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UNITED STATES OF AMERICA
Justice at last or more of the same?
Detentions and trials after *Hamdan v. Rumsfeld*

Summary

The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that the measure of legal rights and human rights are given to detainees.

Chairman of the US Senate Armed Services Committee, 13 July 2006[1]

On 29 June 2006, the United States Supreme Court delivered its judgment in the case of *Hamdan v. Rumsfeld*. The case concerned Salim Ahmed Hamdan, a Yemeni national captured in 2001 during the international armed conflict in Afghanistan, and detained without trial since June 2002 in the US military base at Guantánamo Bay, Cuba. He was charged in July 2004 for trial by military commission under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism signed by President George W. Bush on 13 November 2001. By five votes to three, the Supreme Court concluded that the military commissions as constituted under the Military Order were unlawful, as they had not been expressly authorized by Congress, and violated international law and US military law.

By finding Article 3 common to the four Geneva Conventions of 1949 to be applicable in this case, the Supreme Court punctured a central tenet of the administration's policy implemented after its invasion of Afghanistan when President Bush determined that common Article 3 would not apply to *al-Qa'ida* or Taleban detainees. Common Article 3 – which reflects customary international law applicable to international and non-international conflicts – guarantees minimum standards of humane treatment and fair trial. Four of the Justices also pointed to the fair trial rights set out in the International Covenant on Civil and Political Rights (ICCPR) and international humanitarian law. The USA ratified the ICCPR in 1992 and considers it to be "the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights".[2] However, it has refused to apply the ICCPR outside US sovereign territory.

Amnesty International welcomed the *Hamdan* decision as the organization had campaigned for an end to the military commissions and for revocation of the Military Order

[1] Senator John Warner, opening hearing of the Senate Committee on Armed Services on *Military Commissions in light of the Supreme Court decision in Hamdan v. Rumsfeld*, 13 July 2006.
[2] Matthew Waxman, Head of the US Delegation and Principal Deputy Director, Policy Planning Staff, US Department of State. Opening statement to the UN Human Rights Committee, Geneva, Switzerland, 17 July 2006, available at http://www.state.gov/s/p/rem/69126.htm. Mr Waxman added that the USA "played a significant role in drafting those foundational instruments".

since November 2001.[3] Recalling that the US administration had sought to drain the Supreme Court's earlier *Rasul v. Bush* judgment of any real meaning for the Guantánamo detainees, the organization called on the government to adopt a good faith interpretation of the *Hamdan* ruling in the interest of justice and respect for human rights and the rule of law. The organization urged the President not to seek to resurrect the military commissions in other forms or by other means. Instead, the ruling should be used as a springboard for real change in the USA's "war on terror" detention policies and practices which to date had systematically violated international law and standards. [4]

The administration's response to the *Hamdan* ruling indicates an unwillingness to abandon military commissions or the other core aspect of the Military Order – indefinite detention without charge or trial. Indeed, President Bush's announcement on 6 September 2006 confirming what had long been reported – that in the "war on terror" the Central Intelligence Agency (CIA) has been operating a policy of secret detentions and "alternative" interrogation techniques – suggests an administration in unapologetic mood. [5] President Bush has said that "unfortunately, the recent Supreme Court decision put the future of this program in question, and we need this legislation to save it".[6]

> *"We, the States Members of the United Nations, resolve…to recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law".*
> From Global Counter-Terrorism Strategy, adopted by the United Nations General Assembly on 8 September 2006

The legislation referred to by President Bush is the "Military Commissions Act of 2006" he sent to Congress on 6 September. President Bush stated that if Congress were to authorize the Act, the 14 alleged leading *al-Qa'ida* members he announced had been newly transferred from secret CIA custody to Guantánamo could be put on trial in connection with the attacks of 11 September 2001. The administration appears prepared to use these high-profile detainees to apply pressure on Congress – in the lead-up to congressional elections and at the time of the fifth anniversary of the 11 September attacks – to adopt legislation authorizing a revised version of the military commissions struck down by the *Hamdan* ruling, and to endorse other aspects of the administration's detention policy.

The main part of the proposed bill describes the need for and provides for the structure of military commissions to try "alien unlawful enemy combatants". The legislation

[3] *USA: Presidential order on military tribunals threatens fundamental principles of justice*, AI Index: AMR 51/165/2001, 15 November 2001, http://web.amnesty.org/library/Index/ENGAMR511652001.
[4] *USA: President Bush must use Supreme Court ruling as springboard for change*, AI Index: AMR 51/102/2006, 29 June 2006, http://web.amnesty.org/library/Index/ENGAMR511022006.
[5] President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
[6] President's Radio Address, 16 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060916.html.

would endorse and codify in legislation the executive's unilateral authority to establish military commissions. The commissions as proposed would allow for the admission of coerced and hearsay evidence and for the defendant to be excluded from any part of the proceedings in which classified information is admitted. Only foreign nationals would be tried by these military commissions.

Echoing the disturbing conflation in the USA's National Defense Strategy – that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism"[7] – the administration bill asserts that the use of courts-martial to try "unlawful enemy combatants" would be "impracticable", including because "the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment…to the abuse of American legal processes". The proposed legislation would provide that, apart from the narrow judicial review afforded under the 2005 Detainee Treatment Act (DTA), "no court, justice or judge shall have jurisdiction to hear or consider any claim or cause of action, including an application for a writ of *habeas corpus*, pending on or filed after the date of enactment of this Act, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement". Explaining its effort to make the DTA retroactive to curtail access to the courts of all detainees in Guantánamo, the administration has stated that "our courts should not be misused to hear all manner of other challenges by terrorists lawfully held as enemy combatants in wartime".[8]

The duty of the USA to bring to justice anyone responsible for crimes, including the crime against humanity that was committed on 11 September 2001, is undisputed. No less, however, is its duty to ensure respect for human rights and the rule of law in the course of such efforts. In 2003, for example, the United Nations (UN) Security Council adopted resolution 1456, which stated:

> "*States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law*".[9]

The USA has failed to meet this obligation. Yet the UN Security Council resolution is a key component of the "compelling body of international obligations relating to counterterrorism" referred to by the USA's own National Strategy for Combating Terrorism, which highlights the need for "international standards of accountability".[10] Amnesty

[7] National Defense Strategy, March 2005, http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf.
[8] Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html.
[9] Available at: http://daccessdds.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf.
[10] National Strategy for Combating Terrorism, September 2006, available at http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf.

International urges the USA to recall the resolution it cosponsored and voted for in 2005 in the UN Commission on Human Rights, emphasising that "States are guarantors of democracy, human rights and the rule of law and bear responsibility for their full implementation".[11]

This report is the latest in a number of Amnesty International materials aimed at documenting human rights violations committed by the USA in the "war on terror" and calling on the US authorities to change direction with a view to coming into compliance with international law and standards. By way of background, Section 1 of the report recalls the administration's approach to detentions in the "war on terror", placing its current stance in the context of earlier policies and practices and its elastic interpretation of the law to fit those policies and practices.

By blocking the commission proceedings, the *Hamdan* ruling had most immediate direct impact on the trials that were pending, ensuring that pre-trial commission hearings under the 2001 Military Order did not resume. Following the decision, the discussion in the USA, including in Congress, began from the assumption that there should be some form of military rather than civilian trials for the Guantánamo detainees. The discussion has ranged from those who argue that Congress should authorize military commissions as constituted under the 2001 Military Order with few if any changes, to those who hold that military trials more or less approximating courts-martial under the Uniform Code of Military Justice (UCMJ) would be the most appropriate option.

As explained in Section 3, Amnesty International believes that proceedings in respect of Guantánamo detainees should be conducted in civilian rather than military courts. Even if the USA pursues trials in military courts, however, there are numerous detainees over whom the organization believes there is no justifiable case for military jurisdiction. These are the individuals who were picked up outside any zones of armed conflict and transferred without due process of law to US custody in Guantánamo or elsewhere. None of the 14 individuals transferred in September 2006 to Guantánamo from secret CIA custody are believed to have been detained originally in Afghanistan, but were captured in countries including Thailand and United Arab Emirates. Five of the 10 people charged for trial by military commission under the Military Order were originally detained in Pakistan, including one man detained at Karachi airport and transferred to Morocco before being taken to Guantánamo. In addition, one of the five individuals captured during the non-international armed conflict in Afghanistan, Omar Khadr, was 15 years old at the time of his detention more than four years ago. Amnesty International believes that no person who was a juvenile at the time of capture should be subject to trial in military court. Appendix 1 of the report details the cases of the 10 detainees who have been charged. Appendix 2 lists the 14 detainees transferred to Guantánamo from secret CIA custody. Appendix 3 lists some examples of other detainees currently held in Guantánamo who were detained outside of zones of armed conflict, and Appendix 4 expands on one of these cases – that of Mohamedou Ould Slahi – by way of further illustration. Mohamedou Slahi was detained in Mauritania, transferred for eight

[11] *Democracy and the rule of law*. Human Rights Resolution 2005/32.

months to Jordan before being taken to Guantánamo via Afghanistan. International humanitarian law does not apply to him or others like him.

At a minimum, the USA should differentiate between the detainees it has in its custody, as distinct legal regimes apply depending on whether they were picked up in zones of international armed conflict, non-international armed conflict, or no armed conflict, and whether they were adults or children at the time of their detention. Amnesty International is deeply concerned at the apparent widespread official acceptance of the global war paradigm in the USA, such that only one category of detainee is contemplated – the "enemy combatant", to whom the laws of war, as defined by the USA, should apply, and who, if a foreign national, should be tried, if tried at all, by a one-size-fits-all trial military tribunal.

Any proceedings conducted in respect of these detainees must comply with international fair trial standards. Section 4 of this report sets out these standards, and Section 5 calls on the USA to abandon the death penalty in these or any other trials. However, the issue of trials cannot be taken in isolation. Only 10 detainees held in Guantánamo had been charged for trial by military commission by the time of the *Hamdan* ruling, and the vast majority of those held by the USA in the "war on terror" are unlikely ever to face US judicial proceedings. Under its global war paradigm, the administration views the question of trials of those it designates as "enemy combatants" as an entirely separate issue, one that does not in any way impact on the detention regime itself. According to the administration, detainees are first and foremost held for intelligence-gathering purposes or to prevent them returning to the global "battlefield" in what is now dubbed by the Pentagon as "the Long War", and in more critical quarters as the "forever war".[12] Administrative detention in such circumstances could last a lifetime.

For more than a year, Amnesty International has been calling for the Guantánamo detention camp to be closed (see Appendix 5). From the beginning of detention operations in Guantánamo in January 2002, the US administration removed the detainees from the protections of the US Constitution, disregarded provisions of applicable international humanitarian law, and declined entirely to apply international human rights law. Amnesty International believes that this failure has left all those held in Guantánamo arbitrarily detained in violation of international human rights law. They should be charged without further delay with recognizably criminal offences and tried within a reasonable time in full accordance with international standards for fair trial, or else released. Section 6 underscores that the practice of indefinite detention without charge or trial is plainly unlawful, and describes how, more than two years after the Supreme Court ruled in *Rasul v. Bush* that the federal courts have jurisdiction to hear *habeas corpus* appeals from the Guantánamo detainees, none currently detained there has had the lawfulness of his detention judicially reviewed. This situation must be brought to an end.

[12] See for example, *Military culture must change to fight the 'Long War'*. American Forces Information Service, 23 January 2006, http://www.defenselink.mil/news/Jan2006/20060123_3984.html. In contrast, see *Taking stock of the forever war*, by Mark Danner, New York Times, 11 September 2005.

The *Hamdan* ruling has placed the USA at a crossroads in its "war on terror" detention policies and practices. To date, this "war" has been one in which the administration has sought unfettered executive power and has disregarded provisions of international law. Human rights violations have been the inevitable outcome. The *Hamdan* ruling was an important judicial intervention, to which the executive and Congress are set to respond.

Amnesty International urges legislative and executive officials formulating new legislation to repair the government's previous disregard for international law and its war paradigm which has gone far beyond being merely a rhetorical or metaphorical device, with a distressing impact on thousands of detainees and their families. With this in mind, Section 2 of this report challenges the USA's conceptualization of the "war on terror" as a global armed conflict governed by the laws of war and to which human rights law does not apply. The administration is seeking to have the "war on terror" made retroactive to extend before 11 September 2001 in order to be able to charge detainees with "war crimes" committed before that date and try them in front of military commissions. It is notable that, while it continues to pursue war crimes charges against foreign nationals – regardless of where in the world outside the USA they were taken into custody – not a single US soldier, civilian, or contractor has been charged with war crimes despite compelling evidence that such crimes have occurred.

The *Hamdan* ruling also has implications for addressing this impunity issue. As detailed in Section 7, the Supreme Court's conclusion on the applicability of common Article 3 has reawakened the administration's concern over what it has characterized as the article's "vague" terms, especially its prohibition on "outrages upon personal dignity, in particular humiliating and degrading treatment". This same concern was expressed by the then White House Counsel in 2002 when advising the President to reject Geneva Convention protections in order, *inter alia*, to protect US agents from prosecution under the USA's War Crimes Act, which makes violations of common Article 3 prosecutable as war crimes in US law. Four years later, in its proposed Military Commissions Act, the administration is seeking to have Congress amend the War Crimes Act to exclude retroactively "outrages upon personal dignity, in particular humiliating and degrading treatment" as war crimes prosecutable under the Act. Such an amendment could also be interpreted by the administration as providing a congressional "green light" for CIA interrogators to use their "alternative" techniques against detainees held in secret custody, as referred to by President Bush in his speech on 6 September 2006.

Any such impunity amendments should be resisted. There is already a disturbing pattern of impunity in relation to the USA. This includes a level of leniency for abuses in the "war on terror", a failure to investigate possible responsibility for such abuses in the higher echelons of government, and the USA's decision early in the "war on terror" to repudiate its signature to the Rome Statute of the International Criminal Court and its subsequent campaign to pressure governments to enter impunity agreements with it. What amounts to an impunity clause in the DTA, that Act's severe curtailment of the non-derogable right of Guantánamo detainees to seek judicial review of their detention, treatment and conditions, and the executive's resort to secrecy further facilitate a lack of accountability. Congress should repeal or amend these parts of the DTA and not adopt any further legislation on trials

or detentions which lead to impunity or otherwise conflict with the state's international obligations.

Section 8 calls on the USA to implement protections against torture and ill-treatment that meet international law and standards, and in Section 9 Amnesty International urges Congress to consider amending or repealing the Authorization for the Use of Military Force (AUMF) that it passed on 14 September 2001. The proposed Military Commissions Act seeks to bolster the AUMF as a source of executive power in the "war on terror". Amnesty International considers that the resolution lacked clarity and in the five years since it was passed it has been interpreted expansively by the executive to justify violations of international law. While the administration made it clear at the time that it did not believe it needed the AUMF, such a step taken by Congress to modify or terminate it would still send a powerful message that a fresh start is in order.

By halting the military commissions, the Supreme Court has provided the USA with the opportunity for a substantial change of approach to "war on terror" detentions, to bring its policies and practices into full compliance with its international obligations, and to ensure full accountability for human rights violations committed by US personnel. Amnesty International urges it not to miss this opportunity.

1. Elastic, policy-driven interpretation of the law

It is of the nature of war to increase the executive at the expense of the legislative authority.

Alexander Hamilton, 1788.[13]

Leading up to the Supreme Court's *Hamdan* decision, President Bush had indicated that he was waiting for the Court to rule, but was in favour of closing the Guantánamo Bay detention camp and bringing some of the detainees to trial in existing courts in the USA.[14] Although the question as to the legality of detentions at Guantánamo Bay was not in fact before the Supreme Court, President Bush said that the *Hamdan* decision was one in which the Justices "accepted the use of Guantánamo, the decision I made".[15] Two months later he would reveal that 14 "high-value" detainees had just been transferred from secret CIA custody to military detention and possible trial in Guantánamo, and he was now speaking in terms of moving

[13] The Federalist Papers, No. 8.

