



REPRIEVE



August 3, 2009

Mr. Manfred Nowak
Special Rapporteur on Torture
Office of the High Commissioner for Human Rights
Palais Wilson
8-14 Avenue de la Paix
1211 Genève 10

BY EMAIL: bkainz@ohchr.org
BY FAX: +41 22 917 9006

RE: Appeal for Intervention Regarding the Enforced Disappearance of Mr. Mustafa Setmariam Nassar

This communication concerns the government of the **United States of America**, state party to the International Covenant on Civil and Political Rights since 8 September 1992 (Reservations, articles 5-7, 10 (2.3), 15 (1), 19, 20, 27, 47) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 21 October 1994 (Reservations, articles 1, 3, 10-14, 16, 30)

And the **Government of Pakistan** signatory to the International Covenant on Civil and Political Rights since 17 April 2008 and signatory to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 17 April 2008

And the **Government of Syria** state party to the International Covenant on Civil and Political Rights since 21 April 1969, and state party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since 19 August 2004

(Mr. Nassar's case is also being submitted to the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism)

Dear Mr. Nowak,

We write regarding the case of Mr. Mustafa Setmariam Nassar, a Spanish citizen of Syrian origin forcibly disappeared some time in October 2005.

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We wish to bring this case to your attention because of your mandate and in an effort to locate Mr. Nassar, and thereby alleviate both his suffering and that of his wife and young family who have not heard of him since his enforced disappearance on an unknown date in 2005.

We request that you take up Mr. Nassar's case with the governments of the United States, Pakistan, and Syria clarify with them the allegations contained in this letter, and inquire as to Mr. Nassar's current location and status. In particular, we ask that you fully investigate the specific circumstances of Mr. Nassar's enforced disappearance. Based on media reports these three governments were either involved in Mr. Nassar's enforced disappearance and/or may have information pertinent to your inquiries. Our detailed requests are set forth at the end of this communication.

We enclose copies of the following documentation relevant to this communication:

- a. Declaration of Steven Macpherson Watt in *Mohamed v Jeppesen* in Opposition to United States Government's Motion to Dismiss or in the Alternative, Summary Judgment, Dec. 14, 2007 (N.D. Ca. 2005) (No. 5:07-cv-02798)
- b. Letter from Human Rights Watch to former President G.W. Bush dated February 26, 2007
- c. Response of the United States to Human Rights Watch dated September 6, 2006
- d. Letter from the ACLU to Director of Central Intelligence, Leon Panetta, dated April 8, 2009
- e. Response of Director of Central Intelligence dated June 10, 2009

THE AUTHORS OF THIS COMMUNICATION

The American Civil Liberties Union Foundation ("ACLU") is a non-profit legal organization that educates the public about human rights and civil liberties and that employs lawyers who provide legal representation free of charge in cases involving civil and human rights. The ACLU has filed two federal court cases challenging the "extraordinary rendition" program, and another before the Inter-American Commission on Human Rights. In addition, we have been involved in other advocacy efforts to end the program including public education and outreach and legislative advocacy.¹

Reprieve uses the law to enforce the human rights of prisoners, from death row to Guantánamo Bay. Reprieve investigates, litigates and educates, working on the frontline, providing legal support to prisoners unable to pay for it themselves. Reprieve promotes the rule of law around the world, and secures each person's right to a fair trial. In doing so, Reprieve saves lives. Reprieve prioritises the cases of prisoners accused of the most extreme crimes, such as acts of murder or terrorism, as it is in such cases that human rights are most likely to be

¹ Further information on this litigation and related advocacy can be found at www.aclu.org/rendition.

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jettisoned or eroded. Reprieve focuses on cases involving the world's most powerful governments, especially those that should be upholding the highest standards when it comes to fair trials.

Alkarama (Dignity) for Human Rights is a human rights organization devoted to promoting and protecting human rights in the Arab world, including Morocco. Alkarama participates in all United Nations human rights procedures, including submission of communications and reports to the Special Procedures and Treaty bodies as well as the newly established Universal Periodic Review (UPR).

