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USA: Trials in error

Third go at misconceived military commission experiment

Military commissions wrong choice in 2001, wrong in 2006, and would be wrong now

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There is still much to do before the Guantánamo chapter is truly brought to a close. Its remaining inmates must either be tried before a court of law – like any other suspected criminal – or set free
Statement by the UN High Commissioner for Human Rights, Navanethem Pillay, on the International Day in Support of Victims of Torture, 24 June 2009

1. INTRODUCTION AND OVERVIEW: MILITARY COMMISSIONS WERE DEVELOPED AS PART OF 'AMERICA'S BATTLE LAB', A FAILED EXPERIMENT THAT SHOULD BE ABANDONED IN ITS ENTIRETY

In a September 2002 report, the assistant commander of the US Army Intelligence Center described the detention facility at the US Naval Base at Guantánamo Bay in Cuba as "America's Battle Lab" in the global "war on terror". In his review of intelligence operations at the base, Colonel John Custer recommended the creation of an environment at Guantánamo that would be "conducive to extracting information by exploiting the detainees' vulnerabilities".[1] According to the then head of the Pentagon's Criminal Investigative Task Force (CITF), two commanders in charge of the Guantánamo detentions, Major General Michael Dunlavey and his successor, Major General Geoffrey Miller, adopted the "Battle Lab" description. They were among those officials who sought approval for, or approved, interrogation methods that violated the prohibition of torture and other cruel, inhuman or degrading treatment.[2]

In a major speech on national security on 21 May 2009, in which he explained his decision to close down the Guantánamo detention facility, President Barack Obama said that the detentions there had been a "misguided experiment". The use of coercive interrogations conducted out of sight of independent judicial scrutiny, legal counsel and other fundamental safeguards for the detainees was at the heart of this experiment.

Trials by military commission were conceived as part of this approach to detentions. Detainees were treated as little more than objects from which to extract information, rather than human beings accused of criminal conduct to whom fair legal process was due. Human rights violations, including the crimes under international law of torture and enforced disappearance, were the result. A forum for trials was developed that was vulnerable to political interference and could minimize independent external scrutiny of detainee treatment. Further, contrary to international guarantees of equality before the courts and to equal protection of the law, to which the USA had agreed, the system was applied on prohibited discriminatory grounds: US nationals accused of identical conduct would continue to receive the full fair

trial protections of the ordinary US criminal justice system while non-nationals could be deprived of those protections on the basis of their national origin alone.[3]

After taking office, President Obama obtained suspensions in military commission proceedings. However, the administration did not abandon the commissions, and in March 2009 it noted that "at the direction of the Secretary of Defense, the Department of Defense continues to investigate and evaluate cases for potential trial by military commission".[4] In a hearing in front of the Senate Appropriations Committee on 30 April 2009, Secretary of Defense Robert Gates said that the commissions were "still very much on the table".[5] In a media interview on 8 April 2009, Attorney General Eric Holder suggested that "a substantial number" of the people the administration decided to charge would be brought to trial in the civilian federal courts, while others could be taken to "military courts" with "some enhanced measures".

In a statement on 15 May 2009, President Obama said that his administration would reform the military commissions to make them "a legitimate forum for prosecution, while bringing them into line with the rule of law". Among the reforms would be to prohibit the admission at trial of statements obtained under cruel, inhuman or degrading treatment, a tightening of the rules on the use of hearsay evidence, and "greater latitude" for detainees to choose their US military lawyers. In his national security speech a week later, he said that his administration would work with Congress on legislation to "ensure that these commissions are fair, legitimate and effective". Legislation to amend the Military Commissions Act of 2006 (MCA) was under development at the time of writing.

In his speech on 21 May 2009, President Obama said that, "when feasible", trials of Guantánamo detainees would be conducted in federal court, but military commissions would be retained for trials of detainees "who violate the laws of war", where there was a need to protect "sensitive sources and methods of intelligence-gathering", or where there was a need to use "evidence gathered from the battlefield that cannot be effectively presented in federal courts".

President Obama is seeking to reform what, as a presidential candidate in 2008, he had described as an "enormous failure". Amnesty International considers that this military commission experiment failed, as it was doomed to, because its design was never actually about determining criminal responsibility through fair trial. It was about short-changing justice by weighting the system in favour of the government. The organization considers that the commissions have been so tainted as to put them beyond reform.

In a US Senate hearing on military commissions on 7 July 2009, retired US Navy Rear Admiral and former Judge Advocate General, John D. Hutson, said:

> "If the point of the exercise is to create a court system that will ensure convictions of alleged terrorists against whom we don't have sufficient admissible evidence, then we have missed the point. You can't have a legitimate court unless you are willing to risk an acquittal. If you aren't willing to accept the possibility that a jury will acquit the accused based on the evidence fairly presented, then it isn't really a court. It's a charade".[6]

Rear Admiral Hutson described himself as "an early and ardent supporter" of the military commission experiment begun by President George W. Bush in November 2001. He now opposes the commissions, however, and urged the Senate Armed Services Committee to work for repeal rather than reform of the MCA and to support trials in federal court, not by military commission. He said:

> "It is not only unnecessary, it is inappropriate for DoD [Department of Defense] to operate a system of justice in parallel to DoJ [Department of Justice]... We don't ask DoJ to fight wars. We shouldn't ask DoD to prosecute terrorists".

At a hearing in front of a subcommittee of the US House of Representatives the following day, a former prosecutor from the military commissions, Lieutenant Colonel Darrel Vandeveld, said that in 2007 he had entered his job at the Office of Military Commissions as a "true believer", and had left it in 2008 as the "seventh military prosecutor at Guantánamo to resign because I could not ethically or legally prosecute the defendant within the military commission system at Guantánamo."[7] He argued that:

> "The military commissions cannot be fixed, because their very creation – and the only reason to prefer military commissions over federal criminal courts for the Guantánamo detainees – can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation."[8]

Lt. Col. Vandeveld drew the subcommittee's attention to what he said was the poor collection and filing of evidence that had taken place in the commission cases, and pointed to the case of Mohammed Jawad, an Afghan national taken into custody by the USA when he was a child and who is still in Guantánamo today and facing possible trial by military commission (see also Section 2):

> "The obvious reason behind the shoddy preparation of evidence against Mr Jawad is that it was not gathered in anticipation of any semblance of a 'real' trial. With the government setting an extremely low evidentiary bar for continued detention without charge, with the focus on extracting information through coercive interrogations rather than on prosecution, and with the understanding that any trials will forego fundamental due process protections, there is little incentive for investigators to engage in the type of careful, systematic gathering of evidence that one would find in a typical civilian trial. In the case of Mr Jawad, these incentives proved manifestly perverse; they allowed for the prolonged detention and abusive treatment of a juvenile who is very likely innocent of any wrongdoing".[9]

As documents now in the public realm show, the Bush administration was warned early on by insiders that if it embarked on the use of interrogation techniques that amounted to torture or other ill-treatment, it risked jeopardizing trials of detainees. In 2002, for example, an official pointed out that "successful prosecutions in military commissions or subsequent use of detainee statements in Federal prosecutions" would require that the information be legally admissible. Even though this would be a lesser issue under the low standards pertaining in the military commissions, he wrote, many of the proposed interrogation techniques would "place a burden on the prosecution's ability to convince commission members that the evidence meets even that low standard". He added that "any statements obtained under these circumstances will be inherently suspect and of questionable value in a prosecution using established rules of criminal procedure that prohibit such conduct on the part of law enforcement agents".[10]

A 2002 CITF memorandum expressed concern that despite opposition within law enforcement agencies to the use of harsh interrogation techniques, "there appears to be a tendency to revert to a short-sighted coercive model of interrogation".[11] An FBI email from May 2004 recalled earlier "weekly meetings" in which FBI and Justice Department personnel had "all agreed" that the Pentagon's interrogation tactics at Guantánamo "were going to be an issue in the military commission cases", and that this had been brought to the attention of the Office of General Counsel at the Pentagon, but that the Department had "their marching orders from the SECDEF [Secretary of Defense]".[12] Major General Miller, then commander of detention operations at Guantánamo, was warned by the FBI that the Pentagon's interrogation methods, "could easily result in the elicitation of unreliable and legally inadmissible information", but he still favoured those methods.[13]

The first incarnation of the commissions – executive bodies established under a military order signed by President Bush on 13 November 2001 – was ruled unlawful by the US Supreme Court in June 2006 in part on the grounds that they violated the Geneva Conventions.[14] The Bush administration responded by seeking and obtaining congressional approval for a version of the military commissions closely modelled

on the version that the Supreme Court had already thrown out. To achieve this, as outlined further below, President Bush exploited the cases of 14 detainees whose rights had been systematically violated for years by the USA in a secret detention and interrogation program operated largely by the Central Intelligence Agency (CIA).

Amnesty International considers passage of the Military Commissions Act in the autumn of 2006, as congressional elections loomed, to have been a shameful episode. With domestic politics trumping international human rights principles, passage of the Act essentially gave a green light to continuing secret detention and detainee ill-treatment, the denial of habeas corpus and judicial remedy, and the facilitation of impunity for human rights violations. The MCA was and remains incompatible with international law.

Among those voting against the Act was Senator Barack Obama. He condemned the politicization of the human rights of detainees, predicting that:

> "There are going to be 30-second attack ads and negative mail pieces criticizing people who don't vote for this legislation as caring more about the rights of terrorists than the protection of Americans. And I know this vote was specifically designed and timed to add more fuel to the fire. Yet, while I know all of this, I am still disappointed because what we are doing here today, a debate over the fundamental human rights of the accused, should be bigger than politics."[15]

In his national security speech two and a half years later, President Obama made a strong defence of his decision to close the detention facility at Guantánamo Bay. He noted that, "over the last several weeks, we have seen a return of the politicization of these issues that have characterized the last several years", with some using words "calculated to scare people rather than educate them". He continued:

> "As our efforts to close Guantánamo move forward, I know that the politics in Congress will be difficult. These issues are fodder for 30-second commercials and direct mail pieces that are designed to frighten. I get it. But if we continue to make decisions within a climate of fear, we will make more mistakes."

Amnesty International agrees that torture and other human rights violations, including unfair trials and discrimination, thrive on fear, and that fear-mongering has contributed to the USA's resort to policies and practices in the name of countering terrorism in recent years that left it on the wrong side of its international human rights obligations. The organization believes that the military commissions are a part of this picture and that they were a mistake in 2001, were a mistake in 2006, and would be a mistake now. The commissions, like Guantánamo, are part of the problem, and cannot be a part of any real solution to the disregard for human rights that has marked the USA's response to the attacks of 11 September 2001 (9/11). De-militarizing trials of Guantánamo detainees and others accused of similar conduct should be a key part of bringing this regrettable chapter to a close and towards ensuring the USA's future respect for its human rights obligations.

Amnesty International fully recognizes that it was a previous US administration that initiated the military commission experiment and later obtained congressional approval for substantive parts of its scheme. The organization nevertheless considers that no amount of tinkering, with or without congressional approval, can render the discredited machinery of the commissions capable of ensuring that, in any trials before them, justice will both *be done and be seen to be done*, and that equality before the courts and equal protection of the law, and other international standards, will be fully respected and fulfilled. Section 2 of this report looks back at the evolution of the military commission system to show why they were fundamentally misconceived in the first place and that going forward with them, in any form, would also be misguided.

For justice to be done and seen to be done and to maximize public confidence in judicial process, trial courts must be clearly independent of the political branches. The independence and impartiality of the tribunal is essential to a fair trial, as provided in article 14 of the International Covenant on Civil and Political Rights (ICCPR) and other international instruments. The UN Human Rights Committee, the expert body established by the ICCPR to monitor its implementation, has stated in its General Comment on the right to a fair trial under the ICCPR that the requirement that the tribunal be competent, impartial and independent "is an absolute right that is not subject to any exception".[16] The requirement of independence, among other things, means that judges must have security of tenure and be free from any political interference by the executive branch and legislature.[17] The principle of impartiality demands that each of the decision-makers, whether judge or juror, be unbiased. The Human Rights Committee has stated that "the tribunal must appear to a reasonable person to be impartial".[18] It has said that the provisions of article 14 apply to all courts and tribunals, "whether ordinary or specialized, civilian or military".[19]

In the USA, unlike the ordinary federal trial courts (District Courts), military tribunals, whether courts-martial or military commissions, are part of the political branches of government, rather than the judicial branch (Article III of the Constitution). They are established under Article I of the Constitution (the legislative branch), and convened under the command authority of the President as Commander-in-Chief of the Armed Forces (Article II of the Constitution). The Office of Legal Counsel (OLC) at the US Justice Department noted in 2002: "As the Supreme Court has unanimously and repeatedly recognized, military commissions are not 'courts' established under Article III."[20] Judges on Article III courts are appointed for life by the President with the "advice and consent" of the Senate. Military judges on Article 1 tribunals do not have the equivalent independence conferred by security and length of tenure.[21]

The requirement that justice not only be done but to be seen to be done in the case of any Guantánamo detainee whom the USA prosecutes has been turned into a substantial challenge by the USA's unlawful treatment of the detainees. A decision to turn to military commissions rather than independent civilian courts for any such trial will not serve this requirement or human rights standards more generally.

Amnesty International described in March 2007 its concerns about how the rules and procedures under the MCA failed to offer full guarantees of fair trial.[22] In addition, the organization has pointed to logistical and other issues that have undermined fair trials, including the lack of resources for the defence lawyers. The US Senate Committee on Armed Services has recently noted concerns about under-resourcing of defence teams which blocks their ability "to conduct investigations, obtain expert witnesses, and perform other necessary tasks". The Committee has said that it "expects the Department of Defense to review and address" such concerns.[23] The UN Human Rights Committee has stated that the right of accused persons to have adequate time and facilities for the preparation of their defence is "an important element of the guarantee of a fair trial and an application of the principle of equality of arms".[24]

As this report outlines, Amnesty International believes that even if some of the shortcomings of the military commissions are addressed through reforms, there would remain a number of reasons why they would remain incompatible with international standards.

- The military commissions were conceived in 2001 as part of a global war paradigm under which human rights principles have been relegated or disregarded. Reborn under this framework in 2006 with congressional approval, the commissions are set to be resuscitated in 2009 as a part of a continued sweeping invocation and application of a body of international law designed only for the exceptional context of international armed conflicts, to situations where it is the ordinary systems of criminal justice in a framework of international human rights that should apply (see Section 3 of this report).

- The military commissions are not tribunals of demonstrably legitimate necessity, but creations of political choice. Throughout the Guantánamo detentions, the USA has had a fully functioning criminal justice system with the experience, capacity and procedures to deal with complex terrorism cases, as it has demonstrated in a number of cases. Turning to military commissions in this context for these detainees contravenes international standards. Further delaying trials in order to reform unnecessary tribunals violates the right under international law of the detainees to be brought to fair trial without undue delay. Under the current rules by which the government has been implementing the MCA, even if a detainee is tried by a military commission and acquitted, he may be returned to indefinite detention if the executive considered him to have intelligence value or to be a security threat. The new administration has not said that this rule is one it is proposing to change, and has indicated that it believes it would have the authority to detain an acquitted defendant if it deemed him a security threat. Its failure to immediately release even those detainees whose detention has already been ruled unlawful by federal judges, gives rise to concern that the prospect of release after a military commission acquittal is just as unlikely (Section 4).
- Whatever modifications are made, these tribunals will still be *military*, not civilian, bodies. Amnesty International opposes any trial of civilians by military courts of any kind, and subjecting someone who is not a member of armed forces to trial by military tribunals in these circumstances would be inconsistent with international standards. In addition, compelling a civilian defendant to be represented by a military lawyer is incompatible with the right under international law to legal representation of one's choosing (Section 5).
- As noted above, the military commissions lack independence, whether in substance or appearance, from the political branches of government that have authorized and condoned human rights violations against the very category of detainees that would appear before them, and that have failed to this day to ensure accountability and remedy for these violations. Given this backdrop – a backdrop that at least partially explains the initial decision to create these tribunals – the need for such independence could not be greater, even with a new leadership in the executive and legislative branches.
- The military commissions only apply to foreign nationals. If the US authorities constitute a tribunal which provides foreign nationals inferior fair trial protections than those a US citizen accused of the same conduct would receive in the ordinary courts, the trials before it will by definition violate the USA's international legal obligations to ensure that all individuals, regardless of national origin, are equal before its courts, and receive equal protection of the law (Section 6).
- While the administration has proposed to bar admission into evidence at military commission trials statements obtained under cruel, inhuman or degrading treatment, this improvement is likely to have only limited impact in practice if unaccompanied by changes to ensure that the definitions the commissions apply of such treatment incorporate all conduct – including detention conditions and interrogation techniques – covered by the prohibition of torture and ill-treatment under international law; that it is the government that must demonstrate the absence of any such abuse; and that all potentially relevant evidence on this issue is disclosed to the defence. At the same time, military commission defendants would still be denied the fuller protections on this issue that they would receive in the federal courts (Section 7).
- The military commissions do not sit well with a commitment to transparency, a commitment made by the new administration in the name of accountability. The failure of the US government to act on accountability issues, and the continuing invocation of secrecy that has the effect of blocking accountability, raises concern in the context of a military commission system designed to be less than transparent than would be ordinary criminal courts (which nevertheless have powers to protect sensitive information where truly justified and in a manner compatible with justice to the accused) and to facilitate convictions at the same time as

protecting from investigation and prosecution human rights violators on the government side (Section 8).

- The military commissions will have the power to hand down death sentences after trials which do not conform to article 14 of the International Covenant on Civil and Political Rights. Any execution after any such trial would violate the right to life as a matter of international law (Section 9). Amnesty International opposes the use of the death penalty in all cases, unconditionally.

This report focuses on military commissions. At the same time, however, the question remains as to whether the new US administration will take a trial-or-release approach to ending the Guantánamo detentions, as Amnesty International has long sought, or keep indefinite detention as a third option. It is currently keeping this option open. In the case of detainees whom it decides it cannot release or transfer to the custody of other governments, "when feasible" they will be tried in federal court. Where this is deemed by the executive as not feasible, it will turn to military commissions for prosecutions. And where this is deemed not to be an option, indefinite detention without any criminal trial may yet be the outcome.

In his national security speech on 21 May, President Obama raised the possibility that his administration would consider the use of indefinite detention without criminal trial, apparently entirely outside of the ordinary criminal justice system and applying lower standards of proof or fairness even than those applicable in the military commission system, for detainees whom the government deems can neither be released nor prosecuted. He emphasized that:

> "We are going to exhaust every avenue that we have to prosecute those at Guantánamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States… These are people who, in effect, remain at war with the United States. As I said, I am not going to release individuals who endanger the American people. Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture – like other prisoners of war – must be prevented from attacking us again…
>
> In our constitutional system, prolonged detention should not be the decision of any one man. If and when we determine that the United States must hold individuals to keep them from carrying out an act of war, we will do so within a system that involves judicial and congressional oversight. And so going forward, my administration will work with Congress to develop an appropriate legal regime so that our efforts are consistent with our values and our Constitution."

Amnesty International will continue to urge the US authorities not to sanction indefinite detention outside the criminal justice system. In this regard, one of the organization's concerns is that the resuscitation of the military commissions may be part of an approach that seeks to keep the thumb firmly placed on the government's side of the scales, with decisions made on detainees taken according to which avenue is deemed most likely to achieve government "success" rather than according to adherence to principles of equality, due process and human rights. Such an approach, which would seem not to be based on objective and reasonable grounds for treating similarly situated detainees differently, would be incompatible with international human rights law.[25] If the reason for treating such detainees differently was solely to compensate for the problems created by earlier violations of international human rights law committed against them, this would be unconscionable, especially since it would effectively mean that those most victimized previously by torture or other ill-treatment would be those most likely now to be deprived of fair trial and other human rights.

In a hearing in the US House of Representatives on military commissions on 8 July 2009, the Chairman of the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties, Representative Jerrold Nadler, suggested the following description of what "we seem to be going toward":

> "We're going to divide the prisoners into different classifications: Those whom we have good evidence against will get fair trials; those we have weak evidence against we'll give less fair trials; those we have no evidence against, we'll just keep them locked up in preventive detention without any trial at all. In other words, we'll fit the process to the result and in effect have kangaroo justice".

In an interview on 22 May, President Obama revisited what he had said in his national security speech the day before, namely that he had been handed the consequences of "earlier poor decisions", including the "messy situation" of the Guantánamo detentions. He continued:

> "We've got a lot of people there who we should have tried early, but we didn't. In some cases, evidence against them has been compromised. They may be dangerous, in which case we can't release them. And so finding how to deal with that I think is going to be one of our biggest problems".[26]

In similar vein, in an interview on 7 March 2009, President Obama had said:

> "As a consequence of a series of early decisions, we now have people in Guantánamo who have not been tried, have not had an opportunity to answer charges, many of whom are dangerous, some of whom are very difficult to try, will be – some of whom will be difficult to try because of the manner in which evidence was obtained. So there's a clean-up operation that has to take place, and that's complicated."[27]

As it seeks to end the Guantánamo detentions, the new US administration undoubtedly faces the serious consequences of unlawful policies pursued by the Bush administration. Whatever measures the administration takes, however, detainees should not pay for the error of the USA's ways. Any "clean-up" should not amount to a cover-up of any human rights violations that have been committed. Neither should it place any obstacle in the way of remedy for detainees unlawfully treated, or release of detainees unlawfully held whom the USA does not intend promptly to charge. This outcome is long overdue.

No government should be permitted to diminish the quality of justice to compensate for its own past injustices, even if that injustice took place under a previous executive and legislature. The human rights violations of the past cannot provide any valid excuse for further disregard of human rights in the present. If a Guantánamo detainee cannot be brought to fair trial – *for whatever reason*, *and whoever the detainee is* – he should be released. This is true whether the government does not have enough evidence to bring a prosecution or whether the evidence the government does have has been rendered inadmissible in a fair trial by the way in which it was obtained. To jeopardize this rule would be to give governments a green light to gather evidence and treat detainees in any way they see fit and face no consequences for their actions.

An added ingredient to the current situation, as Section 10 outlines, is the USA's long-standing reluctance to apply to its own conduct provisions of international human rights treaties it has ratified or widely-recognized rules of customary international law. This in turn is being exacerbated by the tendency of many lawmakers and officials in the USA to invoke "American values" and tradition to the exclusion of international human rights standards, even when passing laws or adopting policies that clearly violate these obligations.

The assault on human rights principles that came to be a hallmark of the USA's response to the 9/11 attacks leaves the international community with a clear interest in seeing the USA consign to history all remnants of its unlawful detention policies and practices. President Obama expressly recognized this international concern when he ordered the closure of the detention facility at the US Naval Base at Guantánamo Bay in Cuba and the "prompt and appropriate" resolution of each and every detainee case.[28] So too in an interview with Associated Press on 2 July 2009, discussing the question of indefinite detention outside the criminal justice system, when President Obama said:

> "I think it is very important that the American people and Congress, in conjunction with my administration, come up with a structure that is not only legitimate in the eyes of our constitutional traditions, but also in the eyes of the international community, because part of our task in defeating these extremists is winning over allies and populations that right now feel as if we haven't been living up to our highest ideals." [29]

Recognition that concern extends beyond US borders has also come from Secretary of Defense Robert Gates who said that he had noted "the very positive response around the world" to the decision to close the Guantánamo detention facility, and that doing so would create "additional opportunities" for the USA in securing international cooperation in the struggle against violent extremism.[30] Amnesty International believes that the same could be said in relation to abandoning military commissions. Indeed, the organization believes that the international legitimacy of any trials of Guantánamo detainees – all of whom are *non-US* nationals whose rights under *international* law have been violated by the USA – will be as important as domestic acceptance of them.

The new administration has committed the USA to "meeting its UN treaty obligations". A document issued by the US State Department in April 2009 in support of the USA's candidacy for membership of the UN Human Rights Council, stated:

> "The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected. As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations... As part of our commitment to the principle of universality of human rights, the United States commits to working with our international partners in the spirit of openness, consultation, and respect and reaffirms that expressions of concern about the human rights situation in any country, our own included, are appropriate matters for international discussion".[31]

On 14 July 2009, the Chief Prosecutor in the Office of Military Commissions, US Navy Captain John Murphy, said that his office was ready to proceed with the trials of 66 Guantánamo detainees and was awaiting instruction from the administration. In neither his 21 May 2009 speech nor his earlier statement on 15 May, however, did President Obama confirm whether military commissions would definitely occur, or where they would be held if they did, maintaining only that a number of reforms would "begin to restore the commissions as a legitimate forum for prosecution".[32] In an "action memo" to Secretary Gates on 13 May, the Pentagon's General Counsel, Jeh Johnson, noted that the proposed reforms to the Military Commissions Manual (MMC) did not "entail any commitment to employ military commissions for the trial of any detainees; it simply improves the process in the event that commissions are subsequently used".[33]

It is still not too late to abandon this experiment. Amnesty International urges the USA to do so.