[14] For example, statements by President Bush included, on 9 June 2006: "we would like to end the Guantánamo… I believe [the detainees] ought to be tried in courts here in the United States." http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html; 14 June 2006: "I'd like to close Guantanamo… And the best way to handle – in my judgment, handle these types of people is through our military courts." http://www.whitehouse.gov/news/releases/2006/06/20060614.html; 21 June 2006: "I'd like to end Guantánamo… There are some who need to be tried in US courts… there ought to be a way forward in a court of law". http://www.whitehouse.gov/news/releases/2006/06/20060621-6.html.

[15] "[T]he idea of making the decision about creating Guantánamo in the first place was upheld by the courts [sic]. Or let's say, the courts were silent on it." Press conference by the President, 7 July 2006, http://www.whitehouse.gov/news/releases/2006/07/20060707-1.html.

"toward the day when we can eventually close the detention facility at Guantánamo Bay".[16] Any prospect of imminent closure appears to have dissipated. Indeed, the administration seems ready to invoke the *Hamdan* ruling as supporting its broad global war paradigm and notions of sweeping executive power, in particular in relation to the President's "war powers" under the US Constitution. For example, a Justice Department official stressed the following to the Senate Judiciary Committee on 11 July 2006:

> "*It is important to point out that the Court did not call into question the authority of the United States to detain enemy combatants in the War on Terror, and that the Court's decision does not require us to close the detention facilities at Guantánamo Bay or release any terrorist held by the United States. Moreover, the Court implicitly recognized several fundamental Government positions: The Court confirmed our view that the atrocities committed by al Qaeda on September 11 have triggered our right to use military force in self-defense and that we are involved in an armed conflict with al Qaeda to which the laws of war apply. And the Supreme Court made clear that its decision rested only on an interpretation of current statutory and treaty-based law. The Court did not address the President's constitutional authority and did not reach any constitutional question. Indeed, the Court did not accept the petitioner's arguments that the Constitution precludes the use of military commissions. Therefore, the Hamdan decision now gives Congress and the Administration a clear opportunity to work together to address the matters raised by the case, including the appropriate procedures governing military commissions.*"[17]

Undoubtedly, some members of Congress would prefer to give the executive the authorization it seeks. For example, at a hearing in the Senate Armed Services Committee on 2 August 2006, Senator James Inhofe said to the Attorney General that he "would prefer to have something in front of me that conforms to the successes we've had in the [military] commissions and tweaked to take care of the problem with the United States Supreme Court… [A]s one member of this Committee who doesn't believe we should be doing this and yet I realize we have to come up with something – that you keep in mind that my wishes would be we want to make sure that the President is able to effectively and successfully execute this next generation international war… I want terrorists destroyed and locked up for good… I kind of agree to something that Senator [Hillary] Clinton said during the last hearing. She said, you know, hey, we can just hold them, we don't have to try them". Senator Clinton herself then reiterated that "we're not talking about a choice between trying somebody or letting somebody go".

Thus it is clear that while the question of trials is a fundamental one, so too is the widespread use by the USA of indefinite detention without charge. Given that such detention violates international law, as the UN Committee against Torture reminded the USA in May 2006, how does this square with the USA's oft-quoted perception of itself as being a "nation

[16] President Bush discusses creation of military commissions to try suspected terrorists. *Op.cit.*
[17] Testimony of Steve Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, 11 July 2006, http://judiciary.senate.gov/testimony.cfm?id=1986&wit_id=5505.

of laws"?[18] The answer lies in the fact that the law is open to elastic interpretation, manipulation or selective application. Under such elasticity of interpretation, for example, a CIA program of secret detention – a policy in clear violation of international law – becomes "legal".[19]

The state's interpretation of the law appears to be driven overwhelmingly by its policy choices rather than a credible postulation of its legal obligations. For the US administration, one major policy choice was to frame its response to the crime against humanity committed on 11 September 2001 in terms of a global "war" – a "new kind of war" – rather than as a criminal law enforcement effort. The law would have to be made to fit this "new paradigm", as President Bush characterized the situation in a central memorandum impacting detention policy. The latter document also illustrated that for some detainees at least, the US administration viewed humane treatment as a policy choice rather than a legal obligation.[20] In June 2004, with the administration seeking to quell the criticism of its policies following the Abu Ghraib torture revelations, the then White House Counsel recalled the administration's post-9/11 discussions thus:

> *"[S]ome questions we faced were, for example: What is the legal status of individuals caught in this battle? How will they be treated? To what extent can those detained be questioned to attain information concerning possible future terrorist attacks? What are the rules? What will our policies be?...Just as military theorists thought about new strategies and tactics to fight terrorists, so, too, did lawyers in looking at how this war fits into the current legal landscape.*[21]

[18] For example, in November 2005, US Secretary of State Condoleezza Rice said: "America strives to realise our calling as a nation of laws, not of men… America is a country of laws. We will always be a country of laws." Remarks at American Bar Association's Rule of Law Symposium, 9 November 2005, http://www.state.gov/secretary/rm/2005/56708.htm. See also, President Bush: "No question, Guantánamo sends a signal to some of our friends – provides an excuse, for example, to say the United States is not upholding the values that they're trying to encourage other countries to adhere to. And my answer to them is, is that we are a nation of laws and rule of law. These people have been picked up off the battlefield and they're very dangerous. And so we have that balance between customary justice, the typical system, and one that will be done in the military courts." *Press conference of the President*, 14 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060614.html.

[19] Thus, in confirming that the CIA has been operating a policy of secret detentions and "alternative" interrogation techniques, President Bush emphasised that "this program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws". *President Bush discusses creation of military commissions to try suspected terrorists*. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

[20] "[O]ur values…call for us to treat detainees humanely, including those that are not legally entitled to such treatment… As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely…" President George W. Bush. Memorandum: *Humane treatment of al Qaeda and Taliban detainees*, 7 February 2002.

[21] Press briefing by White House Counsel Judge Alberto Gonzales et al, 22 June 2004, available at: http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html.

Nearly five years into detention operations at Guantánamo Bay, the US authorities have charged only 10 of the more than 770 detainees it has held there (see Appendix 1). As of 14 September 2006, there were "approximately 455" detainees held at the base, and "approximately 320" had been released or transferred to the custody of their home governments. All of the detentions and all of the releases and transfers have been undertaken as matters of executive discretion not judicial decision.

From such questions flowed a number of memorandums from administration lawyers discussing a variety of issues. These included questions surrounding interrogations, the President's authority to authorize torture, the limits of the prohibition on torture or other cruel, inhuman or degrading treatment, the use of military commissions, and whether the choice of Guantánamo as a location for detentions would keep detainees out of the reach of the US courts.[22] Documents that have not been made public include an alleged Department of Justice memorandum specifying interrogation methods that the CIA may use against leading members of *al-Qa'ida*. The White House Counsel himself drafted advice to the President that this "new type of warfare… requires a new approach to our actions towards captured terrorists", and that a benefit of not applying the Geneva Conventions to the Afghanistan conflict would be that domestic criminal prosecutions of US agents for war crimes would be more difficult.[23] Much of the legal advice in these memorandums seemed tailored to fit desired policy outcomes. Precedents that suited the policy were emphasised, laws that did not were ignored or downplayed.

The government's policy and practice of indefinite detention without charge can thus be seen as one direct consequence of the war paradigm. Instead of treating those it has detained outside the USA (and some inside) as criminal suspects, the US authorities have branded them as loosely-defined "enemy combatants" in a global conflict. Under this conceptualization, such detainees are both a potential source of intelligence and a potential threat to national security. Access to lawyers is perceived as detrimental to the interrogation process, external influences that break the "continuous" interrogation cycle.[24] Access to the

[22] For a response to the ethical and legal questions raised by three of these memorandums, see *Speaking law to power: Lawyers and torture*, Editorial, American Journal of International Law, Volume 98, pages 689-695 (2004). (1. The memorandums cannot immunize anyone engaging in torture or war crimes; 2. An attorney may be held complicit in the client's criminal conduct; 3. Even if some degree of impunity is created in domestic law, such memorandums cannot provide protection from prosecution under international or foreign law; 4. It is questionable whether the policies the memorandums sought to justify have furthered US objectives in the "war on terror". The editorial concludes: "Ultimately, these memoranda raise even profounder issues regarding the government lawyers' commitment to principles of ordinary morality and common decency, as well as the rule of law – particularly in the context of the 'war on terror'.")

[23] Memorandum for the President from Alberto R. Gonzales. *Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban*. Draft 25 January 2002.

[24] Declaration of Vice Admiral Lowell Jacoby, Director, Defense Intelligence Agency, 9 January 2003, http://www.justicescholars.org/pegc/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

courts is likewise seen as disruptive of military operations.[25] Although repeatedly branded as "terrorists" and "killers" by their captors, they are not necessarily considered as individuals bearing responsibility for specific criminal conduct.[26] Indeed, the question of trials of "enemy combatants" is viewed by the administration as an entirely separate issue, one that does not affect the detention regime itself.[27] According to the administration, detentions may last until the end of the conflict, the definition and timing of which – like the detentions themselves – is a matter of executive discretion, and potentially indefinite.[28]

A handful of the Guantánamo detainees were selected by the executive in 2003 and 2004 for trial by military commission. From the outset, and now in the proposed Military Commissions Act, the administration has cited the USA's historical use of military commissions in justifying resort to them in the 21st century.[29] Yet at the same time the USA claims to be a leading proponent of human rights. The two do not necessarily sit comfortably together. The half century that has passed since the USA last used military commissions has

("the intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism. There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods").

[25] For example, the administration has complained that *habeas corpus* petitions filed after the *Rasul v. Bush* decision "collectively have consumed enormous resources and disrupted the operation of the Guantanamo Naval Base during time of war". *Al Odah v USA*, Supplemental brief addressing Section 1005 of the Detainee Treatment Act of 2005. In the US Court of Appeals for the DC Circuit, 18 January 2006.

[26] For example, at a military commission pre-trial hearing for Salim Hamdan on 24 August 2004, the military prosecutor asked one of the commission members, "do you understand that just because someone was transported to Guantánamo does not mean that they are guilty of an offence?"

[27] The earlier leaked version of the proposed Military Commissions Act stated: "The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission." See also General Counsel William Haynes, Department of Defense news briefing on military commissions, 21 March 2002, available at http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3367 ("The people that we now hold in Guantanamo are held for a specific reason that is not tied specifically to any particular crime. They're not held – they're not being held on the basis that they are necessarily criminals. It might be that as we investigate…that they will be appropriately charged with crimes, in which case we can address that. But there are two separate bases").

[28] "The conflict was begun on the timing and terms of others. It will end in a way, and at an hour, of our choosing." President Bush, at the National Cathedral, Washington, DC, 14 September 2001, quoted in National Security Strategy of the United States of America.

[29] For example, asked why military commissions were necessary, the Pentagon's General Counsel replied: "It's necessary – well, and it is also not new. It is consistent with American history; I mean the use of military commissions historically has been an option for the president." *Department of Defense news briefing on military commissions*, 21 March 2002. In every subsequent news release announcing charges against detainees, the Pentagon has included the line "Military commissions have historically been used to try violations of the law of armed conflict and related offenses." The proposed Military Commissions Act seeks a congressional "finding" for the statement in a 1952 US Supreme Court decision that "since our earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent government responsibilities related to war" (*Madsen v. Kinsella*).

seen the reinforcement of a broad framework of fair trial guarantees in international human rights and humanitarian law. Resort to military commissions risks weakening and undermining this framework.

The resurrection of military commissions in President Bush's 2001 Military Order followed Justice Department advice that ordinary rules of justice need not apply in this "war". Military commissions, it was asserted, "are entirely creatures of the President's authority as Commander-in-Chief… and are part and parcel of the conduct of a military campaign. As a result, they are not constrained by the strictures placed on a criminal case by… the Bill of Rights".[30] The administration's proposed Military Commissions Act seeks to have Congress endorse the President's unilateral power to establish military commissions as well as his authority to detain "enemy combatants", expansively defined.[31]

The vast majority of those held by the USA in the "war on terror" are unlikely ever to face US judicial proceedings.[32] Despite the then White House Counsel's assertion in late 2001 that the military commissions would "dispense justice swiftly, close to where our forces may be fighting", in reality the commissions have fallen far short of achieving these ends.[33] Part of the reason is that the administration's policy-driven interpretation of the law has inevitably collided with that of most of the legal community, including judicial authorities such as the US Supreme Court in the *Rasul v. Bush*, *Hamdi v. Rumsfeld*, and now *Hamdan v. Rumsfeld* rulings. But relatively narrowly-framed judicial decisions interpreted narrowly and in self-serving fashion by the executive make for slow progress towards full respect for human rights. As explained in Section 6 below, for example, more than two years after the Supreme Court ruled in *Rasul v. Bush* that the US courts had jurisdiction to consider *habeas*

[30] *Re: Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan*. Memorandum from Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002. This memorandum cites another memorandum that has not been made public, *Re: Legality of the use of military commissions to try terrorists*. Memorandum for Alberto R. Gonzales, Counsel to the President, from Patrick F. Philbin, Deputy Assistant Attorney General, 6 November 2001. President Bush signed the Military Order establishing military commissions one week after the date of this latter memorandum.

[31] Under the proposed Act, an "unlawful enemy combatant" would be anyone determined by the President or the Secretary of Defense "(A) to be part of or affiliated with a force or organization – *including but not limited* to al Qaeda, the Taliban, any international terrorist organization, or associated forces – engaged in hostilities against the United States or its co-belligerents in violation of the law of war; (B) to have committed a hostile act in aid of such a force or organization so engaged; or (C) to have supported hostilities in aid of such a force or organization so engaged." (emphasis added).

[32] In a telephone conference on 30 June 2006, a "senior administration official" suggested that 40 to 80 would be "a reasonable range" for the number of detainees who could face charges. See Transcript of teleconference with senior officials regarding Supreme Court's ruling in the Hamdan case, US Department of Justice, 30 June 2006, http://www.usdoj.gov/opa/pr/2006/June/06_opa_411.html. However, a prosecutor with the Office of Military Commissions in July 2006 reportedly stated that he was not aware of more than another 10 cases which would be prosecuted. See Testimony of Professor Neal Katyal, Georgetown University Law Center, Senate Armed Services Committee, 19 July 2006, http://armed-services.senate.gov/statemnt/2006/July/Katyal%2007-19-06.pdf.

[33] *Martial justice, full and fair*. By Alberto Gonzales. New York Times, 30 November 2001.

corpus appeals from foreign nationals held in military custody in Guantánamo, not a single detainee currently held there has had the lawfulness of his detention judicially reviewed.

On 6 September 2006, President Bush confirmed that in the "war on terror" the CIA has been operating a program of secret detentions outside the USA.[34] President Bush stated that the secret CIA program, including "alternative" interrogation techniques used to break the resistance of the detainees, had been subject to "multiple legal reviews by the Department of Justice and CIA lawyers" who had determined that the program "complied with our laws". Yet secret detention is a violation of international law. In effect, the President was admitting that the USA had resorted to enforced disappearance, a crime under international law. Criminal responsibility attaches to persons who order or facilitate an enforced disappearance.[35]

> "*The Committee is concerned by credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end, without even keeping the International Committee of the Red Cross informed. In such cases, the rights of the families of the detained persons have also been violated. It is further concerned that, even when such persons may have their detention acknowledged, they and others have been held for months or years in prolonged incommunicado detention, a practice that violates the rights protected by articles 7 and 9* [of the ICCPR]."
> UN Human Rights Committee, Concluding observations on the USA, 28 July 2006,

In his 6 September address, President Bush announced that 14 of the foreign nationals held in secret CIA custody overseas had just been transferred to Guantánamo. Following the transfers, the Office of the Director of National Intelligence (DNI) issued a document, which provides some detail on the case of one of the 14 men, Abu Zubaydah.[36] It states that after he was taken into custody in Pakistan in March 2002 and handed over to the USA, he had stopped "cooperation" with his US interrogators. In order to overcome this lack of cooperation, "over the ensuing months, the CIA designed a new interrogation program" and "sought and obtained legal guidance from the Department of Justice that none of the new procedures violated the US statutes prohibiting torture." At that time, the Department of Justice took the position that the USA had "no legal obligation under the [Convention against Torture] on cruel, inhuman or degrading treatment with respect to

[34] *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
[35] Article 2 of the draft UN Convention on Enforced Disappearances reads "For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."
[36] *Summary of the High Value Terrorist Detainee Program*, undated, http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf)

aliens overseas".[37] In addition, Justice Department legal advice contained in a now infamous August 2002 memorandum which came to light after the Abu Ghraib torture revelations was reportedly written in response to a CIA request for legal protections for its interrogators. The memorandum stated among other things that the President could authorize torture, that interrogators could cause a great deal of pain before crossing the threshold to torture, and that there were a "significant range of acts" that might constitute cruel, inhuman or degrading treatment but would not rise to the level of torture and be prosecutable under the US torture statute.[38]

In the case of Abu Zubaydah, according to the Office of the DNI, the CIA interrogation techniques "proved highly effective". Neither the DNI document, nor President Bush, has elaborated on what the techniques entail, and the authorities continue to resist revealing either the existence or contents of an alleged presidential directive authorizing the CIA to establish detention facilities outside the USA, and a purported Justice Department memorandum specifying interrogation methods that the CIA may use against "high value" detainees (see Section 4(h)(2) below). However, the "alternative" interrogation techniques, as President Bush characterized them, have been widely reported to include methods that would clearly violate international law.[39] In the case of Abu Zubaydah, CIA and other US government sources were cited in 2002 as indicating that he was "not being tortured, but a variety of methods are being used to encourage him to talk. Typical military interrogation tactics would include depriving him of sleep, changing the temperature of his cell and 'modulating caloric intakes' - spookspeak for withholding food and then providing it as a reward."[40] Abu Zubaydah was held for four and a half years in incommunicado detention.

