USA

WRONG COURT, WRONG PLACE, WRONG PUNISHMENT

FIVE ALLEGED '9/11 CONSPIRATORS' TO BE ARRAIGNED FOR CAPITAL TRIAL BY MILITARY COMMISSION AT GUANTÁNAMO

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in May 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

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Index: AMR 51/032/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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INTRODUCTION

On 5 May 2012, at the US naval base at Guantánamo Bay, Cuba, a US Army Colonel, in his role as a military commission judge, is due to conduct the arraignment of five men who have been in US custody without trial for approaching a decade.

The route taken to get to this point is one that any government committed to human rights values should view as a betrayal of such principles.

At the hearing on 5 May, at which Amnesty International will have an observer, the charges against the men will be read out and they will be asked how they plead.[1] This will be their second arraignment, the first having been held four years earlier, on 5 June 2008, under the previous US administration. Since then, the charges have been dismissed, a decision taken to transfer the men from Guantánamo to the US mainland to bring them to trial in civilian court, that decision reversed, the case handed back to the Pentagon, and charges for trial by military commission re-filed.

These proceedings are being held in the wrong court – at the deeply flawed and widely discredited military commissions rather than in the well-established ordinary civilian US criminal justice system. The hearing is also being held in the "wrong place" – a detention facility that, by US Presidential order, was supposed to have been closed down more than two years ago, and to which these detainees were transferred after years being held incommunicado in solitary confinement at undisclosed locations by the USA.

Yemeni nationals Walid bin Attash and Ramzi bin al-Shibh, Saudi Arabian national Mustafa Ahmed al Hawsawi, and Pakistani nationals Khalid Sheikh Mohammed and Ammar al Baluchi (Ali Abdul-Aziz Ali) are charged with crimes relating to the attacks of 11 September 2001 (9/11), in which nearly 3,000 people were killed. Amnesty International has consistently called for those responsible for this crime against humanity to be brought to justice in accordance with international fair trials standards and without resort to the death penalty.

The USA's military commission system, now in its third incarnation since November 2001, does not meet these standards. Moreover, the arraignment continues a process that the US government intends to see end in the execution of the five men if it obtains their convictions. In the event of their acquittal, it reserves the right to return them to indefinite detention. Meanwhile those who authorized and committed crimes under international law against these five men and others previously held in the USA's secret detention program continue to enjoy impunity, a state of affairs facilitated by the USA's invocation of state secrecy.

This situation – indefinite detention, unfair trial, and a lack of accountability for human rights violations – is the product of the USA's "global war" theory it adopted after the 9/11 attacks. As Amnesty International has repeatedly asserted, this theory is a gross distortion of international law. Human rights principles have fallen foul of this framework, with the Guantánamo detentions remaining at the centre of its distortions more than a decade after the attacks.

The five men are charged under the Military Commissions Act of 2009 with terrorism, hijacking aircraft, conspiracy, murder in violation of the law of war, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, and destruction of property in violation of the law of war. The prosecution of these acts as "war crimes" in a military court under the USA's sweeping "global war" theory remains deeply flawed.

The Convening Authority for the military commissions referred the charges on for a joint trial on 4 April 2012, as well as authorizing prosecutors to seek the death penalty. A trial date has not yet been set, but the military judge has said that he will "establish a full schedule for the litigation of this case" at the arraignment on 5 May.[2]

This case – one of the highest profile US prosecutions for decades – has presented the USA with a chance to show that it means what it says when it speaks about its commitment to human rights. For the time being, however, the USA seems set on a path that ends in justice neither being done nor being seen to be done.

WRONG APPROACH

The Bush administration responded to the attacks of 11 September 2001 by invoking the vision of a global "war" against al-Qa'ida and other groups in which international human rights law would not apply.

The Obama administration has adopted this framework, which is indeed now largely accepted within all three branches of the US government. Since the Bush administration "declared" the "war on terror", the USA has backdated this "war" to having begun prior to 9/11, including in the law under which these five detainees have been charged.[3] The USA has asserted the exclusive right unilaterally to define the "war" and to make up its rules.

Successive administrations have used this theory to assert the right to return detainees acquitted at trial to indefinite detention under the 'law of war', and to prosecute individuals held at Guantánamo with charges alleged to be "in violation of the law of war". In this way, the use of military commissions is an integral part of a system of indefinite military detention without fair criminal trial of detainees. This is all part of a continued sweeping invocation of the international law of armed conflict – to justify measures taken outside of any specific armed conflict and that are fundamentally incompatible with the ordinary systems of criminal justice operating in a framework of international human rights law.

