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A deepening stain on US justice

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"*Trials of the type contemplated by the United States government would be a stain on United States justice*". Lord Johan Steyn, senior United Kingdom judge, 2003[1]

It is now over two and a half years since President George W. Bush signed a Military Order on the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism. Anyone held under the Military Order can be detained indefinitely without charge or trial. They can also be brought to trial by military commissions – executive bodies, not independent or impartial courts – whose verdicts, including death sentences, cannot be appealed in any court. Despite widespread international condemnation of these proposed trials, the US authorities have continued preparations for them. Pre-trial proceedings in the cases of four detainees are scheduled to be conducted in the US Naval Base in Guantánamo Bay in Cuba during the week of 23 August 2004.

Amnesty International has called for the Military Order to be rescinded ever since it was signed, on the grounds that it is fundamentally flawed and because trials under its provisions will violate international fair trial standards. [2]

- The commissions will entirely lack independence from the executive.
- The right to counsel of choice and to an effective defence is severely restricted.
- There will be no right of appeal to an independent and impartial court established by law.
- Only foreign nationals are eligible for such trials, violating the prohibition on the discriminatory application of fair trial rights. A US citizen charged with a similar crime would not face trial by military commission, and would have the right to appeal to higher courts of law.

The Military Order can be applied to anyone suspected of being or having knowingly harboured either a member of *al-Qa'ida* or someone who has "engaged in, aided or abetted, or conspired to commit, acts of international terrorism". It is broad in scope and open-ended. The Pentagon's instructions for the military commissions extend the concept of armed conflict to include single hostile acts or attempted acts, or conspiracy to carry out such acts, a definition so broad that it could encompass many acts that would normally fall under the jurisdiction of the normal criminal justice system.[3]

The USA's claims to be a progressive force for human rights have rung increasingly hollow over the past three years. The government's continuing pursuit of military commission trials against a selection of foreign nationals it has unilaterally labelled as "enemy combatants" and held in virtual incommunicado detention for more than two years will feed a

growing recognition that this is an administration which refuses to place respect for human rights at the heart of its response to the atrocities of 11 September 2001.

Double standards are apparent. On the one hand, the executive plans to try a selection of foreign nationals under a military commission system designed to secure convictions on lower standards of evidence than pertain in the US courts. On the other, the very same administration has discussed how any US agents accused of torture during the "war on terror" might avoid conviction. Previously secret memoranda have suggested legal defences for accused US agents of "necessity" and "self-defence", as well as the notion that authorization under the President's Commander in Chief powers could override the prohibition on torture.[4]

A 26 February 2002 memorandum from the Justice Department to the Pentagon describes the military commissions as "entirely creatures of the President's authority as Commander in Chief… and are part and parcel of the conduct of a military campaign".[5] A few days earlier, President Bush signed a memorandum holding that this was a campaign which "requires new thinking in the law of war".[6] The thinking that has been done, however, has resulted in familiar abuses, including the denial of *habeas corpus*, the use of incommunicado and secret detention, a pattern of official commentary on the presumed guilt of detainees, and the sanctioning of harsh interrogation techniques which contravene international standards. This rejection of basic safeguards has made torture and ill-treatment more likely to occur.

The military commissions will be able to use the fruits of any torture or ill-treatment that may have occurred. Indeed, the procedures for the commissions provide that evidence "shall" be admitted if the presiding officer or a majority of the commission members consider that it "would have probative value to a reasonable person".[7] In other words, if a statement made under torture or coerced by the conditions of detention at Guantánamo or elsewhere is considered to have some "probative value", it "shall" be admitted. In similar vein, the Justice Department memorandum of 26 February 2002 advised that "incriminating statements may be admitted in proceedings before military commissions even if the interrogating officers do not abide by the requirements of *Miranda* [the US Supreme Court decision controlling the rights of criminal suspects and conduct of interrogators]". We now know that the administration has approved interrogation techniques that have gone beyond normal US army doctrine. The purpose of the techniques has been to extract information. Methods approved in December 2002 by Secretary Rumsfeld for use at Guantánamo, for example, included stress positions, sensory deprivation, hooding, stripping, the use of dogs to inspire fear, and isolation.[8]