President Bush stated that "as soon as Congress acts to authorize the military commissions I have proposed" (in the Military Commissions Act of 2006), Abu Zubaydah and the 13 other men who "our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice". Under the administration's

[37] See statement by Attorney General Alberto Gonzales, page 7 of *USA: Guantánamo and beyond – The continuing pursuit of unchecked executive power*, May 2005, http://web.amnesty.org/library/index/engamr510632005.

[38] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[39] For example, see *CIA's harsh interrogation techniques described*, ABC News, 18 November 2005, available at http://abcnews.go.com/WNT/Investigation/story?id=1322866. (listing techniques grabbing, slapping, and: "*Long Time Standing*: …Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions… *The Cold Cell*: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water… *Water Boarding*: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt."

[40] Michael Elliott, "The Next Wave," *Time Magazine*, 17 June 2002. http://www.time.com/time/magazine/article/0,9171,1002701,00.html.

bill, which would only apply to foreign nationals, evidence extracted under cruel, inhuman or degrading treatment could be admitted at a military commission trial if the military judge held it to be reliable and of "probative value". "Justice" handed down by the proposed military commissions could include the death penalty. Any execution could not go ahead until the President approved it.

Amnesty International calls on the USA to finally match its deeds to the words of its own National Strategy for Combating Terrorism. In February 2003 this document stated:

> "*The choice is really about what kind of world we want to live in. In waging this war, therefore, we will be equally resolute in maintaining our commitment to our ultimate objective. The defeat of terror is a worthy and necessary goal in its own right. But ridding the world of terrorism is essential to a broader purpose. We strive to build an international order where more countries and people are integrated into a world consistent with the interests and values we share with our partners – values such as human dignity, rule of law, respect for individual liberties… We understand that a world in which these values are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism. This is the world we must build today*".[41]

In September 2006, an updated National Strategy for Combating Terrorism was published by the US administration. It stated that:

> "*the long-term solution for winning the War on Terror is the advancement of freedom and human dignity through effective democracy… Effective democracies honor and uphold basic human rights… Effective democracies also limit the reach of government… This is the battle of ideas*".[42]

Amnesty International urges the USA to adopt a new approach as its starting point in formulating its response to the *Hamdan* ruling. It should include in its response a full acceptance of and adherence to international human rights and humanitarian law.

2. Human rights do not vanish in "war"

However States conceive of the struggle against terrorism, it is both legally and conceptually important that acts of terrorism not be invariably conflated with acts of war.

United Nations Independent Expert, 2005[43]

In his State of the Union address in January 2004, President George W. Bush said:

> *I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments... After the chaos and carnage of September the 11th, it is not enough to*

[41] National Strategy for Combating Terrorism, February 2003, http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf.
[42] National Strategy for Combating Terrorism, September 2006, *op.cit.*
[43] Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, UN Doc. E/CN.4/2005/103, 7 February 2005, par. 17.

serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got. (Applause)[44]

A war discourse – referring to a *global* war rather than an armed conflict as defined under international humanitarian law – has been a defining characteristic of the US government's response to the atrocities of 11 September 2001. Prior to that day, the USA had "dealt with [terrorist] attacks as primarily a law enforcement matter".[45] On 11 September 2001, however, President Bush opened a meeting with his principal advisers with the words "we're at war".[46] Five days later, the Director of the Central Intelligence Agency issued a confidential memorandum to CIA staff headed "We're at war", stating that "All the rules have changed".[47] Four and a half years later, the introductions to both the USA's National Security Strategy and its National Strategy for Combating Terrorism began with the words "America is at war".[48]

Many US officials appear to have fully accepted the global war paradigm. Opening a post-*Hamdan* hearing in the Senate Armed Services Committee on 13 July 2006, Chairman Senator John Warner stated that "we're a nation at war". A day earlier, opening a hearing before the House Armed Services Committee on 12 July 2006, the Committee's Chairman, Representative Duncan Hunter, said:

"*Make no mistake about it, the United States is engaged in a war with terrorists. Whether we call it a 'long war' or a 'global war against terrorism' or some other term, this nation is at war. The enemy declared war in 1996, when Osama bin Laden declared a jihad against America. It continued on September 11th and it continues today. We are at war. And we may be for a long time*".

The Deputy Secretary of Defense emphasised to the Senate Armed Services Committee on 2 August 2006 that "the legal framework we construct together should take the law of war, not domestic civilian criminal standards of law and order, as its starting point".[49] In similar vein, in a post-*Hamdan* hearing before the Senate Judiciary Committee a day earlier, a former Associate Deputy Attorney General from the US Justice Department submitted that "too many people seem to view the 'war on terror' as a 'war' only in the rhetorical sense, like

[44] State of the Union, 20 January 2004, Address available at http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html.
[45] Press Briefing, White House, 22 June 2004, *op.cit.*
[46] Chapter 10 of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission Report). August 2004, http://www.9-11commission.gov/report/index/htm.
[47] Memorandum: *We're at War*. George J. Tenet, Director of Central Intelligence, 16 September 2001.
[48] US National Security Strategy, *op. cit.* National Strategy for Combating Terrorism, 2006, *op.cit.* The Quadrennial Defense Review (http://www.defenselink.mil/qdr/report/Report20060203.pdf, February 2006) begins "The United States is a nation engaged in what will be a long war"; and the National Defense Strategy (http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf, March 2005) begins with the sentence "America is a nation at war".
[49] Deputy Secretary of Defense Gordon England. Future of Military Commissions in light of the Supreme Court decision in *Hamdan v. Rumsfeld*, Senate Armed Services Committee, 2 August 2006.

the 'war on drugs' or the 'war on poverty', and as a result, they fall back on law-enforcement models for fighting these terrorists…". [50]

Amnesty International fully acknowledges that there have been international and non-international armed conflicts in which the USA has been involved since declaring the "war on terror" in September 2001. The US-led interventions in Afghanistan in October 2001 and Iraq in March 2003 were international armed conflicts and subsequently, after June 2002 and June 2004 respectively, became non-international armed conflicts. However, as the International Committee of the Red Cross (ICRC) has said:

> "*Whether or not an international or non-international armed conflict is part of the 'global war on terror' is not a legal, but a political question. The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict*";[51]
>
> and:
>
> "*Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war*."[52]

The US administration, however, has used the global war paradigm to demote international human rights law or, in many instances, to attempt to obliterate is applicability entirely. It maintains that its activities in the "war on terror" are exclusively regulated by the law of war, and that human rights law is inapplicable in this global armed conflict.[53] In addition it maintains that the International Covenant on Civil and Political Rights (ICCPR) and at least Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) do not apply to individuals in US custody outside of the USA. [54] In recent months, the expert bodies tasked with

[50] Daniel Collins, Testimony before the US Senate Committee on the Judiciary, *Hamdan v. Rumsfeld: Establishing a constitutional process*, 11 July 2006.
[51] *The relevance of IHL in the context of terrorism*, Official statement of the International Committee of the Red Cross, 21 July 2005, http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.
[52] *International humanitarian law and terrorism: questions and answers*, 5 May 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument.
[53] See for instance Additional Response of the United States to Request for Precautionary Measures-Detainees in Guantánamo Bay, Cuba, July 15, 2002, addressed to the Inter-American Commission on Human Rights http://www.ccr-ny.org/v2/legal/september_11th/docs/7-23-02GovtResponsetoObservations_andIACHR_Decision.pdf pp. 3-5; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, April 4, 2003 http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, p. 6.
[54] The Human Rights Committee has characterized such an approach as "unconscionable": "…it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory". Human Rights Committee, *López Burgos v. Uruguay*, UN Doc. A/36/40, 6 June 1979, para. 12.3.

overseeing compliance with these two treaties have rejected the USA's position and called for change. In May 2006, the Committee Against Torture stated that the USA should:

> "*recognize and ensure that the Convention [against Torture] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction*".[55]

Similarly, in July 2006, the Human Rights Committee urged the USA to "review its approach and interpret the ICCPR in good faith" and in particular to:

> "*acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as in times of war*".[56]

Because the US administration views the entire world as the battlefield in the "war on terror", it considers that anyone it labels as an "enemy combatant" in this conflict can be detained without charge in military custody and, in the case of foreign nationals, subject to trial by whatever tribunal replaces the military commissions blocked by the Supreme Court in *Hamdan v. Rumsfeld*. International human rights law is nowhere in its thinking. In formulating new legislation, the USA should reverse this abrogation of US legal obligations, and consider the following:

> "*The [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive*."[57]

and:

> "*Human rights law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with international humanitarian law… Despite their different origins, international human rights law and humanitarian law share a common purpose of upholding human life and dignity*".[58]

Even in situations of armed conflict, the US government has refused to apply relevant rules of international humanitarian law. It has designated those captured in the armed conflict

[55] Conclusions and Recommendations of the Committee against Torture: United States of America. CAT/C/USA/CO/2, 18 May 2006, http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf.
[56] Human Rights Committee, Concluding Observations: United States of America, 28 July 2006, http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf.
[57] Human Rights Committee General Comment 31, UN Doc: CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[58] Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman. UN Doc. E/CN.4/205/103, 7 February 2005, para 23.

in Afghanistan, together with other foreign nationals captured around the world in the context of the "war on terror", as "enemy combatants", a label with no status in international law.[59]

The administration is now seeking to extend the "war on terror" retroactively to cover years leading up to 11 September 2001, for the purpose of trying "alien unlawful enemy combatants" it charges with violating the laws of war, including prior to that date. But as already noted, calling something a "war" does not make it so, in terms of the applicability of international humanitarian law. In the *Hamdan* ruling, the Supreme Court noted that the government had not up to that point claimed that the President's war powers were activated prior to 11 September 2001, and had relied upon the Authorization for the Use of Military Force (AUMF) passed by Congress on 14 September 2001 (see Section 9 below). The Court went on to note that the charge of conspiracy to commit war crimes levelled against Salim Ahmed Hamdan covered a period from 1996 to November 2001. The Court stated:

> "*all but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF – the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions*."[60]

In the proposed Military Commissions Act, the administration has responded by seeking congressional approval for the "finding" that "for more than 10 years, the al Qaeda terrorist organization has waged and unlawful war of violence and terror against the United States and its allies", and by including the following provision in the Act:

> "*Alien unlawful enemy combatants may be tried for violations of the law of war and offenses triable by military commissions committed against the United States or its co-belligerents* ***before****, on, or after September 11, 2001*" (emphasis added).

Rather than tinkering with the machinery of military commissions, the government should admit that its experiment with military commissions has been a damaging failure. However, Amnesty International is concerned that the post-*Hamdan* discussion in Congress apparently started from the assumption that there is a global armed conflict in which only the laws of war, as defined by the USA, apply. In so doing, the debate threatens to lead to an outcome that perpetuates the government's rejection of international human rights law.

2.1 Non-derogable rights; the USA has not derogated

The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation

[59] Two US citizens who were designated as "enemy combatants" have since been released and deported (Yaser Esam Hamdi) or returned to civilian jurisdiction (Jose Padilla). A third US citizen, John Walker Lindh, reached a plea agreement in federal court under which the government agreed "to forego any right it has to treat the defendant as an unlawful enemy combatant" based on the charges against him, unless he ever again in his life engaged in such conduct.

[60] The charge sheet is available at http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf.

Human Rights Committee, August 2001

International human rights law applies in all places and at all times. Nevertheless, the general human rights treaties allow states to undertake to derogate from full application of certain rights, such as in situations of a proclaimed public emergency threatening the life of the nation. Any such derogating measure must be temporary in duration, strictly necessary to meet a specific threat, non-discriminatory, and not inconsistent with other rules of international law.

Article 4 of the ICCPR identifies certain rights as non-derogable even "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed". There can be no derogation from articles 6 (the right to life), article 7 (the prohibition on torture or other cruel, inhuman or degrading treatment or punishment) and certain due process rights. These are:

- Everyone shall have the right to recognition everywhere as a person before the law (article 16). This means that the state may not under any circumstances limit a person's right to defend his or her rights in a system of justice;
- No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed (article 15.1);
- A heavier penalty may not be imposed than the one that was applicable at the time that the criminal offence was committed. However, if a new provision in the law for the imposition of a lighter penalty, the offender must benefit from it (article 15.1).

In 2001, the Human Rights Committee issued an authoritative analysis of Article 4 of the ICCPR.[61] In it, the Committee stated that:

> "*Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a state moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency… The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation…*
>
> *States parties [must] provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation… The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists…*"

[61] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001.

The Committee went on to consider that a number of additional Covenant rights were effectively non-derogable, beyond those explicitly provided for in article 4 of the ICCPR. These, the Committee stated, include

- the prohibition on the arbitrary deprivation of liberty;
- the requirement that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the human person;
- the prohibition on abductions or unacknowledged detentions;
- fundamental principles of fair trial, including the presumption of innocence.

The Committee stated that "the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".

It should be underscored that even where derogations are permitted, the right in question remains in effect, as the derogation only reduces its scope of application as far as is strictly necessary to meet a threat to the life of the nation. In order to derogate from the ICCPR, a state must declare a state of emergency and notify the United Nations. The USA has not declared such an emergency nor any intention to derogate from any of the rights guaranteed under the ICCPR.[62] Nonetheless, the USA has appeared to treat the "war on terror" as a state of emergency, using it as a basis to nullify or severely restrict a number of fundamental ICCPR rights. For example, the USA's broad resort to a theory of "military necessity" has facilitated torture or other cruel, inhuman or degrading treatment, despite the prohibition on such treatment being non-derogable.[63]

Amnesty International is concerned by the US Attorney General's statement to the Senate Armed Services Committee on 2 August 2006 that "military necessity" is a principal basis upon which the administration still seeks to use military commissions to try detainees held in Guantánamo and elsewhere. In its *Hamdan* judgment, the Supreme Court stated that the government had shown an "inability" to meet the "most basic precondition – at least in the absence of specific congressional authorization – for establishment of military commissions: military necessity". The Court continued:

[62] Indeed, President Bush said in August 2006 that the USA is now "safer than it has been". *President meets with counter-terrorism team*, http://www.whitehouse.gov/news/releases/2006/08/20060815.html, and the National Strategy for Combating Terrorism, published in September 2006, states that "since the September 11 attacks, America is safer". Nation Strategy for Combating Terrorism, *op.cit.*

[63] See pages 14-18 of *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. See also cases of Mohamed al-Qahtani, pages 15-24 *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), June 2006, http://web.amnesty.org/library/Index/ENGAMR510932006.