2.
GUANTÁNAMO, COERCIVE INTERROGATIONS, AND MILITARY COMMISSIONS ARE INTERWOVEN SYMBOLS OF DISREGARD FOR INTERNATIONAL HUMAN RIGHTS LAW

The USA's pursuit of trials by military commission cannot be divorced from the international law-violating detention and interrogation regime for which they were developed. Neither a shift in location for such trials, nor a modification of the rules under which they operate, can cleanse them of this stained association or their own ill-conceived origins. There can be no such thing as a "fresh start" for these tribunals, even under the auspices of a different administration and Congress. The USA is better off without them.

In his national security speech on 21 May 2009, President Obama explained that he had decided to shut down the Guantánamo facility because the detentions there had led to the government "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". He similarly explained that he had ordered an end to "enhanced interrogation techniques" because they "undermine the rule of law", "alienate us in the world", and "serve as a recruitment tool for terrorists". Amnesty International welcomed these first steps, but urges the President and his administration to take the next step and abandon military commissions. They are an integral part of this bigger picture.

This would be the third attempt at the USA's 21st century military commission experiment. It is more than seven and a half years since President Bush signed the military order establishing military commissions for the trial of alien "enemy combatants" in the "war on terror". Not a single trial took place under the order as a result of the inevitable legal challenges to its fundamentally flawed rules – resulting in ongoing violations of the right to fair trial without undue delay, violations which continue to this day (see Section 4).

President Bush's 13 November 2001 military order – revocation of which Amnesty International called for immediately after it was issued – contained the kernels of his administration's approach, substantial residues of which remain.[34] According to the order, the 9/11 attacks had "created a state of armed conflict" and anyone subject to the order could be tried "for violations of the law of war and other applicable laws by military tribunals"; "given the nature of international terrorism", it was "not practicable" to apply in military commissions "the principles of law and the rules of evidence generally recognized in the trial of criminal cases" in the US federal courts; the military commissions would protect classified information and "state secrets" from disclosure; the military order would apply only to foreign nationals; the death penalty would be an option, despite the lower standards of fairness in the trials; and no detainee would have access to any court in the USA or elsewhere to seek any remedy.[35]

In explaining his decision to end the Guantánamo detentions, President Obama pointed to their ill-conceived beginnings. He emphasized that "part of the rationale for establishing [the detention facility at] Guantánamo in the first place was the misplaced notion that a prison there would be beyond the law". Indeed, the detentions began about two weeks after the Office of Legal Counsel at the US Department of Justice advised the Pentagon that under existing constitutional law the federal courts could not "properly entertain an application for a writ of habeas corpus by an enemy alien" captured abroad and detained in Guantánamo because it was not "sovereign" US territory.[36] In the words of Jack Goldsmith, former head of the OLC (2003-2004), "because [Guantánamo] was technically not a part of US sovereign soil, it

seemed like a good bet to minimize judicial scrutiny".[37] Minimizing independent judicial oversight was a hallmark of the Bush administration's approach to detentions, and helps to explain its resort to military commissions.

This memorandum was just one of a number of documents emanating from the OLC which provided the "legal" cover for the USA's "war on terror" detention regime, including on military commissions. Among other things, the OLC advised the administration that the President had "full discretion" to transfer to third countries *al-Qa'ida* and Taliban detainees taken into custody "outside the territorial jurisdiction of the United States", and that the USA was "free from any constraints imposed by the [UN] Torture Convention in deciding whether to transfer detainees that it is holding abroad to third countries".[38] It further opined that "necessity or self-defense" could justify torture by US agents, and that certain "enhanced" interrogation techniques – such as inducing the perception of drowning (waterboarding), slapping, prolonged sleep deprivation, stress positions, confinement in a small dark box, exploitation of detainee phobias, forced nudity, and dousing with cold water – could, singly or in combination, lawfully be used by US agents against detainees held in secret custody outside the USA.[39]

The military commissions were a part of this wider scheme from the outset, authorized even before Guantánamo was chosen as a location for a strategic interrogation centre in the "war on terror". The OLC advised the White House, a week before President Bush signed his military order, that military commission trials were a lawful option for trials of "terrorists".[40] In February 2002, the Secretary of Defense said that the USA was beginning the process of interrogating detainees with a view to possible prosecution.[41] In the same month, the OLC told the administration that the prohibition under the US Constitution's Fifth Amendment against forcing a detainee to incriminate himself, and restrictions that this protection "may place on conduct in interrogations", did not apply "in the context of a trial by military commission for violations of the law of war". Therefore, the OLC claimed, "to the extent that the only trial-related use of statements obtained in an interrogation will be before a military commission, there is no need to provide *Miranda* warnings" (right to remain silent, right to a lawyer) to detainees before interrogating them, whether for intelligence-gathering or prosecutorial purposes.[42] Because at that point the "possibility still exist[ed] that some detainees may be prosecuted on criminal charges in Article III [federal] courts", the Pentagon had asked the OLC whether it would be "prudential" to give *Miranda* warnings so as to "preserve the possibility of using statements in a criminal trial". The OLC responded that whether statements made by detainees who had not been '*Mirandized*' would be admissible in a US federal court would depend on the purpose of the interrogation that was conducted, whether it was for intelligence purposes, law enforcement purposes, or mixed purpose. No such complexity would arise in military commission cases, it advised. Within a matter of months, the administration had decided that "not one single" Guantánamo detainee would "see the inside of a courtroom in the United States", according to the head of the FBI's Military Liaison and Detainee Unit.[43]

The US Supreme Court ruled the first incarnation of the military commissions unlawful on 29 June 2006 in *Hamdan v. Rumsfeld* on the grounds that it had not been expressly authorized by Congress and its structure and procedures violated US military law and the four Geneva Conventions of 1949. On 6 September 2006, President Bush responded to the *Hamdan* ruling by sending to Congress draft legislation entitled the 'Military Commissions Act of 2006', telling legislators that "five years after the mass murders of 9/11, it is time for the United States to begin to prosecute captured al Qaeda members".[44] In a major national security speech on the same day, President Bush exploited the cases of 14 detainees whose fate and whereabouts until then had been unknown – they had been held for up to four and a half years incommunicado in solitary confinement at secret locations, and subjected to torture or other cruel, inhuman or degrading treatment authorized at high levels of the US government. The President said that the 14 – accused of, though not yet charged with involvement in the 9/11 attacks and other serious crimes – could be brought to "justice" at Guantánamo, and the CIA could continue its secret detention and interrogation program, if Congress would pass the MCA. Among other things, the

legislation sought to strip the US courts of jurisdiction to hear habeas corpus petitions from foreign nationals held as "enemy combatants" and to authorize the President to establish military commissions to try such detainees. Congress – facing mid-term elections and the charged climate of the fifth anniversary of the 9/11 attacks – passed the Act.

The military commissions authorized by Congress, and now being reformed and revived by the new administration, were a close relation of those established under the 2001 military order. Moreover, the provisions of the MCA showed that the commissions were still an integral part of an approach to detentions and detainee treatment, and impunity, that was inconsistent with international law and to which the US Congress had now given its seal of approval. Jack Goldsmith, former head of the OLC, wrote:

> "The Military Commissions Act of 2006 explicitly authorized many aspects of the military commission regime that the Supreme Court had invalidated three months earlier. And it gave the President much more, including a broadened definition of 'unlawful enemy combatant'; implicit approval for aggressive interrogations short of torture; immunity from prosecution for those who participated in past interrogations that crossed the prohibited line; narrowing interpretations of the Geneva Conventions and amendments to the War Crimes Act that minimized the impact of the Supreme Court's decision; elimination of judicial habeas corpus review over Guantánamo; and a prohibition on the judicial use of the Geneva Conventions to measure the legality of the Guantánamo detentions".[45]

By the time of President Obama's inauguration on 20 January 2009, there had been three convictions under the MCA.[46] In addition, seven of the 14 detainees transferred from secret CIA custody to military detention in Guantánamo in the first week of September 2006 had been charged under the MCA, with the government pursuing the death penalty against six of them. In the case of the seventh, Ahmed Khalfan Ghailani, arrested in Pakistan in July 2004 and held in secret US custody for two years, the Convening Authority for the military commissions had declined to allow the Bush administration to pursue his execution and in October 2008 referred the charges on for trial as non-capital.[47]

This second incarnation of the military commissions was halted soon after President Obama took office and obtained a 120-day suspension of proceedings. In Ahmed Ghailani's case, for example, the military judge granted the government's request for a suspension, albeit with the instruction that "pre-trial processing" of the case would continue.[48] He set Ahmed Ghailani's military commission trial to begin on 9 October 2009.[49]

On 21 May, the eve of the expiry of the 120-day suspension of commission proceedings, the Justice Department announced that Ahmed Ghailani would be tried in federal court under an indictment that had been pending against him in the US District Court for the Southern District of New York since 12 March 2001. The Bush administration's failure to bring Ahmed Ghailani to trial in federal court stemmed from its policy decision to prioritize intelligence gathering over due process, but it is also troubling that it took four months for the new administration to turn to the federal courts in this case (and that, to date, it remains the only such decision taken).[50] The Justice Department said only that a "thorough review" of Ahmed Ghailani's case by the Guantánamo Review Task Force set up under an executive order signed by President Obama on 22 January 2009 had resulted in the decision to transfer the case to the civilian authorities for prosecution.[51] On 29 May 2009, the Convening Authority for the military commission dismissed the charges against Ahmed Ghailani. On 9 June 2009, the detainee was transferred from Guantánamo to New York to face trial in federal court on charges carrying a possible death sentence. He appeared in court on that same day and pleaded not guilty to the charges.

While Amnesty International will continue to urge the USA not to resort to the death penalty against Ahmed Ghailani, or any other person, the organization nevertheless considers the transfer of Ghailani to

civilian custody to be a positive step that should be promptly replicated in any case where the government intends to prosecute a Guantánamo detainee. The administration should not treat the Ghailani prosecution in any sense as a test case by delaying charges against any other Guantánamo detainee it intends to prosecute in federal court.[52] Nor should any action by Congress block or delay transfer to the USA of any detainee so charged.

President Obama emphasised in his 21 May 2009 address that, although as a US Senator he had voted against the Military Commissions Act, he had done so because it had "failed to establish a legitimate legal framework, with the kind of meaningful due process and rights for the accused that could stand up on appeal". He had, he continued, "support[ed] the use of military commissions to try detainees, provided there were several reforms". Those who suggested that his support for military commissions now represented a reversal on his part were wrong and, he said, should look at the record.

The record of the MCA congressional debates indeed shows that Senator Obama supported military commissions. His opposition to the MCA centred on its stripping of habeas corpus rights for the Guantánamo detainees because it would mean that "a perfectly innocent individual could be held and could not rebut the Government's case" for indefinite detention as an "enemy combatant".[53] While Senator Obama favoured reform of the administrative review proceedings at Guantánamo in order to develop "a real military system of justice that would sort out the suspected terrorists from the accidentally accused"[54], he appeared less troubled by the prospect of trials by military commission:

> "Now, the vast majority of folks in Guantánamo, I suspect, are there for a reason. There are a lot of dangerous people. Particularly dangerous are people like Khalid Sheikh Mohammed. Ironically, those are the guys who are going to get real military procedures because they are going to be charged by the Government... The irony of the underlying bill as it is written is that someone like Khalid Sheikh Mohammed is going to get basically a full military trial, with all of the bells and whistles. He will have counsel, he will be able to present evidence, and he will be able to rebut the Government's case. The feeling is that he is guilty of a war crime and to do otherwise might violate some of our agreements under the Geneva Conventions. I think that is good, that we are going to provide him with some procedure and process. I think we will convict him, and I think he will be brought to justice. I think justice will be carried out in his case."[55]

As Amnesty International described in a report in March 2007, the rules and procedures under the MCA offer no guarantees for a full and fair trial, including and perhaps in particular for those who had previously been held in the CIA's secret detention program, the operational details of which remain classified at the highest levels of secrecy (see Section 8).[56] Indeed, the organization believes that the case of Khalid Sheikh Mohammed serves to further illustrate not that military commissions are tribunals of necessity, as President Bush suggested in his November 2001 military order and in arguing for the MCA five years later, but that they should be abandoned, along with the Guantánamo detention facility, and that any trials of Guantánamo detainees can and should be held in civilian courts that are independent of the political branches of government.

Khalid Sheikh Mohammed was one of the 14 detainees whose cases were used by President Bush in his 6 September 2006 speech seeking congressional approval of the MCA and to justify the USA's secret detention program and the "alternative set of procedures" used in it. 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. This led directly to human rights violations, including torture and other ill-treatment as well as enforced disappearance, which made much of the information obtained useless for criminal trials. Rather than taking the time and care to gather evidence that *would* be admissible in a proper criminal trial, the government had chosen to create military commissions as a matter of expedience. Short-cutting and short-changing the ordinary rules of

fundamental justice, then, the military commissions were designed to allow the use of information which is prohibited, for very good reasons, in any other US criminal court whether civilian or military, and indeed whose use is prohibited by international law.

In a speech on 21 May 2009, former Vice President Dick Cheney – who has admitted that he was involved in approving "enhanced interrogation techniques" for use in the secret detention program – recalled that after Khalid Sheikh Mohammed was arrested in Pakistan in March 2003, "American personnel were not there to commence an elaborate legal proceeding, but to extract information from him".[57] The detainee was not brought to trial in a US federal court (where he had previously been indicted), but instead put into secret CIA custody for the next three and a half years. Three days after his arrest, US Attorney General John Ashcroft said that "Khalid Sheikh Mohammed's capture is first and foremost an intelligence opportunity".[58] That same month, Khalid Sheikh Mohammed was subjected 183 times to "water-boarding", a torture technique in which the perception of drowning is induced in the strapped down detainee.[59] Khalid Sheikh Mohammed was "always kept naked" during the waterboarding, and female interrogators were present, "increasing the humiliation aspect".[60] He has alleged that in his third place of detention, when he was not in interrogation, he was shackled in the "prolonged stress standing position" for a month, with his wrists shackled to a bar or hook in the ceiling above his head. He has also said that he was kept naked for a month in secret detention in Afghanistan, and during one period was kept shackled continuously for 19 months, even when inside his cell.[61] Khalid Sheikh Mohammed was charged in 2008 under the MCA, and sought to plead guilty and represent himself, despite the fact that he was facing the death penalty (see Section 9). No one has been brought to account for the crimes under international law committed against him.

The case of Mohamed al-Qahtani is also instructive. After the White House and "possibly the National Security Council" had been briefed in 2002 about the potentially high intelligence value of this Guantánamo detainee, "the answer came back that there was no interest in prosecuting Al-Qahtani in a US court at that time".[62] Instead he was subjected to torture and other ill-treatment in 2002 and 2003 under a "special interrogation plan", before being charged for death penalty trial by military commission in 2008. A Deputy Attorney General at the US Department of Justice's Criminal Division has said that he consistently advocated for Guantánamo detainees to be prosecuted in civilian federal court, but at the time had not known about the harsh interrogation techniques being used against detainees in US custody.[63]

Mohamed al-Qahtani has recanted statements he made under alleged torture and other ill-treatment. The Bush administration was reported to have employed "clean teams" in Guantánamo to re-interrogate detainees in a bid to obtain incriminating information using supposedly "non-coercive" methods. This was said to have been unsuccessful in Mohamed al-Qahtani's case.[64] In 2008, the charges against him were dismissed by the Convening Authority for the military commissions. She later explained that this was because of the torture to which he had been subjected, and that even if the government was to seek to reinstate the charges she would dismiss them again. Like its predecessor, the new US administration is not known to have ordered a criminal investigation into the alleged torture of Mohammed al Qahtani and, as in the case of Khalid Sheikh Mohammed, no one has been brought to account for his ill-treatment. He remains in indefinite detention in Guantánamo.[65]

It is not only detainees deemed to have high intelligence value who were singled out for the use of coercive interrogation techniques and detention conditions, and such cases further illustrate why the military commissions cannot be considered in isolation from the wider detention regime and why the commission system should be jettisoned as one of the rotten branches of this regime.

On 3 July 2003, the Pentagon announced that six detainees had been made eligible for trial by military commission under President Bush's military order, the first such announcement. One of them was

Yemeni national Salim Hamdan. From 10 June 2003 to 31 July 2003, a period of 50 days, he was placed in a sleep disrupting program known as "Operation Sandman".[66] Then from December 2003 to October 2004, Salim Hamdan was put into solitary confinement in Guantánamo's Camp Echo in a windowless cell that lacked natural light and fresh air. He said that he considered making a false confession in order to ameliorate his situation.[67] His then US military lawyer was instructed that he could only negotiate a guilty plea, which the authorities apparently believed Hamdan was ready to make. This lawyer, who found that Hamdan did not want to negotiate such a plea, later told the US Senate Judiciary Committee that he believed the government was engaged in a "clear attempt to coerce Mr Hamdan into pleading guilty".[68]

On 7 July 2004, nine more detainees were made eligible for military commission trial under the military order. One of them was Omar Khadr, who was a 15-year-old child when he was first taken into US custody in 2002 in Afghanistan and allegedly subjected to torture or other ill-treatment there before being transferred to Guantánamo as a 16-year-old.[69] According to a Canadian government document, dated 20 April 2004 but not made public until July 2008, in March 2004 Omar Khadr "was not talking" and "he hadn't cooperated since July 3, 2003" (the day on which the Pentagon had announced that six detainees had been named under the military order).[70] The 17-year-old was put into the sleep disruption/deprivation program known as the "frequent flyer program" for three weeks in March 2004 to "make him more amenable and willing to talk".[71] He was "not permitted more than three hours in any one location. At three hours intervals he is moved to another cell block, thus denying him uninterrupted sleep". The 20 April 2004 document added that Khadr "will soon be placed in isolation for up to three weeks and then he will be interviewed again". This was despite the military already having a "big file" on Khadr and despite the fact that the US authorities "were not really looking for much now". Omar Khadr had, however, "recanted all earlier statements, including his confession to having thrown the grenade that killed the American soldier", the alleged war crime for which he was facing trial by military commission.[72] Omar Khadr remains in Guantánamo, still facing trial under the MCA.

The same is true of Afghan national Mohammed Jawad, charged under the MCA in 2008 with throwing a grenade in December 2002 that injured two US soldiers and their Afghan interpreter. Jawad was 16 or 17 years old, or possibly younger, at the time of his arrest, and would have no legal representation in US custody for almost six years.[73] By 2004 the US authorities were viewing him less as a potential source of intelligence and more as a candidate for prosecution by military commission, and his interrogations were now being conducted by law enforcement rather than intelligence personnel.[74] In the two months after the first Guantánamo detainees were charged for trial by military commission on 24 February 2004, Mohammed Jawad was interrogated twice – once on 29 March and once on 26 April – by the Pentagon's Criminal Investigation Task Force (CITF), the agency which conducted interrogations for the military commission process. A little over a week later, on 7 May 2004, he was put into the frequent flyer program, and thence into segregation into an isolation facility, followed by placement in the harsh conditions of Guantánamo's Camp 5. In the frequent flyer program, he was moved from cell to cell every few hours, day and night. Over a two-week period, he was moved 112 times. He was subjected to this within months of having made a suicide attempt.

Mohammed Jawad's post-frequent flyer program interrogations – all conducted by CITF personnel and all conducted without legal counsel for the detainee – resumed in August 2004, with interrogation sessions on 18 August and 27 August 2004. These interrogations occurred in the week before and the week of the first military commission hearings in Guantánamo. Mohammed Jawad's last interrogation for eight months occurred on 8 November 2004, on the same day that a federal District Court halted military commission proceedings, and threw their future into doubt.[75] The suspension by criminal investigators of their interrogations of Mohammed Jawad at this point suggests that their aim may have been to obtain statements from the unrepresented teenager for use at a future trial. With the hiatus in the commissions, the immediate need for any such statements dissipated.

The government appealed the District Court ruling, and on 15 July 2005 the US Court of Appeals reversed the decision, finding that Congress had authorized the military commission process and that the Geneva Conventions did not confer any rights upon a commission defendant that he could enforce in court. Mohammed Jawad's interrogations resumed on that very same day, 15 July 2005. In addition to his 10 interrogations during the remainder of that month, he was interrogated four more times in 2005. All 14 interrogations were conducted by CITF personnel. With the military commission system back on track (until the Supreme Court's June 2006 *Hamdan* ruling), it appears that the authorities were again attempting to get information, or even a guilty plea, for a possible prosecution. After all, the government's primary evidence against Mohammed Jawad was a confession written in a language, Farsi, that he could not speak or write, signed with a thumbprint by this functionally illiterate teenager.

By 2008, the military commission prosecutors were still planning to rely upon this statement in their case against Jawad, but the defence moved to suppress the document and at the suppression hearing, the prosecution asserted that it would not be offering the statement into evidence.[76] On 28 October 2008, the military commission judge ruled that the government could not use any statements made by Mohammed Jawad during his few hours in Afghan custody after his arrest, as he had been subjected to torture, including in the form of death threats against him and his family.[77] The government did not appeal this ruling. On 19 November 2008, the same judge ruled that the government could not use any statements made by Mohammed Jawad in the US Forward Operating Base in Kabul where he had been held immediately after being handed over to US custody, as any such statements were the product of the preceding torture in Afghan detention (he had also been subjected in US custody to handcuffing, blindfolding, hooding, to humiliating photography while naked, as well as classified interrogation techniques).[78] The government has appealed this ruling. The new administration has obtained a stay of that appeal until 17 September 2009.[79]

Replacing functions ordinarily the exclusive purview of independent civilian judges vis-à-vis individuals who are not members of armed forces, such as habeas corpus review and criminal trial, with substandard military versions was an integral part of the unlawful detentions, the ill-treatment, and the impunity. The UN Special Rapporteur on the independence of judges and lawyers wrote in 2008 of the importance of preserving judicial functions:

> "limiting judges' scope of action, restricting their area of jurisdiction or undermining their independence jeopardizes most judicial guarantees, particularly the exclusion of evidence obtained by torture or other forms of coercion, the right to be tried without undue delay, the right to report violations of the rights of the accused to a competent judicial authority at all stages of the proceedings, the right to appeal judgements, and the fundamental right to be presumed innocent".[80]

This was the case here. For example, the Combatant Status Review Tribunals – the Bush administration's experiment to replace habeas corpus with administrative review – were interwoven not only with the Guantánamo detentions and interrogations, but with the general level of impunity that also became a hallmark of the USA's "war on terror". Their lack of independence from the branch of government that was controlling every aspect of the detentions facilitated this absence of accountability. Thus, when Saudi national 'Abd al-Rahim Al Nashiri told his CSRT in Guantánamo in March 2007 that he had been waterboarded in secret CIA custody – "they used to drown me in water" – this led to no criminal investigation, as far as Amnesty International is aware.[81]

So too with the military commissions. In their arraignment on 5 June 2008 at Guantánamo, for example, five detainees previously held in secret CIA custody 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, information that the US administration deemed classified at the highest level of secrecy (see Section 8). 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".[82] A year later, despite the allegations of a crime under international law that were raised in front of this military judge, no investigation is known to have been initiated or action taken to bring to account those responsible for the torture and enforced disappearance in these cases.

On 12 July 2004, in a case not involving the secret CIA detention program, the US Naval Criminal Investigative Service (NCIS) had contacted the prosecution at the Office of Military Commissions with a request to interview a detainee who was being held at Guantánamo. The NCIS was investigating a suspected assault by one or more US personnel at Bagram air base and wished to conduct a "victim interview" of the detainee at Guantánamo. The NCIS was advised that the detainee was facing the possibility of being charged for trial by military commission in the near future, was represented by military counsel, and therefore should not be interviewed. Charges were referred against the detainee the following day, and the NCIS was told that they could not interview the detainee until after the military commission process was completed.[83] Amnesty International believes that the detainee was Salim Hamdan, who at the time was being subjected to coercive detention conditions in an apparent bid to obtain a guilty plea for his trial by military commission (see above).

At his eventual trial in 2008, conducted under the unfair procedures and rules established pursuant to the MCA, although the military judge prohibited the prosecution from admitting into evidence certain statements made by Salim Hamdan in US custody in Afghanistan, other statements that appear also to have been obtained under coercive conditions were admitted.[84] Such statements would presumably have been excluded by any ordinary US civilian or military court. Statements admitted included some taken during and following a period of some 210 days after his capture during which he was held incommunicado. In the military commission proceedings, this revelation of Hamdan's seven months incommunicado detention "did not cause a ripple", in the words of a journalist present for the New York Times.[85] Whether any such revelations will cause a ripple in any future commission proceedings, with the rules on the admission of coerced statements amended, remains to be seen. There is reason to doubt that the commissions would respond with the level of scrutiny necessary (see Sections 7 and 8).

There must be transparent, non-discriminatory rules of criminal justice equally applied to all charged Guantánamo detainees by competent, independent and impartial tribunals, not a return to a military trial system lacking structural independence from the political branches of government that have authorized and condoned human rights violations against them and have failed to this day to ensure accountability and full remedy for them. The failure of US authorities throughout the duration of the Guantánamo detentions to respect the presumption of innocence of the detainees who were categorically accused of being "killers", "terrorists" and the "worst of the worst", heightens the need for any prosecutions to be conducted in independent courts. Instead some may yet face trials by military commissions using relaxed rules of evidence and various procedures that continue to favour the prosecution.

