CIA Director Leon Panetta, supra p. 1.
93 The principle of proportionality, like necessity, has a place in the *jus ad bellum*, as well as the *jus in bello*. According to Gardam: “The legitimate resort to force under the United Nations system is regarded by most commentators as restricted to the use of force in self-defense under Article 51 and collective security action under chapter VII of the UN Charter. The resort to force in both these situations is limited by the customary law requirement that it be proportionate to the unlawful aggression that gave rise to the right. In the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.” Judith Gardam, *Proportionality and Force in International Law*, 87 Am. J. Int’l L. 391 (1993).
94 The United States has an obligation to take feasible precautions to protect civilians, such as providing advance warning of an attack; never attacking homes; or only attacking at night in open spaces. The author has found no evidence that the U.S. is taking precautions in Pakistan. *See infra* n. and accompanying text.
96 See Murphy supra n. 80.
needs Afghanistan’s consent to carry out such raids from Afghan territory. Afghanistan has not, apparently, given this consent.

The strongest conclusion to draw under the *jus ad bellum* is that there is no legal right to resort to drone attacks in Pakistan. Drone attacks are uses of military force. Pakistan is not responsible for an armed attack on the United States and so there is no right to resort to military force under the law of self-defense. Pakistan has not expressly invited the United States to assist it in using force. At best there have been mixed signals from Pakistan about the U.S. strikes. Further, even with express consent, the attacks would have to be part of Pakistan’s own military operations. Even then, drone attacks may well be counter-productive to the military objective of eliminating the challenge from Pakistani militants, and they have been responsible for the deaths of many unintended victims, leading to serious questions about whether they may be used consistently under the principle of proportionality.

*The Jus in Bello*

If the government of Pakistan continues to be engaged in internal armed conflict on its territory and requests U.S. assistance, the U.S. must still comply with strict limits on how it uses drones. Indeed, in the circumstances of Western Pakistan, using drones lawfully may be an insurmountable challenge.

In the spring of 2009, Pakistan used major military force on its territory to respond to increasing challenges to central authority. In other words, the nature of the only armed conflict in Pakistan is an internal or non-international armed conflict. In such a conflict, some IHL rules applicable in international armed conflict do not apply, but these are generally rules respecting detention. The core IHL rules respecting targeting are the same in international and non-international armed conflict. These are the rules of distinction, necessity, proportionality, and humanity.97

One of the most important rules respecting the conduct of armed conflict may well be the rule of distinction. Under international law, civilians may not be intentionally targeted. Only members of a state’s armed forces during armed conflict or persons taking a direct part in hostilities may be targeted. In the ICRC study of customary international humanitarian law, distinction is the first rule:

> Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.98

This rule is supported by a number of legal authorities, including, perhaps most importantly, Additional Protocol I of 1977 to the 1949 Geneva Conventions:


98 *ICUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, supra n. 60, at 3.
Article 43(2) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Article 51(3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities. 99

Persons with a right to take direct part in hostilities are lawful combatants; those without a right to do so are unlawful combatants. 100 Having a right to participate in hostilities means that the person may not be charged with a crime for using force. CIA operatives, like the militants challenging authority in Pakistan, have no right to participate in hostilities and are unlawful combatants. 101 They may be charged with a crime. 102


100 Knut Dörmann, The legal situation of “unlawful/unprivileged combatants”, 85 INT’L REV. RED CROSS 45, 46 (2003). “[U]lawful/unprivileged combatant/belligerent” is “understood as describing all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy.”

101 Cullen, supra n., at 27: “The CIA has an important role in developing the actionable intelligence that is key to success. The operations themselves, however, should be executed solely by military personnel.”