The use of "extended solitary confinement in dark" cells was one of the torture techniques used in Iraq that the US government cited in its build up to the invasion of that country.[9] The USA has used the same technique in occupied Iraq, systematically according to the International Committee of the Red Cross[10], and in Guantánamo the first six men made eligible for trial by military commission, including the four whose preliminary hearings are imminent, have been subjected to prolonged isolation.[11] Sometime after July 2003 when the six were deemed by President Bush to fall under the Military Order, they were removed from Camp Delta – where most of the hundreds of Guantánamo detainees are held – to the isolation cells of Camp Echo. There, each has been held for months for 23-24 hours a day in a reportedly windowless cell with no possibility of communication with other detainees. Prolonged isolation in conditions of reduced sensory stimulation can cause severe physical and psychological damage. In a declaration signed on 31 March 2004, psychiatrist Dr Daryl Matthews, who visited Guantánamo in 2003 at the invitation of the Pentagon, stated that the solitary confinement places the detainees "at significant risk for future psychiatric deterioration, possibly including the development of irreversible psychiatric symptoms".[12] It also increases the susceptibility of the detainees to being coerced into making confessions or statements implicating themselves or others.

Salim Ahmed Hamdan, a Yemeni national who has been in US custody since November 2001, was transferred to an isolation cell in Guantánamo's Camp Echo in early December 2003. According to Dr Matthews's declaration, Salim Ahmed Hamdan said that he had "considered confessing falsely to ameliorate his situation". Two former Guantánamo detainees from the UK wrote to a US Senate Committee in May recalling: "After three months in solitary confinement under harsh conditions and repeated interrogations, we finally agreed to confess [to being present at a meeting with Osama bin Laden]. Last September an agent from MI5 [British secret service] came to Guantánamo with documentary evidence that proved we could not have been in Afghanistan at the time... In the end we could prove our alibis, but we worry about people from countries where records are not as available."[13]

Salim Ahmed Hamdan, fellow Yemeni Ali Hamza Ahmed Sulayman al Bahlul, Ibrahim Ahmed Mahmoud al Qosi, a Sudanese national, and David Matthew Hicks, an Australian, are the four men who are scheduled to face preliminary hearings prior to their trials by military commission. The charges against them include conspiracy to commit war crimes and "terrorism". The death penalty will not be sought against these four men as at their actual trials the defendants will appear before a commission of five members including the "presiding officer". There will also be an alternate member.[14] A death penalty trial must be held before seven commission members. Life imprisonment will be the maximum punishment available in these four cases. Sentencing is at the discretion of the commission members. There are no detailed guidelines. The rules simply state that all sentences "should be grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general".[15]

The time the defendants have already spent in detention "shall not be considered to fulfill any term of imprisonment imposed by a military commission".[16] Even if a defendant is acquitted, his release is not guaranteed. If he is considered still to be a security risk or to have intelligence value, he would return to indefinite detention unless and until a Combatant Status Review Tribunal determined that he was no longer an "enemy combatant".[17] This administrative review process is entirely separate from the military commissions.

The preliminary hearings for the four defendants facing trial by military commissions will take place, not before the full commission, but before the presiding officer only. It is expected that the presiding officer – Retired military judge, Colonel Peter E. Brownback – will hear pre-trial motions, may set trial dates, and will be questioned by defence and prosecution lawyers on his fitness to serve on the military commissions. Concerns have already been raised that Colonel Brownback has a long-term friendship with Major General John Altenburg, the "appointing authority" who selected him as presiding officer.[18] The appointing authority, designated to that role by the Secretary of Defense, is also the official who approves the charges against defendants facing trial by military commission, and approves plea agreements.[19]

Colonel Brownback's view of his role has caused concern among the military lawyers representing the four detainees. In an email, dated 28 July 2004, he made his position clear:

a. I have the authority to set, hear, and decide all pretrial matters;

b. I have the authority to order counsel to perform certain acts;

c. I have the authority to set motions dates and trial dates;

d. I have the authority to act for the Commission without the formal assembly of the whole Commission.