SUMMARY OF FACTS

Mr. Nassar is a 42 year old Spanish citizen of Syrian origin, married to Helena Moreno Cruz, also a Spanish citizen. Mr. Nassar is considered an influential theorist and intellectual in the Islamist movement. Law enforcement authorities in the United Kingdom, Spain and the United States have long suspected Mr. Nassar of having been involved in a number of terrorist acts, including the September 11 attacks against the United States. According to media reports, in October 2005, Mr. Nassar was apprehended by Pakistani intelligence in Pakistan and handed over to U.S. officials. Mr. Nassar has not been heard of since this time. His wife, Ms. Cruz, has requested information from the United States on her husband's whereabouts, but the United States has stated that it can neither confirm nor deny such information because it is classified.

KEY FACTS RELATING TO MR. NASSAR'S ENFORCED DISAPPEARANCE

Due to the nature of the situation, the following account is based on conversations with Ms. Cruz, whom the ACLU and Reprieve legally represent, and on media reports.

BACKGROUND INFORMATION ON MR. NASSAR²

Mr. Nassar was born in Aleppo, Syria in the late 1950s.³ He studied mechanical engineering at the University of Aleppo for four years, until 1980.⁴ In the early 1980s, Mr. Nassar fled Syria following his involvement in a failed attempt by the Muslim Brotherhood to overthrow the government then in power.⁵ In 1985 he arrived in Spain, where he traded in leather and Arab

² See generally, Brynjar Lia – ARCHITECT OF GLOBAL JIHAD: THE LIFE OF AL QAEDA STRATEGIST ABU MUS'AB AL-SURI, London: Hurst 2007.

³ José Yoldi, *Garzón ordena buscar al español Setmarián, 'número 4' de Al Qaeda*, *El País*, April 14, 2009, available at http://www.elpais.com/articulo/espana/Garzon/ordena/buscar/espanol/Setmarián/numero/Qaeda/elpepiesp/20090414/elpepinac_10/Tes

⁴ Lia, *supra* note 2, at 34.

⁵ Craig Whitlock, *Architect of New War on the West*, *The Washington Post*, May 23, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/22/AR2006052201627.html>.

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goods in a market in Madrid. During this time he also wrote extensively.⁶ In the late 1980s he met Helena Moreno Cruz, a Spanish citizen, at Madrid's Escuela Oficial de Idiomas.⁷ They were married shortly afterwards,⁸ and he subsequently took Spanish citizenship.⁹ Mr. Nassar and his wife have four children, all Spanish citizens.¹⁰ Since his marriage, Mr. Nassar and his family have lived in a number of countries including the United Kingdom, Afghanistan and Pakistan. Mr. Nassar has authored a number of books and other publications on Islam and jihad, and is viewed as an influential theorist and intellectual in the Islamist movement.¹¹

U.S. INTEREST IN MR. NASSAR

Official U.S. documents and web postings, as well as media reports, indicate that the United States has long been interested in capturing Mr. Nassar. These same documents and postings also suggest that Mr. Nassar was in fact captured and that the United States government was either involved in his capture or is cognizant of his current whereabouts. The former U.S. administration pursued Mr. Nassar at least since November 2004, when it offered a \$5 million reward for information relating to his capture as part of its "Rewards for Justice" program.¹² In January 2005 --- months before Mr. Nassar's reported capture in Pakistan --- the U.S. Embassy in Pakistan reiterated this offer by posting a notice for a \$5 million reward in a prominent Pakistani newspaper.¹³ Around the time of his reported capture, the Government removed Mr. Nassar's name from the "Rewards for Justice" list, and withdrew the \$5 million reward for information leading to his arrest. It also removed his name from the FBI's "most wanted" list. The website of the U.S. National Counterterrorism Center confirms that Mr. Nassar was captured in Pakistan in November 2005.¹⁴

More recently in June 2009, in response to a request by Spanish Judge Baltazar Garzon made through Interpol for information on Mr. Nassar's whereabouts, the U.S. Federal Bureau of Investigation informed Judge Garzon that Mr. Nassar was not then in the United States.¹⁵ The

⁶ José María Irujo, *En una cárcel secreta: Un 'yihadista' en el limbo*, El País, May 18, 2008, available at

http://www.elpais.com/articulo/reportajes/yihadista/limbo/elpepusocdmg/20080518elpdmgrep_1/Tes?print=1.