"*Any urgent need for imposition or execution of judgment is utterly belied by the record: Hamdan was arrested in November 2001 and he was not charged until mid-2004. These simply are not the circumstances in which, by any stretch of the historical evidence or this Court's precedents, a military commission established by Executive Order…may lawfully try a person and subject him to punishment*".

The 14 detainees recently transferred for possible trial in Guantánamo from secret CIA custody had been held for up to four and a half years incommunicado at secret locations. All the detainees held in Guantánamo have been in US custody for at least a year, many for nearly five. All are held distant from any zone of armed conflict. Any "military necessity" argument for military commissions therefore surely evaporates. Courts already exist that could try such detainees.

The USA undoubtedly faces challenges in bringing to trial anyone whom there are grounds to believe has been involved in acts of "international terrorism". Some of the particular challenges identified by the administration surround the right to a trial within a reasonable time, and what evidence may be admissible, including that which may be hearsay, classified or allegedly coerced. However, a detainee's right to a fair trial – to be able to effectively challenge the evidence that is used against him in a trial in a proper court brought within a reasonable time – should not be prejudiced by any unlawful treatment to which he or any other detainee has been subjected. Indeed, in light of the years of legal, physical or psychological abuses which detainees held in Guantánamo and elsewhere have suffered, including the 14 men recently transferred to Guantánamo from secret CIA custody, it is even more crucial that any trials scrupulously respect international standards of fairness.

For years, Amnesty International and others have been urging the government to treat the detainees strictly according to international law and standards. Amnesty International takes no position on the guilt or innocence of detainees prior to trial – that is precisely what a fair trial by an independent and impartial tribunal is supposed to determine. The organization recognizes the duty of governments to protect public security and to bring to trial those who commit crimes, whether in the context of armed conflicts or not. But such efforts must themselves respect human rights, or the pursuit of justice becomes an exercise in injustice.

3. Status of detainees: implications for trial

Hamdan has appeared before the Combatant Status Review Tribunal, but the CSRT was not established to address detainees' status under the Geneva Conventions… [I]t is at least a matter of some doubt as to whether or not Hamdan is entitled to the protections of the Third Geneva Convention as a prisoner of war and that accordingly he must be given those protections unless and until the "competent tribunal" referred to in Article 5 concludes otherwise.

US District Court, November 2004[64]

[64] *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004, http://www.dcd.uscourts.gov/Opinions/2004/Robertson/04-1519.pdf.

All persons have the right to liberty. A person's liberty may only be restricted for reasons and in accordance with procedures set out in national and international law.

The international armed conflict in Afghanistan ended in June 2002.[65] Under the Third Geneva Convention, the USA was obliged to treat those who were captured during hostilities as prisoners of war (POWs), in the absence of a determination "by a competent tribunal" that they were not POWs. When that armed conflict ended, the USA was required to release or charge with recognized criminal offences any person so detained.

All persons, without exception, who have been charged with a criminal offence are entitled to trial before an independent, impartial and competent tribunal established by law in proceedings which meet international standards of fairness.

Under the Fourth Geneva Convention, civilians detained in the international armed conflict in Afghanistan were entitled to have their detention ("internment") reviewed "as soon as possible" by a "court or administrative board." They too were required, when that conflict ended, to be released, unless charged with recognized criminal offences.

Within the context of the subsequent non-international armed conflict in Afghanistan, government forces, and/or the forces of other states on the territory which it authorises, may detain or intern persons. While international humanitarian law treaties are silent on the matter of procedures for the internment of persons in non-international armed conflicts, human rights law and standards apply at all times.[66] At a minimum, these persons were entitled to have their detention promptly, and thereafter periodically, reviewed by a court. They also had the right to "take proceedings before a court, in order that the court may decide without delay on the lawfulness of [their] detention and order [their] release if the detention is not lawful".[67]

Former POWs from the international armed conflict are not immune from such detention/internment when the conflict becomes non-international. However, unlike the earlier internment of POWs in the international armed conflict, for which a person's membership of enemy armed forces is sufficient reason for detention or internment, detention or internment must be for reasons specifically pertaining to the activities of the detained individual. The fact that a person was formerly a POW is not, in and of itself, sufficient to justify automatic detention or internment. Rather, there must be individualized assessment and transparent process in each case. The US provided no such process for detainees after the international armed conflict in Afghanistan ended in June 2002.

Some persons were detained in countries outside of Afghanistan or other zones of armed conflict.[68] They could only lawfully be detained if suspected of recognizable criminal

[65] The conflict is deemed to have ended with the conclusion of the Emergency Loya Jirga and the establishment of a Transitional Authority on 19 June 2002.
[66] See e.g. Jelena Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, 87 (No. 858) International Review of the Red Cross 375 (June 2005).
[67] Article 9(4), ICCPR.
[68] Amnesty International considers that the transfer of these persons to Guantánamo was carried out outside the rule of law, and that their detention there was/is unlawful.

offences, treated as civilian criminal suspects, and guaranteed all rights due to such status under international human rights law. Such rights include the right to challenge the legality of their detention before a court and to release if the detention is deemed unlawful, and the right to be promptly informed of any charges. If not charged, the person must be released.

Children (persons under the age of 18) who have been detained should have been treated in accordance with their special status under international humanitarian and human rights law.

The USA has disregarded these fundamental principles and provisions of international law in its treatment of those picked up in Afghanistan or elsewhere, including those transferred to Guantánamo. Amnesty International therefore considers that all those currently held in Guantánamo are arbitrarily and unlawfully detained. The organization believes that the detainees must be charged without further delay and brought to trial within a reasonable time in full accordance with international fair trial standards, or else released. In addition, no detainee upon release should be forcibly returned to any country where they risk serious human rights violations.

The legal authority upon which the US has sought to circumvent fundamental human rights is unknown to and clearly contravenes international law. This basis of authority claimed by the USA is derived from its global war paradigm, by which the US labels all persons detained in this "war" as "enemy combatants". International law does not recognize such a category of detainee. Although the USA asserts that it respects the laws of war, it has done so by selectively picking and choosing which principles and provisions to apply as well as the extent and manner of their application. The administration considers that the Guantánamo detainees, if charged, should be tried by a one-size-fits-all military commission, a tribunal employing lesser standards of justice than would apply to US soldiers or civilians.[69] To date, decisions about release or transfer to the custody of another government, has been perceived and carried out as a matter solely for executive discretion, not judicial decision. The US takes the position that it can continue to detain a person indefinitely whether or not criminally charged and that it can continue with the detention even if the detainee has been charged, tried and acquitted by the proposed military commissions.[70]

As the US considers its legislative response to the *Hamdan* ruling, it should ensure that all persons detained in Guantánamo are promptly charged with a recognizable criminal

[69] For example, in the hearing before the Senate Armed Services Committee on 13 July 2006, the military witnesses were asked by Senator Dayton whether the trial procedures needed to reflect "the spectrum of individuals that are in custody throughout the world", Rear Admiral James E. McPherson, Judge Advocate General of the US Navy, responded that "I think we can devise one system that would apply to all." Rear Admiral McPherson noted that there might be people against whom "the evidence is such that we simply could not prosecute them." For these individuals, he suggested, "we could continue to hold them until the cessation of hostilities", that is, the end of the "war on terror".

[70] This was expressly stated in the earlier leaked version of the proposed Military Commissions Act. Although not expressly stated in the version sent to Congress on 6 September 2006, the administration has taken this position since detentions in Guantánamo began. For example, see Department of Defense news briefing on military commissions, 21 March 2002.

offence or released. It should also ensure, at a minimum, that no civilian is tried before a military tribunal of any kind.

3.1 Detained in international armed conflict

Salim Ahmed Hamdan, the Yemeni national whose case is at the centre of the *Hamdan v. Rumsfeld* ruling, was captured by Northern Alliance forces in Afghanistan in November 2001 during the international armed conflict that occurred in that country following the US-led intervention in October 2001 until the establishment of a Transitional Authority on 19 June 2002. He was handed over to the US military.

Under the Third Geneva Convention, Salim Hamdan and all other persons detained in the context of the international armed conflict in Afghanistan should have been presumed to be a prisoner of war (POW) and treated as such unless and until a "competent tribunal" determined that he was not a POW (Article 5). The burden is on the detaining authority to show that a detainee does not qualify for POW status. Prisoners of war must be released and repatriated without delay after the cessation of hostilities unless they are to be tried for war crimes or other criminal offences. [71] As combatants, prisoners of war cannot be prosecuted for simply taking part in hostilities.

International humanitarian law imposes strict equality of treatment: prisoners of war held by one party to the conflict are entitled to the same rights guaranteed to members of that party's forces or nationals. This means that prisoners of war:

- Must be tried before the same courts and according to the same procedures as the personnel of the detaining state (Third Geneva Convention, article 102). They must be tried by military courts, unless members of the armed forces of the detaining country could be tried for the same crimes in civilian courts (Third Geneva Convention, article 84). US soldiers have been tried by military courts-martial although they can be tried in the civilian courts for offences not of a purely military nature.
- Cannot be subjected to punishments for criminal offences which do not apply to the military personnel of the state detaining them and must not receive more severe sentences (Third Geneva Convention, articles 82 and 102).

In no circumstances whatsoever can any person, including a prisoner of war, be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized and the procedure of which does not afford the accused the rights and means of defence provided for in article 105 of the Third Geneva Convention (Third Geneva Convention, article 84). The failure to ensure such trials constitutes a war crime (Third Geneva Convention, article 107).

[71] Unjustifiable delay in the repatriation of prisoners of war or civilians is a war crime. Article 85(4)(b) of Protocol I Additional to the Geneva Conventions of 194; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Volume 1, p. 588, Cambridge University Press/ICRC.

If Salim Ahmed Hamdan or anyone else captured during the international armed conflict in Afghanistan had been found by a competent tribunal not to be a POW, they would have had the status of a civilian, protected under the Fourth Geneva Convention. They, too, should have been released at the end of that conflict unless charged with recognized criminal offences (Fourth Geneva Convention, Article 133). Unlike POWs, such persons may be tried under the law of the detaining state for taking up arms, as well as any criminal acts they may have committed.

In its authoritative commentary on the provisions of the Fourth Geneva Convention, the International Committee of the Red Cross (ICRC) stresses that:

> "*Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law*."

The USA, however, did in fact create an intermediate status outside the law, which they have termed "enemy combatant". Indeed, none of the detainees captured during the international armed conflict in Afghanistan and either held in that country or transferred to Guantánamo or elsewhere was recognized as a prisoner of war by the US administration or had their case reviewed by a competent tribunal for that purpose. As the State Department Legal Advisor acknowledged in 2006, it was "clear that there was a state of international armed conflict in Afghanistan, to which the US was a party", in which the detainees were picked up. However, he asserted that the detainees were "neither prisoners of war under the Third Geneva Convention, nor protected persons under the fourth Geneva Convention".[72] This plainly unlawful anomaly stemmed from President Bush's determination that neither Taleban nor *al-Qa'ida* detainees would qualify as prisoners of war.[73] It should be noted that

[72] *Update on US detainee policy and criminal prosecutions in Iraq*. John B. Bellinger III, State Department Legal Advisor, Foreign Press Center, Washington, DC, 15 February 2006, http://fpc.state.gov/fpc/61444.htm.

[73] The *Hamdan* ruling did not offer an opinion on the merits of the presidential determination on the prisoner of war issue or on the government's contention that there were two simultaneous conflicts that occurred in Afghanistan – one between the USA and the Taleban and one between the USA and *al-Qa'ida*. In the District Court opinion in the same case, Judge Robertson had said: "Notwithstanding the President's view that the United States was engaged in two separate conflicts in Afghanistan (the common public understanding is to the contrary), the government's attempt to separate the Taliban from al Qaeda for Geneva Convention purposes finds no support in the structure of the Conventions themselves... Thus at some level – whether as a prisoner of war entitled to the full panoply of Convention protections or only under the more limited protections afforded by Common Article 3, the Third Geneva Convention applies to all persons detained in Afghanistan during the hostilities there." *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

the ICRC at the outset disputed the presidential determination on the applicability of the Geneva Conventions in relation to the Afghanistan conflict.[74]

Despite having not been brought before a competent tribunal as provided under Article 5 of the Third Geneva Convention, or indeed any other tribunal, Salim Ahmed Hamdan was transported to the US Naval Base in Guantánamo Bay in June 2002, the same month that the international armed conflict in Afghanistan ended. He has been held without trial in Guantánamo ever since, for more than four years. For the first two years of his custody in Guantánamo, Salim Hamdan was held without charge. In July 2003, he became one of six detainees to be named under President Bush's Military Order of 13 November 2001. He thus became "eligible" for trial by military commission. However, it was not until more than one year later – in mid-July 2004 – that he was formally charged. Between December 2003 and October 2004, he was held in solitary confinement in Camp Echo.

The Combatant Status Review Tribunals (CSRTs) devised by the US administration in response to the *Rasul v. Bush* and *Hamdi v. Rumsfeld* decisions of the US Supreme Court in June 2004 do not constitute the "competent tribunals" required by the Third Geneva Convention. They were not tasked with determining prisoner of war status, but only with ascertaining whether or not the detainee, in most cases after more than two years in custody, should continue to be considered an "enemy combatant", with the burden on the detainee (without a lawyer) to disprove his expansively defined "enemy combatant" status. President Bush's earlier determination that no Taleban or *al-Qa'ida* detainee would qualify for prisoner of war status remains in force. Indeed, detainees appearing before the CSRTs were told that the tribunals did not have the authority to determine whether a detainee should have been classified as a prisoner of war.[75] This limited mandate is confirmed in two post-*Hamdan* memorandums on the CSRTs and the yearly follow-up Administrative Review Board (ARB) process.[76]

The time for Article 5 tribunals for these detainees has long since passed: "Article 5 tribunals are intended to be implemented on the spot, or as soon thereafter as practicable, in order to determine a detainee's status in the first instance. That is how the United States has applied Article 5 in every military conflict since World War II".[77] In contrast to this prior practice, Guantánamo detainees received their CSRTs (and subsequent ARBs) more than two

[74] "There are divergent views between the United States and the ICRC on the procedures which apply on how to determine that the persons detained are not entitled to prisoner of war status." ICRC press release, 9 February 2002

[75] For example, see pages 54-55 of *USA: Guantánamo and beyond – The continuing pursuit of unchecked executive power*, May 2005, http://web.amnesty.org/library/index/engamr510632005.

[76] Implementation of Combatant Status Review Tribunal procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba, dated 14 July 206, signed by Deputy Secretary of Defense Gordon England, http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf; and Revised implementation of Administrative Review procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba, dated 14 July 2006, signed by Deputy Secretary of Defense Gordon England, http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf.

[77] *Al Odah et al v. USA et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005.

years after the first of them were taken to Cuba, thousands of miles from the conflict in Afghanistan. Furthermore the definition of "enemy combatant" was expanded for the CSRTs, reaching those who had never been to Afghanistan, except in cases when they were seized in other countries and taken to US custody there *en route* to Guantánamo.[78] In addition, the USA has reversed the burden of proof in respect of the CSRT. To put it another way: "Unlike in a conventional hearing, where the tribunal listens to the evidence and then announces its result, in a CSRT, the superiors announce the result, and then convene a hearing".[79] A federal judge has characterized the CSRT has having "fundamental deficiencies", including its reliance on classified evidence and the lack of legal counsel for the detainee to compensate for this deficiency.[80] The CSRTs can also rely on coerced evidence, in violation of the Geneva Conventions.

Under international humanitarian law, if a person who has fallen into the power of an adverse Party and not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence.[81] The USA has not provided for the possibility of any person in its custody to exercise this right.

Denial of the right to a "fair and regular trial" for a prisoner of war who is charged with a crime or for a civilian protected person under the Fourth Geneva Convention can amount to a war crime.[82] As with other war crimes, those responsible for such a war crime must be tried by the state where they are found or be extradited to another state for trial, or transferred to an international criminal court.

