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

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"*I wonder, now, what the Rules of Battle are*"
Lewis Carroll, 1896[1]

In the decade since President George W. Bush ordered his Secretary of Defense to establish a detention facility for foreign nationals taken into US custody in the so-called "war on terror" and to set up a military commission system to try a selection of them, more detainees have died in the US detention facility at Guantánamo Bay than have been tried by military commission.[2]

Today, the current administration has selected six detainees, from among the 171 men still held at Guantánamo, who it wants to see executed.[3] One of the six, 'Abd al Rahim Hussayn Muhammed al-Nashiri, is set to appear before a military commission at the base for an arraignment hearing (a pre-trial hearing) on 9 November 2011, having already been in detention for some nine years.

Arrested in Dubai, United Arab Emirates, by local security forces in October 2002, 'Abd al-Nashiri was handed over to US agents a month later, and held in secret custody at undisclosed locations by the Central Intelligence Agency (CIA) for almost four years, during which time he was subjected to torture and other ill-treatment as well as to enforced disappearance. He was transferred to military custody at Guantánamo in September 2006.

'Abd al-Nashiri was charged in April 2011 with, among other things, "murder in violation of the law of war" and "terrorism" under the Military Commissions Act (MCA) of 2009. This legislation, signed into law by President Barack Obama on 28 October 2009, enacted a third version of the military commission experiment begun by President Bush in late 2001.[4] 'Abd al-Nashiri is accused of involvement in the attack on the *USS Cole* in Yemen on 12 October 2000 in which 17 US sailors were killed and 40 others wounded, in the attack on the French oil tanker *MV Limburg* in the Gulf of Aden on 6 October 2002 in which a crew member was killed, and in the attempted attack on *USS The Sullivans* on 3 January 2000.[5]

In late September 2011, the "convening authority" of the military commissions, retired Navy Vice Admiral Bruce MacDonald, referred the charges against 'Abd al-Nashiri on for trial as capital, thereby authorizing the prosecution to seek the death penalty if it obtains a conviction. Having subjected 'Abd al-Nashiri, among other things, to the crimes under international law of torture and enforced disappearance for which there has been no criminal accountability, the USA now aims to deprive him of his life after a military trial, conducted by a tribunal and under procedures that are incompatible with respect for the human right to fair trial and equal protection of the law.

The government is keeping its options open, however, in case 'Abd al-Nashiri is acquitted. To do so it can turn to a system it has developed to keep its thumb firmly on its side of the scales of justice.

EXECUTION MEANS EXECUTION, BUT DOES ACQUITTAL MEAN RELEASE?

While President Bush's military order of 13 November 2001 no longer controls these trials, one of its central tenets still echoes down the years: "It is not practicable to apply in military commissions", the order said, "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts".[6] One of the principles generally associated with criminal trials in these federal courts is that if the

defendant is acquitted, unless held on other charges, he or she is freed.

Not so in Guantánamo, where justice has been turned on its head under the "global war" paradigm developed by the Bush administration and largely adopted by its successor. Under this framework, international human rights law has been bypassed and principles of criminal justice undermined.

For the Guantánamo detainees, the international human rights law requirement of trial within a reasonable time was long ago jettisoned by their captors. The MCA of 2009 makes no provision guaranteeing the right to trial within a reasonable time. Indeed, the Act states that "any rule of courts-martial relating to speedy trial" under the Uniform Code of Military Justice "shall not apply to trial by military commission".

Under the theory that it is involved in an open-ended and global war with al-Qa'ida and associated forces, the US government reserves the right to continue to detain individuals indefinitely, even if they have been acquitted of all criminal charges brought against them.[7] In a pre-trial motion filed in October 2011, 'Abd al Nashiri's lawyers asked the military judge overseeing the forthcoming trial – US Army Colonel James Pohl – to order the government to reveal what will happen should 'Abd al-Nashiri be acquitted. They argue that for a trial "to be meaningful to society and the defendant", it "must hold the possibility of both punishment and reprieve for the accused", and that reprieve should ordinarily mean release. They argue that if the government intends to hold him regardless of the outcome of the trial, then