The above listing is not supposed to be all inclusive. Perhaps a better way of looking at the matter is to say that I have authority to order those things which I order done… [T]he counsel must accept my order or face sanctions, which no one wishes to have happen.[20]

Colonel Brownback added that his interpretation of the military commission procedures "is the one that counts" unless and until a "superior competent authority (The President, The Secretary of Defense, The General Counsel of the Department of Defense, The Appointing Authority) issues directives state that what I am doing is incorrect." This list of officials to whom the presiding officer would defer starkly illustrates how the military commission process is an entirely closed executive loop with no independent input or oversight.

In his criticism of the military commission proposals in 2003, senior UK judge, Lord Johan Steyn said: "The term kangaroo court springs to mind. It derives from the jumps of the kangaroo, and conveys the idea of a pre-ordained arbitrary rush to judgment by an irregular tribunal which makes a mockery of justice."[21] There is certainly concern on the part of the military defence lawyers at the lack of time and resources that they have been allocated to prepare for the defence of their clients. This is a process in which the military controls resources and scheduling. The lawyers for Ali Hamza Ahmad Sulayman al Bahlul, for example, have not met with their client since mid-April 2004, because they have not been provided with an interpreter who is acceptable to them, a "legitimate" concern according to Major General Altenburg[22]. Prior to that they had only been able to speak with Ali al Bahlul for two days since being assigned to the case in February 2004. The prosecution are seeking a trial date of 8 November 2004 and will oppose a delay despite the interpreter problem.[23]

Any convicted defendant will have his conviction and sentence reviewed by a three-member panel of military officers, or civilians commissioned as military officers. The Pentagon has explained that "the reason that we have made them military officers is that the military commission process is designed to be within the military".[24] In his 28 July email, Colonel Brownback suggested that, once the trials are over, "there is plenty of time on appeal, if necessary, to correct any mistake I might make", and the defence counsel could complain to the reviewing body about any fault they saw in his interpretation of his role. However, this review body does not have to consider written submissions from the defence or prosecution, although it "shall ordinarily" do so. The only thing it has to do in all cases is to review the trial record.

Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR) guarantees that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The United Nations Human Rights Committee has stated: "The provisions of article 14 apply to all courts and tribunals" and that proceedings must "genuinely afford the full guarantees stipulated in article 14". Under Article 14, therefore, the appeal court must be a competent, independent and impartial tribunal established by law. Clearly, the review panel does not meet this standard.

Under the commission rules, the review panel members are selected by the Secretary of Defense, who can also remove them for "good cause", which "includes, but is not limited to, physical disability, military exigency, or other circumstances." That it is Secretary Rumsfeld who chooses review panel members was confirmed by a senior Pentagon official at a briefing in December 2003:

Q: *Who chose the review panel members?*

A: *The Secretary of Defense*.[25]

This system has been crying out for a semblance of independence. Yet Secretary Rumsfeld's choice of who will serve on the review panel has already caused concern. For example, one of his appointees, former judge, prosecutor and congressman Edward George Bieser, has been described as Secretary Rumsfeld's "good friend and sometime neighbour", and as an individual who is "very friendly with Rumsfeld", according to a former judicial colleague of Edward Bieser. [26] Another report states:

> "*Secretary of Defense Donald Rumsfeld personally named Biester to the Military Commission Review Panel… It was perhaps the culmination of a friendship that stretches back more than 35 years. Biester and Rumsfeld are old friends, who first met when they served in Congress together and have stayed close over the years.*"[27]

Edward Biester, and the other appointees, will be commissioned as major generals in the army and will receive military pay.