The USA's sweeping "global war" legal theory is not recognised in international law – indeed, the theory's development and invocation by the USA appears to have been calculated from the start precisely to avoid established rules of international human rights and humanitarian law, as well as human rights protections under ordinary US domestic law. The "global war" theory has had devastating effects on the US human rights record over the past decade. The military commissions carry an indelible anti-human rights stain, and the USA's pursuit of these trials cannot be divorced from the international law-violating detention and interrogation regime for which they were developed.

These five men were arrested in Pakistan during a seven-month period from 2002 to 2003 – Ramzi bin al-Shibh was taken into custody on 11 September 2002, the other four in March and April 2003.

Everyone has the right not to be subjected to arbitrary detention. During their nine years in US custody, the five defendants in these proceedings have never been brought before a court and had that court rule on the lawfulness of his detention. They were held incommunicado in solitary confinement at undisclosed locations for periods of between three and four years. Since then they have been held, with little contact with the outside world, for over five years at Guantánamo.

Khalid Sheikh Mohammed, for example, was arrested on 1 March 2003. He was not brought

to trial in a US federal court (where he had previously been indicted), but instead put into secret CIA custody and subjected to enforced disappearance for the next three and a half years until his transfer to military custody at Guantánamo on 4 September 2006 with 13 other men, including his now four co-defendants. His case illustrates how detainees were treated first and foremost as potential sources of intelligence with no rights, rather than human beings accused of criminal conduct and entitled to fundamental rights.

The UN Special Rapporteur on human rights and counter-terrorism has said that intelligence services should not be permitted to deprive people of their liberty solely in order to gather information from them.[4] Three days after the arrest of Khalid Sheikh Mohammed, then US Attorney General John Ashcroft had said that his "capture is first and foremost an intelligence opportunity".[5] That same month, this detainee was subjected 183 times to "water-boarding", a torture technique in which the process of drowning the detainee is begun.[6] In a speech on 21 May 2009, former Vice President Richard Cheney recalled that after Khalid Sheikh Mohammed was arrested, "American personnel were not there to commence an elaborate legal proceeding, but to extract information from him".[7] In his memoirs published in 2010, former President George W. Bush said that he had personally approved the use of "enhanced interrogation techniques, including water-boarding, on Khalid Sheikh Mohammed."[8]

In place of a ruling on the lawfulness of their detention, these detainees were subjected to enforced disappearance, torture or other cruel, inhuman or degrading treatment during years in unlawful detention and now face capital trial in a substandard tribunal.

WRONG COURT

The arraignment of these five detainees will come one month before the 20th anniversary of the USA's ratification of the International Covenant on Civil and Political Rights (ICCPR).[9] The military commissions are an affront to this treaty.

The Bush administration described the ICCPR as "the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[10]

The military commission system is now in its third version since President Bush first established it by executive order signed on 13 November 2001.[11] However, in addition to the fact of its military rather than civilian nature, it still fails to meet international fair trial standards. Central to such standards is the requirement for criminal trials to be conducted before independent and impartial tribunals. Among other flaws, the commissions lack independence, whether in substance or appearance, from the political branches of government that have authorized, condoned, and blocked accountability and remedy for, human rights violations committed against the very category of detainees that will appear before them.

The UN Human Rights Committee, the expert body established under the ICCPR to monitor implementation of the treaty, has stated, in its General Comment interpreting the right to a fair trial under the ICCPR, that the trial of civilians by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is "necessary and justified by objective and serious reasons", and where "with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials".[12] Clearly that is not the case here.

The US government has itself admitted that the federal courts would be an entirely legal,

appropriate and available forum in which to conduct the trials of these men. The Attorney General, the USA's chief law enforcement official, has described as "misguided" and "wrong", the political opposition to such trials.[13] The five men about to be arraigned are facing trial by military commission – under a system reserved by the USA exclusively for non-US citizens – due to domestic political considerations not as a result of any obligations recognized in or consistent with international law.

In November 2009, 10 months after President Barack Obama took office, the Department of Justice announced that the five men would be brought to trial "as soon as possible" in ordinary civilian federal court in New York. The "alleged 9/11 conspirators", said Attorney General Eric Holder, "will stand trial in our justice system before an impartial jury under long-established rules and procedures."[14] The promise was short-lived, however, falling victim to domestic politics. In April 2011, citing congressional blocking, the Attorney General announced a U-turn. The five would no longer be prosecuted under long-established rules and procedures in a long-established civilian court, but under essentially untested procedures before a military commission under a post-9/11 law. This outcome is clearly contrary to the UN Basic Principles on the Independence of the Judiciary which state:

> "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".[15]

Amnesty International categorically rejects the trial of civilians by military courts, including civilians that are alleged to have engaged in the kind of conduct at issue in this case. Even applying the criteria set out by the Human Rights Committee, however, the military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice. By their very nature, then, their application in cases such as these violates the right to fair trial.