> "the sentence of death is the *only* result that changes anything. In all other respects, no matter the outcome, Mr Al-Nashiri's life will remain as it is now… The Government has a duty to be candid with this tribunal. The Prosecution should not be allowed to suggest, even at the earliest stage of the proceedings, that an acquittal will free the Defendant if that is not true". [8]

The government has responded that the defence motion should be denied by Colonel Pohl. It asserts that, by approving trials by military commission under the MCA,

> "Congress did not authorize the commission to resolve every aspect of the life of the accused, to be the sole process determining whether the accused might ever be detained by the United State Government, or even to try the accused for every potentially criminal act that he might be alleged to have committed…
>
> The legality of the accused's law-of-war detention is a matter beyond the scope of the commission proceedings… The status of the accused is a matter that will be addressed by appropriate components of the US government, subject to habeas review by the federal courts, after the commission proceedings have been resolved".[9]

The brief confirms the administration's position, and that of its predecessor, that acquittal does not necessarily mean release in this context. Should 'Abd al-Nashiri be acquitted, it asserts, the government could continue to hold him under the USA's purported interpretation of the law.[10] The decision as to whether to do so "would be a policy decision, based on a wide variety of circumstances that cannot possibly be known at this time, and are not within the province of a military commission to address".

The defence lawyers have responded that while they have found "no clear authority" for their motion that the military judge order the government to clarify what acquittal would mean in this specific case, this is because "the government has chosen to place the defendant in an unprecedented situation: a capital trial before an ad hoc system".[11] They repeat the question

which lies at the centre of their motion:

> "If Mr al-Nashiri is acquitted, will he, like almost all other people held for trial, ever be freed? If the answer to this question is no, then the Prosecution has a 'heads I win, tails you lose' advantage. Indeed, the only possible change for Mr al-Nashiri is if the jury votes to kill him. Otherwise his life remains the same: indefinite detention at Guantánamo Bay".[12]

The defence has asked the military judge to hold oral argument on this issue at the arraignment hearing on 9 November.

It is the government that has defined the "war" and made up the rules it now invokes.[13] Its approach to foreign nationals it takes into custody outside the USA in this global "war" takes the form of a jigsaw:

- "Whenever feasible", detainees whom the administration decides it cannot release or transfer to the custody of other governments will be tried in federal court;[14]
- Where the administration deems this not feasible – and whatever other factors may enter into such a decision it currently considers that Congress has presently made this the case for all Guantánamo detainees by blocking their transfer to the US mainland – it will turn to military commissions at Guantánamo;[15]
- In the case of acquittal by military commission, the outcome can be continued detention, and
- Where no trial is deemed possible – which the administration has determined is the case for 48 Guantánamo detainees – indefinite detention without any criminal trial is the order of the day.[16]

In its brief urging Colonel Pohl not to order it to specify whether 'Abd al-Nashiri will be released if acquitted at his forthcoming trial, the government asserts that if al-Nashiri is indeed returned to indefinite detention after such an acquittal, he would be able to challenge the lawfulness of his detention in a habeas corpus petition in US District Court.

All is not as normal here either, however. As has been shown by the current habeas corpus cases relating to Guantánamo detainees, even if a federal judge rules that such a detainee is being unlawfully held and the government decides not to appeal, judicially ordered release is no guarantor of liberty. The judges only order, for example, "all necessary and appropriate steps to facilitate" the detainee's release. Because the USA refuses to release any Guantánamo detainee in the US mainland, this judicial deference effectively allows the executive to continue to hold the detainee at its discretion so long as it claims to be looking for another country to which it is willing to release the detainee (and which is willing to receive him), a solution that may be months or years in coming to pass, if it ever does.

The essence of habeas corpus proceedings has for centuries been that government authorities are required to bring an individual physically before the court and demonstrate a clear legal basis for their detention. Normally, if the government is unable to do so promptly (i.e. within a matter of days), the court is to order the individual released. This is the bedrock guarantee against arbitrary detention (reflected in article 9(4) of the International Covenant on Civil and Political Rights (ICCPR), for example); if it is not fully respected by the government and courts in every case, the right to liberty and the rule of law is more generally undermined.