US Attorney General Eric Holder told an audience in Berlin in April 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".[86] It is not just the Guantánamo detention facility that should be shut down, however. 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, 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.[87] They should be scrapped too.

3.
MILITARY COMMISSIONS ARE THE OFFSPRING OF A GLOBAL WAR PARADIGM THAT HAS BEEN AND CONTINUES TO BE SERIOUSLY DETRIMENTAL TO HUMAN RIGHTS

A central policy choice of the Bush administration – not a legal necessity – was to respond to the attacks of 11 September 2001 and the risk of further violence against civilians in terms of a constant global "war" without foreseeable end, rather than an international law enforcement effort in which use of military measures can only exceptionally be justified under international law. Today, the USA's global war paradigm appears to be accepted by large parts of all three branches of the US government. It is a framework under which fundamental human rights continue to suffer.

In his inaugural speech on 20 January 2009, President Obama stated that "our nation is at war against a far-reaching network of violence and hatred". In his national security speech four months later, he confirmed his support for military commissions as "the best" venue for "those who violate the laws of war" and preventive detention for people who the USA deems it cannot prosecute but who, "in effect, remain at war with the United States". He emphasised that the USA is "indeed at war with al Qaeda and its affiliates".

As already noted, among the "findings" of President Bush's 13 November 2001 military order on the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" was that the USA was now in an armed conflict with "international terrorists, including members of al Qaida". Two days later, Vice President Cheney had said:

> "As the president deems necessary, non-US citizens suspected of terrorist activity, whether captured here or abroad, will face trial by military commission. The mass murder of Americans by terrorists or the planning thereof is not just another item on the criminal docket. This is a war against terrorism. Where military justice is called for, military justice will be dispensed."[88]

President Bush told US federal prosecutors that he had:

> "reserved the option of trial by military commission for foreign terrorists who wage war against our country. Non-citizens, non-US citizens who plan and/or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life. And if I determine that it is in the national security interest of our great land to try by military commission those who make war on America, then we will do so. We will act with fairness, and we will deliver justice, which is far more than the terrorists ever grant to their innocent victims".[89]

In his central detention policy memorandum of 7 February 2002, President Bush stated that the "war on terror" constituted a "new paradigm" requiring "new thinking in the law of war".[90] This notion spread.[91] According to Vice President Cheney, "One great lesson of 9/11 was that we had to stop treating terrorist attacks merely as law enforcement problems – where you find out what happened, arrest the bad guys, put them in jail, and move on."[92] He has since sought to justify conduct by the USA in this "war" constituting crimes under international law, most notoriously (but by no means exclusively) the form of torture known as "waterboarding".[93]

Visiting Guantánamo in January 2002, Secretary of Defense Rumsfeld said "It's important for people to recognize that this is a different circumstance, the war on terrorism. It requires a different template in our thinking. All of the normal ways that we think about things simply don't work."[94] Six and a half years later, Secretary Rumsfeld was singled out by the Senate Armed Services Committee for his "authorization of aggressive interrogation techniques for use at Guantánamo Bay [which] was a direct cause of detainee abuse there" and which had "contributed" to the use of such techniques in Afghanistan and Iraq.[95]

In a January 2002 memorandum, the White House Counsel, Alberto Gonzales, agreed that "the war against terrorism is a new kind of war", one that "places a high premium" on "the ability to quickly obtain information from captured terrorists and their sponsors". He advised President Bush that in this context a "positive" consequence of not applying Geneva Convention protections to the detainees would be that the threat of future "domestic criminal prosecution" of US agents for war crimes would be "substantially" reduced.[96] US Attorney General John Ashcroft offered similar advice to the President.[97] In the seven and a half years since, no US agent has been prosecuted under the USA's War Crimes Act or under its anti-torture statute.

Other governments maintained a law enforcement approach. In the context of UK counter-terrorism efforts, for example, the Director of Public Prosecutions (DPP) for England and Wales said in 2007 that "London is not a battlefield." The people who were killed in the London bombings of 7 July 2005 "were not victims of war" and the perpetrators were not "soldiers" as they claimed. "We need to be very clear about this", the DPP continued, "On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'." He said: "Acts of unlawful violence are proscribed by the criminal law. They are criminal offences. We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice."[98]

In an executive order issued on 20 July 2007, President Bush reaffirmed that USA considered itself to be engaged in an armed conflict global in scope to which the USA's interpretation of international humanitarian law (the law of war) applied, apparently to the exclusion of international human rights law:

> "The United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces. Members of al Qaeda were responsible for the attacks on the United States of September 11, 2001, and for many other terrorist attacks, including against the United States, its personnel, and its allies throughout the world. These forces continue to fight the United States and its allies in Afghanistan, Iraq, and elsewhere, and they continue to plan additional acts of terror throughout the world."[99]

The executive order gave the green light for the CIA to continue its program of secret detention and "enhanced" interrogation. A few weeks later, the CIA Director made clear that the USA's global war paradigm was still very much intact:

> "We're at war, and this city (New York)... has been a battlefield in that war...I've seen public references to, quote, 'the so-called war on terrorism' or, quote, 'the Bush administration's war on terrorism', but for us it's simply war. It's a word we use commonly without ambiguity in the halls of the Pentagon and at Langley [CIA headquarters]".[100]

The military commissions were conceived in 2001 as part of this global war paradigm, reborn under it in 2006 with congressional approval, and set to be resuscitated in 2009 as a part of the USA's continuing invocation of a global war framework.

In 2001, the Bush administration had turned to the Office of Legal Counsel at the Department of Justice for advice on military commissions, as it also did on the issue of keeping the Guantánamo detentions

from the scrutiny of independent courts, and in relation to interrogation techniques and other detainee issues. The OLC was asked by the White House "whether terrorists captured in connection with the attacks of September 11 or in connection with ongoing US operations in response to those attacks" could be tried by military commission.[101] According to the OLC,

> "The critical question for determining whether military commissions can properly be used here… is whether the terrorist attacks have created a situation to which the laws of war apply. That is, are the terrorist acts subject to the laws of war at all, or are they solely criminal matters to be treated under the municipal criminal law of the United States".

It is worth noting that even under the OLC memorandum's reasoning, whether actually to treat counter-terrorism operations as a whole as a "war" and to resort to military commissions, were political *choices*, not *dictated* by any rule of law. The OLC emphasized that for purposes of domestic US law "determining whether the laws of war apply in this context is a political question for the President to determine in his role as Commander in Chief". The OLC memorandum continued:

> "Precedents under American law… are sufficient to establish conclusively that at least as of September 11, terrorist attacks on the United States had created a situation that would justify a conclusion that the laws of war properly apply. We realize that if a decision is made to use military commissions, it will also be important to justify American actions to our allies and others internationally… [T]here is sufficient authority in current sources under international law for the President to justify to the international community a decision that it will be the policy of the United States to apply the law of armed conflict to terrorists in the current situation".

Documents have since become available that reveal the public relations exercise that was pursued by the USA to seek to persuade the international community that the military commissions were justifiable, hollow words that further contributed to the commissions' current lack of international legitimacy. For example, on the day the first military commission rules were released by the Pentagon, 21 March 2002, the US State Department issued a cable to numerous US Embassies. Among the "talking points" US diplomats were "requested to deliver… to the most senior officials possible" in those countries which had nationals held at Guantánamo was: "We believe that your government should be pleased with the outcome" of the military commission rules developed by the Pentagon. It claimed that the commission procedures "are consistent with fundamental international standards governing criminal trials", and "although the [military commission] rules address a different body of law, they are also consistent with the International Covenant on Civil and Political Rights".[102] In July 2003, the State Department provided the US mission at the Organization for Security and Cooperation in Europe (OSCE) with this same line for responding to the OSCE's Office for Democratic Institutions and Human Rights.[103]

The November 2001 OLC opinion, giving legal approval for military commissions as a policy choice for the President to make, had not even mentioned the ICCPR (with which the commissions were in fact grossly incompatible). Indeed the USA has not expressly changed its position that the ICCPR does not apply in situations the USA deems to be armed conflict. Moreover, on the Geneva Conventions – with which, the talking points to the embassies and the OSCE mission insisted, the military commissions were consistent – the OLC had said:

> "We stress at the outset that determining that the terrorist attacks can be treated under the rubric of the 'laws of war' does *not* mean that terrorists will receive the protections of the Geneva Conventions or the rights that the laws of war accord to lawful combatants...
>
> [I]n the field of international law, certain principles have received sufficient recognition that they could be credibly cited as reflecting customary practice among nations. The President may

> choose to enforce these standards as a matter of policy (and may determine as a matter of policy to have the Armed Forces of the United States adhere to similar standards), but they are not 'law' that limits the President as Commander in Chief."

The OLC memorandum addressed Article 3 common to the four Geneva Conventions of 1949 which prohibits, among other things, torture, cruel treatment, and "outrages upon personal dignity, in particular, humiliating and degrading treatment", *as well as unfair trials*:

> "The standards of common article 3, moreover, are reflective of a minimal standard of conduct that some view as required in all armed conflict. The United States recognized that some such minimal principles could be enforced against enemies as long ago as 1945 when the International Military Tribunal at Nuremberg applied standards of the Geneva and Hague Conventions to German conduct on the Eastern Front even though the Soviet Union had expressly denounced the Geneva Conventions before the war. Since then, the United States has supported statements in the United Nations of minimal standards, reflective of the principles in common article 3, that must be observed by all governmental and other authorities responsible for action in armed conflict".

A week later, President Bush signed his order authorizing military commissions, and two months after that, on 7 February 2002, he signed a memorandum confirming that the USA would not apply Geneva Convention protections to *al Qa'ida* or Taleban detainees, including the protections of common Article 3.[104] Four years later, he signed into law the Military Commissions Act under which no military commission defendant could turn to the Geneva Conventions for protection. Under the MCA any "alien unlawful enemy combatant subject to trial by military commission" is prohibited from "invok[ing] the Geneva Conventions as a source of rights."[105] In proposed legislation currently being developed by the Senate Armed Services Committee, this would effectively remain the case, while replacing "alien unlawful enemy combatant" with "alien unprivileged enemy belligerent": any "alien unprivileged enemy belligerent subject to trial by military commission" is prohibited from "invok[ing] the Geneva Conventions as a basis for a private right of action".[106] Neither Congress, nor the administration, has stated that the USA will ensure that military commissions comply with the ICCPR.

The OLC's historical and legal analysis in its November 2001 memorandum, which has never been withdrawn or revoked, airbrushed human rights out of the picture.[107] No mention was made of international human rights law, a body of law that applies at all times, including in times of armed conflict.

The global war paradigm has been adopted by the new administration, as has a general failure to ensure accountability for international crimes that have been committed under this legal framework, such as the torture and enforced disappearance carried out in the CIA secret detention program. At his confirmation hearing in front of the Senate Judiciary Committee in January 2009, Attorney General-designate Eric Holder stated categorically that in his view the USA is "at war". He went further, by saying that he thought "our nation didn't realize that we were at war when, in fact, we were". He went on to say that, looking back at the 1990s – and specifically the bombings of two US embassies in East Africa in 1998, and the bombing of the USS Cole in Yemen in 2000, "we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination."[108] He was then asked the following question: "If our intelligence agencies should capture someone in the Philippines that is suspected of financing Al Qaida worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in an Al Qaida activity?" The Attorney General-designate responded that he would. Elana Kagan, confirmed to the post of US Solicitor General on 19 March 2009, had been asked the same question at her confirmation hearing in February 2009, and had given the same answer.

Under this reasoning, and with the revival of military commissions and executive support for possible preventive detention legislation, any foreign national suspected of involvement with *al-Qa'ida* and associated groups taken into US custody anywhere in the world, if charged, could be tried by military commission if prosecution in federal court was deemed not feasible. If not charged, indefinite detention could yet be this person's fate.

In his 21 May 2009 speech, President Obama said that "after 9/11, we knew that we had entered a new era" and that "our government would need new tools to protect the American people, and that these tools would have to allow us to prevent attacks instead of simply prosecuting those who try to carry them out". Under President Bush, the "new thinking" led to directly to old familiar abuses such as torture and other ill-treatment, detention without due process, enforced disappearance and military trials of civilians. President Obama has taken substantial and welcome steps towards ending torture and limiting or ending secret detention, but his administration's apparent embrace of this law of war framework looks set to lead to revamped military commissions as well as the possibility of administrative detention at Guantánamo being replaced with a preventive detention regime on the mainland.[109]

Under the Bush administration, the USA effectively rejected international human rights law and applied a selective, unilateral interpretation of international humanitarian law, the law of war, to the detention of those it designated as "enemy combatants". In 2007 and 2008, for example, the US government rejected the concerns and recommendations of the UN treaty monitoring bodies, the Committee Against Torture and the Human Rights Committee relating to the USA's "war on terror" detentions. It claimed that "the United States is in an armed conflict with al-Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the [UN Convention against Torture or International Covenant on Civil and Political Rights] provides the applicable legal framework governing these detentions".[110]

This approach appears to be continuing under the new administration. On 3 June 2009 in Geneva, the US government responded in the UN Human Rights Council to the report on the USA of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which had included conclusions on aspects of the USA's counter-terrorism policies abroad. The USA said that "we continue our objection to the scope of this report, as we do not believe that military and intelligence operations during armed conflict fall within the Special Rapporteur's mandate".[111] The concerns of various UN experts about US "war on terror" policies had routinely been dismissed on these grounds under the Bush administration.

In effect, the USA appears to have transformed the emergency situation declared by President Bush on 14 September 2001 and repeated in his military order of 13 November 2001, into a "new normal". In this regard, the following passage from a 2008 report of the UN Special Rapporteur on the independence of judges and lawyers bears repeating:

> "Declared and undeclared states of emergency continue to give rise to serious human rights violations. The most common and worrying violations include arbitrary detention, torture and ill-treatment, enforced disappearance, denial of the right to challenge in court the legality of a detention, denial of the right to be tried by an independent court, unfair trials..."[112]

On 14 September 2001, President Bush informed Congress that he had declared a "national emergency" in response to the attacks of three days earlier. On the same day, 14 September, Congress passed the Authorization for Use of Military Force (AUMF), a broadly-worded resolution authorizing the President to "use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001". The Bush

administration did not believe the AUMF placed "any limits" on presidential authority to determine the "method, timing, and nature of the response" to the attacks,[113] but cited it anyway in seeking to justify a range of policies, including secret detention, indefinite detention without charge, trials by military commissions, and secret wiretapping. As Amnesty International has pointed out, the AUMF was passed with little substantive debate, a measure of legislator confusion about what it was they were voting for, and no reference to, or express provision for, the issues it has subsequently been used to justify. The organization has called for revocation of the AUMF.[114] Amnesty International regrets that the new administration is citing the AUMF as providing the authority to continue detentions at Guantánamo.[115]

In recent years, in the name of countering terrorism, the USA diverged in various and substantial ways from its international human rights obligations. Undoubtedly, the new administration has already taken some welcome steps back from these policies. Nevertheless, so extreme have been some US policies and practices that some reforms may be tolerated on the grounds that any improvement is better than none. Such tolerance would only cement the damage wrought by the post-9/11 response on the international human rights framework.

This is a matter for all branches of government. As the UN Human Rights Committee has said:

> "All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility".[116]

The new administration has generally dropped "war on terror" as the catchphrase for US counter-terrorism efforts and use of the term "enemy combatant" to label the Guantánamo detainees, but it has adopted at least some of the substance of the insidious global war framework developed by its predecessor.[117] Amnesty International remains concerned that it continues to invoke the laws and means of war without recognizing its international legal obligations to ensure and respect the human rights of every individual, no matter what they are accused of. One hallmark of the previous administration was its insistence on applying its own distorted interpretations of the international law of armed conflict to situations to which those rules were never intended to apply, to the grave detriment of fundamental human rights. Amnesty International will continue to urge the USA to rely more wholeheartedly on its time-tested systems of ordinary criminal justice, within a framework of respect for universal human rights, in its global counter-terrorism efforts. Military commissions should play no part in this.

4.

MILITARY COMMISSIONS ARE CREATIONS OF POLITICAL CHOICE, NOT DEMONSTRABLY LEGITIMATE NECESSITY. THROUGHOUT THE LIFE OF THESE DETENTIONS, THERE HAVE BEEN COURTS ALREADY AVAILABLE. TAKING MORE TIME TO REFORM THE COMMISSIONS VIOLATES THE RIGHT TO FAIR TRIAL WITHOUT UNDUE DELAY

The new administration has been in office for six months. It has charged only one Guantánamo detainee for trial in federal court. Regardless of the failings of the previous administration, the delay in trial or

release of other detainees is unacceptable, and violates the right to trial without undue delay (the administration has said that it intends to prosecute several dozen detainees). A fully functioning civilian judicial system, with the experience, capacity and procedures to deal with complex terrorism cases, was available from day one.

Amnesty International considers that the creation and use of military commissions by the USA to try these men is incompatible with international human rights. The UN Basic Principles on the Independence of the Judiciary state:

> "The UN Basic Principles on the Independence of the Judiciary provide that "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".[118]

The UN Human Rights Committee 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" (see Section 5).[119] The UN Special Rapporteur on the independence of judges and lawyers has said that in the course of his mandate, he has had "the opportunity to examine situations in which restrictions imposed on the operation of the justice system have led to arbitrary detentions and unfair trials. There are situations which involve, for example, the transfer of jurisdiction to military tribunals… Detentions and trials related to terrorism raise special concerns about judicial procedure."[120]

In the June 2006 *Hamdan v. Rumsfeld* ruling, the US Supreme Court noted that historically in the USA, the military commission "was born of military necessity." In his 21 May 2009 national security speech, President Obama did not say that military commissions were militarily necessary in the present circumstances, only that they "have a history in the United States" and "are an appropriate venue for trying detainees for violations of the law of war" when trials in federal court are deemed by the executive to be unfeasible.

In his military order of 13 November 2001, President Bush had claimed that "an extraordinary emergency exists for national defense purposes; that this emergency constitutes an urgent and compelling government interest; and that issuance of this order is necessary to meet the emergency". The order made the bare assertion that it was "necessary" for any detainee subject to it, when tried, to be tried by military commission in order to promote "the effective conduct of military operations and prevention of terrorist attacks". It was claimed that it was "not practicable" to apply in military commissions "the principles of law and the rules of evidence generally recognized" in criminal trials in US federal courts.

Nevertheless, the Bush administration's international public relations effort emphasized the optional nature of the military commissions, not their necessity. US Embassies in Europe, for example, received a Question and Answer briefing from the US State Department on 21 March 2002, the day the Pentagon released the military commission rules, in order that they could respond to European concerns. One of the lines for response was that

> "military commissions are one of many options that may be used in the pursuit of justice during the war on terrorism. Whether they are used will depend upon how the investigations proceed, what evidence is gathered, and whether the President decides to designate any individuals for

> trial. At this time, it is impossible to say whether any individuals will be tried by military commissions and if so, who those individuals might be".[121]

Responding on 21 March 2002 to the question of why military commissions were necessary, the Pentagon General Counsel William Haynes emphasized that this was a "unique conflict".[122] At the same press briefing, the Under Secretary of Defense for Policy, Douglas Feith, added that this was a "very unusual type of war". They nevertheless undercut the notion that military commissions were necessary by emphasizing that they were merely an "option" for the President to consider, in addition to the federal courts and regular courts martial. The President "needed to have this extra option for him to consider, to employ in appropriate circumstances", said William Haynes. Within months of this briefing, however, the Bush administration decided that "not one single" Guantánamo detainee would "see the inside of a courtroom in the United States", as already noted. As explained above and illustrated further below, this decision appears to have been linked in substantial part to the political need to keep certain interrogation methods secret, to maintain executive control over the timing of prosecutions, and to facilitate convictions and possible executions, even based on evidence that had been obtained under unlawful and coercive methods wholly inconsistent with the right to fair trial and prohibition of torture and other ill-treatment.

In the *Hamdan* ruling in 2006, ordering an end to military commissions under President Bush's military order, the US Supreme Court pointed to the "inability on the Executive's part here to satisfy the most basic precondition… for establishment of military commissions: military necessity." The Court noted that the commission set to try Guantánamo detainee Salim Hamdan "was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities." Moveover, "Hamdan is charged not with an overt act for which he was caught red-handed in a theater of war and which military efficiency demands be tried expeditiously, but with an *agreement* the inception of which long predated the attacks of September 11, 2001… None of the overt acts alleged to have been committed in furtherance of the agreement is itself a war crime, or even necessarily occurred during time of, or in a theater of, war. Any urgent need for imposition or execution of judgment is utterly belied by the record; Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order under the authority of [the Uniform Code of Military Justice] may lawfully try a person and subject him to punishment."[123]

Regrettably, the *Hamdan* ruling left the door open to the executive to seek congressional authorization, and one of the Justices, joined by three others, specifically added, "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."[124] However, although the Bush administration obtained congressional approval for the Military Commissions Act – nearly five years after the detentions in Afghanistan and elsewhere began – the military necessity for these tribunals was even less evident than earlier. Signing the MCA into law, President Bush said that the military commissions it authorized him to convene were "necessary" and pointed, among others to the case of Ahmed Khalfan Ghailani by way of illustration.[125] Two and a half years later, Ahmed Ghailani was transferred to the USA to face trial in federal civilian court. Other individuals captured years ago, not necessarily directly involved in any armed conflict recognized by international law, and in any event held thousands of miles from any battlefield, are still facing trials by military commission.

In his 21 May 2009 speech, President Obama said that his administration would be seeking further delays in military commission proceedings at Guantánamo to give it time to implement its proposed changes, and that he would "work with Congress and legal authorities across the political spectrum on legislation to ensure that these commissions are fair, legitimate, and effective". The Pentagon General Counsel's memorandum of 13 May 2009 emphasised that prosecutors should immediately file motions

with the military judges asking for further delays in the nine cases in which charges had been referred on for trial under the previous administration and were still pending. The nine cases involved 13 detainees of seven nationalities.[126] The delay sought was another 120 days.

On 19 May 2009, the first ruling was handed down by a military judge in response to the requested delay. In the case of Saudi Arabian national Ahmed al Darbi, military judge Colonel James Pohl granted the government's motion and set 24 September 2009 as the date for the next hearing in the case. "On its face", Colonel Pohl wrote in his ruling, "the request to delay the next hearing is reasonable" and "will serve the interests of justice". Amnesty International disagrees. Not only is resort to military jurisdiction over Ahmed al Darbi, a civilian, not in the interests of justice (see further below), to postpone his trial in order to reform the commissions when there is a fully functioning federal judicial system available is to deny him his right under international law to be brought to trial without undue delay.

Trials are already years overdue. Further delays are incompatible with international fair trial standards, as they are being justified by reference to the time needed to fix a tribunal that is unnecessary. This is what has contributed to the delays that President Obama criticized in his 21 May 2009 speech. Individuals were first charged for trial by commission five years ago under a system which was unnecessary and deeply flawed – and found unlawful by judicial ruling, with its successor now assessed as inadequate by executive determination. Even if modifying the military commission procedures could make them less unfair, the fact that fully functioning federal civilian courts are available now, and have been for the entire period of the detentions (not to mention from long before), render any further delays contrary to the right under international law for criminal suspects to be brought to trial without undue delay.[127] The change in administration is no justification for the USA's continuing failure to bring charges against detainees for trial in federal court. It is now six months since the new administration took office and in only one Guantánamo case has a charging decision been made. This is in the case of Ahmed Khalfan Ghailani, who did not appear in a civilian court until he had spent nearly five years in US custody. By that time, he had been under indictment in US federal court for more than eight years.

For the Guantánamo detainees, many of whom have been held for more than seven years, the question of trials within a reasonable time has long been rendered inoperative to their plight, not least by the policy decision to make trials secondary to detention and interrogations. In any event, the Military Commissions Act makes no provision guaranteeing the right to trial within a reasonable time. Indeed, the Act expressly 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". To the extent that there are certain time limits in relation to proceedings under the MCA, when they are violated, the military judge has the power to dismiss the charges against the detainee with or without prejudice to the government's right to reinstitute commission proceedings at a later date.[128]

The vulnerability of the military commission system to political interference opens the door to prevarication by the prosecuting authorities, with judicial remedy generally unavailable to the defendant, including for any governmental manipulation of the timing of trials. An independent civilian court would not be so exposed to such machinations.

