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UNITED STATES OF AMERICA
Abandon military commissions, close Guantánamo

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It is now four years since six detainees in US custody at Guantánamo Bay, by presidential order, became the first to be made eligible for trial by military commission. Since then, only one of the nearly 800 individuals who have been held at the base has been convicted by such a commission. On 30 March 2007, five years and two months after he was taken to Guantánamo, David Hicks pled guilty under a pre-trial agreement that meant he could get out of the base and return to his native Australia to serve a nine month sentence. He was transferred out of Guantánamo in mid-May.

David Hicks was one of the six detainees to be identified on 3 July 2003 as eligible for trial under a Military Order signed by President George W. Bush in November 2001. That system was ruled unlawful by the US Supreme Court on 29 June 2006, including because Congress had not authorized it. Three months later, Congress passed the Military Commissions Act (MCA) authorizing a revised system of commissions, and stripping the US courts of the jurisdiction to consider *habeas corpus* appeals from alien "enemy combatants" – the procedure under which the successful challenge to the first military commission system had been brought. David Hicks was convicted under the MCA, legislation which falls far short of international standards.[1]

The next detainees to face charges under the MCA were Canadian national Omar Ahmed Khadr and Yemeni national Salim Ahmed Hamdan, both of whom had been charged under the commission system overturned by the Supreme Court last year. At their arraignment proceedings on 4 June 2007, the military judges dismissed the charges against them because, while both detainees had been designated as "enemy combatants" in Guantánamo, nowhere was there a record of their designation as "unlawful enemy combatants", the label which (when attached to a non-US national) is a prerequisite for trial by military commission under the MCA. This discrepancy had not been raised at David Hicks' arraignment; instead he was convicted by a commission which, as suggested by the 4 June rulings, apparently did not have jurisdiction over him.

[1] *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, http://web.amnesty.org/library/index/engamr510442007.

Thus the US authorities have once again been compelled to examine ways to rectify the problems they have embedded in the military commission process. On 29 June 2007, the military judge in Omar Khadr's case refused to reconsider his earlier decision to dismiss the charges. Military Judge Peter Brownback found that the prosecution had produced nothing since his 4 June ruling to show either that the facts or the law had changed since then. He continued:

> "the use of military courts, tribunals, and commissions to try civilians – and there has certainly been no allegation that Mr Khadr is not a civilian – has faced and continues to face great disfavor in the United States. While such trials have been ratified by the federal court system on occasion, the federal courts have also been inclined to determine that military courts do not have jurisdiction or competence to try civilians... Given that the use of military courts to try civilians is not favored, Congress could not have intended the logical, if unintended, result of the government's argument and position in this case: the military can seize whomever it wants, charge them, refer them to trial by Military Commission, and only then, after the Commission has been called to order, will the initial question of jurisdiction in accordance with the MCA be resolved".[2]

It has been reported that between the military judge's 4 June and 29 June rulings, the Pentagon set up the Court of Military Commission Review, the appellate tribunal of first instance under the MCA. It is further reported that the Pentagon is now preparing to appeal the jurisdictional question to this tribunal. Even if this question is decided in the government's favour, however, Amnesty International will continue to take the position that the procedures of the military commissions as proposed under the MCA are flawed. Moreover, trying civilians in front of military tribunals of any kind runs counter to international standards.[3]

Amnesty International urges the US government to pursue instead a solution that does not involve tinkering with a flawed system. As former US Secretary of State Colin Powell said on 10 June 2007:

> "If it was up to me, I would close Guantánamo not tomorrow, but this afternoon. I'd close it… I would get rid of Guantánamo and I'd get rid of the military commission system and use established procedures in federal law or in the manual for courts-martial… [E]ssentially, we have shaken the belief that the world had in America's justice system by keeping a place like Guantánamo open and creating things like the military commission. We don't need it, and it's causing us far more damage than any good we get for it."[4]

Amnesty International agrees. Guantánamo has long since become an international icon of lawlessness. For more than five years, the organization has been calling for fair trials or release of the detainees held there, while opposing the military commission systems proposed by the government. Since mid-2005, it has been calling for closure of the Guantánamo

[2] *USA v. Omar Ahmed Khadr*. Disposition of prosecution motion for reconsideration, 29 June 2007.
[3] *USA: Justice delayed and justice denied? Trials under the Military Commissions Act, op.cit.*.
[4] NBC Meet the Press, 10 June 2007, transcript available at http://www.msnbc.msn.com/id/19092206/.

detention facility and for any detainees who are to be charged to be brought to trial in the ordinary courts in the USA.