During his nine years in US custody, 'Abd al-Nashiri has never been brought before a court and had that court rule on the lawfulness of his detention. He was held incommunicado in solitary confinement at undisclosed locations for nearly four years. Since then he has been held, with little contact with the outside world, for over five years at Guantánamo. A habeas corpus petition was filed on his behalf in October 2008 following the US Supreme Court's ruling four months earlier that the detainees held at Guantánamo could challenge the lawfulness of their detention in US District Court.[19] That petition began:

> "Petitioner has been detained in isolation without a lawful basis for [redacted]. He has been tortured, harassed, degraded, and wrongly classified as an 'unlawful enemy combatant' by agents of the President of the United States... He is being held under color and authority of the executive branch, and in violation of the Constitution, laws and treaties of the United States, including the Geneva Conventions, as well as in violation of customary international law and fundamental human rights... This Court should issue a Writ of Habeas Corpus, compelling Respondents either to release Petitioner or to establish in this Court a lawful basis for his detention..."[20]

"In response to the terrorist attacks of 11 September 2001, the United States instituted a program run by the CIA to detain and interrogate a number of known or suspected high-value terrorists, or 'high-value detainees' ('HVDs'). This CIA program involves information that is classified TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security [redacted]. After he was captured, the Accused ['Abd al-Nashiri] was detained and interrogated in this program… Consequently, any and all statements by the Accused… are presumptively classified until a classification review can be completed…. [I]formation related to this program [that] has not been declassified or officially acknowledged…includes (i) the location of its 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… Due to the classified information involved with this case, and the harm to national security that its disclosure reasonably could be expected to cause, the MCA allows for certain protective measures to be adopted in this military commission."

Government motion, *USA v. Al-Nashiri*, 27 October 2011[17]

"Everything that Mr Al-Nashiri says is presumed to be classified Top Secret/Sensitive Compartmented Information (TS/SCI). Because of this presumption, a number of restrictions must be observed. First, all members of the defense team, to include the mitigation investigator, must possess a TS/SCI clearance, and be read-on to the appropriate programs in order to conduct legal visits with Mr Al-Nashiri. Second, any notes produced from legal visits are treated as TS/SCI and must be stored and transported accordingly. Third, any legal mail from Mr Al-Nashiri is treated as TS/SCI. Fourth, the defense may only discuss what Mr Al-Nashiri told them or notes from the meeting at a Sensitive Compartmented Information Facility (SCIF). This presumption creates enormous obstacles that prevent the defense from conducting a capital defense…"

Defence response, *USA v. Al-Nashiri*, 2 November 2011[18]

Amnesty International has repeatedly expressed concern that sweeping invocations of secrecy in US counter-terrorism cases may be blocking accountability and remedy for human rights violations such as torture and enforced disappearance. Further, the government's claim that the fact it subjected individuals to secret techniques – including some widely acknowledged to constitute serious human rights violations – allows it to censor anything and perhaps everything those individuals or anyone they speak to might have to say to anyone else about what happened to them, raises real concerns about respect for the right to an effective remedy and freedom of expression.

Over three years later, there has yet to be a ruling on the merits of 'Abd al-Nashiri's habeas corpus petition. It might be considered highly unlikely that his challenge would ultimately be successful, given the detention authority claimed by the administration and endorsed by the

courts in other cases.[21] Under such circumstances, if he were to be acquitted by military commission, and returned to indefinite detention, the final piece of the USA's detentions jigsaw could be a habeas corpus "victory" for the government well over a decade after the detainee was taken into custody. But even a judicial finding of unlawful detention would not necessarily mean release.

The USA's global war paradigm, and the justification under it of military commissions and indefinite detention without criminal trial, thereby undermines the ordinary systems of criminal justice and principles of human rights. The global war framework should be replaced by a policy that restricts any application of the laws of war to those specific situations that constitute "armed conflicts" as recognised under international law (such as the specific conflict in Afghanistan), and fully recognises and respects international fair trial standards and other human rights. Military commissions should be abandoned in favour of prosecutions in ordinary federal courts, and any detainee whom the USA does not intend to prosecute should be released, into the USA if there is no other current option available.