The military commissions are discriminatory. If any Guantánamo detainee slated for prosecution was a US national, he could not be tried by these military commissions: under US law he would have the right to a civilian jury trial in an ordinary federal court, not before a panel of US military officers operating under rules and procedures that provide a lesser standard of fairness. To discriminate in the quality of criminal justice in this manner is a clear breach of the USA's human rights obligations.

Article 2 of the ICCPR requires states to respect and to ensure "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, **national** or social **origin**, property, birth or other status" [emphasis added]; article 26 further provides that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law", including on grounds of national origin. In addition, among the rights provided for in the ICCPR, in article 14, are the right to "be equal before the courts and tribunals", the "right to a fair and public hearing by a competent, independent and impartial tribunal established by law" and to various "minimum [fair trial] guarantees, in full equality", which are all to be provided free from discrimination in accordance with Article 2. The same standard of fair trial should be applied to all, regardless of national origin: that is a fundamental principle of human rights and the rule of law.

In its recently filed fourth periodic report to the UN Human Rights Committee, the Obama administration stated that "the United States is committed to promoting and protecting

human rights" and that the USA was hoping to "improve its human rights performance" through scrutiny of its record by the Committee and the public. One immediate improvement would be for the USA to abandon military commission trials in favour of prosecutions in the ordinary federal courts.

WRONG PLACE

In a speech on national security on 21 May 2009, four months after he had ordered his administration to shut down the Guantánamo detention facility by 22 January 2010 at the latest, President Obama explained that he had decided to close the facility because the detentions there had led the government into "defending positions that undermined the rule of law" and because it had become "a symbol that helped al-Qa'ida recruit terrorists to its cause". His administration is now about to run the highest-profile trial in decades at that very same location where hundreds of detainees had been held for years with very little contact with the outside world, some, including these defendants, following years in secret detention where they were subjected to enforced disappearance, torture or other ill-treatment.

Attorney General Holder told an audience in Berlin in 2009 that he and President Obama were in agreement that "Guantánamo has come to represent a time and an approach that we want to put behind us".[16] Guantánamo and military commissions are interwoven symbols of a systematic disregard for human rights principles. If the Guantánamo prison is "Exhibit A" of the counter-terrorism detention legacy he was handed by his predecessor, as President Obama characterized it in an interview with the New York Times in March 2009, then military commissions are Exhibit A.1, an equally discredited annex of the detention regime.[17] They should be scrapped too. Even if these trials were relocated, they would still be the wrong approach.

WRONG DONE

The military commissions cannot be divorced from the unlawful detention and interrogation regime for which they were developed. This is not least because of the continuing failure of the USA to meet its obligations on independent investigation, accountability and effective remedy for the now well-documented allegations of torture and other ill-treatment, enforced disappearance, and other human rights violations, including against the individuals selected for trial in front of these tribunals.

Prior to being transferred to military custody at Guantánamo on 4 September 2006, the five detainees in this case were subjected to more than three years of enforced disappearance in the secret detention program then being operated by the CIA under the authorization of President George W. Bush. In addition, they were subjected to interrogation techniques or detention conditions that violated the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. The details of where they were held during this time, how they were interrogated and by whom, and their conditions of confinement, remain classified at the highest levels of secrecy.

To date, the International Committee of the Red Cross (ICRC) is the only independent organization known to have interviewed any of the 14 detainees transferred in September 2006 from CIA custody to Guantánamo. The ICRC's leaked report confirmed that Khalid Sheikh Mohammed was subjected to water-boarding. The detainees told the ICRC that other techniques used against them included "prolonged stress standing position" (detainee held naked, arms extended and chained above the head for up to three days continuously and for up to two to three months intermittently); "beatings by use of a collar", used to "forcefully bang the head and body against the wall" (known in CIA parlance as "walling"); beating and

kicking; confinement in a box; prolonged nudity; sleep deprivation and use of loud music; exposure to cold temperature/cold water; prolonged shackling; and threats, including threats of torture and other ill-treatment, threats of rape of detainee and detainee's family; and threats of being brought close to death.[18]

All detainees were held in solitary confinement, incommunicado, for the entirety of their secret custody. The ICRC concluded: "This regime was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalization and dehumanization. The allegations of ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture". The ICRC also concluded that the detainees had been subjected to enforced disappearance.

Ramzi bin al-Shibh, for example, told the ICRC that in his fourth place of detention he had been subjected for seven days continuously to prolonged stress standing – wrists shackled to a bar or hook on the ceiling above his head, while held naked. He also alleged that in this same detention facility he was hosed with cold water during interrogation and that in his eighth place of detention, he was "restrained on a bed, unable to move, for one month, February 2005 and subjected to cold air-conditioning during that period".