102 Some prefer to continue to reserve the term “combatant” for members of a state’s armed forces in an international armed conflict. See, e.g., Jordan Paust, Responding Lawfully to Al Qaeda, 56 Cath. U. L. Rev. (2007). They use “unprivileged belligerent” for someone with no right to engage in an international armed conflict. Frits Kalshoven remarks, “The ‘unprivileged belligerent’ goes back to Baxter’s famous article; he was an army major (and a lawyer) at the time and his terminology came from the Hague Regulations. In the seventies, he [] was not using this terminology any longer, so we may all forget it. ‘The choice is reduced to ‘combatant’ or ‘civilian’!’” E-mail message to the author, Nov. 1, 2005. See Richard Baxter, So-called Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs, 28 Brit. Y.B. Int’L & COMM. HUM. Rts 323 (1951); Dörmann, supra n. 100. This term may also be used respecting rebels in a non-international armed conflict. The term is, however, increasingly being abandoned. See the discussion in A, B v. Israel, Supreme Court of Israel, sitting as the Court of Criminal Appeals (June 11, 2008) (Gaza Detainee Case). The court introduces a new test for combatancy: “indirect” participation in hostilities. This is a dangerous extension not supported by the weight of authority. The court’s decision was, however, limited to detention. The term “combatant” in English means someone who takes part in combat. That meaning tracks the more up-to-date usage adopted here. Attempts to substitute other straightforward terms, such as “fighter” have not succeeded, in part because other languages do not reflect a distinction between “fighters” and “combatants”. I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW supra n. 60, at 13. But see Marco Sassoli, The International Legal Framework for Stability Operations: when May International Forces Attack or Detain Someone in Afghanistan?, 39 ISYB. HUM. RTS 177 (2009). Sassoli prefers the term “fighters.” The ICRC defines “enemy combatant” as “a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an international armed conflict.” International Committee of the Red Cross (ICRC), Official Statement, The Relevance of IHL in the Context of Terrorism (Jul. 21, 2005), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/html/terrorism-ihl-210705. However, in its 2005 study of customary international law, the ICRC found:

Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labeled “combatants”. For example, in a resolution on respect for human rights in armed conflict adopted in 1970, the UN General Assembly speaks of
In the case of drone attacks in Pakistan, there will generally be some question as to the identity of persons the U.S. intends to kill with missile strikes. This is not a situation like the invasion of Iraq where U.S. forces met large, organized units of the Iraqi Army outside Baghdad. Outside Baghdad, using drones to launch missile attacks might in fact have protected civilians from bombs dropped from airplanes flying at high altitudes. But can drones ever be precise enough to comply with the rule of distinction in the situation of Western Pakistan? Suspected militant leaders wear civilian clothes. Even the sophisticated cameras of a drone cannot reveal with certainty that a suspect being targeted is not a civilian. The ICRC Interpretative Guidance on Direct Participation in Hostilities points out that in just such a situation, international humanitarian law gives a presumption to civilian status:

[In case of doubt as to whether a [sic] specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. The presumption of civilian protection applies, a fortiori, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict. Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances.]

Even when a drone operator is reasonably certain in the circumstances that his or her target is not a civilian, the United States is obligated to “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.” Little information is available as to whether the U.S. takes any precautions when carrying out drone strikes.

In addition to distinction, the U.S. must also respect the principles of necessity, proportionality and humanity in carrying out drone attacks. “Necessity” refers to military necessity, and the obligation that force is used only if necessary to accomplish a

---

“combatants in all armed conflicts”. More recently, the term “combatant” was used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts. However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.

I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra n. 60, at 12.

In its 2009 interpretative guidance on direct participation in hostilities, the ICRC has introduced new terminology for members of non-state actor military groups: “members of an organized armed group with a continuous combat function.” International Committee of the Red Cross, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 27 (May 2009)[hereinafter ICRC Guidance on DPH]. Somehow one suspects that this will not become the phrase of art on the battlefield. It is imperative, however, to have a clear understanding of who may be lawfully targeted and who may not. Combatants may be targeted. Civilians may not.

103 ICRC Guidance on DPH, at 75-76 (footnotes omitted).

reasonable military objective. “Proportionality” prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.” These limitations on permissible force extend to both the quantity of force used and the geographic scope of its use.

