



ICJ Submission to the Universal Periodic Review (UPR) of the United States of America 9th Session of the Working Group on the Universal Periodic Review - April 2010

The ICJ welcomes this opportunity to present its submission to the UPR of the United States. This review is of importance as it represents the first chance for the Human Rights Council to take stock of US counter-terrorism laws, policies and practices since the new administration took office in 2009. The ICJ urges this Council to define clear benchmarks for the protection of human rights in the fight against terrorism. In its report *Assessing Damage, Urging Action*, the Eminent Jurists Panel provided a detailed analysis of the ‘war on terror’ paradigm used by the past administration and the human rights violations grounded in it, and called for the repudiation of this paradigm and the laws, policies and practices that have arisen from it.ⁱ

The ICJ recognizes that the US has taken steps to address certain extra-legal practices such as torture and cruel, inhuman or degrading treatment; the CIA secret detention program. It recognizes that the US has limited the rhetoric of a ‘war on terror’, which had questioned the validity of international human rights and humanitarian law, and has stressed that there is no contradiction between upholding human rights and ensuring security. These developments are to be welcomed. However, the ICJ draws the attention to the continuation of many legal policies concerning the detention, trial and transfer of persons held pursuant to counterterrorism action that are based on an over-inclusive or erroneous application of the international law of armed conflict. Above all, the ICJ wishes to attention to the persistent impunity and lack of accountability for serious human rights violations and crimes under international law.

The UPR should lead to an affirmation of human rights law in counter-terrorism. The ICJ urges the US to recognize the extra-territorial application of human rights law and, in cases of genuine armed conflict, the dual applicability with humanitarian law—two principles that are firmly recognized under international law.ⁱⁱ While the Executive Order of January 2009 confirmed that the protections of Common Article 3 of the Geneva Conventions apply to all individuals detained in any armed conflictⁱⁱⁱ, the ICJ considers that all such persons, however categorized, should also be treated in line with the guarantees contained in articles 4-6 of Additional Prot II and article 75 of Additional Prot I, which the US has historically considered to form part of customary international law, and those contained in human rights law.^{iv} The ICJ would also underscore that many detainees have been held outside of armed conflict, and it is the protection of human rights law, not international humanitarian law, that must be accorded to those detainees.

The Working Group and the Human Rights Council should urge the Government to:

- **Recognize and give effect to the extra-territorial application of international human rights treaties to situation in which it exercises effective control or authority over territory or persons;**
- **Recognize and give effect to the dual applicability of human rights and international humanitarian law in case of actual armed conflicts.**

Impunity for torture and other ill-treatment, disappearances and arbitrary, including secret, detention

The Human Rights Council should as a priority urge the US administration to end impunity for serious human rights violations and crimes under international law, such as torture and enforced disappearances. International law entails a positive obligation to investigate all allegations of war crimes, torture, enforced disappearance and other serious human rights violations and violations of international humanitarian law with the aim of bringing those responsible to justice.^v These investigations should extend to those who authorized, participated in or were complicit in such practices.^{vi} Superior orders or similar defenses, such as reliance on legal advice, do not preclude individual responsibility for crimes under international law.

There is ample evidence of the US' use of torture; cruel, and inhuman or degrading treatment; enforced disappearance, including that accompanied by secret detention; prolonged arbitrary detention and "extraordinary renditions" constituting multiple human rights violations. These violations resulted from official policies and some, such as secret detentions and interrogation techniques amounting to torture or acts of cruel, inhuman or degrading treatment, have been officially acknowledged. A prosecutor was assigned to investigate some of these violations in summer 2009, but the Department of Justice (DOJ) has made clear that this investigation would not result in prosecutions of those who acted in 'good faith' and in accordance with the legal advice provided by the Office of Legal Counsel (OLC) regarding the interrogations of detainees.^{vii} Given that the OLC provided advice that authorized acts clearly amounting to torture or equally prohibited forms of cruel, inhuman or degrading treatment, the ICJ is concerned that the scope of the investigations will be so narrow as to preclude any meaningful form of accountability. More than misguided legal advice, the OLC memos have served to immunize those who engaged in clear human rights violations against legal challenges. In this regard, the ICJ is also concerned by the DOJ's decision not to recommend legal or other disciplinary actions against the legal architects of these interrogation policies—a decision that contradicts the findings of the DOJ's own ethics committee, and which makes criminal investigations for possible complicity in torture as required by article 4 CAT unlikely.^{viii}