Everything these detainees know, say or write about their time in CIA custody is presumptively classified Top Secret/Special Compartmented Information (TS/SCI).[19] Neither their US lawyers (who have TS/SCI security clearance), nor anyone in the government may reveal it without exposing themselves to criminal liability under US law. If the defendants or lawyers begin speaking about any such topic at military commission proceedings, the authorities will cut the courtroom transmission (which has a 40-second broadcast delay) so that observers behind the glass wall dividing the commission room from the public gallery area, and anyone observing the video transmission at remote locations in the USA, cannot hear what was said.

In a pre-trial motion filed on 26 April 2012 in this case, the US authorities assert that:

> "because the Accused were detained and interrogated in the CIA program, they were exposed to classified sources, methods and activities. Due to their exposure to classified information, the Accused are in a position to reveal this information publicly through their statements. Consequently any and all statements by the Accused are presumptively classified until a classification review can be completed."

Aside from limited amount of information acknowledged by the US authorities, including that the CIA program existed, that "enhanced interrogation techniques" were approved for use in the program, and that three detainees were subjected to "water-boarding", other information remains classified or has not been officially acknowledged. The motion continues:

> "This classified information includes allegations involving (i) the location of detention facilities, (ii) the identity of any cooperating foreign governments, (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees, (iv) interrogation techniques as applied to specific detainees, and (v) conditions of confinement".

Such information, the government argues, "must be protected from disclosure in this military commission", including at the arraignment on 5 May 2012.[20]

In their previous arraignment on 5 June 2008 at Guantánamo, these five detainees mentioned the word torture on a number of occasions. They had clearly been told by the

authorities, however, that giving any specific details of their time and treatment in secret custody was off-limits. At one point in the proceedings, Khalid Sheikh Mohammed began chanting verses of the Koran. When the military judge warned him that this would use up his allotted time, the defendant protested that the "red lines" the detainees had been told they were not to cross in their testimony were those related to torture, not verses of the Koran. "I do not mention the torturing", he said "I know this is a red line".[21]

If these detainees have knowledge about detention conditions or interrogation techniques that violate the prohibitions against enforced disappearance and of torture and other cruel, inhuman or degrading treatment or punishment, it is only because the US government itself forced that knowledge on them in the course of carrying out such violations of their rights. Allowing a government to, in effect, indefinitely and unilaterally keep secret the details of allegations of such human rights violations – indeed it has gone so far as to physically censor the voices of those who claim to have suffered the violations – in a manner that by purpose or effect deprives the person of access to an effective remedy and preserves the impunity of the perpetrators, is fundamentally inconsistent with international law.

On the subject of transparency in relation to information about such crimes, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism said recently: "Transparency is key not only to bring to justice those officials who may have participated in crimes of this kind, but also in dispelling unjustified suspicions. The unjustified maintenance of secrecy, on dubious legal grounds, only delays efforts at establishing the truth".[22] The UN, among others, has formally recognised "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", referring in part to "the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred".[23]

On 21 January 2009, President Obama issued a memorandum asserting that his administration was "committed to creating an unprecedented level of openness in Government" in the interest, among other things, of accountability. However, this general commitment is in stark contradiction to the administration's insistence that "with limited exceptions, the specific details of the capture, detention, and interrogation of particular enemy combatants remains highly classified".[24] Torture and enforced disappearance are themselves crimes under international law. There has still been no explicit admission from the US government that crimes were committed against these and other detainees in the CIA secret detention program despite the wealth of information about these systematic human rights violations now in the public realm.

This lack of transparency, by effect if not design, continues particularly to obscure human rights violations committed in the CIA's secret detention program, including against those like these five defendants who were held in that program and remain today in Guantánamo. The US government has a duty to prevent acts of terrorism, protect those threatened by such attacks, and to bring those responsible to justice. However, it also has a duty to ensure accountability and remedy for human rights violations. The use of secrecy coupled with a determination to "look forward, not back" when it comes to torture by US agents, is also in clear breach of the USA's obligations under international law to investigate, prosecute and punish those responsible for the enforced disappearance and alleged torture or other cruel, inhuman or degrading treatment of many of the detainees held at Guantánamo, including these five men.

WRONG PUNISHMENT

The US administration intends to seek the death penalty against these five detainees if it obtains their convictions.[25] Amnesty International opposes the death penalty unconditionally. While international human rights law recognizes that some countries retain the death penalty, it prohibits the imposition and execution of a death sentence based on a trial that has not met international standards of fairness.

The UN Human Rights Committee has emphasised that fair trial guarantees are particularly important in cases leading to death sentences, and that "the imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant [ICCPR] have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)."[26] Any use of the death penalty based on these military commission trials would be a violation of the right to life.