If, as discussed above, drone attacks in Pakistan are fueling interest in fighting against the United States rather than suppressing it, using drones is difficult to justify under the principle of necessity. Most serious of all, perhaps, is the disproportionate impact of drone attacks. Fifty civilians killed for one suspected combatant killed is a textbook example of a violation of the proportionality principle. Even in cases with fewer unintended victims, it makes a difference whether the victims are children, elderly people, in a home, and so on. Proportionality is not just a matter of numbers.

Another principle that provides context for all decisions in armed conflict is humanity. The principle of humanity supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. Again, according the ICRC Guidance, the principles of necessity and humanity are particularly important in situations such as Pakistan:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

In the well-documented case of the attack on Baitullah Mehsud’s in-laws house in August 2009, we see the serious legal problems with the U.S. approach. Reports on the attack say that the CIA carried out the killing. CIA operatives have no legal right to participate in armed conflict killing. The reports indicate U.S. authorities were certain that they correctly identified Mehsud. They reported they could even see that Mehsud was receiving an intravenous transfusion. The very first Geneva Convention of 1864 forbids

---

106 Additional Protocol I, Art. 51(5); see also Additional Protocol I, Art. 35(1): “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”
107 ICRC Guidance on DPH, at 80-81.
108 For a detailed description of the strike, see, Mayer, *supra* n. 1, at 36.
the targeting of the sick and wounded as a basic principle of humanity. The 2005 ICRC study of customary international humanitarian law says,

Rule 47. Attacking persons who are recognized as hors de combat is prohibited. A person hors de combat is:

... 
(b) anyone who is defenceless because of un consciousness, shipwreck, wounds or sickness. ... 109

Without specific medical information regarding his conditions, it is impossible to say whether or not Mehsud’s illnesses rendered him “defenceless” or “hors de combat.” He might have continued to give orders by cell phone. Did the U.S. have such information? As already discussed, Mehsud was, presumably, the only intended target. He is likely the only target about whom the CIA had any detailed information. What did the U.S. know of the others in the house? Reports say a wife, her parents, “seven bodyguards” and one “lieutenant” were also killed. Was that all? What about the uncle, identified as a “medic”? Was anyone else in the house? Were the bodyguards and the lieutenant direct participants in hostilities? At the time of the attack, the “bodyguards” and “lieutenant” were not directly participating in hostilities. The ICRC Interpretative Guidance might still support targeting them if, as appears to have been the case that they were engaged in a continuous combat function. Without this sort of information, however, as the Guidance advises, the U.S. should treat individuals as civilians. In this case, twelve persons were killed in the targeting of one man hooked up to an intravenous drip.

The U.S. has publicized the Mehsud attack, and, therefore, presumably holds the position it was lawful. Yet, the killing raises concerns about possible negative repercussions. If Pakistani forces—police or military—following law enforcement rules had attempted to arrest Mehsud and the members of his organization, Pakistan might have had a chance of gaining information about the organization, to conduct more arrests, to hold trials, and to promote the rule of law in the region. 110 Instead, such U.S. strike may well keep the cycle of violence in motion.

Conclusions

The U.S. use of combat drones in Afghanistan between 2004 and 2009 appears to fall far short of meeting the international law rules governing resort to armed force and the conduct of armed force. 111 The U.S. has used drones in Pakistan to launch significant military attacks, attacks only lawful in the course of an armed conflict. The U.S. has not, however, restricted its attacks to situations of armed conflict. Moreover, Pakistan has neither requested U.S. assistance in the form of drone attacks nor expressly consented to

109 I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra n. 60, at 164; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, art. 3, art. 12.
111 See also, Alston, supra n. 23.
Study on Targeted Killings, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions (Pages 24-25)

Philip Alston, Special Rapporteur on Extrajudicial Killings, Human Rights Council, 14th Session, A/HRC/14/24/Add.6 (May 2010)

Report: Alston addresses the claim that drones’ surveillance capabilities better prevent collateral civilian casualties and injuries, arguing that “[t]he precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.” He describes interviews with witnesses and victims’ family members showing that “international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding.” He concludes that “[o]utside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal.” The full report describes publicly available information about states’ targeted killing policies and the applicable legal framework.

