KNOWN UNKNOWNS

Margaret L. Satterthwaite[1]

I first heard about the men who would become clients of our clinic from a colleague at Amnesty International. "Did you hear about the Yemenis that the International Secretariat interviewed?" she asked me, referring to Amnesty's London headquarters. "They were held in one of the CIA 'black sites'—we think in Eastern Europe." It was mid-2005, and a small group of researchers and human rights lawyers had been working to find detainees who had spent time in the CIA secret prisons, known as "black sites." At the time, we knew little more than the basics about the extraordinary rendition and secret detention program (the Program), many facets of which the U.S. government had not yet officially acknowledged. Much of what was known had been gathered from individuals who were rendered to foreign custody and tortured, as well as from detainees who were held by the CIA before being sent to Guantánamo, and from leaks by intelligence personnel to the media. Two famous cases illustrated both what was known and what was unknown at the time that I first heard about our clients-to-be.

By 2005, the case of Canadian citizen Maher Arar was well known. Arar was apprehended and rendered to Syria while changing planes at JFK International airport in New York in September 2002. Picked up on the basis of faulty information, Arar was held by the Syrians in a tiny, airless cell for almost a year and was severely maltreated. The nature of the questions he was asked made plain that Arar was being held at the behest of the U.S. government. Finally released in October 2003, Arar sought legal redress both in Canada and the United States. Working closely with Canadian lawyers who were pressuring the Canadian government to create a commission of inquiry into facts surrounding Arar's rendition, the Center for Constitutional Rights took on representation of Arar and filed suit in January 2004 alleging that U.S. officials had violated Arar's constitutional due process rights and had conspired in his torture in Syria in contravention of the Torture Victims Protection Act. Although the case was dismissed by the district court (but was still pending before the Second Circuit as of this writing), the filing—as well as the advocacy conducted by CCR on Arar's behalf—brought a great deal of attention to the extraordinary rendition policy and sparked a national debate that until then had not included the important focal point of a human story. Through his compelling account of mistaken rendition, Maher Arar gave a face to the concept of "torture by proxy," a policy the media had reported soon after the 9/11 attacks. Spirited away in an erstwhile private jet to a country known for the systematic use of torture, Arar was a victim of a carefully

[1] Associate Professor of Clinical Law, Director of the International Human Rights Clinic, and Faculty Director of the Center for Human Rights and Global Justice at NYU School of Law. I extend my profound gratitude to my colleagues Jayne Huckerby and Anne FitzGerald, as well as Amna Akbar, Lama Fakih, Akram al-Khatib, and Fuad Yahya. I am grateful also for the hard work and insights of former students Michael Price, Brenda Punsky, and Reena Arora. Like all narratives based on life experiences, the events and dialogue included here have been shaped and changed through the operation of time, memory, and incomplete understanding by the author. All mistakes are entirely my own.

crafted practice that sought to gain "actionable" intelligence through the exploitation of legal loopholes constructed by Administration lawyers.

German national Khaled El-Masri had been apprehended while on vacation in Macedonia when he was mistakenly identified as a wanted terrorism suspect with a similar name. Sent to a secret CIA prison in Afghanistan, El-Masri was ill-treated by U.S. agents over the course of many months. El-Masri was finally released—according to press accounts—when then-Secretary of State Condoleezza Rice took action concerning the mistaken rendition. His story made headlines in January 2005 when it was detailed in the *New York Times*. In late 2005, the ACLU filed suit against former CIA director George Tenet, other CIA officials, and three corporations alleging that the defendants had violated El-Masri's human and civil rights. The experiences of Arar and El-Masri were similar in many respects: both men were transported without charge on suspicions of having ties to al-Qaeda that later evaporated; both were citizens of Western democracies that were allies of the United States; both had experienced ill-treatment and horrible conditions of confinement; and both men sought justice. Each man, however, represented a different side of the extraordinary rendition and secret detention Program: Arar had been transferred from the United States to Syria, where he was tortured by Syrians at the behest of the United States.

The media coverage and the factual investigation conducted as part of the Arar and El-Masri lawsuits allowed observers to piece together disparate bits of information about the Program into a more coherent picture. By mid-2005, we knew that the U.S. government had some form of sorting procedure whereby some detainees were sent to Guantánamo (and Bagram) for detention, some were sent to foreign custody for interrogation, and others were held by the CIA itself in secret prisons. An unknown number of detainees had experienced more than one of the procedures. By the time Amnesty International met the men who would become our clients, these facts, together with the work of investigative reporters and the cryptic, self-congratulatory statements released by the White House and other official sources proud of "incapacitating" suspected terrorists, were publicly available. President Bush had not yet made his dramatic disclosure—prompted largely by the Supreme Court's 2006 holding in *Hamdan* that all detainees in the war on terror were protected from inhumane treatment—that the CIA had indeed been operating a rendition and secret detention program.