In its report on the USA over a year ago, the UN Committee Against Torture, the expert body which monitors compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, stated that "detaining persons indefinitely without charge constitutes *per se* a violation of the Convention" and called on the USA to "cease to detain any person at Guantánamo Bay and close this detention facility".[5]

It is also now more than a year since President Bush himself said that he wanted to close Guantánamo. At that time, he stated that some of the detainees ought "to be tried in US courts… there ought to be a way forward in a court of law".[6] A few days earlier, he had said that he believed that "they ought to be tried in courts here in the United States".[7] A year later, however, the administration is showing no inclination to bring about a speedy resolution to the Guantánamo human rights scandal that complies with international law and standards.

A meeting was scheduled to take place on 22 June 2007, at which, according to the White House spokesperson, administration officials were "going to be focussing on doing what the President has asked them to do for the past few years [sic], which is work to get the facility closed."[8] In the event, this "regular" meeting was cancelled because "it wasn't necessary to have it". There was no imminent decision to be made about Guantánamo, and "no deadline".[9]

According to the spokesperson on 22 June, the administration still wants to try selected Guantánamo detainees under the Military Commissions Act. On the same day, the Pentagon announced the transfer of another detainee to Guantánamo, the 18th such transfer in the past 10 months. Clearly, the administration is not being driven by the same sense of urgency about abandoning military commissions and closing Guantánamo that has been expressed by former Secretary of State Powell and others.

Since the USA declared the "war on terror", the question of trying detainees held in US custody in Guantánamo has come a distant second to the administration's aim of keeping judicial review of these detentions as narrow as possible. It has acknowledged that only a minority of those held in Guantánamo will ever face charges. Amnesty International continues to reiterate that, if the detainees are not to be charged and given a fair trial in proceedings which comply with international human rights law and standards, they should be released. Governments with citizens detained in the base should actively seek their release if

[5] UN Doc.: CAT/C/USA/CO/2. Consideration of reports submitted by States Parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture: United States of America, 19 May 2006.
[6] President Bush participates in press availability at 20006 US-EU Summit, 21 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060621-6.html.
[7] President Bush and Prime Minister Rasmussen of Denmark participate in joint press availability, Camp David, 9 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html.
[8] Press briefing by Dana Perino, White House, 22 June 2007, http://www.whitehouse.gov/news/releases/2007/06/20070622-4.html.
[9] *Ibid.*

the USA continues in its failure to file recognizably criminal charges and bring such detainees to fair trial.

No detainee released from Guantánamo should be transferred to a country where he would face torture, other ill-treatment, or other serious human rights violations. The USA should not rely on "diplomatic assurances" to bypass its international legal obligations in this area. Such assurances are legally unenforceable and inherently unreliable, particularly where torture and other cruel, inhuman or degrading treatment are concerned. Other governments should give active consideration to accepting any detainees who cannot return to their own countries because they would be at risk of human rights violations there. The USA should ensure that detainees have an effective opportunity to seek reparation in the US courts for any abuses they have suffered in US custody, including enforced disappearance, arbitrary detention, and torture.

In looking at their options for closing the Guantánamo detention facility, US officials are reported to be exploring the possibility of legislation that would allow the long-term detention without trial of foreign terrorism suspects inside the USA.[10] Secretary of Defense Robert Gates has characterized the challenge as one of "finding a statutory basis for holding prisoners who should never be released and who may or may not be able to be put on trial."[11] A reason given by Secretary Gates for not being able to try such detainees is that the evidence against them might involve "sensitive intelligence sources or something like that". Amnesty International is concerned that this could include the interrogation methods used by the Central Intelligence Agency against detainees held in secret custody, the location of the secret facilities in which such detainees have been held, and what their conditions of confinement have been in such facilities. All such information has been classified as top secret, which, according to the US administration, would cause "exceptionally grave damage" to national security if revealed.[12] To deny someone a fair trial in order to prevent disclosure of human rights violations would further compound the lawlessness that has riddled US detention policies and practices in the "war on terror".