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
• Provide effective advance warning to the civilian population, through leaflets, broadcast warnings, etc. in the areas in which targeted killings may take place. The warnings must be as specific as possible.

• Any such warning does not, however, discharge the obligation to distinguish between lawful targets and civilians. “Warnings are required for the benefit of civilians, but civilians are not obligated to comply with them. A decision to stay put — freely taken or due to limited options — in no way diminishes a civilian’s legal protections.”

• The use of civilians as “shields” is strictly prohibited. But one side’s unlawful use of civilian shields does not affect the other side’s obligation to ensure that attacks do not kill civilians in excess of the military advantage of killing the targeted fighter.

G. The use of drones for targeted killing

79. The use of drones for targeted killings has generated significant controversy. Some have suggested that drones as such are prohibited weapons under IHL because they cause, or have the effect of causing, necessarily indiscriminate killings of civilians, such as those in the vicinity of a targeted person. It is true that IHL places limits on the weapons States may use, and weapons that are, for example, inherently indiscriminate (such as biological weapons) are prohibited. However, a missile fired from a drone is no different from any other commonly used weapon, including a gun fired by a soldier or a helicopter or gunship that fires missiles. The critical legal question is the same for each weapon: whether its specific use complies with IHL.

80. The greater concern with drones is that because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed, and under what circumstances, too expansively. States must ensure that the criteria they apply to determine who can be targeted and killed – i.e., who is a lawful combatant, or what constitutes “direct participation in hostilities” that would subject civilians to direct attack – do not differ based on the choice of weapon.

81. Drones’ proponents argue that since drones have greater surveillance capability and afford greater precision than other weapons, they can better prevent collateral civilian casualties and injuries. This may well be true to an extent, but it presents an incomplete picture. The precision, accuracy and legality of a drone strike depend on the human intelligence upon which the targeting decision is based.

82. Drones may provide the ability to conduct aerial surveillance and to gather “pattern of life” information that would allow their human operators to distinguish between peaceful civilians and those engaged in direct hostilities. Indeed, advanced surveillance capability
enhances the ability of a State’s forces to undertake precautions in attack.\textsuperscript{144} But these optimal conditions may not exist in every case. More importantly, a drone operation team sitting thousands of miles away from the environment in which a potential target is located may well be at an even greater human intelligence gathering disadvantage than ground forces, who themselves are often unable to collect reliable intelligence.

83. It was clear during my mission to Afghanistan how hard it is even for forces on the ground to obtain accurate information. Testimony from witnesses and victims’ family members, showed that international forces were often too uninformed of local practices, or too credulous in interpreting information, to be able to arrive at a reliable understanding of a situation.\textsuperscript{145} International forces all too often based manned airstrikes and raids that resulted in killings on faulty intelligence. Multiple other examples show that the legality of a targeted killing operation is heavily dependent upon the reliability of the intelligence on which it is based.\textsuperscript{146} States must, therefore, ensure that they have in place the procedural safeguards necessary to ensure that intelligence on which targeting decisions are made is accurate and verifiable.

84. Furthermore, because operators are based thousands of miles away from the battlefield, and undertake operations entirely through computer screens and remote audio-feed, there is a risk of developing a “Playstation” mentality to killing. States must ensure that training programs for drone operators who have never been subjected to the risks and rigors of battle instill respect for IHL and adequate safeguards for compliance with it.

85. Outside the context of armed conflict, the use of drones for targeted killing is almost never likely to be legal. A targeted drone killing in a State’s own territory, over which the State has control, would be very unlikely to meet human rights law limitations on the use of lethal force.