⁷ *Id.*

⁸ José María Irujo, *El Hombre de Bin Laden en Madrid*, El País, March 2, 2005, available at www.elpais.es/comunes/2005/11m/08_comision/libro_electronico_red_islam/red_islamista_01%20doc.pdf at 15-16. See also, Lia, *supra* note 2, at 54, 56.

⁹ Irujo *Id.*

¹⁰ *Id.* at 19.

¹¹ For example, a 1,600-page volume titled, *The Call for a Global Islamic Resistance*, has been available on the Internet since December 2004. Whitlock, *supra* note 5. See also, Lia *supra* note 2 at 485-93 (bibliography of Nassar's writings).

¹² Lia, *supra* note 2, at 321.

¹³ *Id.*

¹⁴ The National Counterterrorism Center, Counterterrorism Calendar 2009, Captured or Killed as of December 2008, available at www.nctc.gov/site/profiles/capture.html (last visited Jun. 18, 2009).

¹⁵ Yoldi, *supra* note 3; José Maria Irujo, *El FBI asegura que Setmariam "no está en territorio de EE UU*, El País, June 7, 2009, available at

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FBI did not, however, address whether Mr. Nassar may be held in U.S. custody elsewhere or whether it knows where he was then held.

These official documents, web postings and media reports lead reasonably to the conclusion that the U.S. participated in Mr. Nassar's apprehension in Pakistan and that it should be aware of his current whereabouts.

THE CIRCUMSTANCES LEADING UP TO AND INCLUDING MR. NASSAR'S ENFORCED DISAPPEARANCE

The exact circumstances surrounding Mr. Nassar's enforced disappearance have never been officially confirmed but have been the subject of numerous media reports. These reports indicate that Mr. Nassar was apprehended and detained in Pakistan in or around October 2005 by agents of the Pakistani government and that shortly thereafter he was transferred to the exclusive custody and control of agents of the United States government.¹⁶ In November, 2005, reports suggest that Mr. Nassar was taken to the U.S. military base on Diego Garcia, an island in the Indian Ocean owned by the United Kingdom and leased, in part, to the United States.¹⁷ Recent, unconfirmed reports suggest that Mr. Nassar may be held *incommunicado* in Syria.¹⁸

Although media reports on Mr. Nassar's enforced disappearance are scarce, and some times conflicting, they strongly suggest that Pakistan participated in Mr. Nassar's initial apprehension in Pakistan; that officials from both the Pakistani and U.S. governments were involved in his detention for a period in Pakistan, and that he was subsequently handed over to the exclusive control of the United States and held for a period at a facility in Diego Garcia.

THE U.S. "EXTRAORDINARY RENDITION" PROGRAM

The circumstances of Mr. Nassar's apprehension and enforced disappearance are consistent with numerous other documented cases. Like those cases, Mr. Nassar's was carried out as part of a broader counter-terrorism, intelligence gathering program initiated and developed by the United States in the aftermath of the September 11 terrorist attacks. This program, commonly known as the "extraordinary rendition" program, was devised and developed by the government of the United States in cooperation with governments around the world.¹⁹

http://www.elpais.com/articulo/espana/FBI/asegura/Setmarian/territorio/EE/UU/elpepuesp/20090607elpepinac_9/Te

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¹⁶ See e.g., Irujo, *supra* note 8. See also, The National Counterterrorism Center, Counterterrorism Calendar 2009, *supra* note 14; William Maclean, *Al Qaeda ideologue in Syrian detention – lawyers*, Reuters, June 10, 2009, available at <http://www.reuters.com/article/latestCrisis/idUSLA456186>.