The Working Group and the Human Rights Council should urge the Government to:

- **Undertake a comprehensive and effective independent investigation with the aim of bringing to justice those responsible for crimes under international law, including war crimes, torture and enforced disappearances, including those who authorized, aided and abetted or were otherwise complicit and those who executed these violations;**
- **Commit to co-operate with ongoing investigations and prosecutions in other countries through mutual legal assistance and to prosecute or extradite those accused of crimes under international law.**

Ensuring the right to remedy and reparation

The lack of criminal investigations is matched by the lack of respect for the right to a remedy and reparation for victims of serious human rights violations.

The ICJ is concerned that the government continues to obstruct access to justice through the invocation of national security doctrines or state secrets privileges in ways that seek to deprive victims of practices such as extraordinary renditions, secret or other incommunicado detention, torture or other cruel, inhuman or degrading treatment of their right to an effective remedy. Statutory limitations, such as those found in the Military Commissions Act (MCA), also serve to deprive current and former detainees of 'any remedy as to their treatment, trial or conditions of confinement'.^{ix} While the Supreme Court has recognized that Guantanamo detainees have a constitutional right to challenge the lawfulness of their detention through *habeas corpus* proceedings, lower courts have so far considered that the above-quoted provision of the MCA precludes any judicial remedy in cases involving ill-treatment suffered during capture, transfer or detention.^x The administration also continues to invoke national security, foreign relations concerns or war powers prerogatives to preclude detainees from seeking civil remedies for such ill-treatment under US common law.^{xi} Also of concern are invocations of state secrets privileges in suits seeking remedies for participation, including through conduct of complicity, in enforced disappearances by means of "extraordinary rendition", torture or cruel, inhuman or degrading treatment. Despite December 2009 policy reforms intended to address excessive secrecy in the classification of documents^{xii}, the government continues to assert state secrets privileges in ways that prevent courts from considering detainees' cases, and has suggested in recent litigation that the privilege could preclude the courts' consideration of 'secret' information even if that information is in fact already public.^{xiii} In addition, the ICJ is concerned that the US may be exerting pressure on other countries to prevent their disclosure of information concerning complicity in torture and other serious human rights violations in the context of intelligence cooperation.^{xiv}

The ICJ recalls that full compliance with the right to a remedy and reparation includes as necessary, measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.^{xv} As of the date of this submission, no reparation has been provided even in those cases in which human rights violations have been well documented.

The Working Group and the Human Rights Council should urge the Government to:

- **Provide victims of human rights violations including torture and other ill-treatment, arbitrary detention, including secret detention and enforced disappearances with an effective remedy and reparation;**
- **Modify existing legislation, such the Military Commission Act, or adopt new legislation to ensure provisions that remedies are not excluded for serious human rights violations in relation to the treatment, transfer, trial or conditions of confinement of detainees;**
- **Ensure that state secrets privileges and other national security considerations are not used to prevent judicial accountability for serious human rights violations or to deprive victims of such violations of their right to a remedy and reparation;**
- **Disclose information about its program of secret detention and “extraordinary rendition” to enable victims to exercise effective remedies, and cooperate with requests for legal assistance from other jurisdictions in civil or criminal cases.**

Prohibition of torture, cruel and inhuman or degrading treatment

The Executive Order on Ensuring Lawful Interrogations recommitted the US to respecting the absolute prohibition on torture as regards all persons within US custody. The order stipulated that treatment in US custody should be ‘*consistent with requirements of ... the CAT, Common Article 3, and other laws regulating the treatment and interrogations of individuals detained in any armed conflict*’.^{xvi} The order ordered the CIA to close any detention facilities then operating and mandated that no individual detained by the US in an armed conflict may be subjected to any interrogation technique not listed in the Army Field Manual. The ICJ recognizes these steps but wishes to draw attention to a number of remaining concerns.