86. Outside its own territory (or in territory over which it lacked control) and where the situation on the ground did not rise to the level of armed conflict in which IHL would apply, a State could theoretically seek to justify the use of drones by invoking the right to anticipatory self-defence against a non-state actor.\textsuperscript{147} It could also theoretically claim that human rights law’s requirement of first employing less-than-lethal means would not be possible if the State has no means of capturing or causing the other State to capture the target. As a practical matter, there are very few situations outside the context of active hostilities in which the test for anticipatory self-defence – necessity that is “instant, overwhelming, and leaving no choice of means, and no moment of deliberation”\textsuperscript{148} – would be met. This hypothetical presents the same danger as the “ticking-time bomb” scenario does in the context of the use of torture and coercion during interrogations: a thought experiment that posits a rare emergency exception to an absolute prohibition can effectively institutionalize that exception. Applying such a scenario to targeted killings threatens to eviscerate the human rights law prohibition against the arbitrary deprivation of life. In addition, drone killing of anyone other than the target (family members or others in the vicinity, for example) would be an arbitrary deprivation of life under human rights law and could result in State responsibility and individual criminal liability.

\textsuperscript{144} Michael N. Schmitt, Precision Attack and International Humanitarian Law, 87 Int’l Rev. Red Cross 445 (Sept. 2005).
\textsuperscript{145} A/HRC/11/2/Add.4, paras. 14-18, 70.
\textsuperscript{146} See, e.g., Israel Ministry of Foreign Affairs Website, “Findings of the inquiry into the death of Salah Shehadeh” http://www.mfa.gov.il/MFA/Government/Communiques/2002/Findings%20of%20the%20inquiry%20into%20the%20death%20of%20Salah%20Sh.
\textsuperscript{147}infra III.B.
Session Four B: Challenging Inter-State Cooperation: Detention by Proxy, Renditions and Drone Killings in Pakistan

Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism p. 96-98 (para 187-192)

UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism; Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances (February 2010)

Report: While the “full extent of secret detention in Pakistan is not yet known,” the UN joint report describe investigations revealing the scale: the Pakistani government announced 567 documented cases of “enforced disappearances” and 2008 and a Senate Committee has acknowledged that intelligence agencies maintain “countless hidden torture cells” across the country. Reportedly, about 400 missing persons cases were pending before the Supreme Court as of 2009. The full report describes the problem secret detention in several countries and includes government responses to the joint study’s questionnaire, sent to all UN member states.

“Next Generation” Strategies

Challenging Abuse in Transnational Counterterrorism Practices
special powers to check terrorist and disruptive acts include preventive detention “upon appropriate grounds for believing that a person has to be stopped from doing anything that may cause a terrorist and disruptive act.” Although under the act preventive detention was limited to 90 days, it was extended to up to one year under the ordinance, and lawyers and human rights activists argued that, since detentions could be ordered for a full year without any judicial scrutiny, and because in practice there was no effective civilian control over the issuance of the orders, the free reign of the security personnel to judge who was a “terrorist” was unquestionable.\(^{368}\)

185. In June 2007, the Supreme Court of Nepal issued a ground-breaking ruling in response to petitions for the writ of *habeas corpus* in dozens of cases. It ordered the Government to establish a commission of inquiry into disappearances complying with international standards, to enact a law to criminalize enforced disappearances, to prosecute those responsible for past disappearances and to compensate the families of victims.\(^{369}\)

186. In February 2008, however, the Special Rapporteur on torture noted that, while the systematic practice of holding political detainees incommunicado ended with the April 2006 ceasefire, in 2007 OHCHR documented several cases of detainees accused of belonging to armed groups being held for short periods in unacknowledged, incommunicado detention, in the worst case for 11 days.\(^{370}\)

5. Pakistan

187. The full extent of secret detention in Pakistan is not yet known. In its report submitted to the Human Rights Council in 2008, the Working Group on Enforced and Involuntary Disappearances referred to allegations that the Supreme Court was investigating some 600 cases of disappearances and that, while some of the cases reportedly concerned terrorism suspects, many involved political opponents of the Government. The Supreme Court, headed by Chief Justice Iftikhar Mohammad Chaudhry, publicly stated that it had overwhelming evidence that the intelligence agencies of Pakistan were detaining terror suspects and other opponents. The retroactive application of the Army Act would allegedly allow substantial impunity of those tried for having terror suspects disappear.\(^{371}\)

188. The Working Group also took up the cases of Masood Janjua and Faisal Farz, two of those who had disappeared.\(^{372}\) It was a newspaper report about these men that first prompted the Pakistani Supreme Court, in December 2005, to demand answers from the Government about the whereabouts of those who had disappeared. In August 2006, Masood Janjua’s wife, Amina

---

\(^{368}\) Ibid., paras. 42-48.