Even if the military commission authorities were to dismiss charges against a defendant with prejudice to the government, the remedy that would be available to someone charged with a criminal offence in the USA – judicially ordered *and guaranteed* release from custody – may be unavailable to the Guantánamo detainee. Although Section 7 of the MCA, which had purported to strip the courts of jurisdiction to consider habeas corpus petitions from foreign "enemy combatants" in US custody, was found unconstitutional by the US Supreme Court in its *Boumediene v. Bush* ruling of 12 June 2008, the power of the District Courts to order the immediate release of a Guantánamo detainee found unlawfully detained appears to be less than effective.[129]

In a number of habeas corpus cases, even after independent civilian federal judges have ordered the immediate release of Guantánamo detainees as unlawfully held, the detainee has remained in indefinite detention for months. In his national security speech on 21 May 2009, President Obama referred to their cases, noting that "the United States is a nation of laws, and we must abide by these rulings". Yet, when the Justice Department announced on 11 June the transfer to Bermuda of four Uighur men, whose immediate release into the USA had been judicially ordered eight months earlier, it said that they were "subject to release as a result of court orders", but also made clear that their transfer was ultimately the result of executive discretion rather than judicial authority.[130] Thirteen other Uighurs remained in Guantánamo in mid-July 2009 despite the judicial order for their release in October 2008.[131]

Chadian national Mohammed el Gharani, first taken into custody by the USA when he was 14 years old, was not released from Guantánamo until five months after his immediate release was ordered by a federal court. Even then, although the US Department of Justice noted the judicial order, it stated that the release was the result of executive review of the case.[132] Lakhdar Boumediene, whose immediate release was ordered by a US District Court judge on 20 November 2008 was only released from Guantánamo on 15 May 2009. Even then, the government appeared not to be acting pursuant to the judicial order, but as a matter of executive discretion. In the statement announcing the release, the Justice Department said that, as directed by President Obama, "the interagency Guantánamo Review Task Force conducted a comprehensive review of Boumediene's case. As a result of that review, Boumediene was approved for transfer to France".[133] There was no mention of the District Court order. This is somewhat reminiscent of the Pentagon's approach under the previous administration.[134]

If the US administration considers that, even in the case of detainees it deems not to be a threat to US security, it is ultimately up to the executive rather than the judiciary to determine their disposition, leading to months of additional indefinite detention, what will happen in cases where the threat assessment is more prejudicial to the defendant? In this regard, it is a matter of concern that at a press briefing on 9 June 2009, the White House Press Secretary Robert Gibbs refused to answer a very straightforward question. The question was this: if a Guantánamo detainee was brought to trial in US federal court and acquitted, would he be released? The Press Secretary refused to address what he said was "hypothetical". He was repeatedly pushed for an answer on the grounds that this issue went to the credibility of the justice system. He repeatedly refused to answer.

Under the current rules by which the government has been implementing the MCA, even if a detainee is tried by a military commission and acquitted, he may be returned to indefinite detention if the executive considered him to have intelligence value or to be a security threat.[135] This rule is not one of those that the administration has said it is proposing to change. Indeed, at a hearing in front of the Senate Armed Services Committee on 7 July 2009, the Pentagon's General Counsel, Jeh Johnson, said that this was a question that "we talk about often within the administration". He indicated that if a detainee were to be acquitted by military commission, but was still considered to be a "security threat", the administration could continue to detain him:

> "I think that as a matter of legal authority, if you have the authority under the laws of war to detain someone…, that is true irrespective of what happens on the prosecution side".

So, under the USA's global war framework, those brought before military commissions in the future may continue to face the possibility that whether they are convicted or acquitted makes no real difference to their situation of indefinite imprisonment. Indeed, it appears the administration and Congress are currently looking at new legislation to further entrench the existing system of indefinite detention that has grown on an ad-hoc basis through a mixture of executive, judicial, and congressional decisions taken over the past years without a full consideration by any of those bodies of the implications or long-term

consequences of the cumulative effect of their decisions. Amnesty International considers that the existing system of preventive detention to be of grave concern in so far as it undermines the ordinary systems of criminal justice, and any efforts to further entrench it to be fundamentally misguided.

5.
USING ANY MILITARY TRIBUNALS IN THESE CIRCUMSTANCES RUNS COUNTER TO INTERNATIONAL LAW AND STANDARDS

In 2008 Yemeni national Salim Hamdan became the first person to be convicted under the Military Commissions Act after a trial on the merits. He was tried by a military commission, convened under the notion of a global armed conflict, but far removed in time and space from any battlefield (indeed, located far closer to the fully functioning courts in, say, Miami than to any battlefield), and even though the USA did not recognise him as a prisoner of war or a member of the armed forces of a state. Indeed he was not alleged to have participated in the planning, organization, implementation or execution of any particular armed attack. Nor by the government's own admission was there any evidence he ever fired a single shot.

The 2009 report of an international Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights makes the following observation about military justice:

> "Military courts, including Courts Martial, are a recognized form of military justice, and there are a number of good reasons to have military courts deliver justice to members of the military for military offences. Many military courts merit a reputation for excellence. The situation is, however, very different when such military courts are called upon to try civilians for non-military offences. The military is a closed, hierarchical institution and it stresses loyalty to the institution. For the most part, judges in military courts are military officers, appointed by the executive, and subordinate to their superiors in their military hierarchy, even though they may be independent in exercising their judicial functions. Still, the manner in which such judges conduct trials may play a role (or be perceived as playing a role) in subsequent decisions about promotions, assignments and professional rewards. Accordingly, there has been a growing consensus at the international level that military courts should be used only for trying members of the armed forces for offences of a military nature."[136]

Having examined the jurisprudence of the UN Human Rights Committee and regional human rights bodies, the UN Special Rapporteur on the independence of judges and lawyers has maintained that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism runs counter to all international and regional standards and established case law.[137] The USA has regularly criticized the use of military tribunals to try civilians in other countries, including in the context of national security. In its assessment of the human rights record of Peru in 1999, for example, the US State Department noted that "human rights groups and legal experts strongly criticize the power of the military courts to try civilians in cases of treason or aggravated terrorism", and cited the case of "American citizen Lori Berenson, who was tried by a military tribunal without due process rights that would have been afforded her in a civilian court". Proceedings in these military courts, the State Department wrote, "do not meet internationally accepted standards of openness, fairness, and due process". In the entry on Equatorial Guinea in its latest human rights assessment published in March 2009, the State Department reported:

> "The military justice system did not provide defendants with the same rights as the civil criminal court system. The code of military justice states that persons who disobey a military authority, or are alleged to have committed an offence considered to be a 'crime against the

> state,' should be judged by a military tribunal, with limited due process and procedural safeguards, regardless of whether the defendant is civilian or military."

Whatever changes are made to the USA's military commission system, or even if the Guantánamo detainees were to be tried by the ordinary courts martial, the bodies in question will still be *military*, not civilian, tribunals. Amnesty International considers that offences that were not committed in an international or non-international armed conflict cannot, consistent with international standards, be tried by military tribunals of any kind. Amnesty International opposes trial of civilians, including those accused of crimes against humanity or other similarly grave crimes, by military courts.

The UN Human Rights Committee has stated that, while the ICCPR does not expressly prohibit the trial of civilians in military or special courts, the Covenant does require that any such trials be:

> "in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned… [T]he trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party 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 such trials".[138]

As argued above, Amnesty International considers that the US government has failed to make the case for military commission trials in this context, and the necessity argument, unpersuasive even at the outset, has become less and less tenable as the years have passed.[139] Moreover the organization does not believe that trials by military commission will "genuinely afford the full guarantees" stipulated in article 14 of the ICCPR or other principles of international law, whereas the federal courts have a positive track record in this regard.

Civilians accused of criminal conduct should always have been treated as criminal suspects, and therefore subject not only to the law of war or the USA's interpretation of it (and then only if they are detained in the context of an actual armed conflict), but in all circumstances entitled to the protections of international human rights law (and liable to trial and imprisonment under ordinary provisions and systems of criminal law). One such detainee, charged for trial under the MCA and still facing trial by military commission, is Ahmad Mohammad al Darbi, a Saudi Arabian national arrested by civilian authorities in Baku, Azerbaijan, in 2002. He was transported to Guantánamo via alleged torture in US custody in Afghanistan. In other words, like a number of other detainees, he was only in a zone of armed conflict because the USA forcibly took him there. He should only ever have been treated as a criminal suspect, promptly charged for trial in *civilian* court or released. At the time of writing, his next hearing by military commission was scheduled for 25 September 2009, after the military judge granted the new administration's request for a further 120-day delay.[140]

As already noted, the new administration has chosen to transfer Ahmed Khalfan Ghailani, arrested in Gujarat in Pakistan in 2004, to the civilian federal courts. This should have happened years ago. Like Ahmed Ghailani, none of the other six detainees transferred from CIA custody to Guantánamo in early September 2006 and charged in 2008, was arrested on a battlefield but were nevertheless labelled "enemy combatants" by the Bush administration applying its global war paradigm. 'Abd al-Rahim al-Nashiri was arrested in Dubai, United Arab Emirates in October 2002, and for his first month in detention was allegedly interrogated by Dubai agents before being handed over to the USA;[141] Mustafa

Ahmad al-Hawsawi and Khalid Sheikh Mohammed were arrested in Rawalpindi in Pakistan in March 2003, 'Ali 'Abd al-'Aziz 'Ali and Walid bin Attash were arrested in Karachi in Pakistan in April 2003, and Ramzi bin al-Shibh was arrested in Karachi in September 2002.

None of the 14 detainees transferred from secret CIA custody to Guantánamo in September 2006, whose cases were exploited by President Bush in seeking congressional approval for the MCA under which he said they would be brought to trial by military commission, were arrested in Afghanistan. All were reportedly arrested by national police or security forces of the country in which they were first detained before being handed over to the USA. In addition to those named above who have already been charged for trial by military commission, the 14 include Mohammed Farik Bin Amin, Mohammed Nazir Bin Leop and Encep Nuraman (aka Hambali), who were arrested in Thailand in 2003, and Haned Hassan Ahmad Guleed, who was arrested in Djibouti in March 2004. All remain in Guantánamo, nearly six months after the new administration took office.

As noted above, two other detainees currently facing trial by military commission are Mohammed Jawad, an Afghan national, and Canadian national Omar Khadr. Both were taken into custody when they were under 18 years old. As such, Amnesty International considers that they should never have been placed under prolonged military jurisdiction, but transferred to civilian authorities with the expertise and motivation to take account of their age, their needs, and the USA's international obligations. The UN Committee on the Rights of the Child, the expert body overseeing compliance with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified by the USA in 2002, has called on the US government not to try any person arrested and accused of alleged crimes committed when they were children, before military tribunals of any sort. Under the provisions of the Optional Protocol, in the case of children held because they participated in the armed conflict in Afghanistan, the USA has an obligation to provide them with "all appropriate assistance for their physical and psychological recovery and their social reintegration".[142]

The USA never took account of their age in its treatment of these detainees, as it was required to do under international law. If the USA decides to go forward with their prosecution, it must not be in a military court of any kind and it must do so only in ways that fully take into account their age at the time of their alleged crimes and their other human rights. Amnesty International believes, however, given their years of unlawful treatment by the USA, that serious consideration, on humanitarian and remedial grounds, should be given instead to their release for inclusion in suitable programs geared towards their successful reintegration into society. The right to remedy must, after all, be adaptable.[143] On 23 April 2009, the Federal Court of Canada ruled that the government of Canada "must present a request to the United States for Mr Khadr's repatriation to Canada as soon as practicable" and that Canada's ongoing refusal to do so "offends a principle of fundamental justice".

Both Omar Khadr and Mohammed Jawad were taken into custody in Afghanistan after the international armed conflict in Afghanistan ended in June 2002 and became a non-international armed conflict. Amnesty International believes that the failure of the USA to provide those detained during the international conflict with prompt adjudication of their status by a competent tribunal rendered their detention arbitrary, in violation of international human rights law. In the absence of such determinations, their presumed status as prisoners of war would render their trials by military commission unlawful under the Geneva Conventions, because members of the US armed forces would not be subject to such trials.[144]

It is not only the tribunal that will be military in commission cases. The defendant will be represented by a military lawyer, even if that goes against his wishes.[145] One of the modifications proposed by the new US administration is to give the defendant greater choice as to who will represent him. The proposed new rule would allow the defendant to request a military lawyer other than the one assigned to represent him.

His choice is still restricted, however, to a US military lawyer, specifically to one from within the Office of Military Commissions, and only if the lawyer requested is "reasonably available".

Whatever practical change, if any, the modifications to MCA procedures will make, Amnesty International would be seriously concerned by any proposal to use any form of military tribunal to try civilians. The organization continues to call on the USA to rely on ordinary systems of criminal justice alone to justify detention – pending trial – of individuals who are unconnected to any ongoing international armed conflict and are accused of essentially criminal conduct.

The Bush administration's "war on terror" sought to "militarize" due process. In the case of foreign nationals branded as "enemy combatants", habeas corpus review by independent civilian courts was replaced by administrative review by panels of military officers. Trials of such detainees were likewise to be conducted by military tribunals, not independent civilian courts. As part of closing the military detention facility at Guantánamo, the USA should "demilitarize" due process and turn to ordinary procedures of criminal justice for those detainees it intends to charge.

6.
DISCRIMINATORY JUSTICE: HUMAN RIGHTS ENTITLE FOREIGN NATIONALS TO THE EQUAL PROTECTION OF THE LAW

In its opinion claiming that military commissions were a lawful policy option for the USA to take in trying "terrorists captured in connection with the attacks of September 11 or in connection with ongoing US operations in response to those attacks", the US Department of Justice stated that "in the context of the current conflict, any actions by US citizens that amount to hostile acts against the United States or its citizens would make a person a 'belligerent' subject to trial by military commission". However, it added that bringing US citizens to trial by military commission raised "litigation risks" in "establishing the exact application" of US Supreme Court precedent.[146] The Bush administration chose to make the military commissions applicable only to foreign nationals and emphasized the non-applicability of the commissions to US nationals when promoting the MCA (see Section 10).

The draft legislation to amend the MCA at the time of writing would only apply to foreign nationals, and neither the administration nor Congress has so far suggested that the proposed modifications to the military commissions will include allowing US nationals to be tried before them. If so, it will remain the case that if the sole change to the facts alleged against anyone brought to trial by military commission under the MCA were that he was a US national instead of a foreign national, he would not and could not be so tried.

It remained unclear at the time of writing what constitutional rights the administration believed any Guantánamo detainee would have if brought to trial by military commission, and whether its view in this regard would differ if the trials were held on the US mainland.[147] On 7 July 2009, the Pentagon's General Counsel said that:

> "If military commissions were held in the continental United States, I think that we have to carefully consider the possibility that some level of due process may apply that the courts have not determined applies now. I think that assessment has to be carefully evaluated and carefully made…
>
> Much of this is uncharted territory in the courts in terms of what rights, if any, would apply to these detainees. I would say that it's our view that the detainees would not, whether in the

> United States or in any place else, do not enjoy the full panoply of constitutional rights that an American citizen in this country would enjoy."[148]

Extraordinary courts may not be created to try groups of people for criminal offences on the basis of a distinction of any kind, including their national origin. Such courts would contravene the principle of equality before the courts and the principle of non-discrimination, a fundamental principle of international law, and one which runs through all human rights law.[149]

Under the ICCPR, all persons are equal before the law, entitled without any discrimination to the equal protection of the law (Article 26), and "shall be equal before the courts and tribunals" (Article 14). Each state party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights enshrined in the treaty, without distinction of any kind, including on the basis of national origin (Article 2). The UN Human Rights Committee has stated that under the ICCPR:

> "The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of their nationality or statelessness, or whatever their status..., who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds".[150]

The new administration has committed the USA to working for full realization of the principles contained in the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD):

> "The United States is party to the International Covenant [sic] on the Elimination of All Forms of Racial Discrimination, and is committed to seeing the goals of this covenant fully realized. Particular emphasis should be placed not only on eliminating any remaining legal barriers to equality, but also on confronting the reality of continuing discrimination and inequality within institutions and societies".[151]

Under ICERD, everyone has the right to "equal treatment before the tribunals and all other organs administering justice" (Article 5). The UN Committee on Elimination of Racial Discrimination has called on parties to ICERD to ensure in the administration of justice "that non-citizens enjoy equal protection and recognition before the law" and any "non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law".[152] In March 2008, the Committee took issue with the US government's position that ICERD does not apply to the treatment of foreign detainees held as "enemy combatants". The Committee reminded the USA that:

> "States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of the rights set forth in article 5 of the Convention, including the right to equal treatment before the tribunals and all other organs administering justice".[153]

If the US authorities constitute a tribunal which hands down to a foreign national standards of justice which are inadequate and lower than a US citizen accused of the same offence would receive in an already constituted court, the trials before it would fail to meet the test of fairness; they would clearly be discriminatory, in violation of international law. [154]

Further, if the executive branch has the discretion to decide whether to bring an individual before the ordinary courts, or another special court that deprives him of the procedural protections to which he would otherwise be entitled, this effectively allows the executive arbitrarily to deprive such individuals of fair trial protections, which again is inconsistent with the obligation of equal protection of the law.

7.
EXCLUSION OF STATEMENTS OBTAINED UNDER TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT

A contentious issue throughout the life of the military commissions begun by President Bush in November 2001 has been the question of the admissibility of information coerced under unlawful methods, including torture and other cruel, inhuman or degrading treatment or punishment. This is one area that the new administration is proposing to address in its reforms of the military commission procedures.

A fundamental minimum fair trial standard under international law is the right not to be compelled to testify against oneself or to confess guilt.[155] Another fair trial standard, which is also an aspect of the absolute prohibition of torture and other ill-treatment, is that no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment. The term 'cruel, inhuman or degrading treatment or punishment' should be interpreted "so as to extend the widest possible protection against abuses, whether physical or mental".[156] States are prohibited from taking "undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".[157] In cases where it is alleged a statement or confession was obtained in violation of article 7 of the ICCPR [prohibition of torture and other cruel, inhuman or degrading treatment or punishment], "the burden is on the State to prove that statements made by the accused have been given of their own free will".[158]

In its General Comment explaining its interpretation of the right to a fair trial under article 14 of the ICCPR, the UN Human Rights Committee has stated that:

> "To ill-treat persons against whom criminal charges are brought and to force them to make or sign, under duress, a confession admitting guilt violates both article 7 of the Covenant prohibiting torture and inhuman, cruel or degrading treatment and article 14, paragraph 3(g) prohibiting compulsion to testify against oneself or confess guilt".[159]

The Committee further states:

> "as article 7 is also non-derogable in its entirety, no statements or confessions or, in principle, other evidence obtained in violation of this provision may be invoked as evidence in any proceedings covered by article 14, including during a state of emergency, except if a statement or confession obtained in violation of article 7 is used as evidence that torture or other treatment prohibited by this provision occurred".[160]

The exclusionary rule, containing deterrent, remedial, and accountability components, is an inseparable part of the general prohibition of torture and other cruel, inhuman and degrading treatment and, as the Human Rights Committee states, it must include not just statements, but any information obtained as a result of torture or other ill-treatment. The exclusion is not limited to the torture or ill-treatment perpetrated by agents of the prosecuting state. If the latter comes into possession of evidence that has

been obtained by the unlawful actions of another government, that too must be inadmissible, except as evidence against the perpetrator of the unlawful conduct and then only as evidence of the abuse used to extract the information.[161] Whatever its origins, the admission of evidence that has been obtained by torture or other cruel, inhuman or degrading treatment would seriously damage the integrity of proceedings. As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if "statements contained in them may be independently established as true", because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.[162]

Prosecutors should see themselves as the first line of defence in protecting against admissibility of information obtained in violation of human rights. The UN Guidelines on the Role of Prosecutors state that:

> "when prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods…"[163]

In his national security speech on 21 May 2009, President Obama stated that one of his administration's proposed reforms to the military commissions would be that "statements that have been obtained using cruel, inhuman, or degrading interrogation methods" would no longer be admissible as evidence.

As passed into law in 2006, the Military Commissions Act differentiates between statements obtained before 30 December 2005, when the Detainee Treatment Act (DTA) came into force and included a prohibition of cruel, inhuman or degrading treatment (as defined under domestic law) by US personnel abroad, and statements obtained after that date. Under the MCA, in pre- and post-DTA cases, statements "in which the degree of coercion is disputed" may only be admitted if the military judge finds that the statement is "reliable" and possesses "sufficient probative value" and if "the interests of justice would best be served by admission of the statement into evidence". In the case of statements obtained after 30 December 2005, the military judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment as defined and prohibited under the DTA.

The new administration is proposing to eliminate this difference between the criteria for the admissibility of pre- and post-DTA statements. The amendment would mean that regardless of when the statement was made,

> "where the degree of coercion used to obtain a statement is disputed, a military judge may admit the statement only if he or she finds that it was not obtained using interrogation methods that constitute cruel, inhuman or degrading treatment (and if the statement is reliable and sufficiently probative, and that the interests of justice would best be served by admission of the statement into evidence)".[164]

The Pentagon's General Counsel, Jeh Johnson, has said that this change will, by itself, "go a long way towards enhancing the legitimacy and credibility of the commissions".[165] This modification would indeed be an improvement, not least because some four years and thousands of interrogations of individuals in US custody in the "war on terror" took place before 30 December 2005. In the end, whether a particular trial falls short of international standards on the coercion issue will depend on what happens in that case.

If no information that has been allegedly coerced is presented, the question may not arise. Nevertheless, there are some general concerns that present themselves even now.

Firstly, as written, the MCA's treatment of statements allegedly obtained under cruel, inhuman or degrading treatment expressly applies only to interrogation techniques rather than to detention conditions, and modifications so far proposed by the administration and Congress have not altered this. Any modification should be made to clearly apply to "detention conditions" both as a form of and in addition to other kinds of "interrogation techniques". Detention conditions that have amounted to torture or other ill-treatment have been used against detainees, sometimes at the instruction of interrogators to soften up detainees for the interrogation process. In Afghanistan, for example, US detention authorities adopted a "template whereby military police actively set the favourable conditions for subsequent interviews".[166] Under standard operating procedures at Guantánamo all newly arrived detainees would be put into at least a month of isolation.[167] This was applied even to children. For example, in the case of Mohammed Jawad, who is still facing trial by military commission, his transfer to Guantánamo as a teenager after alleged torture and other ill-treatment in Afghan and US custody in Afghanistan has been described by a US military lawyer thus:

> "Mr Jawad arrived at Guantánamo on February 6, 2003 after an approximately 23 hour flight from Afghanistan. Standard procedures at the time were to deprive detainees of food for three days prior to the flight and limit them to small sips of water, so they would not soil themselves during the long flight, during which they would be shackled and not permitted to use the lavatory. Upon arrival at Guantánamo, it was standard operating procedure to place detainees in maximum segregation to reinforce their sense of hopelessness and to set the stage for successful interrogations. During this period, there was to be no human contact other than with interrogators. Even Chaplain and ICRC visits were restricted. No exception was made for Mr Jawad despite the fact that he was a juvenile."[168]

Some techniques were defined as conditions of detention rather than interrogation techniques. There were apparently two versions of the sleep disruption/deprivation technique known as the "frequent flyer program", for example, one aimed at coercing information from detainees, the other at coercing detainee compliance with the rules of detention.[169]

In the CIA's secret detention program, detainees were first subjected to "Initial Conditions" which "set the stage for use of the interrogation techniques, which come later". This initial period would typically consist of the following:

> "Before being flown to the site of interrogation, a detainee is given a medical examination. He then is securely shackled and is deprived of sight and sound through the use of blindfolds, earmuffs, and hoods during the flight… Upon arrival at the site, the detainee finds himself in the complete control of Americans and is subjected to precise, quiet, and almost clinical procedures designed to underscore the enormity and suddenness of the change in environment, the uncertainty about what will happen next, and the potential dread a detainee may have of US custody. His head and face are shaved; his physical condition is documented through photographs while he is nude…"[170]

The International Committee of the Red Cross (ICRC) has said that in addition to the "severe physical pain" to which detainees in the CIA detention program were subjected during transfers (for example, as a result of shackling and being held in painful positions), the transfers "to unknown locations and unpredictable conditions of detention and treatment placed mental strain on the [detainees], increasing their sense of disorientation and isolation". The ICRC was told by the US authorities in late 2006 or early 2007 that the mode of transfer was "to maintain compliance" rather than being "an integral part of the

program". However, according to the ICRC, the transfers increased the vulnerability of the detainees to interrogation, and were "performed in a manner that was intrusive and humiliating and that challenged the dignity of the persons concerned".[171]

If, in the "relatively benign" second phase – known as the "transition to interrogation" – the detainee in CIA custody did not provide "high value" intelligence information to interrogators, the third phase would see the detainee brought to "a baseline dependent state, demonstrating to the detainee that he has no control over basic human needs". The "conditioning techniques" used to achieve this would typically be nudity, sleep deprivation (shackled and in a diaper), and dietary manipulation.[172] In addition, the Justice Department noted,

> "The CIA maintains certain detention conditions at all its detention facilities. These conditions are not interrogation techniques... The detainee is exposed to white noise/loud sounds... and constant light during portions of the interrogation process. These conditions enhance security. The noise prevents the detainee from overhearing conversations of staff members, precludes him from picking up auditory clues about his surroundings, and disrupts any efforts to communicate with other detainees. The light provides better conditions for security and for monitoring by the medical and psychological staff and the interrogators."[173]

In its leaked February 2007 report following its interviews with the 14 detainees who were transferred from the CIA program to Guantánamo in September 2006 for the stated purpose of bringing them to trial by military commission, the ICRC noted that:

> "The conditions of detention under which the fourteen were held, particularly during the earlier period of their detention, formed an integral part of the interrogation process as well as an integral part of the overall treatment to which they were subjected as part of the CIA detention program. This report has already drawn attention to certain aspects associated with basic conditions of detention, which were clearly manipulated in order to exert pressure on the detainees concerned. In particular, the use of continuous solitary confinement and incommunicado detention, lack of contact with family members and third parties, prolonged nudity, deprivation/restricted provision of solid food and prolonged shackling have already been described above. The situation was further exacerbated by the following aspects of the detention regime: deprivation of access to the open air; deprivation of exercise; deprivation of appropriate hygiene facilities and basic items in pursuance of interrogation; and restricted access to the Koran linked with interrogation. These aspects cannot be considered individually, but must be understood as forming part of the whole picture. As such, they also form part of the ill-treatment to which the fourteen were subjected".[174]

Enforced disappearance, to which the ICRC has concluded these 14 men were subjected, also amounts to a form of torture or other cruel, inhuman or degrading treatment, as do other forms of prolonged incommunicado detention and solitary confinement.[175] The UN Committee against Torture has said, in relation to the Guantánamo detentions, that indefinite detention without charge per se contravenes the UN Convention Against Torture. The bottom line is that at the heart of the detention regime was coercion, whereby detainees would be exposed, away from lawyers and courts, to a "continuous" interrogation cycle.[176]

The USA's international obligations prohibit the admission in any proceedings of any information obtained by detention conditions amounting to torture or other cruel, inhuman or degrading treatment or punishment, whatever the purpose invoked for their imposition, whether or not they are characterized as "interrogation techniques". That prohibition is especially important in criminal proceedings, given what is at stake for the individual.