Even if the review panel was independent, its decisions with regard to the final disposition of the case, including sentencing, will only have the power of recommendation to the Secretary of Defense.[28] The Secretary of Defense would then review the trial record and the review body's recommendation. The final decision in any case will reside with the President, the official who named the defendant eligible for trial in the first place, or, by the Secretary of Defence, if so designated by the President.

These two officials and others in the US administration have repeatedly made it clear what they think of the detainees, and in so doing have undermined the presumption of innocence included in the rules for trials by military commission and much trumpeted by the Pentagon. For example, the pattern of public commentary on the cases has included the following labels being put on the Guantánamo detainees by senior members of the administration:

> *These people are terrorists… They are terrorists. They are uniquely dangerous*. Attorney General John Ashcroft, 20 January 2002.[29]
>
> *Hard-core, well-trained terrorists*. Secretary of Defense Donald Rumsfeld, 20 January 2002. [30]
>
> *Among the most dangerous, best-trained, vicious killers on the face of the earth*. Secretary of Defence Donald Rumsfeld, 27 January 2002. [31]
>
> *These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort*. Vice President Dick Cheney, 27 January 2002.[32]
>
> *These killers – these are killers…. These are killers. These are terrorists*. President George Bush 28 January 2002. [33]
>
> *Remember, these are – the ones in Guantánamo Bay are killers. They don't share the same values we share*". President Bush, 20 March 2002. [34]
>
> "*So they're dangerous people, whether or not they go before a military commission… We're dealing with a special breed of person here…* Deputy Secretary of Defence Paul Wolfowitz, 21 March 2002.[35]
>
> *The only thing I know for certain is that these are bad people*. President Bush, 17 July 2003. [36]

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also means that public authorities, not least those who have direct influence and control over proceedings, should not make statements relating to the guilt or innocence of any individual before the outcome of a trial. The UN Human Rights Committee

has stated in its authoritative interpretation of the right to the presumption of innocence guaranteed under the ICCPR: "It is...a duty for all public authorities to refrain from prejudging the outcome of a trial."[37]

Following the naming of the first six detainees under the Military Order in July 2003, the UN Special Rapporteur on the independence of judges and lawyers stated that "in proceeding to apply these drastic measures to counter terrorism, the United States Government is seen defying United Nations resolutions, including General Assembly resolution A/RES/57/219 of 18 December 2002 and Security Council resolution S/RES/1456 of 20 January 2003".[38] The Rapporteur pointed out that these resolutions "reiterate very clearly that counter-terrorism measures must comply with international human rights law, humanitarian law and refugee law. It was the US that went to war with Iraq for breach of a Security Council resolution, and here we find the US blatantly defying these resolutions which they were party to."[39]

The US authorities justify President Bush's decision to resort to military commissions by saying that they have historically been used.[40] This is not the claim of a government with a progressive attitude to human rights. History is full of practices which have now been left behind. The UN Human Rights Committee has stated:

> "The provisions of article 14 (of the ICCPR) apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[41]

On 17 August 2004, John Altenburg, the appointing authority at the Office of Military Commissions said: "This is the first time we've done commissions in 60 years, and we'll have to wait and see what happens as to how it goes and how smoothly it goes."[42] What he failed to point out was that the creation of a separate system of trials before executive bodies is contrary to international standards.[43] The more than half a century in which military commissions have not been used in the USA is a period that has seen the reinforcement of a broad framework of fair trial guarantees in international human rights law and standards and in international humanitarian law. Executive military commissions have no place in 21st century criminal justice systems.