CONCERNS OVER ALLEGED VIOLATIONS OF ATTORNEY-CLIENT CONFIDENTIALITY

On 1 November 2011, lawyers for 'Abd al-Nashiri and the five other Guantánamo detainees currently charged for trial by military commission and facing possible death sentences wrote to the Pentagon asking that the authorities "cease and desist the seizure, opening, translating, reading and reviewing of attorney-client privileged communications". The letter alleges that:

> "a) our clients' privileged communications have been violated by the confiscation of legal materials; b) the violation is on-going, since privileged materials have been read and are being retained and reviewed by [Guantánamo] personnel; c) there is an urgent need to remedy what violations can be remedied at this point, so as to ensure that attorney-client communications can take place unfettered".

All six detainees in question were held in the CIA secret detention program prior to their being transferred to Guantánamo in September 2006. A huge degree of secrecy continues to surround their cases – for example, where they were held by the CIA, what interrogation techniques they were subjected to, what their conditions of confinement were, is information that is classified at the highest level of secrecy. However, their lawyers state that the materials that are the subject of their concern are not classified, and that anyway, the lawyers have the necessary security clearance and are aware of their legal responsibilities in relation to handling classified information.

> "Legal mail – the most sacrosanct of all communications – is even more important when the client is located in a geographically remote, classified holding facility located in a different country from his attorneys… This military commission should intervene to protect the privacy of attorney-client privilege by prohibiting JTF-GTMO from reading communications between attorney and the detainee".
>
> *USA v. Al-Nashiri*, amicus brief, 2 November 2011[22]

Lawyers for 'Abd al-Nashiri have filed a motion before Colonel Pohl, the military judge, seeking to have the Guantánamo authorities barred from violating the attorney-client privilege.[23] The unclassified version of the brief is heavily redacted, but in it the lawyers argue that "the government cannot render counsel ineffective by forcing counsel to operate under conditions that necessarily frustrate counsel's most fundamental professional and ethical obligations to a client… To be minimally effective, counsel must be able to communicate with Mr Al-Nashiri on an ongoing basis with a reasonable expectation of privacy as to the content of what is written and said". They point to the protection on confidentiality provided in the context of courts-martial in the USA, and argue that in the current context – a death penalty trial before

a military commission of "a foreign national, who the United States has designated to be an enemy it wishes to have executed" – the considerations motivating strict enforcement of attorney-client confidentially are "orders of magnitude greater".

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.[24] The UN Human Rights Committee, established by the ICCPR to oversee implementation of that treaty, 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."[26]

> "The mere fact that three years' worth of legal mail was seized and reviewed by a third party is outrageous and prevents Mr Al-Nashiri from receiving the effective assistance of counsel… The prosecution repeatedly uses the adjective 'cursory' to describe the review conducted by JTF-GTMO. But regardless of how many times the word is repeated, it does not make it true… This is a capital case where the accused's very life is on the line. The fact that the government has placed impediments on counsel's ability to adequately represent Mr Al-Nashiri is troubling especially in light of the fact that such restrictions – which laid dormant for the last three years – were put forth on the eve of trial. The intrusion into legal mail is not condoned by Supreme Court law, federal regulation or in habeas proceedings. Accordingly, the defense requests that it not be condoned in this capital trial".
>
> *USA v. Al-Nashiri*, Defense brief, 4 November 2011[25]

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.[27]

DEATH SENTENCES AFTER UNFAIR TRIALS VIOLATE INTERNATIONAL LAW

Amnesty International opposes the death penalty unconditionally, regardless whether its application in a particular case could be compatible with international law. Even international human rights law, in any event, prohibits the imposition and execution of a death sentence based on a trial that has not met the highest standards for fairness. The USA's military commissions do not meet international fair trial standards.

The military commissions do not meet the fair trial requirement that proceedings be conducted before an impartial and independent tribunal. 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.

These special military commissions are creations of political choice, not tribunals of demonstrably legitimate necessity, and turning to them in this context against these detainees contravenes international standards.[28] The fact that the USA has civilian federal

courts open and capable of conducting complex terrorism trials has been recognized by the Obama administration itself. In 2009, US Attorney General Eric Holder announced that the five other Guantánamo detainees who along with 'Abd al-Nashiri are now facing possible capital trials by military commission would be brought to trial in civilian court in the mainland USA.[29] The reason it reversed that decision can be put down to domestic political considerations – not any justification under international human rights law. Indeed, the Attorney General stated that the federal courts remained the place where the five could and should be tried, but that "Members of Congress have intervened and imposed restrictions blocking the administration from bringing any Guantánamo detainees to trial in the United States, regardless of the venue."[30] Under international law, domestic legal considerations may not be invoked to justify failure to meet treaty obligations.[31]