¹⁷ Yoldi, *supra* note 3; Irujo, *supra* note 6 (citing reports from ex-CIA officials).

¹⁸ Maclean, *supra* note 16.

¹⁹ For further information on the "extraordinary rendition" program, including its origins and operation see generally www.aclu.org/rendition; Jane Mayer, *Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program*, The New Yorker, Feb. 14, 2005; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, American Civil Liberties Union – 125 Broad Street, 18th Floor – New York, NY 10004

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On January 22, 2009, President Barack Obama signed an Executive Order that ordered all CIA detention facilities closed.²⁰ The order also commits the President to ensuring that “the practices of transferring individuals to other nations . . . comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control.”²¹

OFFICIAL ATTEMPTS TO ASCERTAIN MR. NASSAR’S WHEREABOUTS

On February 26, 2007, Joanne Mariner, Director of the Terrorism and Counterterrorism Program at Human Rights Watch, wrote to former President George W. Bush and members of his administration seeking disclosure of the “identities, fate, and current whereabouts” of any prisoners who had been held by the CIA since 2001.²² No meaningful response was ever received to this request for information.²³

On April 8, 2009, Anthony Romero, Executive Director of the American Civil Liberties Union, wrote to the U.S. Director of the Central Intelligence Agency, Leon Panetta, inquiring about Mr. Nassar’s current location. A copy of this letter is attached. On June 10, 2009, the CIA responded to this request stating that “the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request” and that even if the CIA was in a position to answer the request that the records would be classified and protected by U.S. laws from disclosure.²⁴

MR. NASSAR’S ENFORCED DISAPPEARANCE VIOLATES INTERNATIONAL HUMAN RIGHTS LAW

The Washington Post, Nov. 2, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>; Document No. (a) Declaration of Steven Macpherson Watt in Support of Plaintiffs’ Opposition to United States’ Motion to Dismiss, or, in the alternative Summary Judgment, in *Mohammed et al., v. Jeppesen*, Dec. 14, 2007 (N.D. Ca. 2005) (No. 5:07-cv-02798)

²⁰ Ensuring Lawful Interrogations, Exec. Order No. 13,491, §4(a); 74 Fed. Reg. 4,893, 4,895 (Jan. 22, 2009).

²¹ *Id.*, §5(e).

²² Following this letter, on June 7, 2007, Human Rights Watch and five other human rights organizations published a report documenting the cases of thirty-nine individuals, including Mr. Nassar, who were believed to have been in U.S. custody but whose whereabouts were unknown. The United States government has never responded to the report’s findings. See, Human Rights Watch et al., *Off the Record: U.S. Responsibility for Enforced Disappearances in the ‘War on Terror’*, June 2007, available at <http://www.hrw.org/legacy/background/usa/ct0607/ct0607web.pdf>.

²³ In response to Human Rights Watch letter, the government furnished five publications, all of which were accessible online and none of which addressed the specific circumstances of Mr. Nassar’s enforced disappearance or the enforced disappearance of any of the other named individuals. See, document (c) attached.

²⁴ See, documents (d) and (e).

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The circumstances of Mr. Nassar’s apprehension, detention and transfer as part of the “extraordinary rendition” program constitute an enforced disappearance for which the United States should be held responsible. As detailed below, the government of the United States is directly responsible for the violation of Mr. Nassar’s absolute right to be free from such treatment. Mr. Nassar’s wife and young family have also been subjected to human rights violations as a consequence of Mr. Nassar’s disappearance.