In the wake of the Abu Ghraib torture scandal, one might think that the US administration would be doing all it could to begin to repair the damage done to the country's reputation. No such inclination is being shown with regard to the military commissions, already widely condemned internationally. Amnesty International deeply regrets that the US administration has continued its preparations for these trials and the organization will continue to campaign for an end to them. Nevertheless, the only thing that would have undermined the defendants' rights even more thoroughly would have been for the trials to have gone ahead entirely closed to independent human rights observers. The organization has therefore accepted the administration's invitation to observe the proceedings, and is sending an international delegate to observe the preliminary proceedings during the week of 23 August 2004 in Guantánamo Bay.[44]

[1] *Guantánamo Bay: The legal black hole*. By Johan Steyn, 27th F.A. Mann Lecture, London 25 November 2003.
[2] Trials by military commission draw closer. Pp. 37-40, *USA: Threat of a bad example - Undermining international standards as "war on terror" detentions continue*. August 2003 http://web.amnesty.org/library/Index/ENGAMR511142003; The threat of trials by military commission. Pp.44-58, USA: *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, April 2002. http://web.amnesty.org/library/Index/ENGAMR510532002; *USA: Six named under Military Order: Another backward step for human rights.* 4 July 2003. http://web.amnesty.org/library/index/engamr510962003 *USA - Military commissions: Second-class justice*. 22 March 2002. http://web.amnesty.org/library/Index/ENGAMR510492002 *USA: Presidential order on military tribunals threatens fundamental principles of justice*. 15 November 2001. http://web.amnesty.org/library/Index/ENGAMR511652001
[3] The instructions specifically state: "This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy therequirement".
[4] Memorandum for Alberto R. Gonzales, Counsel to the President. *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*., Office of Legal Counsel, US Department of Justice, 1 August 2002.*Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003.
[5] Memorandum for William J. Haynes, II, General Counsel, Department of Defense. *Re: Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*. Office of Legal Counsel, US Department of Justice, 26 February 2002.
[6] Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. Subject: *Humane treatment of al Qaeda and Taliban detainees.* The White House, 7 February 2002.
[7] § 6.D.1, Military Commission Order No. 1. Procedures for trials by military commissions of certain non-United States citizens in the war against terrorism. Department of Defense, 21 March 2002.
[8] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. Subject: *Counter-Resistance Techniques*. 27 November 2002. Approved 2 December 2002.
[9] *A Decade of Deception and Defiance. Saddam Hussein's Defiance of the United Nations*. The White House, 12 September 2002.
[10] The ICRC reported the USA's systematic resort to "keeping persons deprived of their liberty completely naked in totally empty concrete cells and in total darkness, allegedly for several consecutive days." The organization was told by military intelligence that this was "part of the process". *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation.* February 2004.
[11] The two men named in July 2003 under the Military Order, but not yet charged, are UK nationals Moazzam Begg and Feroz Ali Abbasi. On 7 July 2004, the Pentagon announced that President Bush had determined that nine more detainees were subject to his Military Order. Their identities and nationalities are unknown. It is also not known if they are all held in Guantánamo Bay, or whether they have been transferred to the isolation cells of Camp Echo.
[12] *Swift v Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004.
[13] Shafiq Rasul and Asif Iqbal, 13 May 2004.
[14] Additional military commission charges referred. Department of Defense News Releas, 14 July 2004. "The case was referred to a panel consisting of a presiding officer and four other members. One alternate panel member was also designated." This panel will hear all four cases.
[15] Military Commission Instruction No. 7, 30 April 2003.
[16] *Id*.

[17] Or the detainee might be successful in seeking judicial review in the US courts, likely to be a long process and one in which it appears the authorities are seeking to stymie. The Combatant Status Review Panels – an entirely separate process from the military commissions – were initiated by the US administration as a response to the US Supreme Court's landmark decision of June 2004. In *Rasul v Bush*, rhe Court ruled that the US courts have jurisdiction over the Guantánamo detainees. The Combatant Status Review Panels, each consisting of three military officers, have been set up to determine whether each detainee should still be held or not. The detainees have no access to legal counsel for this administrative review and some have already refused to take part. The first four cases completed under this administrative review process concluded that the detainees were "enemy combatants". Amnesty International fears that the administration is engaged in an effort to limit the scope of any future judicial review of the detainees' cases. See http://web.amnesty.org/library/Index/ENGAMR511132004.

[18] *War-crimes defense lawyers say they lack resources*. The Wall Street Journal, 9 August 2004.