\(^{369}\) Follow-up report of the Special Rapporteur on torture (A/HRC/7/3/Add.2), para. 446.

\(^{370}\) Ibid., para. 428.

\(^{371}\) A/HRC/10/9, paras 300-302.

\(^{372}\) Ibid., para. 297.
Masood Janjua, and the mother of Faisal Farz, Zainab Khatoon, founded the organization Defence of Human Rights\(^3\) and filed a petition in the Supreme Court seeking information about 16 people that the organization believed had been subjected to enforced disappearance. By July 2008, the organization represented 563 people who had disappeared.\(^4\) Special procedures have sent communications on a number of cases of alleged secret detention.\(^5\)

189. In a report published in February 2009, the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights reported that at a hearing in Pakistan:

> Repeated reference was made to torture, prolonged arbitrary and incommunicado detention and disappearances allegedly committed by the Pakistani Inter-Services Intelligence (ISI). The Panel heard directly from family members of disappeared people, and the trauma that they are living through was all too apparent. It was claimed that persons are held in unacknowledged or secret detention, that individuals have been rendered to other States (often for financial gain), and that individuals have been interrogated by foreign intelligence personnel while in incommunicado detention. The Panel heard that the ISI is operating to a large extent beyond either civilian or judicial control.\(^6\)

190. The authorities’ resistance to investigations into those held in secret detention reached a low point on 3 November 2007, when President Musharraf suspended the Constitution, imposed a state of emergency, dismissed the entire Supreme Court and imprisoned the judges in their homes along with their families, although there was some improvement in 2008. In May, after the Minister for Law and Justice Farooq Naik promised that the Government would trace all of the people subjected to enforced disappearance, two committees were established for that purpose. In June, the Government declared that 43 disappeared people had been traced in Balochistan, and had either been released or were being held in official detention sites, even though, according to the Government’s own figures, 1,102 people had disappeared in Balochistan province alone.\(^7\)

191. Following the election of Asif Ali Zardari as President on 6 September 2008, on 21 November, the Minister for Human Rights Mumtaz Alam Gilani announced that a new law was being prepared to facilitate the recovery of disappeared people. He stated that his ministry had

\(^3\) See the organization’s website at www.dhrpk.org.


\(^5\) A/HRC/10/44/Add.4, para. 168.


567 documented cases of enforced disappearance. Four days later, on 25 November, the Senate Standing Committee on the Interior acknowledged that intelligence agencies maintained “countless hidden torture cells” across the country. Amnesty International stated that new cases of enforced disappearance continued to be reported in 2009. According to an article published in the newspaper *Dawn* on 5 November 2009, the Islamabad Inspector General of Police Kaleem Imam, the Interior Secretary Qamar Zaman and the Rawalpindi Regional Police Officer Aslam Tareen had appeared before the Supreme Court and reported that cases of 416 missing persons had been pending before the apex court since September 2006. The newspaper indicated that:

Their report said the interior ministry was making hectic efforts to trace the missing persons and 241 people had been traced while 175 were still untraced. It said that complete particulars of missing persons were being collected with the help of Nadra and the lists had been sent to the provinces and law-enforcement agencies to enhance efforts to locate them. A special task force had also been constituted, the report added.

192. In June 2008, the Asian Human Rights Commission identified 52 illegal detention centres in Pakistan, where, it stated, “missing persons are held for long periods of time in order to force them to confess their involvement in terrorist and sabotage activities.”

6. Philippines

193. In its response to the request for relevant information from the four experts (see annex I), the Government of the Philippines drew attention to the Bill of Rights of the 1987 Constitution, enacted after the Revolution of 1986 brought an end to the presidency of Ferdinand Marcos. The Bill explicitly bans “secret detention places, solitary, incommunicado, or other similar forms of detention”. The Government also pointed out that the Human Security Act of 2007, the recent counter-terrorism legislation, provides for stiffer penalties for those who violate its provisions regarding the arrest, detention and interrogation of terrorism suspects. The Government did not provide any information on cases in which these provisions might have been violated.