The significance of Amnesty's discovery, in 2005, of men who had been held and then released from the most secret CIA sites—those set up outside Afghanistan—was therefore immediately apparent to anyone carefully following the Program. At that time, no one had reported the first-hand account of a detainee who had been held outside of Afghanistan in a CIA-run "black site." In addition to Amnesty, the ACLU, CCR, Cageprisoners, Human Rights First, Human Rights Watch, and Reprieve had all been investigating the Program aggressively. The Center for Human Rights and Global Justice and the International Human Rights Clinic, which I co-direct at NYU School of Law, had also been working on the issues of extraordinary rendition and secret detention for some time, frequently partnering with one or more of the other organizations. Our reports, including 2004's *Torture by Proxy*, had presented analyses of rendition under U.S. and

international law. We had been actively tracking the cases of individuals we believed were held by the CIA. Although we had been engaged in legal and factual investigation concerning rendition and secret detention for several years, we had not yet taken on the case of an individual who had been subjected to rendition and secret detention. Fitting together the pieces of the puzzle that made up the Program therefore had become somewhat abstract for us. Whereas much of the human rights work I and my clinic did in other countries—on the right to water in Haiti, for example, or the right to equality for women in Nigeria—involved close contact with individuals directly affected by the policies we sought to change, the "War on Terror" work was different because it remained flattened, dead on the page, and largely about principles instead of human beings.

When I was asked if we would take on the representation of the men in Yemen, however, a chill ran down my spine. Here were men who told familiar stories about being abducted and transferred to Afghanistan, where they were subjected to excruciatingly loud music, stress positions, sleep deprivation, and extreme cold. But the familiarity stopped when they were transferred out of Afghanistan into a final secret facility that was purpose-built or refurbished, and which Amnesty believed was somewhere in Eastern Europe. This prison was aimed at maximizing disorientation and the sense of being isolated and alone. Theirs was the story of a CIA "black site"—set up to be off the record, off the map, and outside the law. Taking on their representation seemed important as an embodiment of the work we had been doing to change U.S. policy. But I also knew it would bring us—me, our small staff, and ultimately, my students—face to face with the results of our government's policy. It would require us to engage on a human level with an inhumane policy.

I had a great deal of experience with issues of torture, through work in other countries and work in the asylum system in the United States, and I felt that it was important that the clinic participate in efforts to obtain redress for individuals who had been disappeared by our own government. Still, I knew that this kind of long-distance, potentially high-profile representation would take significant resources, some of which we did not have at the time. Our small staff, passionate about ending human rights violations in the war on terror, agreed that because individual representation was central to the mission of our clinic, we would seek whatever funding, expertise, and assistance we might need from the wide network of allies we had built.

Many months later, I travelled with my colleague Jayne Huckerby, Research Director of the Center for Human Rights and Global Justice, to Yemen to visit our clients for the first time. We had not yet secured the funding needed to bring students along, though we were ultimately able to do so. Anne FitzGerald of Amnesty International travelled with us to introduce us to the men; she had met each of them several times and lobbied the government of Yemen to try or release them after they were returned by the United States. Through extensive discussions, Anne persuaded the prosecutor in charge of the cases and officials of the Political Security agency to allow her to see the men repeatedly while they awaited trial. Yemeni officials told Amnesty that the U.S. had instructed the Yemenis to detain the men, but said that no evidence of criminal activity or

terrorism accompanied that request. Under the watchful eye of Amnesty and other human rights organizations, the government of Yemen asserted that it would not hold individuals without charge. A prosecutor interviewed the men and charged them with the only crime for which he could find evidence—a variety of document fraud, based on the men's own admissions. Each man acknowledged having lived as an undocumented migrant in a foreign country, and each man was convicted on the basis of nothing more than their own statements concerning use of false documents in this connection. They were sentenced to time served, with the months in American secret detention counted as part of that time. Amnesty worked hard to ensure that the men would be released once sentenced, and finally they were released in early 2006—to thankful and traumatized families.

While the men were still in detention in Yemen, Anne told them that there were some American lawyers who were interested in working on their case; now that they were free, we were able to meet in person. We convinced Akram al-Khatib to come along as our interpreter. He had interpreted for Anne on several visits; he knew the clients well, and they trusted him entirely. We spent hours studying the facts of each man's experience and preparing to counsel them on the scope of our representation. We collected all our black clothes and searched our wardrobes for loose-fitting suits.