The military commissions are discriminatory. In terms of fair trial safeguards, the procedures that apply to military commission trials for the foreign nationals detained at Guantánamo fall far short of the procedures that would be applied to US nationals in any other form of criminal court in the USA, even if they were accused of precisely the same conduct. The same standard of fair trial and equal protection of the law should be applied to all, regardless of national origin: that is a fundamental principle of human rights and the rule of law.[32]

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 have not been respected, constitutes a violation of the right to life (article 6 of the Covenant)."[33] Any imposition of the death penalty based on trials before these military commissions would be a violation of international human rights law.

The need for stringent adherence to fair trial standards in such cases could not be greater given what has gone before. In place of prompt charges and ordinary criminal trials without undue delay, 'Abd al-Nashiri and other detainees were subjected to torture or other cruel, inhuman or degrading treatment and other human rights violations during years in unlawful detention.

Looking beyond the 'Abd al-Nashiri case to some of the other detainees held at Guantánamo, the failure of the USA to provide the victims and the general public the opportunity to see those responsible for the 9/11 attacks or any 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 violence by armed groups targeting civilians have the right, like all victims of human rights abuses, to respect for and fulfilment of their rights to justice, reparation, and the truth. It is long past time for the USA to end its now decade-old approach to these detentions of "heads I win, tails you lose" – an approach that is incompatible with human rights principles – and to set a clear course at swift speed from the prison at Guantánamo towards real justice in the country's ordinary courts.

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[1] Chapter VIII, 'It's my own invention', Through the Looking-Glass, and What Alice Found There.

[2] Military Order: Detention, treatment, and trial of certain non-citizens in the war against terrorism. President George W. Bush, 13 November 2001. Eight detainees are known to have died in the base since June 2006, six by reported suicide, two from natural causes. Six detainees have been convicted by

military commission since 2007, four of them under plea bargains which would see them returned to their countries.

[3] The other five are Pakistani nationals Khalid Sheikh Mohammed and 'Ali 'Abd al-'Aziz, Yemeni nationals Walid bin Attash and Ramzi bin al-Shibh and Saudi Arabian national Mustafa al Hawsawi. Charges were sworn against them in May 2011. The convening authority for the military commissions has not yet referred the charges on for trial. The prosecution has recommended that the death penalty be an option against these five defendants.

[4] 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.

[5] Both the invocation of military jurisdiction with respect to 'Abd al-Nashiri, and the premise for some of the 'war crimes' charges against him, rely on legal theories that, as mentioned later in this document, Amnesty International has repeatedly rejected as unsupported by international law: specifically, the idea that rather than a series of discrete and geographically- and temporally-defined armed conflicts, the USA is engaged in an open-ended armed conflict with al-Qa'ida that may manifest itself anywhere in the world at any time and to which human rights law does not apply. (Indeed, the al-Nashiri case explicitly extends the scope of the USA's argument even further by seeking after-the-fact to retroactively define this global armed conflict as having started *before* the attacks by al-Qa'ida on 11 September 2001 or the subsequent adoption of the 2001 Authorization for Use of Military Force by the US Congress). The fact that the basis for invoking military jurisdiction and accusing 'Abd al-Nashiri of "war crimes" is untenable does not, of course, necessarily mean that there would not be evidence to support a trial on ordinary charges of murder under US law against 'Abd al-Nashiri, but this is precisely the course the USA has chosen as a matter of policy to abandon in favour of its highly-militarized "global war" approach.

[6] Military Order: Detention, treatment, and trial of certain non-citizens in the war against terrorism. President George W. Bush, 13 November 2001.

[7] Continuing to hold such a detainee after acquittal "may be authorized by statute, such as the 2001 Authorization for Use of Military Force [AUMF], as informed by the laws of war". Rule 1101, discussion, page II-139. United States Manual for Military Commissions (2010 Edition). The Obama administration holds that the AUMF – a broad resolution passed by Congress on 14 September 2001 after little genuine debate or clarity about what legislators were voting for, and signed into law by President Bush four days later – as providing it the authority to continue detentions at Guantánamo. See USA: Different label, same policy? 16 March 2009, http://www.amnesty.org/en/library/info/AMR51/038/2009/en.