Ten months ago, the US government transferred to Guantánamo from secret CIA custody 14 so-called "high-value" detainees against whom it said it had evidence of involvement in serious crimes, including the crime against humanity that was committed in the USA on 11 September 2001. President Bush used their cases in urging Congress to pass the MCA and a military commission process which would allow the government to introduce evidence while keeping secret the methods used to obtain it and would allow the use of coerced evidence. With the MCA, the military commissions, and the Guantánamo detention regime continuing to draw severe criticism, the government appears to be backtracking from its stated

[10] See for example, *Legislation could be path to closing Guantánamo*. New York Times, 3 July 2007.
[11] Media roundtable with Secretary Gates and Gen. Pace in the Pentagon briefing room, 29 June 2007, transcript at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4004.
[12] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the United States District Court for the District of Columbia, 26 October 2006.

commitment to try these detainees and to be looking to ways to secure their long-term detention without trial.

Prior to their transfer to the base, these 14 individuals had been the victims of enforced disappearance – a crime under international law – held in secret detention at unknown locations for up to four and half years. Ten months after their transfer to Guantánamo, as the trials process convened under the MCA flounders like its predecessor, none of the 14 has had access to a lawyer. None has had access to the courts. None has been charged. Instead, they have been given an administrative review procedure which can rely on hearsay, coerced and secret evidence in confirming the detainee's so-called "enemy combatant" status. This is not the rule of law.

Justice cannot be achieved in a rule-of-law vacuum. To hold people in secret custody or indefinite, virtually incommunicado, detention without charge or trial, while labelling them as "terrorists", "killers" and "bad people", is to jeopardize the possibility that they can be brought to a fair trial. To undermine the prohibition against torture and other ill-treatment in the name of national security makes bringing to justice any detainee who bears the brunt of such a policy more difficult because it calls into question the admissibility of any information obtained under such conditions. And the longer this goes on, the more distant the prospect for justice becomes. In other words, a government which resorts to such tactics facilitates impunity and denies justice to the victims of crime, including terrorism.

If the USA genuinely intends to bring any of the Guantánamo detainees to trial, it must do so in a way which demonstrates a commitment to restoring the rule of law. It should promptly charge any such detainee in the federal courts with recognizable criminal offences. Trials in the form provided for under the MCA as currently enacted are unacceptable, yet currently such trials appear to be the only ones being contemplated by the US administration.

With this in mind, and given the indications that the administration continues to seek to bring Omar Ahmed Khadr and Salim Ahmed Hamdan to trial by military commission under the MCA, Amnesty International calls upon the Canadian and Yemeni governments to join Amnesty International and others in doing all they can to persuade the USA to bring its treatment of these detainees into full compliance with international law. As long as the USA continues to fail to apply international fair trial standards, these two governments should move to protect their citizens by seeking their repatriation and, if there is sufficient and admissible evidence, arranging for a trial in their home country, which must meet international fair trial standards.

In Omar Khadr's case, the USA's failure to apply international law has meant that an individual who was 15 years old when he was taken into custody in Afghanistan in mid-2002 has been held for a quarter of his life in untried military custody, with no account taken of his age and his captors ignoring the requirement under international standards to do all they could to facilitate his rehabilitation and reintegration into society. The Canadian government should do what it can to make up for the USA's failure.

On 29 June 2007, the US Supreme Court announced that it would consider the question – submitted on behalf of Guantánamo detainees – of whether the MCA has stripped the federal

courts of jurisdiction to consider *habeas corpus* appeals from such detainees, as the government asserts. The Court will hear arguments on this issue in its next term which starts on 1 October. Any decision would likely not emerge until 2008. Even a ruling in favour of the detainees' right to *habeas corpus* would not lead to an immediate change in their circumstances, as the issue would be remanded to the lower courts for further proceedings. Neither the executive nor Congress needs to wait until the Court has examined or ruled on this question. They should work to find a solution that brings all US detentions into full compliance with international law and standards.

Every day that Guantánamo is kept open is another day in which hundreds of detainees and their families are kept in the legal shadows. Distressing to the individuals concerned and destructive of the rule of law, the example it sets – of a powerful country undermining fundamental human rights principles – is dangerous to us all. It would be no less dangerous, and no less unlawful, if the USA were simply to transfer the problem it has created at Guantánamo to another location.