We planned our first meeting with Mohammed al-Asad to take place at the office of a local NGO. We hoped that the familiar surroundings might break down some of the distance that was inherent in our representation. The other things—our nationality, our gender, our inability to speak Arabic, and our status as outsiders—could not be altered. When Mohammed al-Asad arrived, he came into the office with a bright smile. "Welcome to Yemen," he said. "I am very glad to meet you." Touching his hand to his chest, he sat down with us at a desk that the NGO lent us for the afternoon. "We are so pleased to meet you," I said, and Jayne and I each introduced ourselves. I had an immediate feeling of wonder: how was it possible that this person, who had been abducted and "disappeared" by my government, could still trust that I came in a spirit of justice, despite what my government had done? I was quite sure that I would not have the same generosity or optimism were the tables turned.

Until this moment, lawyer-client discussions had all taken place by phone. Each conversation had been brief and halting: it was difficult to find a way to explain by phone the first steps we proposed to take—factual investigation and research on potential claims alongside the filing of Freedom of Information Act Requests. We were also well aware that our discussions likely were monitored as part of the NSA's wiretapping program. We had felt that it was our duty to explain this to our client, and it had clearly not helped in building rapport. Now, I hoped that through regular human interaction we could create the relationship needed for a successful lawyer-client relationship.

Jayne asked kindly about Mohammed's family. "They are all doing well," he said, "thank God. But it is very hard for my wife to be without her husband and my children to be without their father." Mohammed's wife was Tanzanian, and Mohammed was awaiting a visa to allow him to reunite with his family in Dar-es-Salaam. When he was apprehended in 2003, he had lived in Tanzania for more than a decade and his family, business, and

community were there. Mohammed asked about our trip. "It was long," I said, and we all laughed. I almost commented about my hatred of airplanes, but it seemed petty and irrelevant in the light of what this man had been through—an experience that began with a disorienting and frightening plane ride from Tanzania to an unknown country in East Africa.

We soon began the conversation in earnest, reviewing the work we agreed to do for Mohammed. We would begin by investigating potential claims he might have that were associated with his rendition and secret detention, investigating the facts pertaining to his treatment, and filing Freedom of Information requests for documents concerning him. We explained that FOIA was a way to obtain government documents on the principle that democracy requires transparency, and that individuals have a right to see the documents that the government holds pertaining to them.

I pulled out a large stack of forms that my students had prepared and explained that we needed Mohammed to sign each one. Mohammed's forehead furrowed as he eyed the stack of about sixty forms. There were two sets: one declared that he waived the privacy interest the U.S. government could forward as a reason to withhold documents under FOIA, and the other certified his identity. "They should know who I am by now," Mohammed said. "The Tanzanians took my passport when they picked me up, and the Americans had me in jail for a year and a half." When Mohammed was apprehended, his passport and cell phone were confiscated. "They did not seem concerned with my privacy when they took me away," Mohammed said. When he encountered the CIA rendition team, they had grabbed him roughly, sliced off his clothes, forced him to endure an anal cavity search, and then bound, diapered, and hooded him before forcing him roughly onto a waiting plane.

"I know," I said. "Our government believes that it must respect certain kinds of privacy while it also acts as though it can ignore other kinds," I said. "It's hard to explain. Even though the U.S. believes it is legal to detain you without first holding a hearing to find out if they have the right person, they also believe that they cannot legally release documents to us—your lawyers—unless we prove that we have your permission." Mohammed shook his head. I felt at a loss to explain the scenario any better. I didn't understand it either.

As he signed the forms, Mohammed reminded us that he had seen U.S. interrogators, doctors, psychiatrists, and other personnel write down information when they spoke with him. He had seen video cameras capturing his every move. He believed the U.S. had his passport and cell phone. There should be medical and psychiatric records, interrogation logs, basic documents processing him into and out of the prisons where he had been held in Afghanistan and the final unknown country.

"Will the government give us any of these things?" Mohammed asked. We explained that we would seek all of those records through our FOIA requests. But because of certain rules allowing the government to refuse to release documents on the basis of national security, we expected that we would not get even a single record. We explained

that the government was likely to forward a *Glomar* response, pursuant to which they would claim that it was impossible to either confirm or deny that they held records pertaining to him.