194. The Committee against Torture noted in its concluding observations on the most recent periodic report submitted by the Philippines under the Convention against Torture, in April 2009, that it was deeply concerned about the de facto practice of detention of suspects by the Philippine National Police and the Armed Forces of the Philippines (AFP) in detention centres, safe houses and military camps.

---


379 See the Commission’s statement at the address www.ahrchk.net/statements/mainfile.php/2008statements/1574/.

380 Secret detention practices were not uncommon during the Marcos presidency (see para. 83 above).

381 CAT/C/PHL/CO/2, para. 12.
“Cruel Brittania: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan” (p. 1-3)
Human Rights Watch (2009)

Report: Documenting the abuse of five UK nationals of Pakistani descent in Pakistan, Human Rights Watch terms the conduct of UK officials who provided information to Pakistani authorities an “invitation to abuse.” UK officials met with the abused individuals “shortly after sessions in which the[y] had been tortured, when it was likely that clear and visible signs of torture were present.” UK officials also “supplied questions and lines of enquiry to Pakistan intelligence sources,” although they knew the individuals were being questioned and that torture is routine in Pakistan. The full report calls on the UK to take several measures, including conditioning its cooperation with Pakistani security and intelligence officials on the “end of torture, enforced disappearance, arbitrary arrests, and other illegality.”

“Next Generation” Strategies
Challenging Abuse in Transnational Counterterrorism Practices
Summary

A key lesson from the past eight years of global efforts to combat terrorism is that the use of torture and ill-treatment is deeply counterproductive. It undermines the moral legitimacy of governments who rely on it and serves as a recruiting sergeant for terrorist organizations. This is recognized in the UK government’s counterterrorism strategy, “CONTEST II,” which asserts that the protection of human rights is central and that the UK’s response to terrorism will be based on the rule of law.

However, this principled and pragmatic assertion of core values is being undermined by the official whitewash surrounding the complicity of UK intelligence and security agencies in torture in Pakistan, with ministers repeatedly rejecting calls for an independent judicial inquiry from a cross-party parliamentary committee and human rights nongovernmental organizations (NGOs) alike. Research by Human Rights Watch and path-breaking investigative reporting by The Guardian newspaper makes it clear that British hands are not clean. The refusal of the government to order an independent and transparent investigation has been an important missed opportunity.

This report provides accounts from victims and their families about the cases of five UK citizens of Pakistani origin—Salahuddin Amin, Zeeshan Siddiqui, Rangzieb Ahmed, Rashid Rauf and a fifth individual who wishes to remain anonymous—tortured in Pakistan between 2004 and 2007. The men were tortured and ill-treated by the military-controlled Inter-Services Intelligence (ISI) agency, the civilian-controlled Intelligence Bureau (IB), or other Pakistani security agencies. Their abuse was part of a longstanding pattern of routine, systematic torture by the Pakistani authorities that has been extensively documented. The accuracy of their accounts of mistreatment has been confirmed by Pakistani and British security and intelligence officials.

Primary responsibility for the use of torture against these individuals lies with the Pakistani authorities. No one in Pakistan has been held accountable. The Pakistani authorities have not prosecuted or disciplined any security officers alleged to have been involved in these incidents, or indeed in any other of the myriad cases of torture. There is no sign that they have even initiated any inquiries. While deeply disappointing, this is hardly surprising—Pakistani and international human rights groups, lawyers, the media, the US State Department, and the United Nations have long documented torture, arbitrary arrests and detention, enforced disappearances, and other human rights abuses by Pakistani government security forces and intelligence agencies taking place with complete impunity.
In Pakistan, torture often follows illegal abductions or “disappearances” by the ISI, other intelligence agencies, the military, or other security services. These practices are systematic and routine, whether in ordinary criminal matters to obtain confessions or information, against political and ideological opponents, or in more sensitive intelligence and counterterrorism cases.