Although the Army Field Manual^{xvii} prohibits a range of abusive interrogation methods, it permits several physically and psychologically coercive techniques such as implied threats (including ‘false flag’ in which the detainee is misled regarding his interrogator’s nationality).^{xviii} It also permits sleep deprivation (to 4 hours in every 24 hours, potentially for 30 days or longer) in combination with a regime of ‘separation’ in which detainees are held in isolation (potentially for 30 days or longer).^{xix} These techniques – especially when used in combination – violate the prohibition on torture and cruel, inhuman and degrading treatment.

The ICJ remains concerned about narrow definitions of torture and cruel or inhuman treatment under US law. Both the Torture Act and the War Crimes Act require that an action must be ‘*specifically intended to inflict severe physical or mental pain or suffering*’ in order for liability for torture to result; article 1 CAT, by contrast, requires only a finding of general intent.^{xx} The War Crimes Act, as amended in 2006, defines ‘*serious physical pain or suffering*’ (‘serious’ being a lower threshold than ‘severe’, the term found in the torture provision) in an extraordinarily restrictive manner, stating that only bodily injuries involving ‘*extreme physical pain*’, dismemberment, disfigurement, burns or ‘*a substantial risk of death*’ will qualify.^{xxi} Severe mental pain or suffering is defined narrowly as the prolonged mental harm caused by or resulting from ‘*the intentional infliction or threatened infliction of severe physical pain or suffering*’; ‘*the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality*’; threats of imminent death or threats that another person will be subjected to any of these techniques.^{xxii}

The ICJ welcomes the steps taken by the US to end the policy of secret detention and some of the worst abuses arising out of the unlawful practice of rendition. However, detainees may still be held in military Special Operations camps incommunicado and in secret for up to two weeks, including without ICRC notification, and the CIA may still hold detainees on a ‘*short-term, transitory basis*’.^{xxiii} The ICJ draws the attention to the fact that reforms have kept in place an unlawful rendition program and thus far led only to the introduction of certain safeguards against renditions to torture, while leaving open the possibility of a variety of informal transfers or renditions, including for intelligence purposes.^{xxiv} The ICJ is concerned about the US’ reliance on “*diplomatic assurances*” in this context which serves effectively to circumvent the *non-refoulement* principle where there are real risks of serious human rights violations. The ICJ also shares the recommendations of the joint study on secret detentions^{xxv}, according to which the US has not

yet disclosed sufficient information about its secret detention policies, including who has been subjected to secret detention, where such facilities were located and to what locations persons have since been transferred. The ICJ considers it vital that clear rules govern intelligence cooperation, that ensure that US officials do not become complicit in human rights violations committed by foreign intelligence agencies.

The Working Group and the Human Rights Council should urge the Government to:

- **Revise the Army Field Manual to ensure that authorized interrogation techniques do not result in torture or cruel, inhuman or degrading treatment, especially if applied in combination;**
- **Revise the definitions of torture and cruel or inhuman treatment in all legislative acts to ensure compliance with the requirements under the Convention Against Torture, and to withdraw the relevant reservations to the Convention Against Torture;**
- **Provide information on the locations and names of detainees who have been subjected to enforced disappearances, include by means of secret detention or “extraordinary rendition”;**
- **Request information on transfers/renditions that may still be practiced, including for intelligence purposes, and to call for the full respect of the principle of *non-refoulement*;**
- **Provide the Human Rights Council with information regarding any measures or guidelines the Government may have in place to prevent future complicity in serious human rights violations in the context of intelligence cooperation.**

Ending arbitrary detention in counter-terrorism

The ICJ welcomed the order to close the facility at Guantanamo Bay, and regrets that the deadline has not been met. The ICJ stresses, however, that it is above all the continuation of the legal regime of arbitrary detention and trial by military commissions, more than the venue in which these practices take place that is of concern. The US has announced that it will continue to hold detainees in administrative detention^{xxvi}; at the time of writing, it is unclear whether such administrative detention will be limited to those already held in Guantanamo Bay or whether the US will seek general administrative detention legislation which would apply in the future to detained persons. The ICJ considers that such prolonged and potentially indefinite administrative detention of persons without trial or charge violates article 9 ICCPR.