3.2 Detained in non-international armed conflict

An unknown number of people held in Guantánamo (and hundreds currently in US custody in Afghanistan) were taken into custody during the non-international armed conflict in Afghanistan, ongoing since the transfer of power to the Transitional Authority on 19 June 2002. Common Article 3, as well as the relevant rules of customary international humanitarian law, applies to this conflict. International human rights law is also applicable. The ICRC affirms that if brought to trial for any crimes they may have committed, anyone

[78] For example, UK residents Bisher al-Rawi and Jamil El Banna were seized in Gambia and transferred to US custody in Afghanistan and thence to Guantánamo where they remain (see Appendix 3). On the "enemy combatant" definition, see Joseph Margulies, *Guantánamo and the abuse of presidential power*. Simon & Schuster (2006), pages 161-162.
[79] Page 166, Joseph Margulies, *Guantánamo and the abuse of presidential power*, op.cit.
[80] *In re Guantanamo detainee cases*, Memorandum Opinion Declining in Part and Granting in Part Respondents' Motion to Dismiss or Grant for Judgment as a Matter of Law in the US District Court for the District of Columbia, 31 January 2005, http://www.dcd.uscourts.gov/opinions/2005/Green/2002CV-299~8:57:59~3-2-2005-a.pdf.
[81] Article 45.2 of Additional Protocol 1 to the Geneva Conventions.
[82] Article 130, Third Geneva Convention; article 147, Fourth Geneva Convention and article 85(4)(e), Additional Protocol I.

picked up in the non-international armed conflict in Afghanistan is "entitled to the fair trial guarantees of international humanitarian and human rights law".[83] The *Hamdan* ruling noted that any trials must be carried out in front of a "regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples". The *Hamdan* ruling declared that common Article 3 must be interpreted as broadly as possible, and four of the Justices drew particular attention to the protections contained in Article 75 of Additional Protocol 1 as well as in Article 14 of the ICCPR. Welcoming the *Hamdan* decision, the UN Human Rights Committee noted that common Article 3 "reflects fundamental rights guaranteed by the [International] Covenant [on Civil and Political Rights], in any armed conflict."[84]

Violations of common Article 3, including the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable by civilized peoples", can amount to war crimes under international law.

3.3 Detained outside of zones of armed conflict

An unknown number of detainees were picked up outside any conflict zone and subject to unlawful transfers to Afghanistan, Guantánamo and elsewhere. International humanitarian law does not apply in such cases. For example, Pakistan national Muhammad Saad Iqbal al-Madni has said that he was arrested in Jakarta, Indonesia, on 9 January 2002, taken to Egypt two days later and held there until 12 April 2002. Thereafter he was flown to Afghanistan where he was held in US custody between 13 April 2002 and 22 March 2003 when he was transferred to Guantánamo where he remains. In other words, he was in Afghanistan at a time of international and then non-international armed conflict in the country *only* because he was taken and held there by the USA.

Many of the detainees were picked up in Pakistan. Indeed, five of the 10 people charged for trial by military commission were originally detained in Pakistan, including Binyam Muhammad, an Ethiopian national and British resident detained at Karachi airport and transferred to Morocco before being taken to Guantánamo (see Appendix 3).[85] The 14

[83] *International humanitarian law and terrorism: questions and answers*, 5 May 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument.

[84] United States of America, concluding observations, 28 July 2006, *op.cit.*

[85] In the government's charge sheet, it is alleged that Binyam Muhammad left Afghanistan during the international armed conflict, and in Pakistan met with Abu Zubaydah and Jose Padilla. It is alleged that "Abu Zubaydah stated that he preferred Binyam Muhammad conduct an "overseas" operation instead of going back into Afghanistan as originally planned. Binyam Muhammad agreed to carry out an operation inside the United States". Binyam Muhammad was arrested at Karachi airport attempting to go to London on a forged passport. Jose Padilla, a US citizen, was arrested at Chicago airport on 8 May 2002 and on 9 June 2002 designated by President Bush as an "enemy combatant". He was held without charge or trial in military custody for three years and five months years. He was charged in November 2005 and transferred to Department of Justice custody in January 2006. The announcement of the indictment – which made no mention of the alleged bomb plot for which Padilla was originally detained – came only two days before the government's brief in response to Padilla's appeal to the US

individuals transferred in September 2006 from secret CIA custody to military custody in Guantánamo and possible trial there are all believed to have been captured outside zones of armed conflict, including in Pakistan, Thailand and United Arab Emirates (see Appendix 2). Other detainees currently in Guantánamo were picked up in countries that have included Bosnia-Herzegovina, Pakistan, Mauritania, Gambia and Egypt (see Appendix 3). Such individuals should always have been treated as criminal suspects, and therefore subject to international human rights law, including the right to prompt judicial review of the lawfulness of their detention and to release if that detention was deemed unlawful. Under no circumstances should they be tried in front of military tribunals of any kind.

By way of illustration, Amnesty International outlines the case of Mohamedou Ould Slahi in Appendix 4 of this report. This allegedly "high-value" detainee was not taken into custody in a zone of armed conflict, yet he has been labelled by the US administration as an "enemy combatant" to whom the "laws of war" apply and to whom human rights law does not. If charged and tried, according to the position of the administration, he would be subject to a military commission; yet he is a civilian. Moreover, he has suffered nearly five years of human rights violations, including unlawful transfers between countries, very lengthy incommunicado detention, torture or other cruel, inhuman or degrading treatment, denial of the right to *habeas corpus*, and a continued official presumption of his guilt without being brought to any court for trial. As the US considers how to respond legislatively to the *Hamdan* ruling, it should keep such cases in mind.

3.4 No military trials for children

The US authorities have detained a number of people who were under 18 years old at the time of being taken into custody. Releasing three Afghan children from Guantánamo in January 2004, the Department of Defense stated that "as with all detainees, these juveniles were considered enemy combatants that posed a threat to US security… Age is not a determining factor in detention." The three children who were released were between the ages of 13 and 15 at the time of their detention. In their release from the base, as in other matters relating to detainees, the USA was expressly acting in terms of executive policy preference rather than in compliance with its international legal obligations. The US determined that the "juvenile detainees no longer posed a threat to our nation, that they have no further intelligence value and that they are not going to be tried by the US government for any crimes."[86]

The detention and interrogation of unrepresented children in Guantanamo violate principles reflecting a broad international consensus that the vulnerabilities of under-18-year-olds require special protection. For example, international standards provide that detention should only be used as a last resort. When detention is resorted to, Article 37 of the Convention on the Rights of the Child (CRC) states that "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well

Supreme Court was due to be filed. The District Court was also scheduled to accept briefings from the government on the question of whether Padilla had been properly designated as an enemy combatant.

[86] Transfer of juvenile detainees completed. Department of Defense news release, 29 January 2004, http://www.defenselink.mil/releases/2004/nr20040129-0934.html.

as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Under Article 40, if the child is alleged to have violated the law, they should be "treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society". The USA has signed the CRC and is therefore obliged under international law not to do anything that would undermine the object and purpose of the treaty pending its decision on whether to ratify it.[87]

The USA has ratified the Optional Protocol to the CRC on the involvement of children in armed conflict (as has Afghanistan). Under Article 6(3), in the case of children held because they participated in the international or non-international armed conflict in Afghanistan, the USA has an obligation to provide them with "all appropriate assistance for their physical and psychological recovery and their social reintegration". Detaining children in indefinite military custody in Guantánamo Bay cannot meet this obligation. There may have been at least 17 people held in the camp who were under 18 years old at the time they were taken into custody. Yassar Talal 'Abdullah Yahia al-Zahrani was reportedly 17 when he was detained. He died in Guantánamo in June 2006, apparently as a result of suicide.

Principle 6 of the draft UN Principles governing the administration of justice through military tribunals, submitted by the UN Special Rapporteur to the Sub-Commission on the Promotion and Protection of Human Rights on the issue of the administration of justice through military tribunals in 2005, states that:

> "*Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should minors be placed under the jurisdiction of military courts*". [88]

Omar Khadr, a Canadian national (Canada has also ratified the Optional Protocol to the CRC), was charged in November 2005, more than three years after he was detained in Afghanistan at the age of 15. The charges against him include the allegation that during a firefight with US soldiers on or around 27 July 2002 (during the non-international armed conflict in Afghanistan), he threw a grenade which killed a US soldier.

Omar Khadr is no longer a child – after five years in custody he is now 20 years old – but the principle should still stand (or governments could simply hold children in custody until they became adults in order to treat them as adults). He should not be tried by a military tribunal.

[87] Vienna Convention on the Law of Treaties, article 18.

[88] Report of the Special Rapporteur on the administration of justice through military tribunals to the Sub-Commission on the Protection and Promotion of Human Rights, UN Doc. E/CN.4/Sub.2/2005/9, 2 June 2005.

3.5 No military trials for civilians

More than 20 years ago, the Human Rights Committee, in its interpretation of Article 14 of the ICCPR, stated that:

> "*The provisions of article 14 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...*"[89]

This position has since evolved. During the past decade, the Human Rights Committee has consistently expressed concern at the broad jurisdiction of military courts, stating that the trials of non-military persons should be conducted in civilian courts before an independent and impartial judiciary, while the jurisdiction of military courts should be restricted to trial of military personnel accused of purely military or disciplinary offences.[90] In particular, the Committee has raised its concern about cases where military courts exercised jurisdiction over "terrorism" offences or offences against the security of the state.[91] The Committee against Torture has expressed similar concerns and made similar recommendations. [92]

Principle 4 of the draft UN Principles governing the administration of justice through military tribunals states that:

> "*Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts*".

Principle 7 states:

[89] CCPR General Comment 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law.* 1984

[90] Human Rights Committee, Concluding observations: Lebanon, UN Doc. CCPR/C/79/Add.78, 5 May 1997, par. 14; Concluding observations: Cameroon, UN Doc. CCPR/C/79/Add.116, 4 November 1999, par. 21; Concluding Observations: Uzbekistan, UN Doc. CCPR/CO/71/UZB, 26 April 2001, par. 15.

[91] Human Rights Committee, Preliminary observations: Peru, UN Doc. CCPR/C/79/Add.67, 25 July 1996, par. 12; Concluding observations: Slovakia, UN Doc. CCPR/C/79/Add.79, 4 August 1997, par. 20; Concluding observations: Egypt, UN Doc. CCPR/CO/76/EGY, 28 November 2002, par. 16; Concluding observations: Serbia and Montenegro, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, par. 20.

[92] Committee against Torture, Conclusions and recommendations: Peru, UN Doc. A/50/44, 26 July 1995, par. 69 and 73; Conclusions and recommendations: Cameroon, UN Doc. CAT/C/CR/31/6, 5 February 2004, par. 7 and 11; List of issues to be considered during the examination of the fourth periodic report of Peru, UN Doc. CAT/C/PER/Q/4, 21 February 2006, par. 22.

> "*The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status.*" [93]

The Inter-American Commission on Human Rights has stated that placing civilians under the jurisdiction of the military courts is contrary to article 8 of the Inter-American Convention on Human Rights (the right to a hearing by a competent, independent and impartial tribunal) and that military courts are special and purely functional courts designed to maintain discipline in the military and police and ought therefore to apply exclusively to those forces.[94] The Inter-American Court of Human Rights reasoned as follows:

> "*Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.*"[95]

The African Commission on Human and People's Rights has consistently maintained that the only purpose of military courts is to "determine offences of a purely military nature committed by military personnel" and that "military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts."[96]

Having examined the jurisprudence of the Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, the Special Rapporteur on the independence of judges and lawyers, Leandro Despuy, maintained that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism runs counter to all international and regional standards and established case law.[97]

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[93] UN Doc. E/CN.4/Sub.2/2005/9, 2 June 2005.

[94] Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V/II.85 doc.9 rev., 11 February 1994, at 507 (Peru).

[95] Inter-American Court of Human Rights, Castillo Petruzzi et al. Case, Judgment of 30 May 1999, par. 128.

[96] African Commission on Human and Peoples' Rights, Principles an guidelines on the right to a fair trial and legal assistance in Africa, May 2003. See also: African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, pars. 58-65, in 14th Annual Activity report 2000 – 2001.

[97] Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights, UN Doc. E/CN.4/2004/60, 31 December 2003, par. 60.

3.6 Civilian trials for all those charged?

As a matter of principle across all countries, Amnesty International takes the position that justice is best served by prosecuting all persons accused of war crimes, crimes against humanity, and other grave violations of international law, such as torture, "disappearances" and unlawful killings, in independent and impartial civilian courts rather than in military tribunals. There is a emerging international consensus for this position.[98] Such a position appears to be supported by the US government when it involves other countries.[99]

Law professor Neal Katyal, who argued the case for Salim Ahmed Hamdan in front of the US Supreme Court on 28 March 2006, testified at a Senate Armed Services Committee hearing on 19 July 2006 as to how he believed Congress should respond to the *Hamdan* ruling. He pointed out that the likely small number of detainees who would ever face trial made this "in short, one of the worst factual contexts for new legislation. The legislation would be created for only a small number of people, all of whom have already been confined for years, and all of whom will continue to be locked up regardless of any legislation that Congress passes. To boot, each of those men is already amenable to trial in court-martial and in a federal district court".[100] Amnesty International urges resort to the ordinary courts for all the detainees, and emphasizes that whatever mechanism is applied requires fair trial procedures for all.

The USA's Uniform Code of Military Justice undoubtedly establishes an elaborate justice system. By expressing its preference for trials in civilian courts, Amnesty International does not contend that any individual court-martial under the UCMJ could not meet international fair trial standards (presuming the court had jurisdiction over the defendant). Nevertheless, the organization emphasises that the right to trial before a competent, independent and impartial tribunal established by law requires that justice must not only be done, but must be seen to be done.[101] The organization questions whether this can be achieved in the eyes of the world via military justice in the context of the US government's sweeping war paradigm in which international human rights law has been bypassed and international

[98] See Principle 8 of UN Draft Principles governing the administration of justice through military tribunals.

[99] For example, in its most recent reports on human rights in other countries, the US State Department noted in the entry on Peru: "During the year the Constitutional Tribunal handed down two sentences with important human rights implications. In the first, the tribunal reiterated the principle that civilian courts rather than military ones should handle human rights cases." US State Department, *Country Reports on Human Rights Practices, 2005*. Published 8 March 2006. (also relevant to the USA's conduct in the "war on terror", the entry on Peru continued, "In the second, it found that disappearances constituted a 'permanent crime' and therefore were not subject to a statute of limitations").

[100] Testimony of Professor Neal Katyal, Georgetown University Law Center, Senate Armed Services Committee, 19 July 2006.

[101] House of Lords, *R . v. Bow Street Magistrate, Ex parte Pinochet (No.2)* [1999] 2 WLR 272, quoting Lord Hewart, C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259. See also: European Court of Human Rights, *Delcourt v. Belgium* (application no. 2689/65), Judgment, 17 January 1970, para. 31.

humanitarian law selectively applied by the USA, and in which the military has been tainted by abuses and a lack of independent investigations and impunity up the chain of command.

Amnesty International suggests that the US authorities should reflect upon the positive benefits that would be gained by turning to the civilian courts in the case of the relatively small number of detainees who are likely to face charges. Given that cases of "war on terror" detainees held in the USA, including foreign nationals, have already been tried in the country's federal courts in the USA, it would bring a consistency of approach.[102] Such a "demilitarization" of the USA's prosecutorial response could also herald a greater respect for human rights in the pursuit of security, a promise the US administration has made throughout the "war on terror", but so far has failed to meet.

After John Walker Lindh, a US national captured during the international armed conflict in Afghanistan and charged with conspiring with *al-Qa'ida* to murder US citizens, pled guilty in a US federal court, US Attorney Paul J. McNulty said: "[T]his case proves that the criminal justice system can be an effective tool in combating terrorism".[103] In April 2002, a Pentagon spokesperson said that "as we've shown with John Walker, the US citizenship does make it a different case and a different kind of treatment".[104] The administration is still intending to try foreign nationals, including those picked up in similar circumstances and accused of similar crimes as John Walker Lindh, in front of military commissions. Discrimination in the administration of justice and discriminatory application of fair trial rights, including those set out in article 75 of Protocol 1 to the Geneva Conventions and Article 14 of the ICCPR which the Justices cited in the *Hamdan* ruling, are prohibited under international law. The principle of non-discrimination is one of numerous fair trial standards that the US authorities should take into account as they consider their response to the *Hamdan* decision.