The International Convention for the Protection of All Persons from Enforced Disappearance prohibits the arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, and the subsequent refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.²⁵ The Convention further states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”²⁶ The Declaration on the Protection of All Persons from Enforced Disappearance states that “enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families” and “constitutes a violation of the rules of international law. . . .”²⁷ The U.N. Human Rights Committee has also determined that enforced disappearance violates article 9(1) of the International Covenant on Civil and Political Rights.²⁸

The prohibition of enforced disappearance is a *jus cogens* norm of international law and a non-derogable right, equally applicable in time of peace and war or other state of emergency.²⁹ The entire “extraordinary rendition” program is aimed at forcibly disappearing, secretly detaining and torturing persons such as Mr. Nassar, who the United States suspects of having been involved in terrorism. By subjecting Mr. Nassar to the program the United States has placed Mr. Nassar beyond the reach of legal protections, and rendered him particularly vulnerable to torture and other unlawful methods of detention and interrogation.

The U.S. government has acknowledged that Mr. Nassar was captured in Pakistan in November 2005. Mr. Nassar’s capture and his subsequent detention were conducted “by agents of [the U.S. and Pakistan] or by persons or groups of persons acting with the authorization, support, or

²⁵ Art. 1, *opened for signature* Feb. 6, 2007, U.N. Doc. A/61/488, G.A. Res. A/61/177.

²⁶ *Id.*

²⁷ Art. 1, Dec. 18, 1992, G.A. Res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49

²⁸ See, e.g., *Bleier Lewenhoff v. Uru.*, HRC, ¶ 14, U.N. Doc. CCPR/C/OP/1 at 109 (1985); *Quinteros v. Uru.*, HRC, ¶ 13, U.N. Doc. CCPR/C/OP/2 at 138 (1990); *Bautista de Arellana v. Colom*, HRC, ¶ 9, U.N. Doc. CCPR/C/55/D/563/1993 (1995). See also, Inter-American Convention; *Goiburú et al. v. Paraguay*, Inter-Am. Ct. H.R., (*Merits, Reparations and Costs*) (2006) (comparing the U.S. “extraordinary rendition” program to the “atrocious and inhuman methods and practices” of Operation Condor) (Separate Opinion of Judge Antônio Augusto Cançado Trindade at ¶¶ 54, 55, 59).

²⁹ See, e.g., *Goiburú et al. v. Paraguay*, Cases 11.560, 11.665 and 11.667, Inter-Am. Ct. H.R., ¶84 (2006) (“the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*”).

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acquiescence of the [U.S.].” The U.S. government has “refused to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.” As “[n]o exceptional circumstances whatsoever . . . may be invoked as a justification for enforced disappearance,” the treatment of Mr. Nassar by the U.S. government violates international human rights law.

REQUESTS

Based on the information above, we, the ACLU, Reprieve and Alkarama for Human Rights request that you raise Mr. Nassar’s case with the governments of the United States, Pakistan, and Syria to clarify with them the allegations contained in this communication. In particular, we ask that there be a prompt and independent investigation by these governments into the circumstances surrounding Mr. Nassar’s enforced disappearance, including *inter alia*, Mr. Nassar’s:

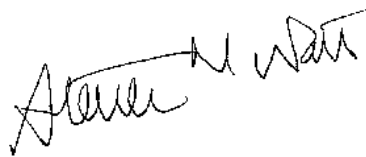
- (1) initial apprehension arrest, detention, interrogation and treatment in Pakistan, by agents of the Pakistani and U.S. governments;
- (2) unlawful rendition from Pakistan by agents of the U.S. government;
- (3) detention, interrogation, and treatment in any other locations, including but not limited to the Diego Garcia military base and Syria; and
- (4) current location, conditions of confinement and physical and psychological well-being.

Finally, we request that all information obtained about Mr. Nassar be shared with his wife and his four children, as his enforced disappearance and their lack of information about his current whereabouts and well-being have caused and continue to cause them great suffering.

Should you require any further information before acting upon this request, or in the course of your inquiry, please do not hesitate to contact any of the authors of this communication.

Sincerely,

Steven Macpherson Watt



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