The ICJ is also concerned about the arbitrary detention of detainees who have been “cleared for release” but are not able to return to their home countries, either because of risks to them or because the US will not return persons to certain countries. For example, it has suspended transfers to Yemen, even of detainees cleared for release. The US has contended that even where a court makes a determination pursuant to a *habeas petition* that there is no lawful basis for a person detention, it is not required to release the person. It has refused to release any detainee into the US, and so will continue to hold persons even after a successful habeas petition, either because the person faces a risk of torture in his home country or is a national of a state of which the US will not transfer detainees and has not been accepted by a third country for resettlement.^{xxvii} Human rights law requires the rights to an effective remedy and to challenge the lawfulness of detention; these rights entail the ability to obtain an immediate release upon a finding that detention is not justified, including - in the absence of other viable options – a release into the US itself.^{xxviii}

Guantanamo Bay is not the only facility in which persons remain arbitrarily detained. A concern is the detention of approximately 600 individuals in US facilities in Bagram and in Iraq. In respect of Bagram, the US revised regulations for detention and review for those detained.^{xxix} While these regulations represent an improvement, they continue to fall short of the requirements of article 9 (1) (4) ICCPR, and exclude judicial review of any detention. The new system assigns a military officer to each detainee as a ‘personal representative’, but does not permit detainees to seek the assistance of either military or civilian legal counsel. Detention is reviewed by a board of three officers part of the military chain of command, who are not required to possess legal qualifications. While detainees will receive notice of the reasons for their internment and are allowed to call witnesses who are ‘reasonably available’, there remain numerous limitations that are likely to limit the fairness of these procedures in practice, as detainees appear to have no means of appealing against decisions of the review board. The rules fail to exclude information that may have been obtained through torture or cruel, inhuman or degrading treatment. The review board itself fails to enjoy institutional independence, and thus cannot guarantee the impartiality of its decisions. In addition,

the US continues to prevent judicial scrutiny of detention in Bagram and is challenging court rulings finding that some detainees held in Bagram have the right to seek writs of habeas corpus.^{xxx}

The ICJ is particularly concerned that those detained in Bagram include a number of individuals who were not detained in the context of the armed conflict in Afghanistan, but may have been subsequently transferred to the country for the purpose of detention. In this regard, the ICJ wishes to draw the Working Group's attention to the overriding concern that rules on the detention, treatment and trial of persons held at Guantanamo Bay or Bagram Airbase remain based on an impermissibly expansive definition of belligerency. While the government has replaced the designation of '*unlawful enemy combatant*' with that of '*unprivileged enemy belligerent*'^{xxxii}, this has resulted in no significant substantive change in the designation of persons who can be subjected to detention or trial under those rules. The definition of unprivileged enemy belligerent continues to cover not only persons engaged and apprehended in a recognized armed conflict such as those in Afghanistan or Iraq, but also persons suspected of providing 'substantial support' to al-Qaeda, the Taliban or associated forces, regardless of where such support was allegedly provided; thus, the definition may permit the apprehension and detention of persons anywhere in the world, irrespective of their participation in an armed conflict as recognized under international law.