4. In all courts, adherence to fair trial standards

The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens… Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the

[102] The Deputy Attorney General has stated that since 11 September 2001, the Justice Department has "charged 435 defendants and won 253 convictions in 45 different judicial districts across the country, with many of these defendants still awaiting trial. These statistics…represent defendants charged in terrorism or terrorism-related criminal cases with an international connection". Prepared remarks of Deputy Attorney General Paul J. McNulty at the American Enterprise Institute, Washington, D.C., 24 May 2006, http://www.usdoj.gov/dag/speech/2006/dag_speech_060524.html.

[103] *Lindh pleads guilty, agrees to aid inquiry*. Los Angeles Times, 16 July 2002. On 17 March 2006, Paul J. McNulty was sworn in as Deputy Attorney General of the United States – the second most senior law enforcement position in the country – after being nominated to the position by President Bush and confirmed by the Senate.

[104] Department of Defense News Briefing - ASD PA Clarke and Brig. Gen. Rosa, 4 April 2002, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3391.

past course of decisions, and stout confidence in the strength of the democratic faith which we profess.
Justice Black, US Supreme Court, 1951[105]

The most immediate impact of the Supreme Court's decision in *Hamdan v. Rumsfeld* is in relation to trials. The ruling halted the executive's attempts to try Salim Ahmed Hamdan and a number of others by the military commissions constituted under President Bush's Military Order of 13 November 2001. The main focus of the discussion between Congress, the executive and others since the ruling of 29 June 2006 has been the question as to the system that should replace the military commissions declared unlawful by the Supreme Court.

As noted above in Section 3, international humanitarian law, including Article 3 common to the four Geneva Conventions of 1949, does not apply to all the detainees held by the USA at Guantánamo and elsewhere, namely those who were taken into custody outside of zones of armed conflict. The rights to which such detainees are entitled are standards contained in international treaties and customary law. Such detainees include some or all of the 14 men transferred in early September 2006 from secret CIA custody to military detention in Guantánamo where President Bush suggested they would be tried by military commission if Congress approved the administration's Military Commissions Act of 2006 (see Appendix 2). They also include, among others, individuals picked up in Bosnia, Gambia, Egypt, Indonesia and Mauritania (see Appendix 3).

Whether tried in civilian courts, courts-martial or by military commission, all persons charged with a criminal offence, including war crimes, must be tried before an independent and impartial court established by law in proceedings which meet international standards of fairness.

In *Hamdan*, the Supreme Court ruled that common Article 3 was applicable to the case before it. The International Court of Justice (ICJ) has determined that the rules in common Article 3 "constitute a minimum yardstick", reflecting "elementary considerations of humanity".[106] They have evolved to reflect customary rules of international law applicable in times of armed conflict, either international or non-international.[107] Among other things, common Article 3 prohibits:

[105] *Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951), Justice Black concurring.
[106] Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Rep., para. 218.
[107] The ICJ considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". Ibid. Para. 220. The International Criminal Tribunal for the former Yugoslavia has also held that common Article 3 is "applicable to armed conflicts *in general*" (emphasis added). Prosecutor v. Dusko Tadic, Trial Chamber II, Opinion and Judgment of 7 May 1997, para. 559. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol. I, p. 352.

"*the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples*".

In other words, no one should be sentenced or subject to the death penalty unless they have been tried by an independent, impartial and competent court established by law in proceedings which meet international standards of fairness. The *Hamdan* ruling noted that official commentaries accompanying common Article 3 make clear that "the scope of the Article must be as wide as possible". A plurality of four Justices went on to note that the phrase "all the judicial guarantees which are recognized as indispensable by civilized peoples" is not defined in the text of the Geneva Conventions, but asserted that "it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law".[108] They added that many of these protections are contained in Article 75 of Protocol I to the Geneva Conventions of 1949.

Article 75.4(a), for example, provides that "The procedure…shall afford the accused before and during his trial all necessary rights and means of defence". The right of an accused to an effective defence includes, among others, the following rights: the right to assistance of effective counsel of choice at all stages of proceedings, including pre-trial and during appeal; the prompt notification of charges; the right to "equality of arms"; the right to adequate time and facilities to prepare the defence; the right of the accused to be present; the rights to challenge and to present evidence; and the right not to be compelled to testify against oneself or confess guilt. The right to an effective defence also requires the exclusion of any evidence obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.

Amnesty International is concerned by a number of aspects of the administration's proposed Military Commissions Act which curtail the right to an effective defence. These are outlined in the sections that follow.

None of the provisions of Article 75 "may be construed as limiting or infringing any more favourable provision granting greater protection, under any applicable rules of international law" (Article 75.8). Such rules include those enshrined in international human rights law. Indeed, four Justices noted in the *Hamdan* judgment that "the same basic protections" contained in Article 75 are contained in "other international instruments", including in Article 14 of the ICCPR, to which the USA became a party in 1992.[109]

Responding to the *Hamdan* ruling, the White House spokesman said that "we need to go ahead and bring to justice those who are at Guantánamo in a manner consistent with law

[108] *Hamdan v. Rumsfeld*, Justice Stevens, joined by Justices Souter, Ginsburg and Breyer.

[109] In its conclusions on the USA in July 2006, in which it welcomed the *Hamdan* ruling, the Human Rights Committee emphasised that common Article 3 "reflects fundamental rights guaranteed by the [International] Covenant [on Civil and Political Rights], in any armed conflict."

and with our obligations to human rights".[110] To meet this promise, any trials must be carried out in proceedings that meet international standards for fair trial. These standards include:[111]

- All persons must be equal before the courts and tribunals;
- Charges must be for internationally recognisable criminal offences;
- All persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- Trials must take place within a reasonable time;
- All persons must be presumed innocent until proven guilty;
- All persons must have full access to legal counsel of their own choosing, and have adequate time and facilities to prepare their defence;
- All persons must be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them;
- All persons must be tried in their presence;
- All persons must be able to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- No persons must be compelled to testify against themselves or to confess guilt;
- Statements or any other material obtained by torture or by cruel, inhuman or degrading treatment or punishment must be excluded as evidence (except as evidence that such treatment took place);
- All persons convicted of a crime must have the right to have their conviction and sentence reviewed by a higher tribunal according to law. Reviews must be made by competent, independent and impartial tribunals, be genuine and go beyond formal verifications of procedural requirements.

4(a) Trial by a competent, independent and impartial tribunal established by law

The primary institutional guarantee of a fair trial is that decisions will not be made by political institutions but by competent, independent and impartial tribunals established by law. The individual's right to trial in court, with guarantees for the accused in criminal proceedings, lies at the heart of due process of law.[112] The UN Human Rights Committee has clarified that

[110] Press briefing by Tony Snow, 29 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060629-6.html.
[111] Articles 6, 7, 9 and 14 of the International Covenant on Civil and Political Rights; Article 75, Additional Protocol 1 to the Geneva Conventions.
[112] Universal Declaration of Human Rights, article 10; International Covenant on Civil and Political Rights, article 14(1); American Convention on Human Rights, article 8(1); European Convention for

the right to trial by an independent and impartial tribunal is so basic as to be "an absolute right that may suffer no exception".[113] This is borne out by the fact that the Geneva Conventions and their protocols enshrine fair trial guarantees.

As the *Hamdan* judgment found, Congress had not authorized the military commissions established under the Military Order of 13 November 2001. Rather than being established by law flowing from a legislative procedure, as required by international standards, the commissions were instead established by executive order. They neither were, nor were seen to be, independent of the executive. The fact that they were made up of members of the armed forces judging members of the presumed "enemy", broadly defined, under the auspices of the Commander-in-Chief of the Armed Forces, also raised fundamental doubts as to whether the commissions would be seen to be impartial.

In times of armed conflict, common Article 3 to the four Geneva Conventions of 1949 provides that courts must be "regularly constituted". In the *Hamdan* ruling, the Supreme Court invoked the authoritative ICRC commentary on the Fourth Geneva Convention indicating that this wording means "established and organized in accordance with the laws and procedures already in force in a country" and that it definitely excludes all special tribunals.[114] The Court also considered that "more fundamentally, the legality of a tribunal under common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly".[115] The administration's proposed Military Commissions Act states that "a military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions".

Notwithstanding this assertion, the proposed commissions fall far short of international standards under common Article 3 and human rights law.

Established by law. If the commissions are established pursuant to an act of Congress, expressly authorizing the President to establish them, the commissions may be considered to be "established by law". An executive order or other administrative measure outside of the framework of a legislative act does not establish a tribunal by law for the purposes of fair trial guarantees.

Independence. The independence of the tribunal is essential to a fair trial. It means that decision-makers in a given case are free to decide matters before them impartially on the

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the Protection of Human Rights and Fundamental Freedoms, article 6(1); African Charter on Human and peoples' Rights, article 7(1).

[113] Human Rights Committee, González del Río v. Peru, (communication no. 263/1987), Views, UN Doc. CCPR/C/46/D/263/1987, 2 November 1992, par. 5.1.

[114] *Hamdan v. Rumsfeld*, 29 June 2006, p. 69-70. The Supreme Court referred to: Jean S. Pictet (ed.), *Commentary to the IV Geneva Convention relative to the protection of civilian persons in time of war* (Geneva: ICRC, 1958), p. 340; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol. I, p. 355.

[115] *Hamdan v. Rumsfeld*, 29 June 2006, p. 71-72, footnote 67.

basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any branch of government or elsewhere. It also means that the people appointed as judges are selected primarily on the basis of their legal expertise.

Impartiality. The tribunal must be impartial. The principle of impartiality, which applies to each individual case, demands that each of the decision-makers, whether judges or juries, be unbiased. Actual impartiality and the appearance of impartiality are both fundamental for maintaining respect for the administration of justice. The judiciary is required to ensure that the proceedings are conducted fairly and the rights of all the parties are respected.

In 2005, in a resolution co-sponsored and voted for by the USA, the UN Commission on Human Rights called on states to ensure that "military courts or special tribunals are independent, competent and impartial, and that such courts or tribunals apply established procedures of due process of law and guarantees of a fair trial, in accordance with international obligations".[116] The UN Commission on Human Rights also recently stressed the importance of Principle 5 of the UN Basic Principles on the Independence of the Judiciary, which 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*".[117]

Principle 12 of the draft UN Principles governing the administration of justice through military tribunals states that:

> "*The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. The persons selected to perform the functions of judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy.*"

The commentary to the Principles states that:

> "*Emphasis should also be placed on the requirement that judges called on to sit in military courts should be competent, having undergone the same legal training as that required of professional judges. The legal competence and ethical standards of military judges, as judges who are fully aware of their duties and responsibilities, form an intrinsic part of their independence and impartiality.*"[118]

[116] *Democracy and the rule of law*. Human rights resolution 2005/32.
[117] Commission on Human Rights, resolution 2003/39 (Integrity of the judicial system), par. 2.
[118] E/CN.4/Sub 2./2005/9, 2 June 2005, Para 42.

The Principles emphasise that "justice should not only be done but should be seen to be done", and that the "presence of civilian judges in the composition of military tribunals can only reinforce the impartiality of such tribunals".[119]

The proposed Military Commissions Act provides for a military judge – a commissioned officer of the US armed forces who is a member of the bar and has been certified by the Judge Advocate General of the relevant armed force as qualified for duty as a military judge – to preside over each military commission and to decide on matters of law.[120] The other members of the commission – at least five members, but 12 if the case might result in the death penalty – would be members of the US armed forces on active duty. They would decide questions of fact.

The bill proposes that the Secretary of Defense "shall prescribe regulations providing for the manner in which military judges are detailed to such commissions". The Secretary of Defense or his designee – as the "convening authority" – shall detail to be members of any particular military commission those members of the US armed forces on active duty who "in his opinion, are fully qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament".

Decisions by the US authorities to bring people to trial before the military commissions under the 2001 Military Order appear to have been made arbitrarily in that there were no clear criteria known and the decisions appear to have been influenced by the attitude of the detainees' home governments. It was originally proposed that UK nationals Feroz Abbasi and Moazzam Begg would face trial by military commission, but the UK government strongly opposed these proposals stating that the military commissions "would not provide sufficient guarantees of a fair trial according to international standards". The two men have since been released to the UK, where they have not been subject to any criminal charges.

The fact that there is no civilian component to the military commissions, and that the Secretary of Defense – a member of the executive, not the judiciary – is given the power to decide how specific judges are appointed to the commissions, and which members of the armed forces will sit as commission members, raises serious concern as to whether they can meet the requirements of independence and impartiality.

Competence. The right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person. Amnesty International has raised questions about military jurisdiction over individuals who should be considered civilians and over certain crimes (see Section 3 above).

The proposed Military Commissions Act differentiates between "lawful enemy combatants", "unlawful enemy combatants", and "alien unlawful enemy combatants". Only the latter, that is, foreign nationals found to be "unlawful enemy combatants", may be tried by the military commissions proposed under the Act.

[119] UN Doc: E/CN.4/Sub.2/2005/9, para 41.
[120] II §948j (b).

Under the Act, the determination of who is a "lawful enemy combatant", including a prisoner of war, is determined by the President or the Secretary of Defense, not a competent tribunal. Similarly, who is an "unlawful enemy combatant" includes those found to be "enemy combatant" by the executive and the Combatant Status Review Tribunal, an executive body.

Amnesty International is therefore concerned that military commissions established under the proposed Act would not meet the test of competent courts, as the executive retains power to determine who will or will not be subject to trial by commission. In this respect, it is unclear how the commission would enforce the right of persons challenging the its jurisdiction over them on the basis that their status has been determined by the executive in a way that is inconsistent with the facts or their actual status under international law.[121]

Further, as noted by the Human Rights Committee, "quite often the reason for the establishment of [special] courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[122] In the *Hamdan* ruling, the Supreme Court found that "nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case". The administration has responded by including in its proposed Military Commissions Act the statement that: "In a time of ongoing armed conflict, it generally is neither practicable nor appropriate for combatants like al Qaeda terrorists to be tried before tribunals that include all of the procedures associated with courts-martial." The need to resort to classified and hearsay evidence are given as two main reasons.

Given that both civilian courts and courts-martial have established rules and procedures for dealing with hearsay and classified evidence, and US and foreign nationals charged with similar crimes have been tried in such courts, a real question must be answered by Congress as to whether the creation of special military commissions is necessary and advisable.

4(b) The right to equality and non-discrimination

I can say with confidence that there is agreement within the administration that the commission procedures that we would have Congress consider would not relate to American citizens.

US Attorney General, Senate Armed Services Committee, 2 August 2006

All people are entitled to equality before the law and courts. Extraordinary courts may not be created to try groups of people for criminal offences on the basis of their race, colour, sex,

[121] Under Article 45.2 of Additional Protocol 1 to the Geneva Conventions, a person charged with a criminal offence in the context of an international armed conflict has the right assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated, whenever possible prior to trial. A determination by the commission that a person is a prisoner of war or a protected person under the Geneva Conventions should have the effect of stripping the commission of jurisdiction to try the person.

[122] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 4, in UN Doc. HRI/GEN/Rev.7.

language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status. Such courts would contravene the principle of equality before the courts and the principle of non-discrimination. [123]

One of the fundamental flaws of the military commissions as established under the Military Order signed by President Bush on 13 November 2001 was that they applied only to foreign nationals. The second-class justice that they would have handed out to foreign nationals would have violated the principle of non-discriminatory application of fair trial rights.

Under the administration's proposed Military Commissions Act of 2006, only foreign nationals designated as "unlawful enemy combatants" would be subject to trial by military commission. In promoting its legislative proposal, the White House has stressed that "Americans cannot by tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."[124]

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

4(c) Presumption of innocence

I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay… As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.

President George W. Bush, 6 September 2006

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet internationally

[123] Articles 2, 7 and 10 of the Universal Declaration, articles 2(1), 3 and 26 of the ICCPR, articles 2 and 5 of the Convention on the Elimination of Racial Discrimination, articles 2 and 3(1) of the African Charter, articles 1, 8(2) and 24 of the American Convention, article 14 of the European Convention, article 75 of Additional Protocol I to the Geneva Conventions. Also, Human Rights Committee General Comment 15: The position of aliens under the Covenant, 1986, par. 7, in UN Doc. HRI\GEN\1\Rev.1.

