Public

amnesty international

UNITED STATES OF AMERICA

Guantánamo: Trusting the executive, prolonging the injustice

26 January 2005 **AI Index: AMR 51/030/2005**

The sinister shadow of terrorism is generating a confused response, unanchored in the principles that have guided us in the search for a proper balance between our desire for collective security and our need for liberty and individual freedom.
United Nations High Commissioner for Human Rights, 10 December 2004

On 28 June 2004, in *Rasul v. Bush*, the United States Supreme Court ruled that the US federal courts "have jurisdiction to consider challenges to the legality of the detentions of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay". The decision, which came some two and half years after the Guantánamo prison camp received its first detainee, was widely welcomed as the first step towards restoring the rule of law and respect for basic human rights principles to the regime of executive detentions in the US Naval Base in Cuba.

At a press conference in Geneva on 10 December 2004, international Human Rights Day, the UN High Commissioner for Human Rights expressed relief at the Supreme Court's decision, noting that the US courts had historically played a leadership role in the protection of civil liberties. She said that what had been so troubling until the *Rasul* ruling had been the prospect of executive action escaping the scrutiny of the judiciary.

On 19 January 2005, a US District Judge for the District of Columbia handed down a decision which renews that troubling prospect. District Judge Richard J. Leon had considered petitions from seven Guantánamo detainees: French national Ridouane Khalid, detained in Pakistan in October 2001, and six Algerian men – Belkacem Bensayah, Hadj Boudellaa, Saber Lahmar, Mustafa Ait Idir, Lakhdar Boumediene and Mohamed Nechle – who had been extrajudicially removed from Bosnia-Herzegovina by US agents in January 2002.[1]

The case of the Algerians is particularly symbolic of the breadth of the USA's "war on terror" detention policy, and the extent of the power which the executive has claimed for itself in this regard. It brings to mind a prescient warning made by US Supreme Court Justice William Brennan in 1990: "[A]s our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere... When we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same."[2]

The warning has been ignored and the rule of law damaged as a result. In the "war on terror", the administration has jettisoned fundamental human rights principles, while

continuing to proclaim the USA to be the bastion of human rights. In his inauguration address the day after Judge Leon's ruling, President George W. Bush said that the USA was founded upon the principle that "every man and woman on this earth has rights and dignity", and that the USA's "belief in human dignity will guide our policies". The Guantánamo detainees would appear to remain among the exceptions to this rule, along with "war on terror" detainees in US custody elsewhere.

Each of the seven Guantánamo detainees whose petitions were before Judge Leon was seeking a writ of *habeas corpus* so that he could challenge the lawfulness of his detention. The US administration – which has told the detainees held in Guantánamo that they can file *habeas corpus* petitions in the US courts and has given them the address of the DC District Court in which to do this – urged Judge Leon to dismiss the petitions on the grounds that the detainees have no rights under domestic or international law. Judge Leon agreed that there was "no viable legal theory" by which he could issue writs of *habeas corpus* to these detainees held in these circumstances.[3] Thus the legal limbo continues, with its inevitable impact on the psychological health of the detainees and their relatives.

On 18 September 2001, still reeling from the attacks of a week earlier, Congress had passed a joint resolution authorizing President Bush to "use all necessary and appropriate force" against any country, organization or individual involved in the 11 September atrocities. Although it did not specifically address the question of detentions, the only reasonable interpretation of the resolution, Judge Leon wrote, was that Congress had given the President the power to capture and detain anyone either involved in the attacks or posing a threat of further attacks.[4] However, even if Congress had meant to sanction such broad-ranging powers of detention at that time, which would make the subsequent violations of international law no less real or serious, do the country's legislators still support a detention regime that has generated deep international concern, caused serious damage to the USA's reputation, and facilitated torture or other cruel, inhuman or degrading treatment?[5] Do they believe that the goal of long-term security has been served by this policy? Should they not now at every possible opportunity be reminding the administration that respect for human rights is not an obstacle to security, but the route to it, as the country's National Security Strategy and Strategy for Combating Terrorism espouse?[6]

In Judge Leon, the administration found an ally for its position that the "war on terror" is a global armed conflict and that under the President's Commander-in-Chief powers, individuals broadly defined as "enemy combatants" could be picked up by the USA anywhere in the world and be subjected to executive detention for the duration of the "war". In offering such support, Judge Leon was accepting the possibility of lifelong detentions without charge or trial on the order of the executive. The US Supreme Court, for example, has noted that "if the Government does not consider this unconventional war won for two generations", then the detention of a person determined by the executive to be an 'enemy combatant' "could last for the rest of his life".[7] Judge Leon wrote that the President's powers as Commander-in-Chief to prosecute a war nevertheless "must be interpreted expansively", and that the courts' role in reviewing military decisions to detain foreign nationals abroad "is, and must be, highly circumscribed". As such, Judge Leon said, he would "not probe into the factual basis for the petitioners' detention."