Second, the question arises as to whether the rules under the MCA on hearsay and classified information (see Section 8) would still, even with the proposed changes, allow coerced information to be admitted without the defendant being able to effectively mount an effective challenge to it. The military commission rules effectively created a presumption in favour of the admission of hearsay evidence. Hearsay evidence is second-hand information – e.g. 'Person A told me that Person B was driving the car' – as opposed to direct eyewitness testimony – e.g. 'I saw person B driving the car'– and is generally excluded in ordinary criminal trials in the USA, due to concerns about verifiability and therefore reliability, and the fact that it is obviously fairer for an accused to be able to question the witnesses against him. The administration is proposing to reverse the burden of proof on hearsay. Under this change, the proponent of the hearsay (which, in terms of evidence against the accused, would be the government) will have to demonstrate "by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances" (prior to this the burden was on the opponent of the admission of the evidence to prove its unreliability).[177]

Again, while this would offer greater protection than previously, the devil will be in the detail of any rulings in individual cases by military judges on admissibility of hearsay evidence. Further, to the extent the approach to the hearsay rule (or the result of its application) in the commissions would ultimately differ in any respect from the approach or result that would have happened in the trial of a US citizen for the same offence, or in the trial of anyone before the ordinary US criminal courts, the issue of the prohibition of discrimination and the right of all to the equal protection of the law again arises. Also, to reiterate, under international law, any alleged statement made under torture or other cruel, inhuman or degrading treatment, carried out by any government, should not be admitted, in any form, in any proceeding (except against the alleged perpetrator of this ill-treatment as proof that the statement was made).

Third, the US reservations to and stated understandings on ratification of the UNCAT and the ICCPR indicate that, even with the passage of the DTA, the USA only considers itself bound by the provisions on prohibition of cruel, inhuman or degrading treatment or punishment (article 16 of UNCAT and article 7 of ICCPR) to the extent that their requirements match existing US law.[178] This has been exploited by US officials during the "war on terror". According to the minutes of a meeting in October 2002 to discuss interrogation techniques for use at Guantánamo, for example, the then chief counsel to the CIA's Counter Terrorist Center, Jonathan Fredman, noted that UNCAT prohibits torture and other cruel, inhuman or degrading treatment, but claimed that the USA "did not sign up to the second part" which "gives us more licence to use more controversial techniques".[179] A 2005 Justice Department memorandum giving the CIA legal approval to use "enhanced interrogation techniques" advised that the USA's ratification of UNCAT showed that "the United States did not intend to undertake any obligations under Article 16 that extended beyond those already imposed by the Constitution".[180]

Under US Supreme Court jurisprudence, government conduct violates constitutional due process protections if it "shocks the conscience". However, conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".[181]

Under the Bush administration, the Justice Department claimed that the use of "enhanced interrogation techniques" in the CIA's secret detention program did not shock the conscience and therefore did "not violate the substantive standards applicable to the United States under Article 16 even if those standards extended to the CIA interrogation program" (which the OLC argued they did not). The OLC advised that while the use of these techniques "might well shock the conscience" if used in "ordinary criminal investigations", their use in the CIA program did not so offend because they were medically monitored, targeted at a limited number of individuals, and operated to defend national security, a "paramount"

government interest.[182] The OLC said that while it might be "significant" that the US State Department annually condemned such techniques when used in other countries, citing the examples of Egypt, Syria, Pakistan, Uzbekistan and Indonesia, it did not believe such human rights reports provided evidence that the CIA's interrogation program "shocks the contemporary conscience" because the condemned foreign conduct tended to go "beyond the CIA techniques" and "is often undertaken for reasons totally unlike the CIA's". It added that, in these countries, there "is no indication that techniques are used only as necessary to protect against grave terrorist threats or for any similarly vital government interests". Such double standards are another reason for the compelling international interest in seeing the USA now make a clear break from all the unlawful detention policies of the past few years and fully embrace international standards.[183] Military commissions are among the policies that should be abandoned.

While President Obama has ordered the CIA to stop its use of "enhanced interrogation techniques", and the CIA Director has confirmed that the agency has stopped its use of such methods, it is not clear to what extent the new administration would consider that their prior use fell foul of the "shock the conscience" test and whether it would seek to rely on any information obtained under its unlawful methods and conditions.

In its "torture memos", the OLC said that, because the question of what shocks the conscience is context-specific, fact-dependant and somewhat subjective, and given what it called the "relative paucity of Supreme Court precedent applying this test at all", it could not "predict with confidence that a court would agree with our conclusion" that the CIA's use of "enhanced" interrogation techniques was lawful. It added that this need not be a problem, however, because of the USA's ratification of UNCAT, claiming: "Article 16 imposes no legal obligations on the United States that implicate the CIA interrogation program" and "has no domestic legal effect because the Senate attached a non-self-execution declaration to its resolution of ratification", the OLC stated. Because Article 16 had "not been legislatively implemented, the interpretation of its substantive standard is unlikely to be subject to judicial inquiry".

"It is conceivable", the Justice Department memorandum noted, however, "that a court might attempt to address substantive questions under the Fifth Amendment if, for example, the United States sought a criminal conviction of a high value detainee in an Article III court in the United States using evidence that had been obtained from the detainee through the use of enhanced interrogation techniques". As noted above, the Bush administration chose a military commission system in which it seemingly believed that the Fifth Amendment's protections would neither apply to the defendant not constrain the evidence that the commission could consider.[184]

In November 2006, six retired federal judges wrote: "We do firmly contend that Article III courts have a duty to inquire whether, in fact, evidence has been gained by torture or other cruel, inhuman or degrading treatment, and to reject that evidence if so obtained".[185] Amnesty International considers that the USA's Article III courts provide a far greater chance that unlawful executive conduct will receive the necessary independent scrutiny than will be the case under military commissions, reformed or not.

Fourthly, therefore, as on other issues, the question remains as to whether a defendant subject to trial by military commission is denied protections he would receive in the USA's Article III courts, raising the question of discriminatory application of fair trial rights in violation of international law.

Further in this regard, the rules for military commissions under the MCA offered less protection against self-incrimination than applies in other criminal proceedings under the US Constitution. Under the Fifth Amendment to the US Constitution, no one "shall be compelled in any criminal case to be a witness against himself". The Amendment "has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to

tyranny and may lead to the conviction of innocent persons."[186] This protection is not limited to statements compelled during a court proceeding, but extends to prior statements subsequently introduced into evidence at such a proceeding.[187] The protection revolves around "voluntariness", a principle which reflects

> "an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. In cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[188]

The new administration has asked Congress to consider incorporating a "voluntariness" standard into its reform of the military commission procedures, albeit one that takes into account "the unique challenges and circumstances of the battlefield setting".[189] In a statement to the US Senate Armed Services Committee on 7 July 2009, the Pentagon's General Counsel said:

> "The essential mission of our nation's military is to capture or kill the enemy, not to engage in evidence collection for eventual prosecution. However, in both American civilian courts and courts martial, statements of an accused are normally admitted only in the event they are found to be 'voluntary'. There is a concern that, as military commissions prosecutions progress, military commission judges and courts may apply this standard without taking adequate account of the critical circumstances."

Assistant Attorney General David Kris from the US Department of Justice explained that:

> "It is the Administration's view that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional. Although this legal question is a difficult one, we have concluded that adopting an appropriate rule on this issue will help us ensure that military judges consider battlefield realities in applying the voluntariness standard, while minimizing the risk that hard-won convictions will be reversed on appeal because involuntary statements were admitted".[190]

The question being raised by the administration, however, is not truly about 'battlefield realities' or the role of military personnel in conducting war - these will not be determined by the rules of evidence set for military commissions; the question is rather whether involuntary statements, wherever obtained, can be used against a person as evidence in a criminal trial. That is a question of fair trial and criminal justice, which has already settled as a matter of constitutional and international human rights law.[191]

The standards of fairness in criminal trials are not something that can lawfully be made to depend on the circumstances of particular accused persons or the situation in which they came into government custody, even more so here where the government would arrogate to itself the power to determine whether individuals in identical circumstances receive the full ordinary protection of the law or a reduced form, and where vulnerability to such deprivation of fair trial rights is itself applied on an unreasonable discriminatory basis (with identically-situated US citizens automatically being guaranteed a higher standard of fairness in criminal justice than nationals of other origin).

Assistant Attorney General Kris said that "there may be some situations in which it is appropriate to administer *Miranda* warnings to terrorist suspects apprehended abroad, to enhance our ability to prosecute them", but that this would not apply to military personnel "on the battlefield". He did not define "battlefield" – for instance, whether it would extend, under the USA's global war paradigm, to military interrogations conducted in the US airbase in Bagram in Afghanistan or in the naval base at Guantánamo Bay in Cuba, and he did not elaborate on which situations it would be appropriate to tell a suspect that he or she could have a lawyer before being questioned. In any event, no detainee held in the CIA's secret detention program, or held in Bagram, or held in Guantánamo has had access to legal counsel during interrogations.

From the administration's stated position, it would seem that it is indeed intending to introduce into evidence statements that would not be admissible in ordinary civilian court. At the time of writing, it was not known if Congress would add a "voluntariness" standard to the MCA amendment.

Before the Bush administration decided not to prosecute any Guantánamo detainees in federal court, it was advised by the OLC that US Supreme Court precedent suggested that the "Self-Incrimination Clause would likely be applied in a criminal trial of an alien in the United States even if the alien had no previous connection to the country". Even if there may be some doubt about this, it bears noting, the OLC added, that the Supreme Court "has consistently described the Self-Incrimination Clause as a fundamental trial right that is critical for protecting the integrity of the trial process."[192]

The military judge in Salim Hamdan's military commission proceedings in 2008 found that the detainee had never been "advised of a right to remain silent, or warned that his statements could later be used against him in a criminal trial". The judge concluded that "the 5th Amendment of the Constitution does not apply to protect Mr Hamdan", citing the fact that Hamdan had been found to be an "unlawful enemy combatant", and on the premise that there was "no necessity for the 5th Amendment to prevent injustice" in the case. He also held that there were "substantial practical arguments" against applying this protection in Guantánamo, namely that it would "hamstring American military and intelligence officials in the performance of important national security duties" and would be "devastating to our ability to effectively confront and respond to international terrorism". Thus, in his opinion, "although it is clearly within the power of the United States to grant 5th Amendment protections to unlawful combatants, there are also significant practical arguments and exigent circumstances weighing against it".[193]

However, the Fifth Amendment would apply to any US citizen tried for the same conduct for which foreign nationals (and only foreign nationals) are triable by military commission; to deprive individuals of the fair trial protections to which they otherwise would be entitled, on grounds of national origin, constitutes prohibited discrimination in the administration of justice. Equal protection of the law requires that all those accused of similar criminal acts receive the same standards of fairness in the courts of the state, regardless of the location where the trial takes places or the status of the accused.

8.
MILITARY COMMISSIONS DO NOT SIT WELL WITH A GOVERNMENT'S COMMITMENT TO TRANSPARENCY. MOREOVER, THE USA'S CONTINUING DEFENCE OF SECRECY, SWEEPING IN SCOPE, FEEDS CONCERN THAT COMMISSION TRIALS WILL FURTHER BLOCK ACCOUNTABILITY AND REMEDY

The military commissions must also be seen in the context of an approach to detentions that has exploited secrecy and facilitated impunity. Despite the change in administrations, any return to military commissions raises concerns about the injustices that trials before them could compound and perpetuate.

Early in the "war on terror", a memorandum from a US Army lawyer written in the context of the proposed use of harsh interrogation techniques at Guantánamo included the following warning:

> "From a policy standpoint, employing many of the suggested techniques would create a PR [public relations] nightmare. The War on Terror is expected to last many years and ultimate success requires strong domestic and international support. Whatever interrogation techniques we adopt will eventually become public knowledge. If we mistreat detainees, we will quickly lose the moral high ground and public support will erode. The techniques noted above [threats of death and severe pain for detainee and/or his family; and waterboarding] will not read well in either the New York Times or the Cairo Times. Additionally, many of the techniques arguably violate the torture and inhumane treatment provisions of the ICC [International Criminal Court]. While we may not be subject to the ICC, failure to adhere to these provisions severely undercuts our stated position that we follow international law and principles and will police our own".[194]

Despite such warnings, the US authorities chose to pursue interrogation techniques and detention conditions that violated international law, and used secrecy to obscure them, facilitated by an attempt by the executive to usurp judicial functions, all while falsely assuring the public that detainees were being treated humanely. Impunity was built in, despite the USA's "stated position" that it would "police our own" and ensure accountability.[195] In May 2002, the Bush administration had informed the UN Secretary General that the USA would not ratify the Rome Statute of the ICC and therefore would not consider itself bound under international law not to undermine its object and purpose.[196] OLC advice to the White House claimed that withdrawal of the Clinton administration's signature to the ICC meant that US interrogators could not be subject to criminal investigation and prosecution in relation to the "interrogations of al Qaeda operatives".[197] The USA subsequently committed systematic human rights violations against detainees and failed itself to bring to justice those responsible.

Transparency is a key component in ensuring effective human rights protection and accountability for violations. Amnesty International welcomed President Obama's commitment to make transparent government a hallmark of his administration, which he promised on the grounds that "a democracy requires accountability, and accountability requires transparency".[198] The new administration has taken a number of positive steps in this regard, notably by releasing OLC memorandums that gave the legal green light to torture and other ill-treatment.[199]

The decision to revive military commissions – tribunals designed to facilitate convictions – while denying independent scrutiny of any allegations of human rights violations that might be raised by the defendant, does not sit well with this commitment to transparency. Although the new administration has said that it agrees that "the rules governing use of classified evidence [under the MCA] need to be changed", perhaps to make them more similar to those provided under the Classified Information Procedures Act (CIPA) that apply in federal court (see below)[200], its continued failure to take substantive steps to end impunity for past violations, and its continued defence of sweeping invocations of secrecy that are having the effect of blocking accountability and remedy, are cause for concern. The concern is that the military commissions will further undermine respect for human rights standards by dispensing with ordinary fair trial guarantees in order to facilitate convictions as a matter of expediency, while denying justice for unlawful government conduct perpetrated against those accused before the commissions.

Under the ICCPR, all trials on criminal matters "must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large."[201] Any closure of trial proceedings from the public must be "exceptional". [202] Closure of proceedings cannot be permitted to prevent disclosure of human rights violations contravening other provisions of the ICCPR, including the right to remedy under article 2. As the UN Human Rights Committee has pointed out, the set of procedural guarantees contained in article 14 of the ICCPR "often plays an important role in the implementation of the more substantive guarantees of the Covenant".[203] Using closure of proceedings for the purpose or with the effect of concealing and leaving unremedied violations of the ICCPR and other international instruments, such as the UN Convention against Torture, would defeat the object and purpose of those treaties and undermine the integrity of the entire trial process.

As argued above, at least part of the reason the Bush administration turned to military commissions was to compensate for its use of coercive interrogation techniques and detention conditions that would be soundly rejected in any fair trial before an ordinary criminal court against detainees who it might later wish to charge for criminal trial. The military commissions would also allow the executive to manipulate the timing of prosecutions, in violation of the defendant's right to fair trial without undue delay, including in order to keep interrogation techniques secret.

Early in the "war on terror", there was concern among some officials that the US administration's proposed use of aggressive interrogation techniques would come to light. In November 2002, for example, a US Navy memorandum stated:

> "Navy staff concurs with developing a range of advance counter-resistance techniques to apply to foreign detainees. Navy staff recommends, however, that more detailed interagency legal and policy review be conducted on proposed techniques. Such policy review should address the possibility, if not the likelihood, that techniques will be inadvertently disclosed through the visits to the detainees in Cuba by the International Committee of the Red Cross or foreign government delegations, which could lead to international scrutiny. Navy staff also recommends that the classification level of counter-resistance techniques be increased to the Top Secret level".[204]

Also in November 2002, another Pentagon official had recommended that

> "a decision should be made prior to applying the aggressive procedures that the detainee subject to the treatment would not be considered for referral to the Military Commission. This will reduce the risk that the more aggressive techniques used against a few detainees will be revealed"[205]

An April 2003 Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism, originally classified by Secretary Rumsfeld as "secret" and "not releasable to foreign nationals" until 2013, noted that the use of certain techniques such as sleep disruption, sleep deprivation, threat to transfer the detainee to a country that would torture him, isolation, prolonged standing, and exploitation of phobias, could affect the admissibility of statements at any subsequent trial, but that this would be a "lesser issue for military commissions".[206] It also noted that "the more coercive the method, the greater the likelihood that the method will be met with significant domestic and international resistance", which "in turn may lower international and domestic acceptance of the military commission process as a whole". The commission would, the report said, "be faced with balancing the stated objective of open proceedings with the need not to publicize interrogation techniques", and therefore "the timing of the prosecutions must be considered".

The desire not to disclose interrogation techniques or detention conditions that violate international law is not a valid reason to delay trial proceedings or to close them from public scrutiny. This does not mean that the state does not have legitimate interests in keeping certain information from the public realm. Article 14.1 of the ICCPR, for example, holds that there are limits to the right to an open public trial:

> "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice..."

Nevertheless, this provision of the ICCPR must not be misused in order to defeat other provisions of the treaty such as the right to a remedy for human rights violations. It cannot be interpreted, for instance, as permitting concealment of and perpetuating impunity for acts of torture or other cruel, inhuman or degrading treatment (which are absolutely prohibited by the ICCPR in all circumstances), or acts of enforced disappearance.

Under the Military Commissions Act, as passed in 2006, the military judge may close all or part of the commission proceedings to the public, including upon making a finding that such closure is necessary to "protect information the disclosure of which could reasonably be expected to cause damage to national security, including intelligence or law enforcement sources, methods, or activities".[207] Any classified information "shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security".[208] This rule applies to "all stages of the proceedings of military commissions, including the discovery phase".[209] If classified information is disclosed to the defence, the military judge can issue a protective order to ensure that it is not made public. Alternatively, where the classified information is not to be disclosed, the military judge may authorize, but only "to the extent practicable", the deletion of classified parts of documents to be introduced as evidence or their substitution with a summary version or a "statement of relevant facts that the classified information would tend to prove".[210]

The prosecution may also be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities by which the United States acquired the evidence", if the military judge finds that the evidence is "reliable" and the sources, methods or activities are classified. An unclassified summary of the "sources, methods, or activities" may be provided to the defence, but again only "to the extent practicable and consistent with national security".[211] Of overriding concern is the applicability of these provisions even to any classified evidence that "reasonably tends to exculpate the accused".[212] Thus, the defendant may well be denied access to some or all government evidence that would serve to prove his innocence, if that evidence is classified and the government with the assent of the military judge considers it "impracticable" to provide a summary version. The prosecution may also object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take "suitable action to safeguard such classified information".[213]

The government may at any time request an *in camera* presentation if it wishes to invoke the national security privilege or use any classified information. In order to obtain such a hearing, the government can submit an affidavit to the military judge showing that disclosure of the information could reasonably be expected to damage national security. This affidavit would be examined by the military judge only, and would not be provided to the defence. If the judge agrees with the affidavit, an *in camera* presentation is held from which, if the prosecution so requests, the defendant would be excluded. At the presentation, the judge would hear arguments from the defence lawyer and the prosecution, before determining whether the information could be disclosed at the commission proceeding.[214]

Amnesty International is concerned that in any military commission prosecutions, the defendants may face a possibly insurmountable barrier in relation to testing and contesting the credibility of certain classified evidence to be used against them. The defence may be denied the ability effectively to challenge classified information or the "sources, methods, or activities" by which it was acquired by the US authorities. If deletions, summaries or substitutions are considered "impracticable", the defence may even be denied the totality of the information deemed classified.

If such rules and procedures mean that a defendant is not able to challenge effectively information he alleges was obtained unlawfully, it would violate his rights under article 14.3(b) of the ICCPR to have "adequate facilities for the preparation of his defence". On this aspect of a fair trial under international law, the Human Rights Committee has said:

> "'Adequate facilities' must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim".[215]

In his national security speech on 21 May 2009, President Obama said that one reason for turning to military commissions could be where there was a need to protect "sensitive sources and methods of intelligence-gathering". Yet under the USA's Classified Information Procedures Act (CIPA), classified information can be admitted in evidence in criminal prosecutions in the US federal courts, but under procedures that take greater care to ensure that any such use is not allowed to undermine the equally important values of fairness and justice.[216] This availability to the government of protections for legitimate non-disclosure of classified information further erodes the government's argument for military commissions. The fact that secrecy is still being cited as a reason for military commissions gives cause for concern, not least because the new administration continues to keep from public scrutiny much of the truth about the human rights violations perpetrated in the CIA detention program.

While the new administration has released some Justice Department memorandums which gave the legal green light to torture and other ill-treatment in the CIA's secret detention program, the details of how the CIA actually used "rendition", secret detention and "enhanced" interrogation techniques remain classified at "top secret" level. The new administration continues to seek to keep these operational details from public disclosure despite the fact that this information contains details of human rights violations, including the crimes under international law of torture and enforced disappearance. Detainees who were subjected to these violations may yet be brought to trial by military commission.

Recent moves in litigation in federal court by the new administration illustrate why there is reason for concern about future military commission proceedings and the role that classified information could play.

Firstly, soon after taking office, the new administration invoked the "state secrets" privilege to seek dismissal of a lawsuit brought by five non-US nationals alleging they were subjected to torture, inhumane treatment, and enforced disappearance in the USA's "rendition" program operated under the auspices of the CIA.[217] On 28 April 2009, a three-judge panel of the US Court of Appeals for the Ninth Circuit

unanimously rejected the government's invocation of this doctrine, stating that "according to the government's theory, the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, immunizing the CIA and its partners from the demands and limits of the law".[218] The administration objected to the ruling and on 12 June 2009 filed a legal brief urging the full Ninth Circuit court to reconsider. The Justice Department asserted that "permitting this suit to proceed would pose an unacceptable risk to national security" and that the Ninth Circuit panel's decision "would dramatically restructure government operations by permitting any district judge to override the Executive Branch's judgments in this highly sensitive realm".[219] At the time of writing, the Ninth Circuit had not ruled whether it would reconsider its earlier decision.

The second example involves the new administration's stance in Freedom of Information Act (FOIA) litigation, in which it is resisting disclosure of information about what has happened to detainees in the CIA program. A declaration filed by the administration in District Court in June 2009 made clear that the government would oppose the release of any operational details of the secret detention program, including how detainees were treated. The declaration was signed by the new Director of the CIA, Leon Panetta, and concerned a sample of 65 documents from a wider 580 documents, relating to the contents of 92 videotapes that the CIA had made in 2002 of interrogations of detainees held in secret CIA custody, and subsequently destroyed. The CIA Director's declaration argued that "the 65 documents must be withheld in their entirety from public disclosure". Most of them, he said, were classified "Top Secret", and disclosure of their contents could result in "exceptionally grave damage to the national security".