[124] Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html.

prescribed requirements of fairness.[125] The presumption of innocence lasts until the charge against the defendant is proved beyond a reasonable doubt.[126]

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also involves conduct of all other public officials. This means that public authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.[127] It also means that the authorities have a duty to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

Amnesty International welcomes the fact that the administration's proposed Military Commissions Act provides that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt". The real litmus test, however, is how this right is guaranteed in the course of pre-trial and trial proceedings.

The right of all those detained in Guantánamo to be presumed innocent, including those charged for trial by military commission prior to the *Hamdan* ruling and the 14 men transferred to Guantánamo from secret CIA custody after it, has already been undermined by repeated statements of President Bush, Vice President Cheney and other civilian and military officials.

In addition to labeling Guantánamo detainees as loosely-defined "enemy combatants" in a broadly-defined global "war" the end of which it can neither predict nor define, the US administration, including the President who is the Commander in Chief of the Armed Forces, has repeatedly labeled the detainees as "killers" and "terrorists", in violation of the presumption of innocence. President Bush has continued the pejorative and prejudicial labelling of Guantánamo detainees. He said of them in June 2006: "They're cold-blooded killers. They will murder somebody if they're let

The pattern of commentary on the presumed guilt of the detainees was continued by the prosecution in the military commission process under the Military Order. For example, in a press conference in January 2006, prosecutor Colonel Morris Davis referred to defendant Omar Khadr, a Canadian national captured when he was 15 years old and held in Guantánamo since 2002, as a "terrorist" on six occasions and also repeatedly referred to his guilt. The defence challenged these statements as being prejudicial to a fair trial. Amnesty International was alarmed not only by the prosecutor's conduct, but also the finding of the the commission's presiding officer. The latter found that, while the prosecutor's statements at the press conference were "potentially harmful to a criminal proceeding", the defence had not proved that the prosecutor had violated his ethical obligations or that the defendant would be denied a full and fair trial.

[125] Article 11 of the Universal Declaration, article 14(2) of the ICCPR, article 7(1)(b) of the African Charter, article 8(2) of the American Convention, article 6(2) of the European Convention, article 75(4)(d) of Additional Protocol I, article 6(2)(d) of Additional Protocol II.
[126] Human Rights Committee, General Comment 13 (1984).
[127] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 7, in UN Doc. HRI/GEN/Rev.7.

out on the street."[128] Other senior officials have echoed this sentiment throughout the "war on terror". For example, Vice-President Cheney said in 2005 of the 520 detainees then held of Guantánamo:

> *"[H]ard-core terrorists is the only way to describe them. They're unlawful combatants. They're out to kill Americans. And if you put them back on the streets, that's exactly what they'll do… [W]e absolutely need to have a facility like that to house some very violent and evil people*."[129]

Given that even the USA's National Security Strategy cites President Bush's stated aim of the "war on terror" as being "to rid the world of evil", and given the President's repeated references to the "war on terror" as being a struggle between "good and evil", and one in which "either you are with us, or you are with the terrorists", it is clear that such labels fall into a disturbing and broad pattern of commentary on the presumed guilt of the detainees. This labelling violates the presumption of innocence and damages the prospect of a fair trial.

In the case of the 14 individuals transferred from secret CIA custody to military detention at Guantánamo Bay in the first week of September 2006, President Bush again undermined their right to the presumption of innocence, even as he was revealing that the 14 men were being transferred to the possibility of trial by military commission. In his address, President Bush referred to the 14 as "dangerous men" and "terrorists" who "our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001".

Amnesty International is concerned that the repeated use of pejorative labels against the detainees over the past five years has been tolerated throughout government, and in the current context threatens to influence decision-making within Congress in terms of legislation on trials for Guantánamo detainees. For example, at a Senate Armed Services hearing on 13 July 2006, Senator Joseph Lieberman suggested that "there seems to be a consensus on the [military witness] panel about that, that the Uniform Code of Military Justice, if I may use the term simplistically, has too many rights. We don't want to give terrorists all the rights that our troops have when we use the UCMJ to try them."

The pattern of commentary on the presumed guilt of the detainees, including those subsequently released without charge or trial, contrasts with official comments following evidence of war crimes and human rights violations committed by US troops. For example, questioned after the revelations about the torture and ill-treatment of detainees in Abu Ghraib prison, President Bush stressed that there were investigations underway, "some of them related to any criminal charges that may be filed". He continued: "in our system of law, it's essential that those criminal charges go forward without prejudice. In other words, people

[128] President Bush Participates in Press Availability at 2006 U.S.-EU Summit, 21 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060621-6.html.
[129] Radio Interview of the Vice President by Steve Gill, The Steve Gill Show, 17 June 2005, http://www.whitehouse.gov/news/releases/2005/06/20050617-9.html.

need to be – are treated innocent until proven guilty".[130] Amnesty International is deeply concerned by the failure of the President, the Commander-in-Chief of the Armed Forces, to ensure respect for the presumption of innocence equally in the case of all those potentially facing criminal trials.

4(d) The right to a trial within a reasonable time

Somebody who's been in a dark, dank hole for, you know, four years, you're going to run into speedy trial issues, I suppose so that would have to be addressed

Admiral John D. Hutson, Senate hearing, July 2006

The respect for the presumption of innocence also requires that persons who are detained pending trial on criminal charges be tried within a reasonable time or released pending trial.[131] Furthermore, international standards require that proceedings in criminal cases be completed without undue delay.[132]

Admiral John D. Hutson, a former Judge Advocate General of the US Navy told the Senate Armed Services Committee on 13 July 2006 that if the military commissions being envisioned for "war on terror" detainees were to be based on the Uniform Code of Military Justice, some "modification" would have to be made on the right to a speedy trial contained in the UCMJ. He added that "somebody who's been in a dark, dank hole for, you know, four years, you're going to run into speedy trial issues, I suppose so that would have to be addressed".

One of the reasons the administration gives in its proposed Military Commissions Act as to why it is "impracticable" to try "enemy combatants" in ordinary courts-martial is because the latter specifically require "speedy trials".

Under Rule 707 of the Manual for Courts-Martial, a court-martial must occur within 120 days of arrest or summons. This period was selected "as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur". US courts have ruled that when a defendant has been held in pre-trial detention for more than 90 days, there is a presumption that speedy trial rights have been violated and the government must demonstrate due diligence in bringing the case to trial.[133] More than 1,200 days have passed since Salim Ahmed Hamdan was pronounced eligible for trial by military commission under the 2001 Military Order, and more than 800 days have passed since the administration announced that he had been charged.

[130] Interview of the President by Alhurra Television, 5 May 2004, http://www.whitehouse.gov/news/releases/2004/05/20040505-5.html.
[131] Articles 9(3) of the ICCPR, article 7(5) of the American Convention, article 5(3) of the European Convention, article 60(4) of the ICC Statute.
[132] Article 14(3)(c) of the ICCPR, article 8(1) of the American Convention, article 6(1) of the European Convention, article 67(1)(c) of the ICC Statute.
[133] Uniform Code of Military Justice, Appendix 21, analysis of rules for courts-martial, Rule 707 (a).

The proposed Military Commissions Act makes no provision guaranteeing the right to trial within a reasonable time. Congress should ensure that this provision is guaranteed to detainees who are to be tried. Separately, Congress should not authorize indefinite detention without charge or trial.[134]

4(e) Right to lawyer of choice and to defend oneself in person

Everyone arrested or detained - whether or not on a criminal charge - and everyone facing a criminal charge - whether or not detained - has the right to the assistance of legal counsel.[135] The right to a lawyer generally means that a person has the right to legal counsel of their choice.[136] Everyone charged with a criminal offence has the right to defend him or herself in person or through a lawyer.[137]

[134] Even those who are tried, however, do not lose their "enemy combatant" label. Thus if a detainee is tried and acquitted, he may subsequently be returned to administrative detention if the executive considers that he remains a risk to the USA or of intelligence value to it. If a detainee is convicted and sentenced to a term of imprisonment, he may be returned to administrative detention after serving that sentence one or more of the same reasons. The leaked version of the administration's post-*Hamdan* legislation stressed this. Although this is not expressed in the Military Commissions Act released by President Bush on 6 September 2006, the sentiment expressed in the leaked version had been the administration's stated position under the Military Order of 2001.

[135] Principle 1 of the UN Basic Principles on the Role of Lawyers, principle 17(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 55(2)(c) of the ICC Statute.

[136] Principles 1 and 5 of the UN Basic Principles on the Role of Lawyers, article 105 of the Third Geneva Convention of 1949, article 55(2)(c) of the ICC Statute.

[137] Article 14(3)(d) of the ICCPR, article 8(2)(d) of the American Convention, article 6(3)(c) of the European Convention, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 67(1)(d) of the ICC Statute. The right to defend oneself is guaranteed also by Additional Protocol I, which requires that "the procedure . . . shall afford the accused before and during his trial all necessary rights and means of defence" (article 75(4)(a)).

Interrogations began in Guantánamo in January 2002. On 27 February 2002 – four and a half years ago – Secretary of Defense Rumsfeld said that the US was beginning the process of interrogating with a view to possible prosecution.[138] Once any individual has been identified as a suspect in a crime – the Guantánamo detainees have repeatedly been labelled as "killers" and "terrorists" by senior officials in the chain of command – that person has the right to be informed that he or she is a suspect, to be informed of his or her rights – including the right to remain silent without such silence being a consideration in the determination of guilt or innocence, to have counsel of one's own choice and to have free legal assistance if unable to pay for it, and not to be questioned in the absence of one's counsel. As the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court make clear, these rights apply even to persons suspected of the most serious crimes: genocide, crimes against humanity and war crimes.[139]

During the pre-trial hearings before military commissions under the 2001 Military Order, two Guantánamo detainees asked to represent themselves before the commission and a third indicated that he did not want any legal representation.

Ali Hamza al-Bahlul, a Yemeni national, repeatedly refused his military defence lawyer and asked to represent himself. In the alternative, he requested a lawyer from Yemen. In protest against the denial of his right to self representation, Ali al-Bahlul boycotted the proceedings. His military lawyer asked to withdraw his representation based on his client's wishes and his ethical and professional obligations. The commission ordered the lawyer to continue representing the detainee.

Binyam Muhammed, a British resident, told the tribunal that he could not understand how he was expected to trust a US military lawyer after the US has called him a "terrorist" and the "enemy", and that the commission was forcing representation on him by the same military that was detaining him. The presiding officer ordered the defence military lawyer to continue representation.

A third detainee, Saudi national Ghassan Abdullah Al Sharbi, also said that he did not want a military lawyer, or any lawyer. He indicated that he would plead guilty. The presiding officer declared that he was unfit to represent himself.

[138] "They have all now, except for one or two, been questioned and interrogated, looking for intelligence information so that we could stop other terrorist threats, people from attacking our country and our friends and allies and our deployed forces. We're now starting the process of doing a series of interrogations that involve law enforcement. That is to say to determine exactly what these individuals have done. Not what they know of an intelligence standpoint, but what they've done from a law enforcement standpoint. That process is underway." Secretary of Defense interview with KSTP-ABC, St Paul, Minnesota, 27 February 2002, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=2818.

[139] (1) ICTY: Rules of Procedure and Evidence. Section 1. Rule 42. (2) ICTR: Rules of Procedure and Evidence. Part 4, Section 1, Rule 42. And Part 5, Section 1, Rule 63. (3) Rome Statute of the ICC: Part 5. Article 55 (2) states that any suspect has the right: "(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing..; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."

Amnesty International is concerned that, as with the military commissions under the Military Order of 13 November 2001, the proposed Military Commissions Act makes no provision for defendants to defend themselves in person rather than with the assistance of a lawyer, and also restricts the right to a lawyer of one's choice. They may retain a civilian lawyer, but would have to bear the cost unless that person offered their services *pro bono*. The civilian lawyer must be a US citizen and have passed stringent security clearance. A defendant is not able to choose as a lawyer a non-US national, for example, a lawyer from his own country. Even if the defendant is able to retain a US civilian lawyer with national security clearance, he will still be represented by a US military lawyer associate counsel, even if that goes against the defendant's wishes.

This is not to say that no defendant would choose a military lawyer over a civilian lawyer if faced with military proceedings. The principle is simply that the accused should be represented by counsel of his choice unless he wishes to represent himself. The commentary to the draft UN Principles governing the administration of justice through military tribunals notes that:

> "*The provision of legal assistance by military lawyers, particularly when they are officially appointed, has been challenged as inconsistent with respect for the rights of the defence. Simply in the light of the adage that "justice should not only be done but should be seen to be done", the presence of military lawyers damages the credibility of these jurisdictions. Yet experience shows that the trend towards the strict independence of military lawyers - if it proves to be genuine despite the fundamental ambiguity in the title - helps to guarantee to accused persons an effective defence that is adapted to the functional constraints involved in military justice, particularly when it is applied extraterritorially. Nevertheless, the principle of free choice of defence counsel should be maintained, and accused persons should be able to call on lawyers of their own choosing if they do not wish to avail themselves of the assistance of a military lawyer. For this reason, rather than advocating the simple abolition of the post of military lawyers, it seemed preferable to note the current trend, subject to two conditions: that the principle of free choice of defence counsel by the accused is safeguarded, and that the strict independence of the military lawyer is guaranteed*."[140]

Under the proposed Military Commissions Act, it is the Secretary of Defense who makes the rules as to the appointment of military lawyers – both prosecution and defence – to military commissions.[141] It would also be the Secretary of Defense who would establish procedures for the appointment of appellate lawyers for sentenced prisoners. The trend towards "strict independence of military lawyers" referred to in the above paragraph would appear to be undermined in such a system, thereby undermining the need for justice not only to be done but to be seen to be done.

[140] Principle No. 14, para 48.

[141] § 948k "The Secretary shall prescribe regulations providing the manner in which counsel are detailed for military commissions and for the persons who are authorized to detail counsel for such military commissions".

Amnesty International considers that the right of a defendant to legal counsel of choice or to defend himself in person would not be upheld under the proposed legislation.

4(f) The right to adequate time and facilities

The right to adequate facilities to prepare a defence requires that the accused and their counsel must be granted access to appropriate information, including documents, information and other evidence that might help the accused persons prepare their case, exonerate them or, if necessary, mitigate a penalty.[142] Such information provides the defence with an opportunity to learn about and comment on the observations filed or evidence adduced by the prosecution.[143]

Salim Ahmed Hamdan, for example, was not assigned a military lawyer until five months after he was made eligible for trial by military commission under the 2001 Military Order. Given that the executive maintains control over all aspects of any particular detainee's case, as well as the appointment of military counsel or security clearance and access to the detainee for any civilian counsel, there was substantial scope for abuse in this area under the Military Order and for the defendant to be denied access to counsel in time adequately to prepare for trial. Under the administration's proposed Military Commissions Act, even after an individual is formally charged, military defence counsel may not be appointed immediately, but only "as soon as practicable".

The 14 individuals transferred in early September 2006 from secret CIA custody to Guantánamo should have immediate access to legal counsel. In his speech on 6 September 2006, President Bush said that these individuals would be brought to trial if Congress passed his administration's proposed Military Commissions Act.

Respect for this right may be at issue in light of the fact that the proposed Military Commission Act provides that some evidence may be excluded from the defendant (see further below).

4(g) The right to be tried in one's presence

[V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of Protocol 1 to the Geneva Conventions] and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.

Hamdan v. Rumsfeld, 29 June 2006[144]

[142] Article 14(3)(b) of the ICCPR, article 8(2)(c) of the American Convention, article 6(3)(b) of the European Convention, article 75(4)(a) of Additional Protocol I, article 21(4)(b) of the ICTY Statute, article 20(4)(b) of the ICTR Statute, Article 67(1)(b) of the ICC Statute, article 67(2) of the ICC Statute, Principle 21 of the UN Basic Principles on the Role of Lawyers.
[143] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 9, in UN Doc. HRI/GEN/Rev.7.
[144] Justice Stevens, joined by Justices Souter, Ginsburg and Breyer.