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Framework for an end to unlawful detentions

There are undoubtedly substantial challenges to closing the Guantánamo detention facility. Yet the facility is of the USA's own making and the international opposition it has drawn is a direct result of the US government's refusal to bring the detentions into compliance with international law and standards. The government should turn its energies to bringing about closure of the Guantánamo facility without resorting to any practice which would transfer the human rights violations to other locations, including inside the USA. There must be no secret detentions or transfers, no proxy detentions, no transfers to situations of abuse, and no detentions in any other facility under US control where it is claimed that international human rights and humanitarian law do not apply. With this mind, Amnesty International calls for the following key points to be included in any strategy pursued.[13]

General

1. Any detention facility which is used to hold persons beyond the protection of international human rights and humanitarian law should be closed. This applies to the detention facility at Guantánamo Bay, where, in more than five years of detention operations, the US administration has failed to establish procedures which comply with international law and standards. The USA's secret detention program should be immediately and permanently ended and any secret detention facilities, wherever in the world they may be situated, closed down.

[13] An earlier version of this framework was first sent to President George W. Bush in June 2006. See *USA: Memorandum to the US Government on the report of the UN Committee against Torture and the question of closing Guantánamo* (AI Index: AMR 51/093/2006), 23 June 2006, http://web.amnesty.org/library/index/engamr510932006.

2. Closing Guantánamo or other facilities must not result in the transfer of the human rights violations elsewhere. All detainees in US custody must be treated in accordance with international human rights law and standards, and, where relevant, international humanitarian law. All US detention facilities must be open to appropriate external scrutiny, including that of the International Committee of the Red Cross (ICRC).
3. The responsibility for finding a solution for the detainees held in Guantánamo and elsewhere rests first and foremost with the USA. The US government has created a system of detention in which detainees have been held without charge or trial, outside the framework of international law and without the possibility of full recourse to US courts. It must redress this situation in full compliance with international law and standards.
4. All US officials should desist from further undermining the presumption of innocence in relation to the Guantánamo detainees. Public commentary on their presumed guilt puts them at risk in at least two ways – it is dangerous to the prospect for a fair trial and dangerous to the safety of any detainee who is released. It may also put them at further risk of ill-treatment in detention.
5. All detainees must be able to challenge the lawfulness of their detention in an independent and impartial court, so that that court may order the release of anyone whose detention is not lawful. The Military Commissions Act should be repealed or substantially amended to bring it into conformity with international law, including by fully ensuring the right to *habeas corpus*.
6. President George W. Bush should fully rescind his 13 November 2001 Military Order authorizing detention without charge or trial, as well as his executive order of 14 February 2007 establishing military commissions under the Military Commissions Act.[14]
7. Those currently held in Guantánamo should be released unless they are to be promptly charged and tried in accordance with international standards of fair trial.
8. No detainees should be forcibly sent to their country of origin if they would face serious human rights abuses there, or to any other country where they may face such abuses or from where they may in turn be forcibly sent to a country where they are at such risk.

Fair trials

9. Those to be charged and tried must be promptly charged with a recognizable crime under law and tried before an independent and impartial tribunal established by law, such as a US federal court, in full accordance with international standards of fair trial. There should be no recourse to the death penalty.
10. Any information obtained under torture or other cruel, inhuman or degrading treatment or punishment should not be admissible in proceedings before any tribunal. In light of the years of legal, physical and mental abuse to which detainees in US custody have been subjected, any trials must scrupulously respect international standards, including with regard to the admissibility of coerced evidence, and any sentencing take into account the length of detention in Guantánamo or elsewhere prior to being transported there.

[14] Executive Order: Trial of Alien Unlawful Enemy Combatants by Military Commission, 14 February 2007, http://www.whitehouse.gov/news/releases/2007/02/20070214-5.html.

Solutions for those to be released

11. There must be a fair and transparent process to assess the situation of each of the detainees who is to be released, in order to establish whether they can return safely to their country of origin or whether another solution must be found. In all cases detainees must be individually assessed, be properly represented by their lawyers, be provided interpreters if required, given a full opportunity to express their views, provided with written reasons for any decision, and have access to a suspensive right of appeal. Relevant international agencies, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), should be invited to assist in this task, in line with their respective mandates. The options before the US government to deal in a manner which fully respects the rights of detainees who are not to be tried and who therefore ought to be released without further delay include the following:

    (a) **Return**. The US authorities should return released detainees to their country of origin or habitual residence unless they are at risk there of serious human rights violations, including prolonged arbitrary detention, enforced disappearances, unfair trial, torture or other ill-treatment, extrajudicial executions, or the death penalty. Among those who should be released with a view to return are all those who according to the laws of war (Geneva Conventions and their Additional Protocols) should have been recognized after their capture as prisoners of war, and then released at the end of the international armed conflict in Afghanistan, unless they are to be tried for war crimes or other serious human rights abuses. Again, all detainees who are not to be charged with recognizable crimes should be released.