Information relating to the CIA secret detention program is classified at the highest level of secrecy. The National Security Council established a "special access program", the name of which itself remains classified, governing access to information relating to the CIA's covert detention and interrogation activities. Director Panetta's declaration states that although the CIA is no longer using "enhanced interrogation techniques" or operating detention facilities, following President Obama's order to that effect on 22 January 2009, certain information related to the program remains classified Top Secret. The information the USA was seeking to protect, he said, included the identities of CIA personnel – some of whom may have carried out the torture and enforced disappearance in the secret detention program. The administration has already said that it will not prosecute any such agents who were operating pursuant to legal advice provided by the Justice Department.[220] The government is also seeking to protect the locations of secret CIA facilities, notwithstanding that these have essentially now become international crime scenes given what occurred in them.[221] Finally, the government is seeking to keep secret the actual application of "enhanced interrogation techniques" ('EITs') against detainees. The declaration attempts to explain how this can be consistent with the administration's release of OLC memos authorizing such techniques:

> "Some of the operational documents currently at issue contain descriptions of EITs being applied during specific overseas interrogations. These descriptions, however, are of EITs *as applied* in actual operations, and are of a qualitatively different nature than the EIT descriptions *in the abstract* contained in the OLC memoranda… I have determined that information contained within the operational documents at issue concerning *application* of the EITs must continue to be classified TOP SECRET, and withheld from disclosure in its entirety."[222]

Such arguments are unacceptable. The qualitative difference between the two sets of documents is that one – the OLC legal advice – constitutes possible evidence of a criminal conspiracy. The second set – the operational CIA documents – constitutes possible evidence of that conspiracy being carried out. Any information contained in either that implicates human rights violations, including the crimes under international law of torture and enforced disappearance, should be publicly disclosed. There exist means of protecting identities of anyone not implicated in criminal activity, and perhaps means of trying those who are without revealing their identity prior to conviction, that do not require suppression of the entire text of documents. Yet, in the face of all that is already in the public domain about the unlawful conduct

that has occurred, the CIA Director maintained that the government's invocation of sweeping secrecy in opposition of any disclosure is not in order "to suppress evidence of unlawful conduct".

The former administration had said the same thing, but what that administration considered lawful diverged widely from international law and the USA's treaty obligations. Amnesty International is concerned that this remains an issue, given the USA's reservations and other limiting conditions attached to its ratifications of human rights treaties, the continuing invocation of a global "war", and the tendency to measure policies against "American values" rather than international standards, even where those "values" would seem to tolerate violations of the USA's international legal obligations to uphold human rights (see Section 10). In any event, the fact that the administration is arguing for non-disclosure of such information bodes ill for both the fair trial rights of any defendant brought to trial by military commission in a case in which any such information is an issue, and for any fulfilment of the broader obligation to investigate and remedy, including by public recognition of responsibility and effective measures against re-occurrence, of human rights violations.

9.
THERE MUST BE NO RECOURSE TO THE DEATH PENALTY

Amnesty International opposes the death penalty in all cases, unconditionally. A majority of countries have abolished the death penalty in law or practice. The international community has ruled out the death penalty as a sentencing option in international tribunals for even the worst crimes – genocide, war crimes and crimes against humanity. The USA's continuing resort to judicial killing places it at odds both with this global trend as well as with the abolitionist outlook of international human rights instruments.

For the USA to resort to executions after military commission trials would open another ugly chapter in the USA's use of this punishment. Six Guantánamo detainees were facing capital charges when the commissions were suspended in January 2009. Capital charges under the MCA are currently still pending against five of them. At the time of writing, the US Department of Justice had not decided whether to seek the death penalty against Ahmed Ghailani, who was transferred in June 2009 to New York for trial in federal court. It has to inform the court of its decision on the death penalty by 13 October 2009.[223]

Article 6 of the International Covenant on Civil and Political Rights protects the right to life and prohibits the arbitrary deprivation of life. Article 6 is non-derogable in its entirety, even in a "time of public emergency which threatens the life of the nation". While encouraging abolition of the death penalty, article 6 also seeks to ensure that countries which still retain capital punishment impose it only for the most serious crimes in accordance with the law in force at the time of the crime and not impose it in any way that contradicts any other provision of the Covenant.[224]

Any trial that leads to imposition of the death penalty "must conform to the provisions of the Covenant, including all the requirements of article 14".[225] Indeed, in trials leading to the death penalty, "scrupulous respect of the guarantees of fair trial is particularly important", and the execution of a person after a trial which failed to comply with the provisions of article 14 of the ICCPR "constitutes a violation of the right to life".[226]

On 3 June 2009, the US government agreed that the death penalty "should be carried out only in the most serious of cases and only with full procedural safeguards".[227] At the same time, it indicated that it would retain the US position of denying applicability of international human rights law in the context of what it considers to be a global armed conflict. The US government was responding to the findings on the USA of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions following this expert's mission to the USA. In his May 2009 report, the Special Rapporteur wrote:

> "I am also concerned that the death penalty could be imposed under the Military Commissions Act of 2006, the provisions of which violate the due process requirements of international human rights and humanitarian law. I welcome the Government's stay of commission proceedings. It should not resort to prosecutions under the Act again….
>
> The United States has an obligation under international law to provide detainees with fair trials that afford all judicial guarantees. No State may derogate from this obligation, regardless of whether persons are to be tried for crimes allegedly committed during peace or armed conflict. But the text of the MCA and the experiences of those involved in the military commission process which whom I met indicate that commission proceedings utterly fail to meet basic due process standards."[228]

The US Government responded to the Special Rapporteur by stating the USA's continuing objection to the scope of his report, "as we do not believe that military and intelligence operations during armed conflict fall within the Special Rapporteur's mandate", precisely the approach of the Bush administration in communications with a number of UN experts. The US administration did, however, state that there were "significant portions of the report's discussion of the Military Commissions Act with which we agree", and pointed to the fact that it would be working with Congress to develop "a revised legal framework for military commissions".[229]

While the precise contours of the proposed changes to the MCA procedures remain to be seen, Amnesty International continues to have serious doubts that trials under the MCA will fully comply with the requirements of Article 14 of the ICCPR and other international instruments and that as such any executions of detainees convicted after MCA trials would violate the prohibition on the arbitrary deprivation of life. Indeed, based on reasons explained in Section 5 of this report, Amnesty International considers that *any* death sentence of a civilian imposed by *any* military court would fall short of the standards of utmost respect for fair trial guarantees that should be applied in such circumstances.

Article 2 of the ICCPR requires the state party to ensure that any person whose rights under the Covenant have been violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". The UN Human Rights Committee has noted that reparation may include "bringing to justice the perpetrators of human rights violations". Indeed, failure by a government to ensure thorough, effective, impartial and independent investigations and/or failure to bring perpetrators to justice can itself amount to further, separate breaches of the ICCPR. The Committee emphasised that "these obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman or degrading treatment (article 7)… and enforced disappearance (articles 7 and 9)."[230]

The detainees have all been subjected to violations of international human rights law. Some, including the very people whose cases were exploited by President Bush to obtain passage of the MCA and who are still facing trials by military commission, have been subjected to the crimes under international law of enforced disappearance and torture in the CIA's secret detention program. There has been no accountability for these crimes, and no remedy for those subjected to them. Under such circumstances, regardless of whether the trial was conducted in civilian or military court, the cruelty of any death sentence would only be compounded by the prisoner's prior treatment and the absence of any effective remedy or accountability for the human rights violations to which he was subjected.

In a further worrying move, it has been reported that the US administration is considering avoiding a full trial in the 9/11 cases by allowing guilty pleas, even when defendants are facing the death penalty.[231] Again, there is compelling evidence that the defendants in these cases have been victims of torture and enforced disappearances, both crimes under international law. Amnesty International, among others, has

called on the US government to open a thorough investigation of these alleged crimes, yet thus far it has refused to do so. A decision by the USA to move quickly to executions following guilty pleas accepted without question would be a further phase in covering-up the alleged crimes and avoiding accountability. Amnesty International calls for the trials to be transferred to ordinary civilian US courts, and for the detainees to be tried in fair trials without recourse to the death penalty.

10.
EMPHASIS ON DOMESTIC VALUES MUST NOT BE AT EXPENSE OF UNIVERSAL HUMAN RIGHTS VALUES

As a US Senator in September 2006, Barack Obama co-sponsored an amendment to the Military Commissions Act to insert a "sunset provision" in the bill under which "the authority of the President to establish new military commissions" would expire on 31 December 2011. This, Senator Obama said, "would allow us to go back in five years' time and make sure what we are doing serves American ideals, American values, and ultimately will make us more successful in prosecuting the war on terror".[232] The amendment was defeated. Two and a half years after the MCA passed into law, President Obama returned to the subject of US values in explaining his decisions to close the Guantánamo detention facility and end "enhanced interrogation techniques", but to support military commissions and the possibility of preventive detention legislation.

President Obama opened his statement on military commissions on 15 May 2009 by asserting that such tribunals "have a long tradition in the United States", and concluded with the promise that the reformed commissions, along with prosecutions in civilian federal courts, would protect the USA while "upholding our deeply held values". In his 21 May speech on national security the President repeated his invocation of US history and values in reiterating his support for the commissions. Military commissions, he said, "have a history in the United States dating back to George Washington and the Revolutionary War". President Bush had said much the same thing when calling on Congress to pass the Military Commissions Act in 2006.[233] President Obama said that the previous administration had failed to rely upon "our deeply held values and traditions", and that a number of reforms would make "our military commissions a more credible and effective means of administering justice". In an interview on 2 July 2009, he reiterated that "the military commissions structure that we are setting up, I think, will meet the demands of our legal traditions."[234] On 8 July 2009, the Pentagon's General Counsel emphasized to a US Senate committee that the "reformed military commissions can and should contribute to national security by affording a venue for bringing to justice those who violate the law of war, and for doing so in a manner that reflects American values of fairness and justice".[235]

Appeals to national values and tradition is a part of political debate in every country, and reference to domestic values and history can facilitate a country's constructive self-criticism as much as it can feed unhelpful self-satisfaction over domestic laws and institutions. Embracing universal human rights values as a key part of national values can contribute to respect for the rights of all persons within a state's territory or otherwise under its control. However, the invocation of the phrase "American values" by politicians and other decision-makers in the country has all too often been accompanied by a reluctance to acknowledge the application of international standards to the USA, contributing to a form of "American exceptionalism" whereby the human rights rules that apply to all other countries are not acknowledged to apply equally to the United States of America. That exceptionalism may be based in part on an assumption that universal human rights rules or values are somehow inferior to or less worthy than the constitutional and other laws and values of the USA. The grave dangers of reliance on any such assumption was only too starkly demonstrated when in recent years official references to "American

values" became a familiar refrain even as the USA adopted counter-terrorism detention policies that clearly flew in the face of the most basic rules of international human rights and humanitarian law.

From early on in the "war on terror", the White House issued assurances that "as Americans, the way we treat people is a reflection of America's values..., based upon the dignity of every individual".[236] The following month, Abu Zubaydah was arrested in Pakistan and within weeks would be subjected to waterboarding 83 times in a single month as part of the torture and other cruel, inhuman and degrading treatment he endured during four and a half years in solitary incommunicado confinement in undisclosed locations, human rights violations for which no one has been brought to justice, and for which he has received no remedy or even his day in court to challenge the lawfulness of his detention.[237]

In his central policy memorandum of 7 February 2002 purporting to guarantee humane treatment of all detainees in US custody, President Bush said that "our values as a Nation... call for us to treat detainees humanely, including those who are not legally entitled to such treatment". The memorandum stated that humane treatment would be "a matter of policy".[238] There is perhaps no clearer example of how domestic "values" and international law can part company. Every person in the custody of any state anywhere on earth is entitled *as a matter of international law* to humane treatment. From this obligation on governments there can be no departure. Six and a half years later, the US Senate Armed Services Committee concluded that President Bush's decision, articulated in this February 2002 memorandum, "to replace well-established military doctrine, i.e. legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in US custody... Following the President's determination, techniques such as waterboarding, nudity and stress positions...were authorized for use in interrogations".[239]

Former Vice-President Cheney, for one, has continued to justify such techniques, including in the name of national values. On the same day as President Obama gave his national security address, the former Vice President gave his own, in which he again endorsed waterboarding and other "enhanced interrogation techniques". He condemned critics of Bush administration policies for asserting the "theory" that "by the tough questioning of killers, we have supposedly fallen short of our own values". The former Vice President rejected such criticism, stating that "no moral value held dear by the American people obliges public servants ever to spare a captured terrorist from unpleasant things. And when an entire population is targeted by a terror network, nothing is more consistent with American values than to stop them".[240] It would appear that, at least for this former US Vice President (2001-2009), Secretary of Defense (1989-1993), member of Congress (1979-1989) and White House Chief of Staff (1975-1977), interrogation techniques or detention conditions constituting torture or other cruel, inhuman or degrading treatment are consistent with "American values". Whether or not this is what President Obama meant in his 21 May speech when he referred to US officials having made decisions "based upon fear rather than foresight" and having "all too often trimmed facts and evidence to fit ideological predispositions", Dick Cheney's remarks illustrate how "American values" can be a malleable and subjective notion.

On the flipside of the emphasis on "American values" in the "war on terror" has been discrimination against "non-Americans" in the protection of and respect for fundamental human rights and more generally. For example, the Pentagon agency contacted in December 2001 by the Department's General Counsel for information about detainee "exploitation" – the Joint Personnel Recovery Agency (JPRA) – recommended that the Guantánamo authorities "tailor punishment to maximize cultural undesirability" against foreign nationals in custody.[241] The use of dogs, nudity, female interrogators, and removal of religious items had discriminatory resonance. For example, interrogations at Abu Ghraib prison were "influenced by several documents that spoke of exploiting the Arab fear of dogs".[242] In 2005, the OLC advised the CIA that it could legally use "enhanced interrogation techniques" in its secret detention program on the understanding that the interrogation program was not conducted in the USA or "in territory under US jurisdiction" and would not be used "against United States persons".[243] Khalid Sheikh

Mohammed has said he was told in secret CIA custody where he was tortured using such techniques, "you are not American and you are not on American soil. So you cannot ask about the Constitution… This is your bad luck you been part of the exception of our laws" [sic].[244]

In November 2001, the day after President Bush signed the order authorizing military commissions, Vice President Cheney said that those foreign nationals whom the USA labelled as unlawful combatants "don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."[245] In promoting the Military Commissions Act, the White House stressed that "Americans cannot by tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."[246] After passage of the MCA into law, the then US Attorney General stated: "I want to emphasize that the Military Commissions Act does not apply to American citizens. Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law."[247] Denial of fair trial rights on the basis of national origin violates various provisions of the International Covenant on Civil and Political Rights, as detailed in Section 6.

The UN Human Rights Committee has emphasized in relation to the fair trial rights under Article 14 of the ICCPR, not only that there must be no discriminatory application of fair trial rights on the basis of nationality, but also that: "Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law… [I]t cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees".[248]

Military commissions for foreign nationals were repeatedly justified by senior members of the Bush administration in terms of national values and history, not by reference to international standards. On 8 December 2001, for example, Secretary of Defense Donald Rumsfeld said that the development of the military commissions under President Bush's military order would be done in "a careful and measured way that will be respectful of American values".[249] On 21 March 2002, the day the Pentagon released the commission rules, along with a fact sheet explaining that "a military commission is a war-time, military tribunal traditionally used to try violations of the laws of war", Deputy Secretary of Defense Paul Wolfowitz insisted that the administration had "done absolutely the best job it's possible to do", and that the result "truly does meet American standards and American values".[250]

Official references to the "rule of law" were also often heard throughout this period, including in the US National Security Strategy, with President Bush and his administration frequently referred to the USA's commitment to the "non-negotiable demands of human dignity", including "the rule of law". Again, this can have powerful domestic resonance in a country which labels itself as a "nation of laws". Like "American values", however, the "rule of law" can be a shifting concept if international obligations are removed from the equation. Moreover, what passes constitutional muster in the USA does not necessarily comply with international law, even when the US Constitution is deemed to reach the individual in question (which, in the case of the Guantánamo detainees it was held not to for the first six and a half years of their detentions, and which is still the case for most or all of those held in the US airbase in Bagram in Afghanistan).[251] As interpreted during the Bush administration, the "rule of law" permitted practices that constituted torture and other cruel, inhuman or degrading treatment, enforced disappearance, arbitrary detention, and unfair trials by military commission. These policies were given the legal go-ahead by government lawyers, principally in the OLC. Indeed, according to Jack Goldsmith, former head of the OLC (2003-2004), rather than being "indifferent to wartime legal constraints", the Bush administration was "strangled by law, and since September 11, 2001, this war has been lawyered to death". He added that "The President had to do what he had to do to protect the country. And the lawyers had to find some way to make what he did legal".[252] Policy came first, in other words, and the law was made to fit it. The Bush administration's decision to turn to military commissions must be

placed in this context. Congress turned bad executive policy into bad domestic law when it passed the Military Commissions Act in 2006.[253]

While a firm commitment to international law would not have countenanced such legal gymnastics, US policies in what the Bush administration dubbed the "war on terror" did not spring from nowhere, as Amnesty International has repeatedly pointed out in recent years.[254] It is this fact that always made it unlikely that a change in administration would lead to an immediate and wholesale rejection of these policies and practices. Before the 9/11 attacks, the USA was no stranger to inflicting cruelty on prisoners, including by the use of long-term isolation, cruel use of restraints, and judicial killing.[255] The choice of Guantánamo as a location for "war on terror" detentions built on existing US Supreme Court jurisprudence restricting the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals. The policy of "renditions" was also built on past practice and an executive order signed by President Bill Clinton in 1995, as well on the USA's unwillingness to subject itself to international law.[256] Indeed, the USA took a pick-and-choose approach to international human rights law long before 11 September 2001, an approach that was exploited by OLC lawyers and other US officials in authorizing interrogation techniques and detention conditions with violated the international prohibition of torture and other ill-treatment.[257]

Thus in his speech on 6 September 2006, President Bush was able to claim that the interrogation techniques used in the CIA's secret detention program complied with "our laws, our Constitution, and our treaty obligations", noting that the Department of Justice had "reviewed the authorized methods extensively and determined them to be lawful". Clearly, however, the OLC had disregarded and distorted US obligations under the UN Convention on Torture or Other Cruel, Inhuman or Degrading Treatment or the International Covenant on Civil and Political Rights, both of which were ratified by the USA in the 1990s.[258] In his speech, President Bush said that "America is a nation of law" and sending the draft Military Commissions Act to Congress, he stated that: "As we provide terrorists the justice and due process that they denied their victims, we demonstrate that our Nation remains committed to the rule of law."[259] Signing the bill into law, he said that it "complies with both the spirit and the letter of our international obligations". Yet the MCA was an affront to international law. Indeed, once the MCA was passed, President Bush interpreted it as giving the green light for the CIA to continue its secret detention program, a program entirely incompatible with international law.[260]

On his third day in office, President Obama moved to end the CIA's operation of long-term secret detention facilities, a step that Amnesty International has welcomed. In his speech on 21 May 2009, President Obama did not seek to explain this move, focussing instead on his decision to end the CIA's use of "enhanced interrogation techniques". Such methods, he said, "are not America". He continued: "To protect the American people and our values, we have banned enhanced interrogation techniques. We are closing the prison at Guantánamo. We are reforming military commissions, and we will pursue a new legal regime to detain terrorists".

He asserted that reform of the military commissions would bring them "in line with the rule of law". The policies of the new administration, he said, represented "a new direction from the last eight years". Amnesty International has certainly welcomed moves taken by the new administration that have heralded greater human rights protection.[261] Yet without forging a new relationship to international human rights law, the change will be insufficient. There must be a withdrawal of all reservations and other limiting conditions placed by the USA on its ratification of human rights treaties. International law must be interpreted in good faith in accordance with the ordinary meaning of its words in context and in the light of its object and purpose, not twisted to match a particular state's pre-determined policy preferences.[262] US law must be amended to comply with the USA's international obligations or the latter must be enforceable in the domestic courts, and international human rights law must be accepted as applying in times of armed conflict as well as peace and to US actions at home and abroad.[263]

In amongst all of the references to national values, neither President Bush nor President Obama once expressly mentioned human rights in their landmark national security speeches of 6 September 2006 and 21 May 2009 respectively. Neither did Pentagon General Counsel, Jeh Johnson, in his testimony to the US Senate Armed Services Committee on 7 July 2009 in which he urged that "we devise a system that comports with the Geneva Conventions, as well as [the US Supreme Court's 2006] *Hamdan* [ruling], as well as applicable US laws". Neither did Attorney General Holder in his speech in Berlin on 29 April 2009 on the question of closing the Guantánamo detention facility. He said that "I can promise you that our ultimate solutions will be grounded in the Constitution of the United States, the international laws of war, including the Geneva Conventions, and consistent with the rule of law and the democratic histories of our peoples". And on 17 June 2009, Attorney General Holder told the Senate Judiciary Committee that "the Justice Department is leading the work set out by the President to close Guantánamo and to ensure that policies going forward for detention, interrogation, and transfer live up to our nation's values." Again, there was no reference to international human rights law or the universal values contained in the Universal Declaration of Human Rights.

In a major speech in Egypt on 4 June 2009, President Obama picked up a thread from his national security address of 21 May when he said that the "fear and anger" provoked by the attacks of 11 September 2001 had led the USA "to act contrary to our ideals". The government was now "taking concrete actions to change course", he told his Cairo audience, including by ending the use of torture and closing the Guantánamo detention facility. In the same speech, President Obama spoke of "the dignity of all human beings" and humanity's shared aspiration for certain things, including "confidence in the rule of law and the equal administration of justice". These are "not American ideas", he said, "they are human rights, and that is why we will support them everywhere".[264] This recognition of the universality of human rights is welcome.

Indeed Amnesty International welcomes the fact that the US administration has committed the USA "to the principle of universality of human rights". As noted in the introduction, the USA stated in April 2009:

> "The deep commitment of the United States to championing the human rights enshrined in the Universal Declaration of Human Rights is driven by the founding values of our nation and the conviction that international peace, security, and prosperity are strengthened when human rights and fundamental freedoms are respected and protected. As the United States seeks to advance human rights and fundamental freedoms around the world, we do so cognizant of our own commitment to live up to our ideals at home and to meet our international human rights obligations.[265]

Amnesty International urges the government, institutions, and people of the USA to now look not only to the national values of its own citizens within its own jurisdiction, but also to firmly and expressly embrace the recognition of universal human rights principles and respect for international human rights law as not only *applicable* to all counter-terrorism measures and to all detainees, but also (as the nations of the world agreed in the UN Global Counter-Terrorism Strategy) as *a key element* of any effective plan for countering the threat posed by *al-Qa'ida* and other such groups. Those who invoke "American values" should not lightly conclude that the US population accord *less* value to the right to liberty and security of person, to be presumed innocent, to fair trial and treatment, to humanity, or to dignity of each human being, than the minimum protections the USA recognised by ratifying the International Covenant on Civil and Political Rights, the UN Convention against Torture, and other treaties. Nor should decision-makers or others assume that "American values" are substantially different from or inherently superior to the basic values of the global community as articulated in the Universal Declaration of Human Rights. Nor should exceptionalist thinking be allowed to exclude those same universal human rights values from a place at the very heart of state law and policy.

11.
CONCLUSION: USA'S FOCUS ON ITS OWN HISTORY SHOULD NOT BLIND IT TO THE INTERNATIONAL HUMAN RIGHTS STANDARDS THAT HAVE EVOLVED IN THE PAST 60 YEARS

History can offer crucial guidance to governments when they are developing law and policy. In a speech in 2003, an address heavy with criticism of the Guantánamo detentions and the military commissions, one of the most senior judges in the United Kingdom said:

> "It is a recurring theme in history that in times of war, armed conflict, or perceived national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis... Often the loss of liberty is permanent... The litany of grave abuses of power by liberal democratic governments is too long to recount, but in order to understand and to hold governments to account we do well to take into account the circles of history."[266]

At the same time, an over-focus on domestic history can contribute to a blind spot on international standards. The US authorities have repeatedly sought to justify turning to military commissions in the 21st century by reference to the fact that they have been used during US history.[267] The US State Department did so in its public relations messages to other governments after military commission rules were released by the Pentagon in 2002. President Bush did so in his September 2006 speech calling on Congress to pass the Military Commissions Act. And so too did President Obama in his national security speech in May 2009 explaining his decision to resuscitate military commissions under the MCA.

In 2002, asked why military commissions were necessary, Pentagon General Counsel William Haynes replied "It's necessary – well, and it is not new. It is consistent with American history".[268] His hesitation over the question of why the Bush administration deemed military commissions necessary was perhaps unsurprising, given that the USA had a fully functioning civilian judicial system with the experience, capacity and procedures to deal with complex terrorism cases.

The US Department of Justice continues to refer to the USA's historical use of military commissions in seeking to justify their use now. In a statement to Senate Committee on Armed Services on 7 July 2009, for example, Assistant Attorney General David Kris noted President Obama's support for reformed military commissions, and added that "military commissions have a long history in our country dating back to the Revolutionary War". Seven and a half years earlier, when the Justice Department advised the Bush administration that it could turn to military commissions in the "war on terror" if it so chose, it emphasized that "military commissions have been used throughout US history to prosecute violators of the law of war", and it quoted a 1952 US Supreme Court ruling: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war".[269] At the same time, the Office of Legal Counsel's advice ignored the fact that the half-century that had passed since the USA last used military commissions was a period that had seen the reinforcement of a broad framework of fair trial guarantees in international human rights law. Yet the 1966 International Covenant on Civil and Political Rights, which the USA had ratified in 1992, did not even warrant a mention in the Justice Department's November 2001 memorandum.

On the international stage, the USA nevertheless continued to assert that "the United States takes its obligations under the International Covenant on Civil and Political Rights very seriously,[270] and that the

ICCPR was 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."[271] The State Department continued to condemn unfair trials in other countries in its annual human rights assessment, including trials conducted in military or special courts in terrorism or national security cases. Double standards must end, with the USA bringing its own laws and conduct into compliance with international law.