A defence motion filed in April 2012 before US Army Colonel James Pohl, the military judge overseeing the trial of the five defendants in this case, is seeking to have the charges dismissed because of alleged defects in the charge referral process that resulted in the charges being referred on as capital. Alternatively, it argues, the charging process should be re-run, this time with the Convening Authority having afforded "adequate time, resources, communications and the type of client access" to allow the defendants the ability to provide pre-referral input to the Convening Authority.[27]

The motion asserts that the period leading up to the Convening Authority's referral of the charges on for trial was "replete with insurmountable obstacles" particularly to the specialist lawyers assigned because the cases were capital.[28] These obstacles, the motion asserts, have rendered the appointment of "learned counsel" as little more than "window-dressing", and have included the lack of timely security clearances for interpreters and mitigation specialists who would have assisted in preparing the submission to the Convening Authority against having the charges referred as capital. The obstacles also included "the total obstruction of privileged attorney-client communications" as a result of orders issued by the Guantánamo detention authorities which "require monitoring of legal mail and control of access to the clients".

The lawyers maintain that two orders issued in December 2011 by the Guantánamo detention authorities continue to make confidential written communications between counsel and the defendants "impossible". Indeed, the motion asserts that there has been no exchange of privileged or confidential written materials between the five accused and their lawyers since November 2011. It was during the period, the motion points out, that the Convening Authority (CA) had called for the submission of evidence that might mitigate against his referring the case on for trial as capital. In other words, "all five clients face the death penalty following a defective referral process which eliminated the possibility of making an adequate submission to the CA, precluded the CA from obtaining complete and meaningful pre-referral advice regarding mitigation matters, and barred defense counsel from providing meaningful representation at the pre-referral stage of the proceedings."

The military judge has yet to rule on this motion. However, given what these and other lawyers representing Guantánamo detainees have alleged, Amnesty International takes this opportunity to remind the US government that under international fair trial standards, the authorities must respect the confidentiality of the communications and consultations between lawyers and their clients. This applies in the cases of all detainees, whether or not they are charged with a criminal offence. There must be no interception or censorship of

written or oral communications between the accused and their lawyer.[29] The UN Human Rights Committee has stated that the fair trial rights under article 14 of the ICCPR require that

> "Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter."[30]

After years of arbitrarily holding the defendants incommunicado and then with very little contact with the outside world at Guantánamo, the US government has now decided to file charges (for the second time in four years). The decision to bring these charges after this time of course does not give the government any excuse to deny adequate time and resources to the defendant to prepare his defence and to be able to communicate with his lawyer to this end.[31] The logistical and other difficulties associated with representing detainees at a remote offshore military base such as Guantánamo make such obligations critical to the defendant's ability to present their case, not least where the government intends to seek the death penalty. It should further be remembered that these detainees were denied access to any legal counsel for years, with ramifications for the ability of current counsel to establish and maintain the necessary trust for an effective client-attorney relationship.[32]

The Human Rights Committee has emphasised that the need for fair trial rights to be fully respected is heightened in the case of capital trials. Because the right to life under article 6 is non-derogable, even in a state of emergency that threatens the life of a nation (including for that matter any form of armed conflict), all trials leading to the imposition of the death penalty must conform to the ICCPR's provisions, including all the requirements of Article 14, in all circumstances.[33]

Amnesty International will continue to urge the USA, even if it goes ahead with these military commission trials, to drop the death penalty option that has been approved by the Convening Authority. In addition, the organization urges all US officials, especially in this election year, not to fall to any temptation to play politics with this high profile capital trial. The death penalty is a punishment that is particularly vulnerable to politicization.[34] There has already been an episode generating concern in this regard. Asked in 2009 about the views of those offended by the prospect of the trial being conducted in federal court where the constitutional protections afforded to US citizens would apply, President Obama responded: "I don't think it will be offensive at all when he's convicted and when the death penalty is applied to him". This comment was disturbing, not least given that the President is the final clemency authority in federal and military capital cases, but also given that the prosecution is now in the military commission system, over which the President has ultimate constitutional authority as Commander in Chief of the Armed Forces.

The administration is pursuing death sentences against these men at a time when the USA appears to be beginning to turn against judicial killing, a development which cries out for principled human rights leadership, not the opening of a new chapter in the USA's use of capital punishment.[35] In recent years, the UN General Assembly has repeatedly called for a worldwide moratorium on executions with a view to abolition. International human rights standards direct governments to work towards this goal.[36] The USA's growing isolation on the death penalty – and the damage to human rights principles caused by its post-9/11 counter-terrorism policies – can only deepen if the administration obtains death sentences after unfair military commission trials.