[8] *USA v. Al-Nashiri*, Motion for appropriate relief: To determine if the trial of this case is one from which the defendant may be meaningfully acquitted, 19 October 2011.

[9] *USA v. Al-Nashiri*, Government response to defense motion for appropriate relief: To determine if the trial of this case is one from which the defendant may be meaningfully acquitted, 27 October 2011.

[10] "the government could, as a legal matter, continue to detain the accused during hostilities pursuant to the AUMF if it establishes by a preponderance of the evidence that the accused was part of or substantially supported al Qaeda, the Taliban, or associated forces."

[11] *USA v. Al-Nashiri*, Defense reply to government response to defense motion for appropriate relief to determine if the trial of this case is one from which the defendant may be meaningfully acquitted, 1 November 2011.

[12] *USA v. Al-Nashiri*, Defense reply to government response to defense motion for appropriate relief to determine if the trial of this case is one from which the defendant may be meaningfully acquitted, 1 November 2011.

[13] It also makes up the timing. The case of 'Abd al-Nashiri illustrates that the MCA has backdated this "war" to before the attacks of 11 September 2001, as he is accused of alleged war crimes committed

prior to that date ("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…" §948d, Military Commission Act of 2009). In its reply brief to Colonel Pohl, the prosecution even states: "the government cannot know if the hostilities in which al Qaeda and the United States remain engaged will cease before the conclusion of the trial of the accused".

[14] Remarks by the President on National Security, 21 May 2009, http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/

[15] That the rules of the military commissions are, even now, still being developed was demonstrated when, on 7 November 2011, less than 48 hours before 'Abd al-Nashiri's arraignment for his capital case, the Pentagon released its "Regulation for trial by military commission", the manual which "prescribes policies and provisions for the administration of military commissions and implements the Manual for Military Commissions". This last-minute publication was reminiscent of the publication by the Pentagon in 2010 of the Manual for Military Commissions on the eve of military commission proceedings against Omar Khadr, facing trial eight years after being taken into custody as a 15-year-old (see USA: More of the same: New Manual for Military Commissions confirms acquittal may not mean release, 29 April 2010, http://www.amnesty.org/en/library/info/AMR51/036/2010/en)

[16] Guantánamo Review Task Force, 22 January 2010, http://www.justice.gov/ag/guantanamo-review-final-report.pdf

[17] *USA v. Al Nashiri*, Government motion for protective order to protect classified information throughout all stages of proceedings, 27 October 2011.

[18] *USA v. Al Nashiri*, Defense response to government motion for protective order to protect classified information throughout all stages of proceedings, 2 November 2011.

[19] *Boumediene v. Bush*, 553 U.S. 723, 12 June 2008.

[20] *Al-Nashiri v. Bush et al*, Petition for Writ of Habeas Corpus. Redacted version, In the US District Court for the District of Columbia, 2 October 2008.

[21] See, for example, case of Musa'ab Omar Al Madhwani in USA: Still failing human rights in the name of global 'war', 20 January 2010, http://www.amnesty.org/en/library/info/AMR51/006/2010/en

[22] *USA v. Al Nashiri*, Amicus brief filed by James G. Connell, III and Major [redacted] on behalf of Ammar al Baluchi in support of al Nashiri's defense motion to bar JTF-GTMO personnel from reading attorney-client mail, 2 November 2011. (JTF-GTMO = Joint Task Force – Guantánamo).

[23] *USA v. Al-Nashiri*, Defense motion to bar JTF-GTMO personnel from violating the attorney-client privilege by reading attorney-client information, 26 October 2011.

[24] 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."

[25] *USA v. Al-Nashiri*, Defense reply to government response to defense motion to bar JTF-GTMO personnel from violating the attorney-client privilege by reading attorney-client information, 4 November 2011. At the time of writing, and unclassified version of the government response to the defence motion had not been made public.

[26] 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.

[27] 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.

[28] See, for example, 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.

[29] Attorney General announces forum decisions for Guantánamo detainees, US Department of Justice, 13 November 2009, http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html. See note 2 above.

[30] 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

[31] See for example, Article 27 of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

[32] See ICCPR articles 2(1), 14(1) and 26.

[33] 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.