In his 21 May 2009 national security speech explaining why he had ordered the closure of the Guantánamo detention facility, President Obama said that the detentions there had led the government into defending positions that undermined the rule of law. Defending military commissions has done the same, and has led the government into defending positions that have continued to rely on US history at the expense of international standards. When defending the decision to resort to military commission trials even for the alleged "war crimes" of children, for example, the government turned to "a 142-year-old opinion" of the US Attorney General which it claimed "remains binding on the Executive Branch". That opinion, from 1865, states that a: "bushwhacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the law of war".[272] The government's brief continued: "Given that unlawful belligerents historically could be summarily punished – and even executed – under the law of war, it follows *a fortiori* that they may be tried by military commission". Such arguments have been an affront to the Universal Declaration of Human Rights, in the 60th anniversary of which this brief was filed, and to the body of human rights law that has been developed since.

As the UN Human Rights Committee has stated, the ICCPR requires that the procedures a government adopts in the case of children who come into conflict with the law should "take account of their age and the desirability of promoting their rehabilitation." If trial is considered appropriate, it should be conducted "as soon as possible in a fair hearing". Detention before and during the trial should be avoided to the extent possible.[273] In the case of these children, the USA subjected them to years of detention without trial, interrogation techniques and detention conditions that violated the prohibition on torture and other cruel, inhuman or degrading treatment, and charged two of them for trial by military commission under the MCA, legislation with no juvenile justice provisions. These two are still facing this prospect more than five months after the new administration took office.

In sum, in the case of child and adult detainees alike, the USA's counter-terror detention, interrogation and trial policies were developed and defended under the Bush administration as if the 1948 Universal Declaration of Human Rights and the body of human rights law that ensued – including the ICCPR – had never happened or did not matter.

In his speech on 21 May 2009 President Obama asserted that under the Bush administration the USA had "established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable – a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass." The US federal courts, in operation since 1789, and indeed the centuries-old system of criminal trials in England on which their criminal procedures are based, are time-tested institutions, unlike military commissions which have been used sporadically during the USA's history and, before President Bush authorized them in November 2001, had not been used for more than half a century. The absence of precedent led the US government to have to make the rules as it went along, a recipe for the lack of legal clarity, unfairness and delays that ensued. Seven and a half years later, the USA is still amending the rules.

In his testimony before the US Senate Armed Services Committee on 7 July 2009, former Judge Advocate General of the US Navy, John Hutson, explained his early and "ardent" support of the military commissions initiated by President Bush in 2001, saying that he had been "drawn to their historical

precedents". The failure of the commissions in the intervening years, and the fact that they "became a significant distraction for the military", has persuaded him that trials in the federal courts is the right route for the USA to take:

> "US District Courts have successfully prosecuted literally hundreds of terrorists who now reside in Federal prisons around the country, keeping all Americans safer. Federal courts, including judges, prosecutors, marshals, and other court personnel have decades of experience in these cases… There is also now a large body of law that has been developed over the years in the Federal court system. It would take an equal number of cases and decades of trials for [the Department of Defense] to match the Federal precedent…"

Amnesty International has long called for any trials of Guantánamo detainees to be conducted in the federal courts, in proceedings that meet international fair trial standards. To turn back to military commissions – whether or not they reflect "American values" or are consistent with its history, whether or not the administration also turns to the civilian federal courts to conduct some trials, and whether or not the commission trials are held outside Guantánamo – would be a huge step backwards, inconsistent with international standards, and unhelpful to international cooperation in countering terrorism.

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[1] Colonel John Custer, CJCS external review of Guantánamo Bay Intelligence Operations, cited in Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, US Senate, 20 November 2008 (hereinafter "SASC report, November 2008"), pp. 42-43.
[2] SASC report, November 2008, p. xxvii-xxviii, and pp. 73-91. See also Counter-resistance strategies. Memorandum for Commander, United States Southern Command, 11 October 2002. Signed by Major General Dunlavey.
[3] While the USA's "understandings" stated at the time of ratification of the International Covenant on Civil and Political Rights noted its view that not all "distinctions" necessarily constitute "discrimination" if they are "at minimum, rationally related to a legitimate governmental objective", and the Human Rights Committee has noted that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant" (General Comments 18 (1989) on Non-discrimination, and 32 on Right to equality before courts and tribunals and to a fair trial (2007), the distinctions and differentiation in this instance fall well outside any such reasoning.
[4] In re: Guantánamo Bay detainee litigation. US District Court for the District of Columbia. Declaration of Major Heath E. Wells, Operational Law Attorney at the Criminal Investigation Task Force, 10 March 2009.
[5] In a press briefing at the Pentagon on 22 January 2009, Secretary Gates had said: "I am one of the least-qualified people to evaluate whether people are tried under the military commissions, Article III [federal courts], or the UCMJ [Uniform Code of Military Justice – courts-martial]. I think those – those decisions will be made, or recommendations will be made, by the Justice Department, perhaps with the input of the White House counsel for the president."
[6] Statement of John D. Hutson, Senate Armed Services Committee, 7 July 2009.
[7] See, e.g., Military prosecutor in child 'enemy combatant' case resigns, citing 'ethical qualms', 26 September 2008, http://www.amnesty.org/en/library/info/AMR51/107/2008/en.
[8] Testimony of Lt.Col. Darrel Vandeveld before the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Hearing on legal issues surrounding the military commissions system, 8 July 2009.
[9] *Ibid.* For more on Mohammed Jawad's case, see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en.
[10] Counter-resistance techniques. Memorandum for UN and Multilateral Affairs Division (J-5), Joint Staff. Colonel Ronald E. Richburg, USAF Planner, Joint/NSC Matters, Department of the Air Force, 4 November 2002.
[11] Memorandum for JTF-GTMO/J2. Subject: JTF GTMO 'SERE' Interrogation SOP DTD 10 Dec 02, From Timothy James, Special Agent for Orange CITF GTMO, 17 December 2002.
[12] Instructions to GTMO interrogators. Email to T.J. Harrington, 10 May 2004, available at http://www.aclu.org/projects/foiasearch/pdf/DOD000949.pdf.
[13] SASC report, November 2008, *op. cit.*, page 87.
[14] *Hamdan v Rumsfeld*, 126 S.Ct. 2749 (2006).
[15] Statement in US Senate on 28 September 2006.

[16] UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc.: CCPR/C/GG/32, 23 August 2007, para. 19.
[17] *Ibid.*
[18] *Ibid.*, para. 21.
[19] *Ibid.*, para. 22.
[20] Swift Justice Authorization Act. Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 8 April 2002.
[21] The UN Basic Principles on the Independence of the Judiciary, which sets out the minimum conditions necessary to ensure judicial independence, requires that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".
[22] See USA: Justice delayed and justice denied? Trials under the Military Commissions Act, March 2007, http://www.amnesty.org/en/library/info/AMR51/044/2007/en.
[23] National Defense Authorization Act for Fiscal Year 2010. Report (to accompany S.1390). Committee on Armed Services, United States Senate, 2 July 2009, page 176.
[24] General Comment 32, *op. cit.*, para. 32.
[25] The UN Human Rights Committee has stated that: "Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction". General Comment 32, *op. cit.*, para. 14.
[26] Interview on 22 May 2009 with Steve Scully, Political Editor, C-SPAN, aired on 23 May 2009.
[27] Interview on board Air Force One with the New York Times, *op.cit.*
[28] "In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice." Executive order: Review and disposition of individuals detained at the Guantánamo Bay Naval Base and closure of detention facilities. 22 January 2009.
[29] Obama uneasy about indefinite Gitmo detentions. Associated Press, 2 July 2009.
[30] News briefing at the US Department of Defense, 22 January 2009.
[31] United States of America: US human rights commitments and pledges. 27 April 2009, US State Department, Bureau of International Organization Affairs, http://www.state.gov/documents/organization/122476.pdf.
[32] Statement of President Barack Obama, 15 May 2009, White House, Office of the Press Secretary.
[33] Under the Military Commissions Act, the Secretary of Defense is authorized to modify the MMC, and is required to report the changes to US Congress. On 15 May, Secretary Gates informed the Chairmen of both the Senate and the House Committees on Armed Services of the proposed modifications to the military commission procedures.
[34] USA: Presidential order on military tribunals threatens fundamental principles of justice, 15 November 2001, http://www.amnesty.org/en/library/info/AMR51/165/2001/en.
[35] Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Federal Register, 16 November 2001, Vol. 66, Number 2, pages 57831-57836.
[36] Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, From Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, 28 December 2001. It took over six years for this OLC advice to be consigned to history by the Supreme Court in its 2008 *Boumediene v. Bush* ruling that the Guantánamo detainees had the constitutional right to challenge the lawfulness of their detention in federal court. The USA occupies the Guantánamo base under a 1903 Lease Agreement with Cuba. Under the Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise over and within said areas".
[37] Jack Goldsmith. The Terror Presidency: Law and judgment inside the Bush administration. W.W. Norton, 2007, p.108.
[38] Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations, From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 March 2002.
[39] See, for example, Interrogation of al Qaeda operative. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002. And: Application of 18 U.S.C §§2340-2340A to certain techniques that may be used in the interrogation of a high value al Qaeda detainee, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal

Counsel, US Department of Justice, 10 May 2005. And: Application of 18 U.S.C §§2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005.

[40] Legality of the use of military commissions to try terrorists. Memorandum opinion for the Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 6 November 2001.

[41] Secretary of Defense interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002.

[42] "US military tribunals convened abroad are not required to grant aliens rights under Self-Incrimination Clause". Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002. *Miranda* warnings refer to the 1966 US Supreme Court ruling, *Miranda v. Arizona*, holding that detainees must be told of their right to remain silent and their right to a lawyer. The Fifth Amendment, together with *Miranda*, governs the admissibility of statements given in custody in the USA.

[43] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Oversight and Review Division, Office of the Inspector General, US Department of Justice, May 2008, p.78 (hereinafter, "Inspector General's FBI report, May 2008"). The "specific guidance" given to FBI personnel deployed as interrogators in Guantánamo – thousands of miles from any battlefield was "always… no *Miranda*". Instructions to GTMO interrogators, FBI email, 10 May 2004. At Salim Hamdan's trial under the MCA in 2008, six FBI agents testified for the prosecution at a military commission hearing. At no time had Hamdan been advised of his right to remain silent or provided with counsel before questioning. In each case, when asked why no advice of rights was given before questioning, the FBI agent's response was it was not FBI policy at that time to give warnings to anyone held at Guantánamo Bay. See USA: Trial and error - a reflection on the first week of the first military commission trial at Guantánamo, 30 July 2008, http://www.amnesty.org/en/library/info/AMR51/084/2008/en.

[44] Message to the Congress transmitting draft legislation on military commissions, 6 September 2006.

[45] The Terror Presidency, 2007, *op. cit.*, p.138.

[46] On 30 March 2007, David Hicks was sentenced after pleading guilty to providing material support for terrorism, under a pre-trial agreement that would see him leave Guantánamo to serve a short prison sentence in his native Australia. On 7 August 2008, Yemeni national Salim Hamdan was sentenced to 66 months imprisonment after being convicted of providing material support for terrorism. Sixty-one months and eight days of this sentence was credited as time served, and he was transferred to Yemen in November 2008. On 3 November 2008, Yemeni national Ali Hamza Ahmad Suliman al Bahlul was convicted and sentenced to life imprisonment for conspiracy, solicitation and providing material support to terrorism. He had refused to put on a defence, describing the commissions as a "legal farce".

[47] See USA: Another CIA detainee facing death penalty trial by military commission, 2 April 2008, http://www.amnesty.org/en/library/info/AMR51/027/2008/en.

[48] *USA v. Ghailani*, Ruling on government motion for continuance, 13 February 2009.

[49] *USA v. Ghailani*, Schedule for trial, Amendment One, 4 March 2009.

[50] "In the determination of any criminal charges against him, everyone shall be entitled", among other things, "to be tried without undue delay". ICCPR, article 14.3(c).

[51] Accused East Africa embassy bomber held at Guantánamo Bay to be prosecuted in US federal court, US Department of Justice news release, 21 May 2009.

[52] Trial of Guantánamo detainee tests US legal system. Associated Press, 10 June 2009. Also, Ahmed Khalfan Ghailani: The Gitmo test case. Time Magazine, 11 June 2009.

[53] Floor statement on the Habeas Corpus Amendment, 27 September 2006.

[54] Statement in Senate on 28 September 2006.

[55] Floor statement on the Habeas Corpus Amendment, 27 September 2006.

[56] See USA: Justice delayed and justice denied? Trials under the Military Commissions Act, March 2007, *op. cit.*

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

[58] Prepared remarks of Attorney General John Ashcroft, Senate Judiciary Committee hearing, 4 March 2003. According to the Senate Armed Services Committee, "Members of the President's Cabinet and other senior officials attended meetings in the White House where specific interrogation techniques were discussed. Secretary of State Condoleezza Rice, who was then National Security Advisor, said that, 'in the spring of 2002, CIA sought policy approval from the National Security Council (NSC) to begin an interrogation program for high-level al-Qaida terrorists'. Secretary Rice said that she asked Director of Central Intelligence George Tenet to brief NSC Principals on the program and asked the Attorney General John Ashcroft 'personally to review and confirm the legal advice prepared by

the Office of Legal Counsel'. She also said that Secretary of Defense Donald Rumsfeld participated in the NSC review of CIA's program". SASC report, November 2008, *op. cit.*

[59] Re: 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 A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005. Both President Obama and Attorney General Holder have agreed that waterboarding constitutes torture. For example, "waterboarding is torture. My Justice Department will not justify it, rationalize it, or condone it". Remarks as prepared for delivery by Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009.

[60] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. International Committee of the Red Cross, February 2007. This confidential report was leaked in the public domain in 2009.

[61] *Ibid.*

[62] Inspector General's FBI report, May 2008, *op. cit.*, p. 79.

[63] *Ibid.*

[64] Charges against 9/11 suspect dropped. Washington Post, 14 May 2008. Amnesty International considers that applying interrogation techniques that may be considered non-coercive in other circumstances, to a detainee subjected to years of secret, incommunicado or indefinite detention and to torture or other ill-treatment, who remains without remedy, rehabilitation or redress for abuses, provides no assurance that any self-incriminating statements he may make are truly voluntary.

[65] See 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; USA: Torture acknowledged, question of accountability remains, 14 January 2009, http://www.amnesty.org/en/library/info/AMR51/003/2009/en. See also, SASC report, November 2008, *op. cit.*

[66] *USA v. Hamdan*, (military commission). D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008. Operation Sandman involved sleep interruptions and frequent cell relocations, and was apparently especially targeted at Saudi Arabian detainees to keep them "mentally off balance, to isolate them linguistically or culturally, and to induce them to cooperate". Inspector General's FBI report, May 2008, *op.cit.* The military judge in the Hamdan case said that "Operation Sandman did not involve sleep deprivation, but was an appropriate effort by camp commanders to maintain discipline in the camp". The program remains classified, making it impossible for the public to have confidence in the military judge's finding

[67] See page 124 of USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004.

[68] Statement of Lieutenant Commander Charles Swift, JAGC, USN, before the Senate Committee on the Judiciary, 15 June 2005. See also Lawyer says military tried to coerce detainee's plea, New York Times, 16 June 2005.

[69] See USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission, April 2008, http://www.amnesty.org/en/library/info/AMR51/028/2008/en.

[70] Umar Khadr: a meeting with. R. Scott Heatherington, Director, Foreign Intelligence Division, Canadian Department of Foreign Affairs and International Trade, 20 April 2004. According to the Canadian document, Omar Khadr "recognized that he would be on trial" at least four months before he was named under the Military Order with eight other detainees on 7 July 2004, and 20 months before he was charged in November 2005.

[71] For more on the frequent flyer program, see USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en.

[72] *Ibid.*

[73] A letter to the US Embassy in Kabul from the Attorney General of Afghanistan, Mohammad Ishaq Aliko, dated 31 May 2009, suggests that Mohammed Jawad may have been as young as 12 years old at the time of his arrest.

[74] Brigadier General Hood, who was commander of Guantánamo detentions in 2004, has said that Jawad was considered to be of "little interest" in relation to intelligence-gathering by 2004. *USA v. Jawad*, Defense reply to government revised response to D-008 motion to dismiss (torture of detainee), 13 June 2008. Other documents, dated late May 2004, are reported to confirm this and indicate the focus on his case switched around this time to a prosecutorial one. The documents, one from intelligence authorities and another from criminal investigation authorities reportedly state that Mohammed Jawad was a possible candidate for prosecution by military commission, and that his naming under the November 2001 Military Order should be considered likely.

[75] *Hamdan v. Rumsfeld*, US District Court for the District of Columbia. 8 November 2004.

[76] *Al Halmandy et al. v. Obama et al*, Declaration of Katharine Doxakis, Lieutenant Commander, JAGC, US Navy, 19 June 2009. In the US District Court for the District of Columbia. Exhibit B in exhibits to initial traverse.

[77] *USA v. Jawad*, D-022, Ruling on defense motion to suppress out-of-court statements of the accused to Afghan authorities, 28 October 2008.
[78] *USA v. Jawad*, D-021, Ruling on defense motion to suppress out-of-court statements by the accused made while in US custody, 19 November 2008. See also USA: Remedy and accountability still absent: Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds, 1 October 2008, http://www.amnesty.org/en/library/info/AMR51/109/2008/en.
[79] In a brief filed in habeas corpus proceedings in US District Court on 15 July 2009, the Justice Department said that the government would not oppose a defence motion to suppress all statements made by Mohammed Jawad in Afghan and US custody.
[80] UN Doc.: A/63/271. Report to the UN General Assembly of the Special Rapporteur on the independence of judges and lawyers, 12 August 2008.
[81] Indeed this part of the transcript was redacted from the public record until 12 June 2009. Verbatim transcript of Combatant Status Review Tribunal for ISN 10015, held at Guantánamo, 14 March 2007, version as declassified on 12 June 2009. See also USA: Capital charges sworn against another Guantánamo detainee tortured in secret CIA custody, 2 July 2008, http://www.amnesty.org/en/library/info/AMR51/071/2008/en.
[82] See 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.
[83] Report of investigation (closed), US Naval Criminal Investigative Service, 14 July 2004, document available at http://www.aclu.org/projects/foiasearch/pdf/DODDON000393.pdf.
[84] See USA: Trial and error - a reflection on the first week of the first military commission trial at Guantánamo, *op. cit.*
[85] A US trial by its looks, but only so. New York Times, 28 July 2008.
[86] 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.
[87] Obama's Interview aboard Air Force One, New York Times transcript, 7 March 2009.
[88] Remarks at the Federalist Society Annual Convention Dinner, 15 November 2001.
[89] President George W. Bush, Remarks to the United States Attorneys Conference, 29 November 2001.
[90] Memorandum for the Vice President et al. Subject: Humane treatment of al Qaeda and Taliban detainees, President George W. Bush, 7 February 2002.
[91] For example, a JPRA instructor involved in the Guantánamo interrogation experiment wrote in a July 2002 memorandum on "exploitation training" for interrogators, that "we must have a process that goes beyond the old paradigm of military interrogation for tactical information or criminal investigation for legal proceedings. These methods are far too limited in scope to deal with the new war on global terrorism". Exploitation training for [redacted]. Memo from Joseph Witsch to Colonel Randy Moulton and Christopher Wirts, 16 July 2002. Quoted in SASC report, November 2008, *op. cit.*, page 23.
[92] Vice President's Remarks at the Conservative Political Action Conference, 7 February 2008.
[93] For example, see USA: Vice President seeks to justify torture, secret detention and Guantánamo, 23 December 2008, http://www.amnesty.org/en/library/info/AMR51/157/2008/en.
[94] Secretary Rumsfeld Media Availability after Visiting Camp X-Ray, Department of Defense transcript, 27 January 2002.
[95] SASC report, November 2008, *op. cit.*
[96] Decision re application of the Geneva Convention on prisoner of war to the conflict with al Qaeda and the Taliban. Memorandum for the President from Alberto R. Gonzales, 25 January 2002 (draft, 3.30 pm).
[97] Not applying the Geneva Conventions would "provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States". Letter to President Bush from Attorney General John Ashcroft, 1 February 2002.
[98] *Security and Rights*, Ken Macdonald, QC, Director of Public Prosecutions, 23 January 2007. Full speech available at http://www.cps.gov.uk/news/nationalnews/security_rights.html.
[99] Executive Order 13440 – Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007. President Obama has revoked this executive order. His executive order is also framed in terms of armed conflict. Executive Order: Ensuring lawful interrogations, 22 January 2009. See also USA: Law and executive disorder: President gives green light to secret detention program, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007.
[100] Transcript of Remarks by Central Intelligence Agency Director, Gen. Michael V. Hayden at the Council on Foreign Relations, 7 September 2007.

[101] OLC: Legality of the use of military commissions to try terrorists, 6 November 2001, *op. cit.*
[102] The recipient embassies were those in Algeria, Australia, Azerbaijan, Bahrain, Belgium, Bangladesh, Chad, France, Egypt, Jordan, Kuwait, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Spain, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, United Kingdom, Uzbekistan and Yemen. They were also given the following "for response" line: "The US Government has not yet made a decision on if and what criminal charges may be brought against detainees in Guantánamo or in which legal forum they might be brought. The US is very interested in knowing more detail about the legal steps that governments might be prepared to take against their citizens under US control in Guantánamo Bay." Document available at http://www.aclu.org/projects/foiasearch/pdf/DOS002287.pdf.
[103] Document available at http://www.aclu.org/projects/foiasearch/pdf/DOS002696.pdf.
[104] The Supreme Court's *Hamdan* ruling in June 2006 reversed the President's decision on common Article 3, which led, as President Bush said it when seeking congressional approval for the MCA, to the concern that "our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act… This is unacceptable". The MCA, by amending the War Crimes Act to decriminalize under US law certain acts, had impunity for war crimes at its heart, even as it sought to authorize unfair military commission trials for those against whom crimes under international law and other human rights violations had been committed.
[105] MCA §948b (g).
[106] The definition of "unprivileged enemy belligerent" in Senate Bill 1390 is "an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; or (B) has purposefully and materially supported hostilities against the United States or its coalition partners". At the time of writing, Senator Jeff Sessions was proposing an expansion (Amendment 1533), which would add "or (C) is a member of al Qaeda or a group that is connected with al Qaeda".
[107] The current version of this memorandum notes that after it was issued, the US Supreme Court concluded in *Hamdan v. Rumsfeld* in 2006 that the military commissions under the November 2001 "were inconsistent with the UCMJ", and that following the ruling Congress "expressly authorized a system of military commissions pursuant to the Military Commissions Act". Legality of the use of military commissions to try terrorists, 6 November 2001, *op. cit.*
[108] Amnesty International recognizes as a positive development the decision by the new administration to transfer Ahmed Khalfan Ghailani, who was facing trial by military commission, to civilian jurisdiction and prosecution in federal court in New York for his alleged role in the 1998 US embassy bombings in Kenya and Tanzania.
[109] USA: President Obama defends Guantánamo closure, but endorses 'war' paradigm and indefinite preventive detention, 22 May 2009, http://www.amnesty.org/en/library/info/AMR51/072/2009/en.
[110] UN Doc.: CAT/C/USA/CO/2/Add. 1, 6 November 2007. Comments by the Government of the United States of America to the conclusions and recommendations of the Committee against Torture. UN Doc.: CCPR/C/USA/CO/3/Rev.1/Add.1, 12 February 2008, Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee.
[111] Statement by Lawrence Richter, Delegation of the United States of America. Human Rights Council, 11th Session, Geneva, 3 June 2009.
[112] UN Doc.: A/63/271. Report to the UN General Assembly of the Special Rapporteur on the independence of judges and lawyers, 12 August 2008.
[113] The President's constitutional authority to conduct military operations against terrorists and nations supporting them, John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001.
[114] See, for example, USA: Many words, no justice: Federal court divided on Ali al-Marri, mainland 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/087/2008/en.
[115] USA: Different label, same policy?, 16 March 2009, http://www.amnesty.org/en/library/info/AMR51/038/2009/en.
[116] UN Human Rights Committee, General Comment 31. The nature of the general legal obligation imposed on state parties to the Covenant, UN Doc.: CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[117] See Chapter 2, USA: Detainees continue to bear costs of delay and lack of remedy, April 2009 http://www.amnesty.org/en/library/info/AMR51/050/2009/en.
[118] UN Basic Principles on the Independence of the Judiciary, endorsed by the General Assembly 1985.
[119] General Comment 32 (2007), op. cit., para. 22.
[120] UN Doc.: A/63/271. Report to the UN General Assembly of the Special Rapporteur on the independence of judges and lawyers, 12 August 2008.
[121] Document available at http://www.aclu.org/projects/foiasearch/pdf/DOS001917.pdf.
[122] US Department of Defense news briefing on military commissions, 21 March 2002.
[123] As noted above, Salim Hamdan was eventually tried and convicted under the MCA in 2008.
[124] *Hamdan v. Rumsfeld*, Justice Breyer, with whom Justice Kennedy, Justice Souter and Justice Ginsburg join, concurring.