The Working Group and the Human Rights Council should urge the Government to:

- **Close the facility at Guantanamo Bay; try those persons who may be charged with a recognizable offence under international law in accordance with international standard of fair trial; release all other persons either to their home states; through resettlement in third states in conformity international human rights law, or into US territory if no other options are available;**
- **End the system of administrative detention without charge or trial outside recognized armed conflicts and refrain from enacting general legislation on permitting administrative detention;**
- **Provide independent and impartial judicial review to challenge detention in the armed conflict in Afghanistan and Iraq and allow for the right to legal representation;**
- **Review all definitions of 'unprivileged enemy belligerent' to bring them into full compliance with the requirements of international humanitarian law.**

Trial by military commissions

The administration expressed initially a preference for trials before civilian courts for detainees held in Guantanamo Bay, but has retained the system of military commissions, and designated new persons to be tried under the commission, without providing any criteria as to the basis for determining which detainees will be tried before ordinary courts and before military commissions. The MCA has been amended some procedural rules, by excluding statements obtained through torture or cruel or inhuman treatment,^{xxxiii} and it limits (although does not entirely exclude) the use of hearsay evidence and coerced testimony; it also provides defendants with better access to evidence. However, these steps are insufficient to ensure the right to a fair trial by an independent, impartial and competent tribunal (Art. 14 ICCPR). It is to note that military commissions remain embedded in the military chain of command. The ICJ is also concerned that the military commissions retain jurisdiction over persons who have not been engaged in actual armed conflict and who therefore must be considered civilians under international law. Civilian courts in the US are perfectly capable of addressing complex forms of criminality such as terrorist acts, whereas military commissions have not secured meaningful processes or credible convictions in over seven years.

The Working Group and the Human Rights Council should urge the Government to:

- **Repeal the system of military commissions; grant exclusive jurisdiction to civilian courts, prohibit the extension of military jurisdiction to civilians; ensure full compliance with article 14 ICCPR.**

ⁱ *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, 2009, at 49-65 (EJP report).

ⁱⁱ HRC, General Comment No 31, Nature of Legal Obligations Imposed on States Parties, CCPR/C/21/Rev.1/Add.13, 26 March 2004, para.10. International Court of Justice, Advisory Opinion of 9 July 2004, Legal Consequences of the Construction of a Wall, ICJ Reports 2004, p.136, para.10, EJP report, supra, at 56.

ⁱⁱⁱ The White House, Executive Order: Ensuring Lawful Interrogations, 22 January 2009.

^{iv} Eminent Jurist Panel, supra, at 58.

^v See Human Rights Committee, General Comment No 31, Nature of Legal Obligations Imposed on States Parties, CCPR/C/21/Rev.1/Add.13, 26 March 2004.

^{vi} See for example the requirements of article 4 CAT.

^{vii} Statement of Attorney General regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, <http://www.justice.gov/ag>.

^{viii} See US House of Representatives, Committee on the Judiciary, DOJ Report on Bush Administration Interrogation Memos and Related Documents http://judiciary.house.gov/issues/issues_OPRReport.html.

^{ix} See U.S.C. § 2241(e)(2) (2008) 'Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.'

^x See, e.g., *Al-Zahrani v. Rumsfeld*, 2010 WL 535136 (D.D.C. Feb. 16, 2010); *Tumani v. Obama*, 598 F.Supp.2d 67 (D.D.C. 2009); *Al-Adahi v. Obama*, 596 F.Supp.2d 111 (D.D.C. 2009).

^{xi} See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 574-82 (2nd Cir. 2009); *Rasul v. Myers*, 563 F.3d 527, 532 n. 5 (D.C. Cir. 2009); *Al-Zahrani*, *supra* note 14, at *9-10 (D.D.C. Feb. 16, 2010). Brief of the United States as *Amicus Curiae* at 11-18, *Padilla v. Yoo*, No. 09-16478 (9th Cir. Dec. 3, 2009).

^{xii} White House, Executive Order, Classified National Security Information, 29 December 2009.

^{xiii} See *Jeppesen Dataplan*, *supra* note 16, at 958-60; Redacted, Unclassified Brief for United States on Rehearing *En Banc* at 33-42, *Mohamed v. Jeppesen Dataplan*, No. 08-15693 (9th Cir. Nov. 13, 2009). Generally on the invocation of secrecy, see Eminent Jurists Panel, *supra* note 1, at 85-89.