Judge Leon agreed with the government that the detainees have no rights under constitutional law to challenge the lawfulness of their detention because they are non-resident foreign nationals captured abroad and held in a naval base whose "ultimate sovereignty" was Cuba's. He said that nothing in the *Rasul* decision altered this contention, long held by the administration. Indeed, the government had chosen Guantánamo as a location to hold the detainees precisely because it believed that, under US jurisprudence restricting the applicability of the Constitution in the case of federal government actions outside the USA

concerning foreign nationals, it could keep these detainees out of the reach of the US or any other courts.[8]

In the *Rasul* ruling, the Supreme Court majority had noted: "Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – *unquestionably describe custody in violation of the Constitution or laws or treaties of the United States*" (emphasis added). However, Judge Leon characterized the reliance of the petitions before him on this footnote as "misplaced and unpersuasive", adding that the Supreme Court had chosen to answer only the question of jurisdiction, and not the question of whether the individuals concerned possessed any substantive rights on the merits of their claims that they are being unlawfully held. Thus, Judge Leon would have the *Rasul* ruling drained of any real meaning as far as the detainees in Guantánamo are concerned.

Moreover, Judge Leon said that there were no grounds under federal or treaty law by which he should issue a writ of *habeas corpus*. He indicated that the Geneva Conventions did not apply because the detainees were detained outside the zone of the Afghanistan conflict. He added that the detainees also had no enforceable rights either under the International Covenant on Civil and Political Rights or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He noted that neither treaty was self-executing, that is, that they do not give rise to privately enforceable action in the absence of implementing legislation.

The Guantánamo detainees and their long-suffering families deserve more. Justice and the rule of law demand more. Amnesty International agrees with the president of the National Institute of Military Justice who, commenting in his personal capacity, said that Judge Leon had effectively interpreted the *Rasul* decision as a case of "you can come in the courthouse door, but you don't have any rights once you're inside." Eugene Fidell continued, "It's clear these detainees enjoy some substantive rights, besides entering the courthouse and being allowed to drop some papers on the clerk's desk."

In Amnesty International's view, international human rights law applies to all the Guantánamo detainees, and as such each and every one of them has the right to full judicial review of his detention and to release if that detention is unlawful.[9] This is a basic protection against arbitrary arrest, torture and "disappearance". History shows that secrecy in relation to detentions breeds abuse. This is no different in the "war on terror".

More than six months after the *Rasul* ruling, hundreds of people remain in virtual incommunicado detention in Guantánamo. The authorities have never publicly disclosed who they have detained there. Today, the Pentagon continues its approach of providing only approximate numbers of detainees held in the Naval Base. This lack of precision raises the possibility that individual detainees could be moved to and from the base, or between different US agencies, without any public knowledge of such transfers, as they would not be reflected in the approximate numbers of detainees announced by the Pentagon.

On 24 November 2003, for example, the Department of Defense announced that 20 unidentified detainees had been released from Guantánamo three days earlier and "approximately 20" more, also unidentified, had been transferred to the base two days after that, leaving "approximately 660" detainees in custody in Guantánamo. On 15 March 2004, the Pentagon announced that there were "approximately 610" detainees in the base, that is, 50 fewer than four months earlier. Between the two announcements, however, the Pentagon had disclosed the release or transfer to other countries of only 43 Guantánamo detainees. In other

words, "approximately" seven detainees were unaccounted for in the official announcements of releases and transfers from the base.[10]

Given evidence that agents of the Central Intelligence Agency have conducted interrogations at their own secret detention facility in Guantánamo Bay, and that the CIA was exempted from the presidential directive requiring detainees to be treated "humanely", the issue of detainees being transferred between the military and the CIA is of serious concern.[11] Added to this are the allegations about "ghost detainees" in US custody in Iraq, and about US involvement in secret detentions, "disappearances", and secret detainee transfers elsewhere in the "war on terror". It is a situation – regardless of which parts are the result of authorization and which of improvisation – that is crying out for external scrutiny, not deference to the executive.