    When considering returns, the US authorities must not seek or accept diplomatic assurances from the prospective receiving government about how a detainee will be treated after return to that country as a basis for sending individuals to countries where they would otherwise be considered at risk of torture or other ill-treatment. Diplomatic assurances under these circumstances breach international human rights obligations, are legally unenforceable and inherently unreliable. In addition, the USA must not impose conditions, such as continued detention, upon the transfer of detainees under which the receiving state would, by accepting such conditions, be violating their obligations under international human rights law.

    (b) **Asylum and other forms of protection in the USA**. The US authorities should provide released detainees with the opportunity to apply for asylum in the USA if they so wish, and recognize them as refugees if they meet the criteria set out in international refugee law. The US authorities must ensure that any asylum applicants have access to proper legal advice and to fair and effective procedures that are in compliance with international refugee law and standards, including having access to UNHCR. Individuals who do not qualify for refugee status, but are at risk of serious human rights abuses in the prospective country of return must receive other forms of protection and should be allowed to stay in the USA if they wish, pursuant to the USA's obligations under international human rights law, including the International Covenant on Civil and Political Rights, and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or

Punishment. Asylum applicants and those in need of other forms of protection should not be detained, unless in each individual case it is established before a court that their detention is lawful, for a purpose recognized as legitimate by international human rights law, and necessary and proportionate to the objective to be achieved, with the lawfulness of the detention periodically reviewed by the courts, in accordance with international human rights law and standards.

(c) **Transfer to third countries**. The US authorities should facilitate the search for durable solutions in third countries for those who cannot be returned to their countries of origin or habitual residence, because they would be at risk of serious human rights abuses, and who do not qualify for protection in the USA or do not wish to remain in the USA. Any such solution should address the protection needs of the individuals, fully respect all of their human rights, and take into account their views and preferences. Any transfers to third countries should be with the informed consent of the individuals concerned. UNHCR should be allowed to assist in such a process, in accordance with its mandate and policies. Released detainees should not be subjected to any pressures and restrictions that may compel them to choose to resettle in a third country. There must be no transfers to third countries from where individuals may in turn be forcibly sent to a country where they would be at risk of serious human rights violations.

Reparations

12. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, to released detainees for the period spent unlawfully detained and for other violations that they may have suffered, such as torture or other ill-treatment.[15] There must be no limitations placed on the right of victims to seek reparations in the US courts.

Transparency pending closure

13. The USA should invite the five UN experts who have sought access – the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the

[15] See UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly, Resolution 60/147, 16 December 2005. Article 14 of the UN Convention against Torture states: "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation." Those who have been subjected to arbitrary arrest also have a right to compensation. Article 9.5 of the International Covenant on Civil and Political Rights, which the USA ratified in 1992, states: "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation". See *USA: Human Dignity Denied – Torture and accountability in the 'war on terror'*. pp. 167-169, AMR 51/145/2004, October 2004, http://web.amnesty.org/library/index/engamr511452004.

highest attainable standard of physical and mental health, and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention – to visit Guantánamo without the restrictions that led them to turn down the USA's previous invitation. In particular, there should be no restrictions on the experts' ability to talk privately with detainees. It should also grant such access to Amnesty International, which has been seeking it since 2002.

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While closure of the Guantánamo facility and full restoration of the rule of law to all US detentions remains the responsibility of the US authorities, the USA will undoubtedly need the assistance of other governments in bringing this about. Amnesty International urges other governments to do all they can to assist the USA in bringing its detentions, trials and releases of detainees into full compliance with international law and standards. All governments must ensure maximum possible transparency in their actions, and must ensure that they do not become complicit in any unlawful act proposed or perpetrated by any other government.

Other countries

1. Other governments should give active consideration to accepting released detainees voluntarily seeking resettlement there, especially countries of former habitual residence or countries where released detainees have had close family or other ties.
2. All governments should reject conditions attached to detainee transfers requested by the USA which would violate the receiving country's obligations under international human rights law.
3. All countries should actively support closure of the Guantánamo detention camp and all other facilities operating outside the rule of international human rights and humanitarian law, and should call on the USA to bring an end to secret detentions and interrogations.
4. No state should transfer anyone to US custody in circumstances where they could be detained in Guantánamo or elsewhere where they may be held outside the protections of international law, or in cases where they could face trial by military commission.
5. No state should provide any information to assist the prosecution in military commission trials. This applies in all instances, and is especially compelling in cases where the death penalty is sought.

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