^{xiv} *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 2973 (Admin); *R (Binyam Mohammed) v Secretary of State for Foreign and Commonwealth Affairs* [2009] WEHC 2549 (Admin).

^{xv} *UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24.

^{xvi} The White House, Executive Order: Ensuring Lawful Interrogations, 22 January 2009.

^{xvii} Department of the Army, Field Manual No. 2-22.3: Human Intelligence Collector Operations (2006).

^{xviii} Army Field Manual 2-22.3, *supra* note, at M-2, M-30, 8-37, 8-69.

^{xix} *Id.* at M-29, M-30. The manual provides that the use of solitary confinement 'must not preclude the detainee from getting four hours of continuous sleep every 24 hours', a regulation that may be interpreted as permitting sleep deprivation, particularly considering that the manual is silent as to whether a detainee could be permitted to sleep for four hours and then interrogated for 40 hours before being permitted to sleep again. *Id.* at M-30. Additionally, although the manual states that sensory deprivation is prohibited, it permits the use of blindfolds, earmuffs, and goggles to isolate detainees for 12 hours or more if placement in solitary confinement is not physically possible. *Id.* at M-26, M-27, M-29, M-30.

^{xx} 18 U.S.C. § 2340 (2004) (emphasis added); 18 U.S.C. § 2441(d)(1)(A) (2006); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (hereinafter CAT).

^{xxi} 18 U.S.C. § 2441(d)(2)(D).

^{xxii} 18 U.S.C. § 2340(2).

^{xxiii} The White House, Executive Order: Ensuring Lawful Interrogations, 22 January 2009; Eric Schmitt, U.S. Shifts, Giving Names of Detainees to the Red Cross, *New York Times*, August 23, 2009, at A 1.

^{xxiv} Johnston, U.S. Says Rendition to Continue, *NY Times*, 24 August 2009, <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>; DOJ, Special Task Force on Interrogations and Transfer Policies, Recommendations to the President, 24 August 2009.

^{xxv} Joint study on global practices in relation to secret detention in the context of countering terrorism, A/HRC/13/42, 26 January 2010, section 2 (g).

^{xxvi} Remark by President Obama at the National Archives, 21 May 2009.

^{xxvii} See the governments brief in *Kiyemba v. Obama*, Supreme Court, No. 08-1234.

^{xxviii} Brief of Amici Curiae Amnesty International, International Commission of Jurists, Human Rights Watch in Support of Petitioners, http://www.icj.org/IMG/08-1234_Amicus_Brief.pdf.

^{xxix} See Detainee Review Board Procedures at Bagram Theater Internment Facility, Afghanistan, attached as an appendix to Brief of Respondent-Applicants appeal to US Court of Appeals for the District of Columbia, *Al Maqaleh v. Gates*, Nos 09-5266, 09-5277, September 14, 2009.

^{xxx} The government appealed the ruling in *Al Maqaleh v. Gates* of the US District Court for the District of Columbia that held that non-Afghan detainees held at Bagram could invoke *habeas corpus* in the US courts. These detainees had been captured outside of Afghanistan and thus could not legitimately be deprived of the right to *habeas corpus* review by moving them to the battlefield for the purposes of detention. See also the decision of the District Court, which is equally appealed in *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69, 76 (D.D.C. 2009) which rejected the category of substantial support as an independent basis for detention.

^{xxxi} Detainee Review Board Procedures at Bagram Theater Internment Facility, Afghanistan, attached as an appendix to Brief of Respondent-Applicants appeal to US Court of Appeals, *Al Maqaleh v. Gates*, Nos 09-5266, 09-5277, September 14, 2009. The authority to detain includes 'persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the attacks' and those 'who were part of, or substantially supported, Taliban or al Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.'

^{xxxii} House of Representatives, National Defense Authorization Act for Fiscal Year 2010, Report 11-228.