Indeed, such deference has become less and less deserved as more and more has been learned during the "war on terror". For example, we have learned:

- that President Bush considers that there are detainees who are "not legally entitled" to humane treatment, according to a central directive on "war on terror" detentions;[12]
- that the President was advised by White House Counsel Alberto Gonzales not to apply the Geneva Conventions to those picked up in the armed conflict in Afghanistan and transferred to Guantánamo in order to free up US interrogators and make their prosecutions for war crimes less likely;
- that Alberto Gonzales, as President Bush's nominee for Attorney General, was unable to give an immediate and unequivocal "no" to questions from Senators such as "can US personnel legally engage in torture under any circumstances?";
- that a US Justice Department memorandum of August 2002 which represented the administration's position for some two years promoted an extremely narrow definition of torture, legal defenses for US agents accused of torture, the notion that the President is not bound by US or international legal probitions on torture, and the theory that agents could get away with using a wide array of interrogation or detention techniques amount to cruel, inhuman or degrading treatment;
- that despite recently being withdrawn after it became public, the spirit of the August 2002 memorandum lives on in a Pentagon Working Group report of April 2003;
- that Secretary of Defense Donald Rumsfeld authorized interrogation techniques for use in Guantánamo that violated international law and standards.

Despite such evidence of an official tolerance for torture and other cruel, inhuman or degrading treatment and a penchant for secrecy, Judge Leon remained firm in his opinion that the judiciary's role in reviewing the cases of these "war on terror" detainees should at most be "limited". He wrote that "it would be impermissible under our constitutional system of separation of powers for the judiciary to engage in substantive evaluation of the conditions of their detention". He said that even if the treatment of the detainees violated US law, "it does not render the custody itself unlawful".

On the question of the treatment of the detainees, Judge Leon said that "torture is already illegal under existing law", and apparently unmoved by the mounting evidence from detainee and non-detainee sources that torture and other cruel, inhuman or degrading treatment have been a part of the USA's "war on terror" detentions. Despite the limited scope of investigations into such abuses with senior officials shielded from independent inquiry, Judge Leon seemed satisified that "safeguards and mechanisms are in place to prevent such conduct and, if it occurred, to ensure it is punished." He cited the trial, conviction and imprisonment of Army Reserve Specialist Charles Graner for his role in the torture and ill-

treatment of detainees in Abu Ghraib prison in Iraq as illustration of this system in operation (while acknowledging that this was to date the only full court-martial to have taken place as a result of the Abu Ghraib scandal). The administration would no doubt welcome such a reference, given its propagation of the myth that Specialist Graner and a few other soldiers displaying "un-American" values represented the extent of the problem.

Judge Leon appears to maintain a similar blind faith in the military's Combatant Status Review Tribunals (CSRTs). Set up by the government following the *Rasul* ruling, these administrative review panels of three military officers place the burden on the detainee to prove that he not an "enemy combatant", a process for which he has no access to legal counsel or to secret evidence against him. The CSRTs may rely upon coerced evidence.[13] According to Judge Leon, it is up to the executive or US Congress to "modify" or "extend" the rights or the conditions of the detainees as they deem fit. This opinion contains a troubling echo of President Bush's suggestion that there are detainees who "are not legally entitled" to humane treatment. Each man's position indicates a view of human rights as privileges that can be granted, and therefore taken, away by the state.

As the UN Commissioner for Human Rights suggested on Human Rights Day 2004, an independent judiciary plays a crucial role in scrutinizing executive action. This is particularly so at a time when the executive has adopted a broad war mentality and extended the war framework to cover areas that should appropriately be addressed by law enforcement measures, and even then claims that existing laws of war do not cover the current situation. The pressures upon judges to conform to a government's "wartime" views are substantial. Such pressures should be resisted. The UN Basic Principles on the Independence of the Judiciary, for example, hold that "the independence of the judiciary shall be guaranteed by the State" and that "any method of judicial selection shall safeguard against judicial appointments for improper motives".[14]

The outgoing Attorney General John Ashcroft, presumably referring to the *Rasul* ruling among others, condemned what he characterized as a "profoundly disturbing trend" of "intrusive judicial oversight and second-guessing of presidential determinations".[15] Two former US officials have described the *Rasul* decision as "a disaster for the war effort", and advised that future presidential nominations for, and Senate confirmations of, federal judges should take account of this issue: "Too much is riding on the outcome of this war – ultimately, perhaps, the survival of Western societies – to choose judges who are unaware of the complexities of what is at stake".[16] The writers of this dire warning would presumably welcome the recent ruling by Judge Leon, who was appointed by President Bush in February 2002.