[125] "These military commissions are lawful; they are fair; and they are necessary… We will seek to prosecute an operative believed to have been involved in the bombings of the American Embassies in Kenya and Tanzania". President George W. Bush, Remarks on signing the Military Commissions Act of 2006, 17 October 2006.
[126] Amnesty International's understanding is that the 13 were: Mohammad Jawad (Afghan national), Omar Khadr (Canadian), Ahmed al Darbi (Saudi Arabian), Ibrahim Ahmed al Qosi (Sudanese), Noor Uthman Muhammed (Sudanese), Mohammed Hashim (Afghan), Ahmed Khalfan Ghailani (Tanzanian – as noted above, transferred in June 2009 for prosecution in US federal court), Mohammed Kamin (Afghan), Mustafa Ahmad al-Hawsawi (Saudi Arabian), 'Ali 'Abd al-'Aziz 'Ali (Pakistani), Walid bin Attash (Yemeni), Ramzi bin al-Shibh (Yemeni), and Khalid Sheikh Mohammed (Pakistani).
[127] Under the ICCPR and other international instruments, persons who are detained pending trial on criminal charges must be tried within a reasonable time or released pending trial (Articles 9(3) of the ICCPR, article 7(5) of the American Convention, article 5(3) of the European Convention, article 60(4) of the ICC Statute). Furthermore, international law requires that proceedings in criminal cases be completed without undue delay (Article 14(3)(c) of the ICCPR, article 8(1) of the American Convention, article 6(1) of the European Convention, article 67(1)(c) of the ICC Statute). This extends not just to the trial itself, but also to periods of pre-trial detention.
[128] MMC, Rule 707(d).
[129] See generally, USA: Detainees continue to bear costs of delay and lack of remedy, April 2009 http://www.amnesty.org/en/library/info/AMR51/050/2009/en.
[130] United States Resettles Four Uighur Detainees from Guantánamo Bay to the Government of Bermuda, US Department of Justice news release, 11 June 2009.
[131] For more on the case of the Uighurs, and litigation over US courts' own interpretation of their powers to order release, including release into the USA, see Amnesty International Urgent Action update, 8 May 2009, http://www.amnesty.org/en/library/info/AMR51/062/2009/en, and see also, USA: USA: Human rights must transcend party politics, 15 June 2009, http://www.amnesty.org/en/library/info/AMR51/076/2009/en.
[132] United States transfers two Guantánamo detainees to foreign nations, US Department of Justice news release, 11 June 2009.
[133] United States transfers Lakhdar Boumediene to France. US Department of Justice news release, 15 May 2009.
[134] Three other men seized along with Lakhdar Boumediene in Bosnia and Herzegovina nearly seven years earlier were freed by the Bush administration a month after the November 2008 judicial order. Announcing the transfer, the Pentagon said that "following the court's decision, *the government determined* that the detainees should be transferred to their country of citizenship" (emphasis added).
[135] MMC, Rule 1101(b)(3), discussion. "This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war".
[136] Assessing damage, urging action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (2009), pages 136-137. An initiative of the International Commission of Jurists.
[137] See Draft Principles Governing the Administration of Justice Through Military Tribunals, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux. UN Doc.: E/CN.4/2006/58, 13 January 2006.
[138] General Comment 32, *op. cit.*, para. 22.
[139] It remains to be seen, in the event that the new administration does pursue military commission trials, what reasons it will give for doing so in each individual case.
[140] *USA v. al Darbi*, P-014, Ruling on Government Motion for a Continuance, 19 May 2009.
[141] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. February 2007, *op. cit.* After a military judge refused to grant the new administration's request in January 2009 for a 120-day suspension in military commission proceedings, the government dismissed the charges against al-Nashiri, without prejudice.
[142] The UN Human Rights Committee has stated that in the case of juvenile detainees, "detention before and during the trial should be avoided to the extent possible", and that "measures other than criminal proceedings", including counseling and educational programmes, should be considered, providing they are compatible with international human rights law.General Comment 32, *op. cit.*, para. 42.
[143] The UN Human Rights Committee has stated that the ICCPR requires not only that the right to remedy be realized, but that "remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children". General Comment 31. The nature of the general legal obligation imposed on state parties to the Covenant, UN Doc.: CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[144] Article 102 of the Third Geneva Convention states that "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."

[145] Under the existing rules, a defendant may retain a civilian lawyer, but would have to bear the cost unless that person offered his or her services *pro bono*. The civilian lawyer must be a US citizen and have passed stringent security clearance. A defendant is not able to choose as a lawyer a non-US national, for example, a lawyer from his own country. Even if the defendant retains a US civilian lawyer with the necessary security clearance, he will still be represented by a US military lawyer as associate counsel.
[146] OLC: Legality of the use of military commissions to try terrorists, 6 November 2001, *op. cit.*
[147] An OLC memorandum, dated May 2009 but not made public, is reported to advise that defendants would have some constitutional rights if tried by military commissions in the USA, including on the admissibility of coerced statements. See, for example, New guidance issued on military trials of detainees, New York Times, 29 June 2009.
[148] Oral testimony of Jeh Johnson, General Counsel, Department of Defense, Hearing before the Senate Armed Services Committee on military commissions, 7 July 2009.
[149] Articles 2, 7 and 10 of the Universal Declaration, articles 2(1), 3 and 26 of the ICCPR, articles 2 and 5 of the Convention on the Elimination of Racial Discrimination, articles 1, 8(2) and 24 of the American Convention, article 75 of Additional Protocol I to the Geneva Conventions. Also, Human Rights Committee General Comment 15: The position of aliens under the Covenant, 1986, par. 7, in UN Doc. HRI\GEN\1\Rev.1.
[150] General Comment 32, *op. cit.*, para. 9.
[151] United States of America: US human rights commitments and pledges. 27 April 2009, http://www.state.gov/documents/organization/122476.pdf.
[152] General Recommendation no. 30 (general comments) (2004). The Committee also stressed that although Article 1.2 provides for the possibility of differentiating between citizens and non-citizens, that article should not be interpreted to undermine the "basic prohibition on discrimination" or to "detract in any way from the rights and freedoms enshrined in international human rights law, including the ICCPR
[153] UN Doc.: CERD/C/USA/CO/6, Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America.
[154] Thus, e.g., "the [Human Rights] Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]". General Comment 18, Non-discrimination (1989), para. 13.
[155] Article 14.3(g), International Covenant on Civil and Political Rights. Article 75.4(f) of Additional Protocol 1 to the Geneva Conventions.
[156] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by UN General Assembly resolution 43/173, 9 December 1988.
[157] *Ibid.*
[158] UN Human Rights Committee, General Comment 32 (2007), *op. cit.*, para. 41
[159] *Ibid.*, para. 60.
[160] *Ibid.*, para. 6. Article 15 of the UN Convention against Torture prohibits statements obtained as a result of torture being used as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. See also Article 12 of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. ("Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings".)
[161] *A and others v. Secretary of State*. House of Lords. Opinions of the Lords of Appeal for Judgment in the Cause. [2005] UKHL 71, http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf.
[162] *Rochin v. California* 342 U.S. 165 (1952) ("Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct that naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." Also, *Jackson v. Denno*, 378 U.S. 368 (1964) ("It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will, and because of the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves").

[163] Some half a dozen prosecutors resigned from the military commission process during its earlier incarnations. See, e.g., Military prosecutor in child 'enemy combatant' case resigns, citing 'ethical qualms', 26 September 2008, http://www.amnesty.org/en/library/info/AMR51/107/2008/en.
[164] Changes to the Manual for Military Commissions. Action memo for the Secretary of Defense from Jeh. C. Johnson, General Counsel, US Department of Defense, 13 May 2009.
[165] Hearing before the US Senate Armed Services Committee on military commissions. Testimony of Jeh Charles Johnson, General Counsel, Department of Defence. 8 July 2009.
[166] Report on detention and corrections operations in Iraq. Office of the Provost Marshal General of the Army, page 27, 5 November 2003.
[167] For example, a government email dated 4 October 2002, said that the next "Air Flow" – military-speak for detainees being flown from Afghanistan to Guantánamo – was set to be carried out between 2 and 10 November 2002. It continued: "There will be between 20 and 34 new detainees on the flight. We strongly suggested total isolation for as long as possible for these individuals to keep them away from the 'veterans' until all available information is obtained from them." Email available at http://action.aclu.org/torturefoia/released/022306/1205.pdf.
[168] Declaration of Katherine Doxakis, Lieutenant Commander, JAGC, USN, 19 June 2009.
[169] USA: Remedy and accountability still absent: Mohammed Jawad subjected to cruel and inhuman treatment in Guantánamo, military judge finds, 1 October 2008, *op. cit.*, and USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, *op. cit.*
[170] Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005 (Internal quotation marks omitted).
[171] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. February 2007, *op. cit.*
[172] Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees, *op. cit.* Another memorandum stated that "because releasing a detainee from the shackles would present a security problem and would interfere with the effectiveness of the technique, a detainee undergoing sleep deprivation frequently wears an adult diaper". Displaying a chilling tolerance for the unacceptable, the OLC memorandum noted that the CIA had informed it "that diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee". Re: 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 A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.
[173] *Ibid.* (internal quotation marks omitted).
[174] ICRC report on the treatment of fourteen 'high value detainees' in CIA custody. February 2007, *op. cit.*
[175] *Ibid.* "The totality of the circumstances in which the fourteen were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law".
[176] See, for example, Declaration of US Army Colonel Donald D. Woolfolk, 13 June 2002, filed in *Hamdi v. Rumsfeld*. No foreign national detainee held in US custody in Afghanistan, Guantánamo or in the USA's secret detention program had access to legal counsel during interrogations. "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it". Principle 17, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
[177] Changes to the Manual for Military Commissions. Action memo for the Secretary of Defense from Jeh. C. Johnson, General Counsel, US Department of Defense, 13 May 2009.
[178] The MCA also prohibits the admission of any statement obtained by the use of torture (except as evidence against the person accused of torture). MCA, §948r (b). However, the USA defines torture more narrowly than under international law. The UN Committee against Torture has expressed concern at this narrow definition. In May 2006, it called on the USA to "ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the [US] understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or duration". UN Doc: CAT/C/USA/CO/2, 18 May 2006.
[179] Counter Resistance strategy meeting minutes, 2 October 2002. Comments paraphrased.
[180] It should be noted that the prohibition of cruel, inhuman or degrading treatment or punishment has been recognized to constitute a non-derogable and absolute rule of customary international law, binding on all states

regardless of whether they adhere to the particular treaties; see, e.g., UN General Assembly resolution 63/166, 19 February 2009, Preamble and article 1.
[181] *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis* (1998).
[182] 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., Office of Legal Counsel, 30 May 2005, *op. cit.*
[183] The OLC added that "we recognize that as a matter of diplomacy, the United States may for various reasons in various circumstances call another nation to account for practices that in some respects resemble conduct in which the United States might is some circumstances engage, covertly or otherwise".
[184] Under the Fifth Amendment to the US Constitution, no one "shall be compelled in any criminal case to be a witness against himself" (the Self-Incrimination Clause), "nor be deprived of life, liberty, or property, without due process of law". The OLC advised the Pentagon in February 2002 that "the Self-Incrimination Clause does not apply to trials by military commissions for violations of the law of war" and "does not constrain the evidence that military commissions may receive". This conclusion, the OLC advised, was "additionally supported" in the case of trials of foreign nationals held outside US sovereign territory due to the US Supreme Court's jurisprudence that the Fifth Amendment " does not confer rights upon aliens outside the sovereign territory of the United States".
[185] *Boumediene v. Bush*. Brief of *amici curiae* retired federal jurists in support of petitioners' supplemental brief regarding the Military Commissions Act of 2006. In the US Court of Appeals for the District of Columbia Circuit, 1 November 2006.
[186] *Duckworth v. Eagan*, 492 U.S. 195 (1989), Justice O'Connor concurring, joined by Justice Scalia.
[187] For cases, see Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.
[188] See *Schneckloth v. Bustamente*, 412 U.S. 218 (1973), internal quotation marks omitted.
[189] Written testimony of Jeh Johnson, General Counsel, Department of Defense, Hearing before the Senate Armed Services Committee on military commissions, 7 July 2009.
[190] Written statement of David Kris, Assistant Attorney General, before the Committed on Armed Services, US Armed Services Committee, hearing on military commissions, 7 July 2009.
[191] See, e.g., article 14 of the ICCPR and UN Human Rights Committee General Comment 32 (2007), op. cit., paras. 6 and 41.
[192] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*, op. cit.*
[193] *USA v. Hamdan*, D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008.
[194] Review – Proposed counter-resistance techniques. Memorandum for the Office of the Army General Counsel. US Army Colonel John Ley, 7 November 2002.
[195] On 26 June 2003, for example, President Bush asserted that the USA was leading the struggle against torture "by example", and called on "all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture". The USA was already at this time subjecting detainees to torture and other cruel, inhuman or degrading treatment in its secret detention program, human rights violations for which accountability and remedy remain absent to this day. On 26 June 2004, in the wake of the Abu Graib torture revelations, President Bush asserted that the USA would "investigate and prosecute all acts of torture". As in his statement a years earlier, he did not say that it would prosecute ill-treatment falling short of torture, following his administration's attempt to narrow the definition of what constituted torture and maintain that cruel, inhuman or degrading treatment was only something that government should seek to prevent.
[196] At the time, Secretary Rumsfeld stated that the ICC's "flaws… are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction of US service members, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow". US Department of Defense news release, 6 May 2002.
[197] The OLC advice added that it could not account for the actions of "rogue prosecutors" or "predict the political actions of international institutions". Letter to Alberto Gonzales, Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.
[198] See Freedom of Information Act: Memorandum for the heads of executive departments and agencies; and Transparency and Open Government: Memorandum for the heads of executive departments and agencies. President Barack Obama, the White House, 21 January 2009.
[199] On 2 March 2009 the Department of Justice released seven previously undisclosed legal opinions prepared in 2001 and 2002 by the OLC which, among other things, provided legal advice on questions of presidential authority with regard to the use of force, the detention and trial of individuals designated as "enemy combatants", and the

transfer to third countries of al-Qa'ida and Taleban detainees captured outside the USA. On 16 April 2009, it released four other legal opinions written in 2002 and 2005 by the OLC. The four documents discussed in detail, and gave legal approval to, interrogation techniques that the CIA had used or was seeking to use in the secret detention programme, including waterboarding, slapping, stress positions, cramped confinement, exploitation of phobias, dousing with cold water, forced nudity, and sleep deprivation.

[200] Written statement of David Kris, Assistant Attorney General, before the Committed on Armed Services, US Armed Services Committee, hearing on military commissions, 7 July 2009.

[201] UN Human Rights Committee, General Comment 32, *op. cit.,* para. 28.

[202] *Ibid.,* para. 29.

[203] *Ibid.*, para. 58.

[204] Navy Planner's memo wrt counter-resistance techniques. Memorandum for the Director for Strategic Plans and Policy Directorate, Captain D.D. Thompson, Office of the Chief of Naval Operations, Department of the Navy, 4 November 2002.

[205] Assessment of CJT-170 Counter-Resistance Strategies and the potential impact on CITF mission and personnel, Major Sam W. McCahon, Chief Legal Advisor, Department of Defense Criminal Investigation Task Force, 4 November 2002.

[206] Working Group Report on detainee interrogations in the Global War on Terrorism: Assessment of legal, historical, policy, and operational considerations, 4 April 2003. The report noted that prosecution of "unlawful combatants" by the USA "is possible in a military commission, court-martial, or in an Article III [civilian federal] court".

[207] MCA, § 949d (d).

[208] MCA, § 949d (f)(1).

[209] MMC, Rule 701(f).

[210] MCA, § 949d (f)(2)(A).

[211] MCA, § 949d (f)(2)(B).

[212] MCA, § 949j (d)(1).

[213] MCA, § 949d (f)(2)(C).

[214] MMC, Rule of Evidence 505(h).

[215] General Comment 32 (2007), *op. cit.*, para. 33.

[216] See USA: Justice delayed and justice denied? Trials under the Military Commissions Act, March 2007, *op. cit.*

[217] See Section 7 of USA: Detainees continue to bear costs of delay and lack of remedy, April 2009, *op. cit.*

[218] See USA: Federal court rejects government's invocation of 'state secrets privilege' in CIA 'rendition' cases, 29 April 2009, http://www.amnesty.org/en/library/info/AMR51/058/2009/en.

[219] *Mohamed et al., v. Jeppesen and USA*. Petition for rehearing or rehearing *en banc*, In the US court of Appeals for the Ninth Circuit, June 2009.

[220] USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 17 April 2009, http://www.amnesty.org/en/library/info/AMR51/055/2009/en.

[221] On 9 April 2009, the CIA Director, Leon Panetta, stated that the CIA was no longer operating "detention facilities or black sites and has proposed a plan to decommission the remaining sites". On 30 June 2009, lawyers representing Ahmed Ghailani for his trial in federal court filed a motion requesting that the court order the government to preserve the CIA secret detention facilities. See *USA v. Ghailani*, Memorandum of law in support of motion to preserve CIA black sites. US District Court for the Southern District of New York, 30 June 2009.

[222] *ACLU v Department of Defense*, Declaration of Leon E. Panetta, Director, Central Intelligence Agency, US District Court, Southern District of New York, 9 June 2009.

[223] See Amnesty International Urgent Action, 3 July 2009, http://www.amnesty.org/en/library/info/AMR51/081/2009/en.

[224] The Human Rights Committee has noted that article 6 "refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable". The Committee concluded "that all measures of abolition should be considered as progress in the enjoyment of the right to life". General Comment 6 (1982).

[225] UN Human Rights Committee, General Comment 32, *op. cit.*, para. 6.

[226] Ibid., para. 59.

[227] Statement by Lawrence Richter, Delegation of the United States of America, UN Human Rights Council 11th Session, Geneva, 3 June 2009.

[228] UN Doc.: A/HRC/11/2/Add.5, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Addendum. Mission to the United States of America. Advanced Unedited Version, 26 May 2009.

[229] Statement by Lawrence Richter, *op. cit.*

[230] General Comment 31, 26 May 2004, *op. cit.*, paras. 15 and 18.

[231] See Guilty pleas weighed in some 9/11 cases. Associated Press, 6 June 2009 ("Guantánamo detainees facing the death penalty could plead guilty without a full trial under a plan the Obama administration is considering, a senior administration official said Saturday"). The USA's courts martial, to which US soldiers are subject, do not allow guilty pleas in death penalty cases.
[232] Statement in Senate on 28 September 2006.
[233] "Military commissions have been used by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military…The procedures in the bill I am sending Congress today reflect the reality that we are a nation at war". President Bush, 6 September 2006.
[234] Associated Press, op. cit.
[235] Senate Armed Services Committee hearing on military commissions, *op. cit.*
[236] Statement by the White House Press Secretary on the Geneva Conventions, 7 February 2002.
[237] For details on Abu Zubaydah's case, see Appendix 1 to USA: Detainees continue to bear costs of delay and lack of remedy, April 2009, *op. cit.*
[238] Memorandum for the Vice President et al. Subject: Humane treatment of al Qaeda and Taliban detainees, President George W. Bush, 7 February 2002.
[239] SASC report, November 2008, *op. cit.*
[240] Remarks at the American Enterprise Institute, 21 May 2009.
[241] SASC report, November 2008, page 11.
[242] See page 30-36 of USA: Human dignity denied, 2004, *op. cit.*
[243] Re: 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. Office of Legal Counsel, 30 May 2005, *op. cit.*
[244] Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10024, held at Guantánamo Bay, 10 March 2007, version as declassified on 12 June 2009.
[245] Remarks by Vice President Dick Cheney to the US Chamber of Commerce, 14 November 2001.
[246] Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006.
[247] Alberto Gonzales hosts 'Ask the White House'. 18 October 2006, The Attorney General was responding to the question: "If you, Mr Gonzales, were arrested and classified as an unlawful enemy combatant and you were an innocent person, what course of action would you take?"
[248] UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc.: CCPR/C/GG/32, 23 August 2007, para. 4.
[249] Stakeout on Capitol Hill with Secretary Rumsfeld and Gen. Pace, US Department of Defense transcript, 8 December 2001.
[250] Wolfowitz Interview with Jim Lehrer, News Hour, PBS TV. US Department of Defense transcript, 21 March 2002.
[251] For example, under its "evolving standards of decency" assessment, it took until 2005 for the US Supreme Court to conclude that standards of decency had evolved in the USA to the point that the use of the death penalty against children was unconstitutional. By this time all but a tiny minority of countries had long since abandoned such use of judicial killing.
[252] Jack Goldsmith, *The Terror Presidency* (2007), *op. cit.*, pages 69 and 81.
[253] USA: Military Commissions Act of 2006 - Turning bad policy into bad law, 29 September 2006, http://www.amnesty.org/en/library/info/AMR51/154/2006/en.
[254] See for example, 'Un-American activities?' and 'Playing fast and loose with international law', in USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, Sections 1.3 and 11, *op. cit.*
[255] See, e.g., chapters 3-6 of USA: Rights for all, 1998, http://www.amnesty.org/en/library/info/AMR51/035/1998/en. When US Secretary of Defense Donald Rumsfeld was asked soon after transfers to Guantánamo began whether hooding, forcible shaving, and chaining of the detainees might violating their rights, he chose to answer by reference to domestic practice. "That it's a violation of their rights. It simply isn't…. all one has to do is look at television any day of the week, and you can see that when prisoners are being moved between locations, they're frequently restrained in some way with handcuffs or some sort of restraints." Department of Defense news briefing, 11 January 2002.
[256] For example, "the United States is free from any constraints imposed by the Torture Convention in deciding whether to transfer detainees that it is holding abroad to third countries". Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations, From Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 March 2002.
[257] This is not just a view from outside the USA. See, for example, Mayerfield, J., Playing by our own rules: How US marginalization of international human rights law led to torture. Harvard Human Rights Journal, Volume 20 (2007),

pages 89-140. ("[T]he ability of the Bush Administration to adopt torture, and to maintain its policy in the face of explosive revelations, defies the story Americans tell about themselves as members of a rights-protecting democracy. It is essential that we understand why the American legal and political system failed…. [A] principal (though not sole) cause of the failure was the longstanding refusal of the United States to incorporate international human rights law into its legal system"). Or, Ehrenreich, B., Torture, the painful truth, Los Angeles Times, 15 June 2009 ("Perhaps we protest too much. Torture, after all, is a venerable American tradition…. Yet as more classified documents dribble into the headlines, we hold tight to our outrage. The scandal has been slowly breaking for five full years, but still we claim not to recognize ourselves. Despite hundreds of front-page stories, we pretend we didn't know, that it was all somehow kept secret from us… Our outrage over torture… lets us maintain the belief that we had innocence to lose").

[258] Again, in doing so, it could point to the USA's traditional reluctance to apply international law to itself. For example, in giving legal approval to "enhanced interrogation techniques" such as waterboarding, the US Department of Justice noted that when the USA ratified the UN Convention against Torture, it "did not intend to undertake any obligations under Article 16 [prohibition of cruel, inhuman or degrading treatment or punishment] that extended beyond those already imposed by the Constitution". Re: 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. Office of Legal Counsel, 30 May 2005, *op. cit.*

[259] Message to the Congress transmitting draft legislation on military commissions, 6 September 2006.

[260] "When I proposed this legislation, I explained that I would have one test for the bill Congress introduced: Will it allow the CIA program to continue? This bill meets that test." President Bush signs Military Commissions Act of 2006, 17 October 2006.

[261] For example, see USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en.

[262] See the 1969 Vienna Convention on the Law of Treaties, Article 31.

[263] On the ICCPR, the UN Human Rights Committee has said: "Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. UN Doc.: CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 13.

[264] A new beginning. Remarks of President Barack Obama, Cairo, Egypt. Office of the Press Secretary, The White House, 4 June 2009.

[265] United States of America: US human rights commitments and pledges. 27 April 2009, US State Department, Bureau of International Organization Affairs, http://www.state.gov/documents/organization/122476.pdf.

[266] Guantánamo Bay: The legal black hole. Twenty-Seventh F.A. Mann Lecture: 25 November 2003, By Johan Steyn http://www.statewatch.org/news/2003/nov/guantanamo.pdf.

[267] While not the subject of this report, Amnesty International notes that the history of military commissions is not one that is without its critics. For example, see Eugene Fidell, The trouble with tribunals, New York Times, 14 June 2009; Louis Fisher, Military tribunals and presidential power: American revolution to the war on terrorism, University Press of Kansas, 2005 (see especially Chapter 5, Nazi Saboteurs).

[268] US Department of Defense news briefing on military commissions, 21 March 2002.

[269] *Madsen v. Kinsella*, 343 U.S. 341 (1952). Cited in Legality of the use of military commissions to try terrorists, Office of Legal Counsel, 6 November 2001, *op. cit.*

[270] Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Media roundtable with senior government officials, Geneva, Switzerland, 17 July 2006.

[271] 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.

[272] *USA v. Jawad*, Government's response to the defense's motion to dismiss for failure to state an offense and for lack of subject matter jurisdiction under RMC 907, 3 June 2008. This was in the case of Mohammed Jawad. The same argument was made in the case of Omar Khadr.

[273] General Comment 32, *op. cit.*, para. 42.