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USA: Habeas corpus – protecting human rights, promoting accountable government

The US Supreme Court's upcoming review relating to the Guantánamo detention regime goes beyond crucial questions of the rights of the detainees to the very concepts of accountable government, Amnesty International concludes in a new report – *USA: No substitute for habeas corpus: six years without judicial review in Guantánamo*. This is a companion report to the *amicus curiae* ('friend of the court') brief Amnesty International has filed in the Supreme Court with three other international organizations. Amnesty International's co-signatories are the International Federation for Human Rights, the Human Rights Institute of the International Bar Association, and the International Law Association. The brief is available at: http://www.mayerbrown.com/public_docs/probono_Amnesty_International.pdf.

On 5 December 2007, the Supreme Court will hear oral arguments in *Boumediene v. Bush* on whether the Military Commissions Act, signed into law a year ago, has unlawfully stripped the US courts of jurisdiction to consider *habeas corpus* petitions from alien "enemy combatants" held in US custody. *Habeas corpus* is a fundamental procedure under which detainees can challenge the lawfulness and conditions of their detention in an independent and impartial court of law. It also promotes state accountability by providing an independent judicial check on executive or legislative abuse.

Embedded in the legal controversy pending before the Supreme Court is the Combatant Status Review Tribunal (CSRT), an executive body created by the administration two and a half years after the detentions began at Guantánamo to determine whether the detainees were "properly detained" as "enemy combatants". Under the CSRT scheme, panels of three military officers can consider any information – including information obtained under torture and other ill-treatment – in making their determinations. The detainee, virtually cut off from the outside world, has no access to a lawyer or to classified information used against him. Judicial review is limited to a single federal Court of Appeals and to an assessment of the CSRTs "propriety of detention" decisions. The government contends that this scheme is an adequate substitute for *habeas corpus*.

Amnesty International considers that an absence of due process has left all of the Guantánamo detainees arbitrarily detained, in violation of international human rights law, which applies at all times, including in times of emergency or war, however defined. The organization's new report details the right of the detainees to challenge the lawfulness of their detention in an independent and impartial court and their right to a remedy – whether that remedy be release or the initiation of trial proceedings. Belated, unfair and truncated administrative review followed by narrow judicial review falls far short of the USA's international obligations. Moreover, nearly six years after the first detainees arrived in the Guantánamo base, no such reviews by the Court of Appeals have as yet been conducted.

Amnesty International's report details the flaws in the CSRT system, including its lack of independence, its lack of competence to order a remedy, the denial of legal counsel to the detainee who has no meaningful way to confront the government's case against him, the use of information obtained under unlawful methods including torture and other ill-treatment, and the non-transparency of the CSRT system which can obscure the reasons for these unlawful detentions. In addition, this scheme – reserved for foreign nationals – is discriminatory, in violation of international law.

The CSRT scheme has become part of the administration's continued pursuit of unchecked power in the "war on terror". This pursuit has resulted in the violation of the rights of a whole category of detainees, namely those labelled as "enemy combatants", a status unknown in international law, at least with the consequences unilaterally ascribed to it by the USA.

There is evidence that the CSRT has been manipulated to serve the executive's objective of avoiding judicial scrutiny. This falls into a wider pattern of the administration's exploitation or manipulation of individual detainee cases in the "war on terror", particularly evident around times of judicial intervention.

The urgent need for independent judicial oversight is clear. With the protective procedure of *habeas corpus* denied to detainees, the human rights results have been predictable. With the US courts effectively removed from their role as an independent check on executive action, the past six years have seen a litany of abuse – from secret detainee transfers, arbitrary detentions, cruel treatment and unfair trial procedures, through to the international crimes of torture and enforced disappearance. Guantánamo has been a core part of this unlawful detention regime.

The administration chose Guantánamo Bay as a location to hold detainees in the “war on terror” because it believed that under US jurisprudence the courts should not be able to consider *habeas corpus* petitions filed on behalf of foreign nationals held on territory that was ultimately part of Cuba. Six years later, the ‘rights-free’ zone that the USA has attempted to create in Guantánamo cries out for full and effective judicial scrutiny.

This will be the third time that the Supreme Court has considered aspects of the Guantánamo regime, and follows *Rasul v. Bush* in 2004 and *Hamdan v. Rumsfeld* in 2006. Although these rulings went against the government in a number of ways, it has interpreted the decisions in ways that further its objective of avoiding or delaying judicial scrutiny and violate the internationally recognized rights of the detainees. The Court is expected to rule on the *Boumediene* case in 2008, by which time the Guantánamo detentions would be well into their seventh year.

For further information see, *USA: No substitute for habeas corpus: six years without judicial review in Guantánamo*, AI Index: AMR 51/163/2007, November 2007 <http://web.amnesty.org/library/Index/ENGAMR511632007>.