RIGHTING WRONGS

These wrongs could be the subject of immediate action by the US authorities, if they were to adopt a human rights approach. They could immediately abandon this military commission and bring these men to trial in federal court as the administration was prepared to do two years ago. The administration could immediately announce that it will not seek the death penalty in this or other cases.

It could at the same time disclose information as to what happened to these men and others previously held in the CIA's secret detention program, and commit to ensuring accountability for any crimes under international law that occurred in this program and ensuring meaningful access to remedy for those who were subjected to human rights violations.

Among other things, the US Senate Select Committee on Intelligence should release the findings of its review into the CIA's secret detention program, with as few redactions as possible. The review was first announced more than three years ago.[37]

Amnesty International has consistently acknowledged the gravity of the crimes committed on 11 September 2001, and indeed considers that they constituted a crime against humanity. Its pursuit of fair trials, lawful treatment of detainees, and full accountability and access to remedy for human rights violations committed by US personnel in response to the 9/11 attacks, and its opposition to the death penalty, should not be taken in any way to mean that it is ignoring or seeking to downplay the suffering caused by those attacks. That suffering is undeniable.

The failure of the USA to provide the victims and the general public the opportunity to see those responsible for the 9/11 attacks and other such crimes under international law brought to justice in fair trials has been shameful. It has been inconsistent with the USA's human rights obligations to the victims, as well as the accused: victims of terrorism and other armed group violence have the right, like all victims of human rights abuses, to respect for and fulfilment of their rights to justice, redress, and the truth.

11 September 2001 – 2,976 people are killed as a result of the hijacking of four commercial airliners which are then crashed into the World Trade Center in New York City, the Pentagon in Washington, DC, and in Shanksville, Pennsylvania
17 September 2001 – President Bush authorizes CIA to conduct detentions outside the USA
13 November 2001 – President Bush signs military order authorizing detention without trial of foreign nationals and trials by military commission
11 January 2002 – First detainee transfers to US Naval Base at Guantánamo Bay in Cuba
11 September 2002 – Yemeni national Ramzi bin al-Shibh taken into custody in Pakistan
1 March 2003 – Pakistan national Khaled Sheikh Mohammed and Saudi Arabian national Mustafa al Hawsawi taken into custody in Pakistan
29 April 2003 – Yemeni national Walid bin Attash and Pakistani national Ammar al Baluchi (Ali Abdul-Aziz Ali) taken into custody in Pakistan
29 June 2006 – In *Hamdan v. Rumsfeld*, US Supreme Court voids the Bush military commissions, and rules that article 3 common to the four Geneva Conventions applies to al-Qa'ida detainees
4 September 2006 – in response to the *Hamdan* ruling, the administration transfers 14 men, including the above five, from secret CIA custody to Guantánamo
6 September 2006 – President Bush publicly confirms for the first time that the CIA has been operating a secret detention program
17 October 2006 – President Bush signs Military Commissions Act (MCA) into law
30 March 2007 – Under a pre-trial arrangement, David Hicks pleads guilty under the MCA and is sentenced to seven years in prison, all but nine months suspended which is to be served in his native Australia
5 June 2008 – Walid bin Attash, Ramzi bin al-Shibh, Mustafa al Hawsawi, Khalid Sheikh Mohammed and Ammar al Baluchi are arraigned at Guantánamo under the MCA of 2006. A sixth detainee who was originally charged along with them – Saudi Arabian national Mohamed al Qahtani – has had his charges dismissed by the Convening Authority (CA) for military commissions because, as the CA later revealed, of the torture he had been subjected to at Guantánamo.38
12 June 2008 – US Supreme Court rules in *Boumediene v. Bush* that the Guantánamo detainees have the right to habeas corpus, despite the MCA
7 August 2008 – Charged and tried under the MCA, Yemeni national Salim Ahmed Hamdan is sentenced to 66 months in prison, all but five of which are suspended. He is transferred from Guantánamo to Yemen in late 2008
3 November 2008 – At a military commission in Guantánamo, Yemeni national Ali Hamza al Bahlul sentenced to life imprisonment under the MCA 2006
22 January 2009 – President Obama, on his second full day in office, issues orders committing his administration to close the Guantánamo detention facility by 22 January 2010 and ordering the CIA to end its use of long-term secret detention. Military commissions suspended
9 April 2009 – CIA Director says that the CIA is no longer using "enhanced interrogation techniques" authorized by Department of Justice between 2002 and 2009, and "no longer operates detention facilities or black sites." He adds: the "CIA retains the authority to detain individuals on a short-term transitory basis"
29 October 2009 – President Obama signs the Military Commissions Act of 2009 into law, with provisions for revised military commissions
21 January 2010 – Charges under the MCA 2006 against Walid bin Attash, Ramzi bin al-Shibh, Mustafa al Hawsawi, Khalid Sheikh Mohammed and Ammar al Baluchi are dismissed without prejudice
11 August 2010 – Sudanese national Ibrahim al Qosi sentenced to 14 years under MCA 2009. In exchange for his guilty plea entered in July, all but two years of his sentence suspended
31 October 2010 – Details of pre-trial arrangement for Canadian national Omar Khadr released. He is sentenced to 40 years in prison, limited to eight years under a plea agreement, and possible return to Canada after a year. He was 15 when taken into custody in Afghanistan in 2002
18 February 2011 – Sudanese detainee Noor Uthman Muhammed sentenced to 14 years in prison under the MCA 2009, all but 34 months suspended under the terms of a guilty plea and promise to cooperate in future proceedings
31 May 2011 – Charges under the MCA 2009 sworn against Walid bin Attash, Ramzi bin al-Shibh, Mustafa al Hawsawi, Khalid Sheikh Mohammed and Ammar al Baluchi
9 November 2011 – Saudi Arabian national 'Abd al-Nashiri, previously held in the CIA secret program, arraigned for capital trial at Guantánamo on charges relating to the 2000 bombing of the *USS Cole*
29 February 2012 – Pakistani national Majid Khan, held from March 2003 to September 2006 in the CIA secret program, pleads guilty before a military judge in Guantánamo. Under the terms of a pre-trial agreement he will be sentenced in 2016, having co-operated with US authorities in the interim.
4 April 2012 – The Convening Authority for military commissions refers on for joint capital trial charges against Walid bin Attash, Ramzi bin al-Shibh, Mustafa al Hawsawi, Khalid Sheikh Mohammed and Ammar al Baluchi.