In 1928, a US Supreme Court Justice gave a warning that stands today: "If the government becomes a lawbreaker it breeds contempt for the law".[17] Three quarters of a century later, a judge on the United Kingdom's highest court wrote: "Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law".[18]

Judge Leon's decision would have us believe that the US Supreme Court handed down a meaningless ruling when it decided the *Rasul* case. Amnesty International considers that, in reaching his conclusion, Judge Leon placed too much trust in the executive and not enough in the rule of law and fundamental human rights principles. The organization trusts that his colleague on the DC District Court, Senior Judge Joyce Hens Green, who is considering petitions for writs of *habeas corpus* from 54 other Guantánamo detainees, will make a decision based on the principles of international law.

INTERNATIONAL SECRETARIAT, 1 EASTON STREET, LONDON WC1X 0DW, UNITED KINGDOM

[1] See, for example, *Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay*, AI Index: EUR 63/013/2003, 30 May 2003, http://web.amnesty.org/library/Index/ENGEUR630132003.
[2] *US v. Verdugo-Urdquidez*, 494 US 259 (1990),
[3] *Khalid v. Bush*. Memorandum opinion and order. US District Court for the District of Columbia, 19 January 2005.
[4] A central holding of Judge Leon's opinion is that the Guantánamo detainees are held under the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001 (and that that Order is lawful). However, according to what the government has made public, to date only 15 detainees have been made subject to this Military Order, which makes a detainee eligible for trial by military commission. The rest are held, according to the government, generally under the laws of armed conflict and the President's Commander-in-Chief war powers. See, for example, *Rasul v. Bush*, US District Court, District of Columbia. Respondents' motion to dismiss petitioners' first amended petition for writ of *habeas corpus*. 18 March 2002 (the petitioners are not held under the Military Order, but "under the President's authority as Commander in Chief and under the laws and usages of war".)
[5] See *USA: Human dignity denied – Torture and accountability in the "war on terror"*, AI Index: AMR 51/145/2004, October 2004, http://web.amnesty.org/library/Index/ENGAMR511452004.
[6] See: *USA: Undermining security: violations of human dignity, the rule of law and the National Security Strategy in "war on terror" detentions*, AI Index: AMR 51/061/2004, April 2004, http://web.amnesty.org/library/Index/ENGAMR510612004.
[7] *Hamdi v. Rumsfeld*, 000 US 03-6696, 28 June 2004.
[8] See, for example, *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, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, 28 December 2001.
[9] See *USA: Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention*, AI Index: AMR 51/093/2004, June 2004 http://web.amnesty.org/library/Index/ENGAMR510932004
[10] Similarly, on 16 January 2005, the Pentagon announced that a Kuwaiti detainee was being transferred to Kuwait. It said that this meant that 203 detainees had now "departed" Guantánamo, leaving "approximately 550" detainees in the base. Yet in its previous announcement, it had stated that there were "approximately 549" being held there. This suggests that "approximately two" detainees had been transferred to Guantánamo in the interim. On 25 January 2005, the Pentagon announced the transfer of four detainees to the UK, saying that this left "approximately 545" detainees at the base.
[11] See, for example, *At Guantánamo, a prison within a prison*, Washington Post, 17 December 2004. Also, *Human rights not hollow words: An appeal to President Bush on the occasion of his re-inauguration*. AI Index: AMR 51/012/2005, 19 January 2005, http://web.amnesty.org/library/Index/ENGAMR510122005
[12] Memorandum re: *Humane treatment of al Qaeda and Taliban detainees*. The White House. 7 February 2002.
[13] The last CSRT for the current detainees was held on 22 January 2005. The Pentagon reported that 558 tribunals had been held by that date, and had resulted in 362 detainees being confirmed as "enemy combatants", with only three not so labelled, and the remainder of the decisions still pending.
[14] Principles 1 and 10 of the Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[15] John Ashcroft was addressing the Federalist Society on 12 November 2004. See, for example, *Ashcroft criticizes judicial oversight*, Associated Press, 13 November 2004.
[16] *A war the courts shouldn't manage*. By Robert H. Bork and David B. Rivkin Jr. Washington Post, 21 January 2005. Robert Bork was solicitor general of the United States from 1973 to 1977 and later a judge on the US Court of Appeals for the District of Columbia. David Rivkin served in the Justice Department during the Reagan and George H.W. Bush administrations.
[17] *Olmstead v. US*, 277 US 438 (1928), Justice Brandeis dissenting.
[18] Lord Nicholls of Birkenhead, in *A and others v. Secretary of State for the Home Department*, (2004) UKHL 56, *on appeal from: [2002] EWCA Civ 1502.*