We next discussed the potential claims we might pursue. Listening carefully, Mohammed asked detailed questions: what facts were needed, what forums might be used, was his case a good one? Jayne and I took turns answering, trying to ensure that Mohammed understood that though we had solid legal arguments, his case was at best an uphill battle, no matter the forum we chose. Describing the Arar and El-Masri cases, we explained that cases similar to his own had been thrown out of U.S. courts on the basis of something called the state secrets privilege, that cases against the countries that participated in his rendition and secret detention would depend on having factual evidence of where he was transported and held, and that the international human rights courts and tribunals were potential venues but that the U.S. had either opted out of their jurisdictional reach or ignored their rulings. We assured him that we had already begun factual investigation and had many leads, that his human rights claims were very strong, and that we—and our students—were prepared to put in long hours to get the work done. But—in the end, we explained—much depended on what his goals were, what he sought through our representation, and how he felt about each potential avenue.

When we were finished talking about the potential claims and forums, our client chuckled and shook his head. "What you have told me is that it will be easier to go after the weakest countries, and hardest to go after the strongest one—the one that was actually responsible for what was done to me. You are saying that the strongest country has shielded itself from courts that protect human rights, and that its own courts are not available to those it has wronged. You are saying that I might have a better chance of obtaining justice outside the courtroom, through the press or international organizations. And you are asking if I want to accept all of this and proceed anyway, despite the possibility of failure. Am I right?"

"Essentially, yes," I said, and Mohammed laughed.

"Well then," he said, "let us begin." We all laughed together then. At that moment I realized that—like everyone else our clinic worked with—Mohammed had a sense of justice that outweighed his concern about winning or losing. We scheduled a meeting for the next day to continue the discussion.

We met in the conference room of our hotel the next day. Over the course of six hours, Mohammed told us the story of his rendition and secret detention by the CIA. The outlines were as follows: apprehended by Tanzanian officials in Dar-es-Salaam while he was eating dinner with his family, he was soon placed on board a plane and flown a few hours to an unknown country. For a number of specific reasons, Mohammed believed this country was in East Africa or the Horn of Africa. He was held in what appeared to be a local facility but he was questioned by Americans. After some days, he was handed over to a team of U.S. officials that was familiar to us as a CIA rendition team. He was taken to

Afghanistan, where he was held in two different CIA prisons before being transferred in spring 2004 to a final facility. There, he was housed in a small cell with walls and ceiling painted the same drab color, stainless steel bathroom fixtures, and an ankle shackle that was attached to a hook affixed to the wall. He was supervised by guards who wore all black and communicated in hand signals. He was never allowed to see other prisoners, and the white noise that was piped into his cell prevented him from hearing even the voices or footsteps of other prisoners except for during small, unexpected moments when the electricity would go off. Mohammed was shuffled by black-clad guards to meetings with psychiatrists, medical doctors, and interrogators. He was taught a bizarre protocol: whenever he heard the outside door to his cell opening, he was expected to stand in a corner and wait for the guards to handcuff and escort him out of the cell. His every move was captured by the video cameras that were prominently affixed in his cell and other rooms. The isolation was the worst, Mohammed said. The sense of being utterly alone in an unknown place for an unknowable period of time.

When we asked him to estimate the size of the interrogation room, Mohammed answered in reference to the conference room we were all sitting in: "not so much smaller than this room," he said. When we asked him to describe the interrogators' approach, he answered flatly, "it was just like this—they would ask a question, I would answer truthfully. They would write down my answer and then ask another question." When we asked about the type of clothing the interrogators wore, the comparison was again to me and my colleagues. "Not unlike the outfit that she has on," he said, pointing to one of us, "only a different color. There were women interrogators there also. Both women and men." Hair color, eye color, and even writing instruments and pads were all compared to what we used, and accents in particular were like mine. As the only American on our team, I felt it was both appropriate and telling that I became more and more associated—slowly but surely—with the interrogators who Mohammed had encountered in the secret prison.

At the end of the day, Mohammed stood up and thanked each of us. By this time, the energy he displayed at the start of the day seemed to have been entirely drained from his body. His eyes were cloudy and his shoulders had drooped. Although he smiled at us, it was plain that this day of questioning had renewed Mohammed's memories and pulled him back into a place of despondence. This was the Mohammed that Anne had told us about, the one we had encountered so many times on the phone. Here was the Mohamed who could not hide the trauma he experienced at the hands of my government.

We made a plan for the next steps and agreed on the time for our next phone call once we were back in New York. We thanked Mohammed and explained that we would provide updates on our progress at every step of the way. As he left, I realized that something had changed for me also. No longer was the rendition and secret detention program something theoretical or distant. It was now a program with a very tangible human toll. And suddenly, all the work I had done in other countries to document torture and disappearances, to take witness statements, to understand the mechanics of repression, were directly and horribly relevant. It was a relevance I had never hoped for, but it was a relevance that I hoped would serve me—and my client—well.