ENDNOTES

[1] Rule 904, Manual for Military Commissions, 2010 edition.

[2] *USA v. Khalid Shaikh Mohammad et al*. Arraignment Order, 9 April 2012, Colonel James A. Pohl, Military Judge. Under the military commission rules, "within 120 days of the service of charges, the military judge shall announce the assembly of the military commission". Manual for Military Commissions (2010 edition), Rule 707 (a)(2).The defendants are to be "brought to trial" within 30 days of charges being referred. Being brought to trial here means being arraigned. Rule 707 (a)(1).

[3] See §948d of the Military Commissions Act of 2009 ("A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter…, or the law of war, whether such offense was committed before, on, or after September 11, 2001…"). 'Abd al Rahim al-Nashiri, for example, is currently charged with alleged war crimes committed prior to 11 September 2001. See USA: 'Heads I win, tails you lose'. Government set to pursue death penalty at Guantánamo trial, but argues acquittal can still mean life in detention, 8 November 2011, http://www.amnesty.org/en/library/info/AMR51/090/2011/en

[4] UN Doc. A/ HRC/14/46 (2010), Principles 27-28.

[5] Prepared remarks of Attorney General Ashcroft, Senate Judiciary Committee hearing, 4 March 2003.

[6] Application of United States obligations under Article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al Qaeda detainees. Memorandum for John Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.

[7] As prepared for delivery, remarks at the American Enterprise Institute, 21 May 2009.

[8] George W. Bush, Decision points, Virgin Books, 2010, pages 170-171. ("[CIA Director] George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed…. 'Damn right,' I said.")

[9] The USA signed the ICCPR on 5 October 1977 and ratified it on 8 June 1992.

[10] Opening statement to the UN Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of the US Delegation, Geneva, Switzerland, 17 July 2006.

[11] See: USA: Trials in error. Third go at misconceived military commission experiment, July 2009, http://www.amnesty.org/en/library/info/AMR51/083/2009/en.

[12] See UN Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, para 22.

[13] Statement of the Attorney General on the prosecution of the 9/11 conspirators. US Department of Justice, 4 April 2011, http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html

[14] US Department of Justice press conference transcript, http://www.justice.gov/opa/pr/2009/ag-prconf-2009-11-13.pdf

[15] UN Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly 1985.

[16] Attorney General Eric Holder delivers remarks on the closing of Guantánamo Bay, at the Hans Arnhold Center of the American Academy of Berlin, Germany, 29 April 2009.

[17] Obama's Interview aboard Air Force One, New York Times transcript, 7 March 2009.

[18] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody, International Committee of the Red Cross, February 2007.

[19] In the military commission case now looming, the defence has filed a pre-trial motion before US Army Colonel James Pohl, the military judge overseeing the case, seeking to have him end "presumptive classification", which it argues is an example of over-classification. "If a prisoner says that he misses his family," the motion asserts, "this information is 'born classified' even though no original classification authority would or could ever classify it". The defence lawyers also assert that "presumptive classification uniquely cripples the defense function, as its vague boundaries systemically chill the exercise of professional discretion in a way that actual classification does not". USA v. Mohammad et al. Mr al Baluchi's motion to end presumptive classification, 17 April 2012.