Human Rights Watch has no evidence of UK officials directly participating in torture. But UK complicity is clear. First, it is inconceivable that the UK government was unaware of the systematic use of torture in Pakistan. In the circumstances of the close security relationship between the two countries this would represent a significant failure of British intelligence. Reports by governments, including the United States, reports by NGOs, including Human Rights Watch, court cases in Pakistan, and media accounts put everyone on notice that torture has long been endemic in Pakistan. No one in government in Pakistan has ever challenged this in conversations with Human Rights Watch.

Second, UK officials engaged in acts that virtually required that they knew about the use of torture in specific cases. Four men—Salahuddin Amin, Zeeshan Siddiqui, Rangzieb Ahmed, and an individual who wishes to remain anonymous—have described meeting British officials while detained in Pakistan. In some cases this happened shortly after sessions in which the individuals had been tortured, when it was likely that clear and visible signs of torture were present. For example, Rangzieb Ahmed alleges that he was interrogated by British security officials shortly after three fingernails had been pulled out.

Further, UK officials supplied questions and lines of enquiry to Pakistan intelligence sources in cases in which detainees were tortured. UK officials knew that interrogations of these UK citizens were taking place and that torture was routinely used in interrogations. The UK was also putting pressure on Pakistani authorities for results. In this environment, passing questions and offering other cooperation in such cases without ensuring that the detainees were treated appropriately was an invitation to abuse.

Members of Pakistani intelligence agencies have corroborated Human Rights Watch’s information from detainees that British officials were aware of specific cases of mistreatment. They have said that British officials knew that Pakistani intelligence agencies routinely tortured detained terror suspects—what Pakistani officers described to Human Rights Watch as being “processed” in the “traditional way.” Officials describe being under immense pressure from the UK and the United States to “perform” in the “war on terror,” and have noted “we do what we are asked to do.” Pakistani intelligence sources described Salahuddin Amin, for example, as a “high pressure” case, saying that the British (and
American) agents involved were “perfectly aware that we were using all means possible to extract information from him and were grateful that we were doing so.”

Not only do British officials and agents appear to have been complicit in torture, but their cooperation in the unlawful conduct of the ISI has interfered with attempts to prosecute terrorist suspects in British courts. Rashid Rauf, the alleged mastermind of plans for a second 9/11 involving planes departing Heathrow airport in London, was tortured so badly that British officials quickly realized he could not be prosecuted in a British court. His guilt or innocence has never been established, and never will, since he was reportedly killed in a US drone missile strike in Pakistan in November 2008. If he was indeed guilty, the failure to bring Rauf to justice represents an enormous missed opportunity for intelligence services and the public to learn more about this terror plot.

The UK government’s response has been far from decisive. Rather than investigating the alleged complicity of its intelligence services, the UK government has responded with assurances that it does not use or condone torture and by making general denials to specific allegations. It has never responded to the specific claims made by victims, their lawyers, the media, or Human Rights Watch.

In March 2009, in the face of mounting evidence of UK complicity in torture in Pakistan, Prime Minister Gordon Brown announced that the rules determining how the Security Service (MI5) and the Secret Intelligence Service (MI6) are allowed to interrogate suspects, including strict guidance banning the use of torture, would be published. Brown also said that he had asked parliament’s Intelligence and Security Committee to review any developments and relevant information following allegations that British intelligence officers were involved in the torture of terrorism suspects. “Torture has no place in a modern democratic society. We will not condone it. Nor will we ever ask others to do it on our behalf,” Brown said. The public document, he said, would cover “the standards that we apply during the detention and interviewing of detainees overseas.”

However, the UK government has subsequently backed off publishing the guidance in force at the time of the arrests documented in this report. Announcing this in June 2009, Foreign Secretary David Miliband said that doing so could “give succor to our enemies,” though he offered no compelling reason why this would be so. At the same time, Miliband indicated that the latest version of the rules would be made public once “consolidated and reviewed.” As yet, even these rules remain unpublished.