[19] John Altenburg was designated to the post of appointing authority by Secretary Rumsfeld on 15 March 2004. The previous appointing authority, from 21 June 2003 to 15 March 2004, was Deputy Secretary of Defense Paul Wolfowitz.

[20] Memorandum for: Col. Gunn, Chief Defense Counsel. Subject: Counsel and the Authority of the Presiding Officer. 28 July 2004.

[21] *Guantánamo Bay: The legal black hole*. By Johan Steyn, 27th F.A. Mann Lecture, London 25 November 2003.

[22] Defense Department briefing on military commission hearings, 17 August 2004.

[23] Prosecution reply to Docketing Request. Scott Lang, Prosecutor.

[24] Announcements of Key Personnel for Military Commissions; Issuance of Military Commission Instruction No. 9 on Military Commissions Review Panel. Department of Defense news transcript 30 December 2003.

[25] *Id*.

[26] *Bucks judge on terror panel a longtime Rumsfeld friend*. Philadelphia Inquirer, 2 February 2004.

[27] *Former Bucks lawmaker to hear terrorists' appeals*. Bucks County Courier Times, 1 February 2004.

[28] If it finds a "material error of law" has occurred, it has to send the case back for further proceedings. This is binding. Military Commission Instruction No. 9. Department of Defense, 26 December 2003.

[29] *Ashcroft defends detainees' treatment*. CNN.com.

[30] Secretary Rumsfeld media stakeout at NBC. 20 January 2002.

[31] *Rumsfeld visits, thanks US troops at Camp X-Ray in Cuba.* American Forces Information Service.

[32] Fox News Sunday.

[33] White House. President Meets with Afghan Interim Authority Chairman. Remarks by the President and Chairman of the Afghan Interim Authority Hamid Karzai. 28 January 2002.

[34] Remarks by the President to the travel pool. 20 March 2002.

[35] Wolfowitz Interview with Jim Lehrer, News Hour, PBS TV.

[36] Press Conference of President Bush and Prime Minister Tony Blair. White House, 17 July 2003.

[37] General Comment 13. Paragraph 7.

[38] *United Nations rights expert "alarmed" over United States implementation of military order*. United Nations Press Release, 7 July 2003.

[39] Interviewed on The World this Weekend. BBC Radio 4, 13 July 2003.

[40] "I will tell you just briefly that commissions, called by other names, but these types of commissions have been with us since the Revolution. The British used a military commission to prosecute Nathan Hale, and some five years later, the United States government, the United States military, at George Washington's direction, prosecuted Major Andre as a spy for the British. And that was done at a military commission, even though they didn't call it that then. Commissions were used in the War of 1812 and as late as 1817, in that time frame, commissions were used extensively in the Mexican War by General Scott for a variety of purposes." John Altenburg, Appointing Authority for the Office of Military Commissions, Defense Department briefing on military commission hearings, 17 August 2004.

[41] General Comment 13. The UN Working Group on Arbitrary Detention has said: "One of the most serious causes of arbitrary detention is the existence of special courts, military or otherwise, regardless of what they are called. Even if such courts are not in themselves prohibited by the International Covenant on Civil and Political Rights, the Working Group has none the less found by experience that virtually none of them respects the guarantees of the right to a fair trial enshrined in the Universal

Declaration of Human Rights and the said Covenant." The Human Rights Committee has also stated that the jurisdiction of special courts should be strictly defined by law. In its concluding observations on Iraq in 1997, for example, the Committee "expressed concern that in addition to the list of offences which were triable in special courts in Iraq, the Minister of the Interior and the Office of the President had discretionary authority to refer any other cases to these courts."

[42] Defense Department briefing on military commission hearings, 17 August 2004.

[43] Principle 5 of the UN Basic Principles on the Independence of the Judiciary, states: "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."

[44] *Guantánamo: Amnesty International delegate to observe first military commission hearings* http://news.amnesty.org/index/ENGAMR511292004