[20] *USA v. Mohammad et al*. Government motion to protect against disclosure of national security information, 26 April 2012.

[21] See 'Guantanamo Five' Hear Charges, Reject Counsel, American Forces Press Service, 5 June 2008, http://www.defense.gov//News/NewsArticle.aspx?ID=50120. And USA: The show trial begins: Five former secret detainees arraigned at Guantánamo, 6 June 2008, http://www.amnesty.org/en/library/info/AMR51/056/2008/en

[22] UN Counter-Terrorism Expert regrets US court decision preventing oversight of intelligence services, UN News Release, 12 April 2012, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12053&LangID=E

[23] UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, para. 1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005.

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

[25] The prosecution has told the defence that it intends to prove a number of "aggravating factors" at the trial in pursuit of death sentences, including that the crime resulted in the death of more than one person, that it was committed in such a way that multiple lives were endangered, and was preceded by the "intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering" to the victims. Memorandum from Office of the Trial Prosecutor, 20 April 2012.

[26] Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, para 59.

[27] *USA v. Mohammad et al,* Defense motion to dismiss for defective record, 19 April 2012. Also Defense Supplemental Statement of facts on behalf of Mr Bin al Shibh in support of motion to dismiss for defective referral, 20 April 2012; and Mr al Baluchi's (Ali Abdul Aziz Ali) Supplement to AE008 Defense Motion to dismiss for defective referral, 20 April 2012.

[28] Under the military commission rules, in any case in which the prosecution seeks to have the charges referred on for trial as capital, the defendant has the right to be represented by an additional lawyer "who is learned in applicable law relating to capital cases". Rule 506(b), Manual for Military Commissions, 2010 edition.

[29] UN Basic Principles on the Role of Lawyers (1990): Principle 8: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." Principle 22: "Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

[30] UN Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (23 August 2007), para 34. See also General Comment 13, 'Equality before the courts and the right to a fair and public hearing by an independent court established by law' (Article 14), 1984, para 9.

[31] See International Covenant on Civil and Political Rights, article 14.3(b).

[32] For example, Mustafa al Hawsawi had no access to a lawyer from the time of his arrest on 1 March 2003 to April 2008, a period of five years.

[33] UN Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial (Article 14), 2007, para 6.

[34] See, for example, Killing for votes: The dangers of politicizing the death penalty process. Richard Dieter, Death Penalty Information Center, October 1996, http://www.deathpenaltyinfo.org/node/379. See also UN Doc.: E/CN.4/1998/68/Add.3, 22 January 1998. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. Addendum. Mission to the United States of America.

[35] See USA: Another brick from the wall: Connecticut abolishes death penalty, and North Carolina judge issues landmark race ruling, as momentum against capital punishment continues, 27 April 2012, http://www.amnesty.org/en/library/info/AMR51/028/2012/en

[36] For example, the UN Human Rights Committee has said that article 6 of the ICCPR (which recognizes the existence of the death penalty) "refers generally to abolition in terms which strongly suggest that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life". Human Rights Committee, General Comment No. 6 on the right to life (Article 6), 1982.

[37] Feinstein, Bond announce Intelligence Committee review of CIA detention and interrogation program, Senate Intelligence Committee press release, 5 March 2009. During a debate in the Senate in late 2011, Senator Dianne Feinstein said, "As chairman of the Select Committee on Intelligence, I can say that we are nearing the completion a comprehensive review of the CIA's former interrogation and detention program, and I can assure the Senate and the Nation that coercive and abusive treatment of detainees in US custody went beyond a few isolated incidents at Abu Ghraib. Moreover, the abuse stemmed not from the isolated acts of a few bad apples but from fact that the line was blurred between what is permissible and impermissible conduct, putting US personnel in an untenable position with their superiors and the law." S8130, Congressional Record – Senate, 1 December 2011. But see also, California Sen. Feinstein shuns spotlight in re-election bid, McClatchy Newspapers, 27 March 2012, http://www.mcclatchydc.com/2012/03/27/143202/california-sen-feinstein-shuns.html ("'It's a very big study. It is huge,' Feinstein said. 'Over 4 million cables and pieces of paper have been reviewed, and every high-value detainee looked at.' But the 2 1/2-year-old study, with its 20,000 footnotes and its ultra-sensitive subject matter, will probably never become public.")

[38] Guantánamo: A decade of damage to human rights and 10 anti-human rights messages Guantánamo still sends, 16 December 2011, http://www.amnesty.org/en/library/info/AMR51/103/2011/en; USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en.