Everyone charged with a criminal offence has the right to be tried in their presence so that they can hear and challenge the prosecution case and present a defence.[145] This applies even if the press and public are excluded for all or part of the trial for reasons of national security. The right to be present at trial is an integral part of the right to an effective defence.

As with the military commissions under the Military Order of 13 November 2001, the administration's proposed Military Commissions Act, if enacted in its current form, would permit defendants to be excluded from parts of the proceedings before military commissions. According to this proposal, "the military judge may, subject to the provisions of this subsection, permit the admission in a military commission under this chapter of classified information outside the presence of the accused". The accused may be excluded if it is:

> "*necessary to protect classified information the disclosure of which to the accused could reasonably be expected to cause identifiable damage to the national security, including intelligence or law enforcement sources, methods or activities; or necessary to ensure the physical safety of individuals; or necessary to prevent disruption of the proceedings by the accused*".

Under the proposed legislation, the exclusion of the accused must be "no broader than necessary" and must "not deprive the accused of a full and fair trial". Before the judge can exclude the defendant, the head of the executive or military department or agency which has control over the classified evidence shall certify in writing that disclosure of the evidence to the accused would jeopardize national security and that it has been declassified to the maximum extent possible. The military defence lawyer will be able to be present at all parts of the proceedings. The civilian defence lawyer, if the defendant has one, may be permitted to be present and to participate in all trial proceedings, if he or she has the necessary security clearance and that his or her presence "are consistent with regulations that the Secretary [of Defense] may prescribe to protect classified information". Neither lawyer may disclose any such classified evidence to the accused. The accused will be provided with a redacted transcript of the proceeding from which he has been excluded and "to the extent practicable", an unclassified summary of any evidence introduced.

Amnesty International considers that the defendant and his chosen counsel must be present at all stages of the trial unless he acts in an unreasonably disruptive manner (in which case video links can be installed for him to participate remotely) or he knowingly and voluntarily waives his right to be present. The organization considers that because the proposed Military Commissions Act permits the exclusion of the accused and possibly his civilian defence counsel from certain proceedings, it does not guarantee the defendant's right to be present (see also Classified Evidence below).

[145] Article 14(3)(d) of the ICCPR, article 75(4)(e) of Additional Protocol 1, article 6(2)(e) of Additional Protocol II, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 67(1)(d) of the ICC Statute.

4(h) The rights to challenge and to present evidence

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

Justice Frankfurter, US Supreme Court, 1951[146]

Article 14.3(e) of the ICCPR provides that any criminal defendant must be allowed, "in full equality", to be able "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.[147] This aspect of due process has long been recognized under the US Constitution. In 1959, for example, the Supreme Court stated:

> "*Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion.*"[148]

The proposed Military Commissions Act provides that the defence counsel representing an accused person before a military commission "shall have a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the United States, as specified in regulations prescribed by the Secretary [of Defense]". The test of whether this guarantee is meaningful will be how it is reflected in the rules and procedures that are prescribed under such legislation. However, the Act itself provides that "exculpatory evidence that is classified" may be withheld from the defendant. Although it "may be provided" to defence counsel, the latter would not be able to divulge its contents to the defendant. This limitation is clearly a cause for concern.

The use of hearsay evidence and classified evidence has the potential to come into conflict with the fair trial right of any defendant to be able to challenge the evidence against

[146] *Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951), Justice Frankfurter concurring.
[147] Human Rights Committee General Comment 13 (1984).
[148] *Greene v. McElroy*, 360 U.S. 474 (1959).

him or her.[149] With inadequate safeguards, both were part of the fundamentally flawed procedures of the previous military commissions under the 2001 Military Order. In the *Hamdan* ruling, the Supreme Court noted what it called a "glaring condition" of the proposed commissions:

> "*The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close'. Grounds for such closure 'include the protection of information classified or classifiable … ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.' Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.*"

The *Hamdan* ruling went on to describe "another striking feature" of the military commission rules, namely that:

> "*they permit the admission of any evidence that, in the opinion of the presiding officer, 'would have probative value to a reasonable person.' Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn*."

The administration's proposed Military Commissions Act explains that the need to resort to classified and hearsay evidence are reasons why the administration favours military commissions over courts-martial (and in the earlier leaked version of the bill why it did not favour US District Courts). Hearsay and classified evidence are admissible in both types of existing courts, albeit as exceptions under judicial regulation.

Amnesty International believes that any admission of hearsay or classified evidence must, at a minimum, not fall below existing safeguards which apply in US federal courts or courts-martial, and that any such evidence must on no account be admitted at any stage of the proceedings in any trial where the death penalty might be imposed. Given the irrevocable nature of the death penalty, any evidence that is less than transparent and reliable must not be relied upon in capital trials. International standards require that any trial that may end in the death penalty give "all possible safeguards to ensure a fair trial", and evidence must be "clear and convincing leaving no room for an alternative explanation of the facts".[150] The use of classified and hearsay evidence can only undermine this safeguard. Amnesty International, which opposes the death penalty in all cases, urges the US authorities to reject any use of this cruel, inhuman and degrading punishment (see below).

[149] Under the US Federal Rules of Evidence, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". Rule 801 (c).

[150] UN Safeguards guaranteeing protection of the rights of those facing the death penalty. 1984.

4(h)(1) Hearsay evidence

Under the Military Order, military commissions would have allowed the introduction of hearsay evidence if the Presiding Officer concluded that it would have probative value to a reasonable person. Under the administration's proposed Military Commissions Act, the Presiding Officer would be replaced by a military judge and "hearsay evidence is admissible, unless the military judge finds that the circumstances render it unreliable or lacking in probative value". In addition, the military judge "shall exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice".

A primary reason that hearsay evidence is normally disallowed in ordinary criminal proceedings is that the party against whom the statement is introduced is unable to effectively challenge the statement; this is often the case as the person who made the statement is generally not present in court or subject to cross-examination. At a Senate Armed Services Committee hearing on 13 July 2006, one of the military witnesses summed up this problem thus:

> "*What you can't do, I think, is say to the accused: we know you're guilty, we can't tell you why, but there's a guy, we can't tell you who, who told us something, we can't tell you what, but you're guilty*".[151]

The proposed Military Commissions Act seeks to have Congress adopt the "finding" that "hearsay evidence often will be the best and most reliable evidence that the accused has committed a war crime". An expanded version of the administration's view can be gleaned from the earlier leaked version of the Act which stated that "hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict". In such circumstances, it is clear that such evidence must be treated with extreme caution. For example, the "fellow terrorist" may be a person who has been in indefinite detention without charge for several years, possibly incommunicado and in a secret location. That individual may have made the statement as a result of torture or other cruel, inhuman or degrading treatment (and thus the statement would not be admissible under international law), but without the person in court to question, the circumstances surrounding the making of the statement and its veracity cannot be explored. The "fellow terrorist" may equally be a person who has a grudge against the defendant, or who is unwittingly mistaken in the evidence he provides or who has been made promises in return for his testimony.

For this reason, hearsay evidence, apart from limited categories and then subject to appropriate safeguards and weighting, should be excluded. Hearsay evidence should never be the sole or principal evidence on which either conviction or sentence is based.

In courts-martial under the UCMJ and in US federal courts, hearsay evidence is not admissible except under certain regulated circumstances. In courts-martial, the non-appearance of a witness due to "military necessity" can be permissible under certain

[151] Rear Admiral John D. Hutson, retired, US Navy, former Judge Advocate General of the Navy.

circumstances, but the Military Rules of Evidence emphasise that the expression 'military necessity' is "not intended to be a general escape clause".[152]

In promoting its proposed Military Commissions Act, the administration has accused critics of "ignoring the reality that international War Crimes Tribunals permit the introduction of hearsay statements. For example, recognizing the difficulties in gathering evidence pertaining to events that occurred in war zones throughout the world, the International War Crimes Tribunal for the Former Yugoslavia allows witnesses to testify to statements made by other witnesses."[153] This argument comes from a decontextualized and selective postulation of international jurisprudence and ignores that the use of hearsay evidence by any international tribunal is part of a whole structure, with its own built-in safeguards and working methods. Any particular procedure cannot simply be plucked from another system and effectively replicated in the military commission process if the structure and other procedures of that process are themselves flawed.

It should be noted that in the case of the international criminal tribunals, the finders of fact and law are panels of judges, entirely independent of any government, and expert in international law. They are assigned to the case by the court, not by the executive. In the military commissions proposed by the administration, the finder of law would be a single US military judge assigned to the case under regulations prescribed by the Secretary of Defense. The finders of fact would be US military officers, who may not have the necessary legal training, assigned to the case by the Secretary of Defense or his designee.

[152] Rule 804, Military Rules of Evidence.

[153] Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html. Under the rules of evidence for the International Criminal Tribunal for the former Yugoslavia, the court "may admit any relevant evidence which it deems to have probative value", but "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial". Also, the tribunal "may request verification of the authenticity of evidence obtained out of court" (Rule 89). Written instead of oral witness testimony may be admitted, but only if it "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". Factors against admitting such evidence include whether "there is an overriding public interest in the evidence in question being presented orally", or "a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or "there are any other factors which make it appropriate for the witness to attend for cross-examination." (Rule 92*bis*). Under Articles 68 and 69 of the Rome Statute of the International Criminal Court, "the testimony of a witness at trial shall be given in person", except in certain regulated circumstances such as to protect the safety of the witness. The Court may also permit testimony of a witness to be given by means of video or audio technology, as well as the introduction of documents or written transcripts. Any measures taken must "not be prejudicial to or inconsistent with the rights of the accused". Under Article 69, the "Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".

4(h)(2) Classified evidence

Amnesty International takes the view that no-one should be convicted of a criminal offence – above all when that person may be sentenced to death as a result – on the basis of evidence that he or she has been unable to see or to challenge effectively. This does not mean that the state does not have legitimate interests in keeping certain information from the public realm. Article 14.1 of the ICCPR, for example, holds that there are limits to the right to an open public trial:

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

However, the government's legitimate need not to compromise national security must not curtail the defendant's rights under Article 14, including the right to be present and to be able effectively to challenge the evidence against him or her.

Classified information can be admitted in evidence in criminal prosecution in the civilian courts and courts-martial, as well as in immigration proceedings, in the USA. In 1980, Congress passed the Classified Information Procedures Act (CIPA) in order to deal with the problem of "graymail", the situation where a criminal defendant threatens to disclose classified information during the course of a trial in the hope that the government would forego prosecution rather than have the information disclosed.[154] While CIPA applies to cases in the federal civilian courts, Military Rule of Evidence 505 is directly based on it for use in courts-martial.

Under CIPA, the government is allowed to substitute an unclassified summary of classified documents for the documents themselves or to submit a statement admitting as evidence facts that the documents would tend to prove. Courts will generally employ a two-part test, to establish if the information is relevant and material (i.e. beneficial to the defendant's case). The burden is then placed on the government to show when modification or substitution of the document is necessary. Substitutions raise some serious concerns:

> "*Substitutions are also powerful weapons for the prosecution with a high potential for abuse. They are used where the defendant's right to a fair trial most directly conflicts with the government's need to protect national security information. Substitutions change admissible evidence into a different form, without consent of the defendant, for reasons unrelated to criminal justice concerns*."[155]

[154] Brian Z. Tamanaha, *A critical review of the Classified Information Procedures Act*, American Journal of Criminal Law, Vol. 13, pages 277-328 (1986). Information on CIPA and M.R.E. 505 is also taken from *Secret evidence in the war on terror*, Harvard Law Review, Vol. 118 Issue 6, pages 1962-1984, May 2005.

[155] Tamanaha, *A critical review of the Classified Information Procedures Act, op cit*, page 306.

A substitution can be seen as "hearsay within hearsay – a written statement drafted out of court, summarizing other out-of-court assertions, offered to prove the truth of the matter asserted".[156] Certainly, if substitutions are used, "[c]areful judicial scrutiny is required to ensure that the government does not use this power to keep important evidence from the defense". This is even more the case where an administration has shown itself to have a penchant for the abuse of secrecy, not only keeping documents secret, but detentions themselves.

In 2005, the Liberty & National Security Project at the Brennan Center for Justice, New York University School of Law, published a comprehensive study of the comparative attributes of the USA's federal civilian courts, courts-martial under the UCMJ, and the military commissions as proposed under the Military Order of 2001.[157] It concluded that "proponents of military commissions often dramatically overstate the difficulty of prosecuting terrorism suspects in federal courts. In fact, within the existing federal judicial system, a variety of mechanisms mitigate the tensions between secrecy and accountability. The federal courts are basically well-equipped to carry out the overwhelming majority of terrorism prosecutions". The study laid out five options for the government in relation to the use of classified evidence in the context of trials:

- *Filtering*: in the pre-trial and trial period, the CIPA allows courts to 'filter out' any classified information that is not strictly necessary to the resolution of the disputed issues in the case;
- *Restricted disclosure*: where classified information cannot be filtered out, the courts can restrict its disclosure, in particular by limiting the defendant's access to the government's investigative materials and by excluding the public from portions of the trial. Amnesty International notes that this must not conflict with the defendant's right to be able to effectively challenge the evidence against him, and that any exclusion of the public must be "exceptional";[158]
- *Declassification*: often information initially deemed classified can be declassified (see below on executive tendency to over-classify);
- *Alternative charges*: If the prosecution cannot go forward without an unacceptable disclosure of classified evidence, it may be possible to bring alternative charges which can be proved without resort to the classified evidence;
- *Delay:* As a last resort, the government may ask the judge for a delay in the trial until other evidence is developed or until the sensitivity of the classified evidence in question has diminished. Amnesty International stresses that this must not undermine the defendant's right to a trial within a reasonable time. In the current context, where

[156] Tamanaha, *A critical review of the Classified Information Procedures Act, op cit.*, note 168..
[157] *The secrecy problem in terrorism trials*. By Serrin Turner and Stephen J. Schulhofer, Liberty & National Security Project, Brennan Center for Justice at NYU School of Law, available at http://www.brennancenter.org/secrecyproblem.pdf.
[158] Human Rights Committee, General Comment 13 (1984).

detainees have been held for years without trial and the executive has shown a tendency to abuse secrecy, the organization believes further delay is not an option.

It should be noted that "over-classification is a constant pitfall and that executive branch officials tend to exaggerate the need to keep information secret".[159] The following is instructive:

> "*Since 1987, I have represented thirteen non-citizens against whom the government has sought to use secret evidence. In each case, the government initially claimed that the evidence showed the non-citizen to be threats to national security. Yet in each case, the non-citizens were eventually granted relief by court order. In several cases, federal courts concluded that reliance on classified evidence was unconstitutional. In others, judges reversed themselves after the government disclosed the substance of its charges and the individual had an opportunity to present his side of the story. In each case in which the charges were disclosed, they consisted of little more than guilty by association. In no case was the non-citizen ultimately determined to pose any threat to national security*."[160]

In the context of the "war on terror", the US administration has resorted to a level of secrecy that has been widely criticized, including by the UN Committee against Torture, the UN Human Rights Committee and Amnesty International.[161] Possible unlawful fruits of this secrecy could have a direct impact on detainees in Guantánamo or elsewhere who may face trial. Classified documents authorizing interrogation techniques that violated the international prohibition of torture or other cruel, inhuman or degrading treatment have only came to light because of leaks following the Abu Ghraib scandal and litigation pursued under the USA's Freedom of Information Act. Much remains classified in the face of government resistance to declassification.

President Bush's confirmation that in the "war on terror" the CIA has been operating a secret interrogation and detention program – a program that violates international law and

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[159] *The secrecy problem in terrorism trials, op.cit.* The passage continues: "Indeed, 9/11 Commission Chairman Thomas Kean observed that roughly three-quarters of the classified material he reviewed during the Commission's investigation should not have been classified in the first place" (citing US Senators Trent Lott and Ron Wyden in their op-ed article *Hiding the truth in a cloud of black ink*, New York Times, 26 August 2004).

[160] David Cole, *Enemy Aliens: Double standards and constitutional freedoms in the war on terrorism*. The New Press (2003), page 176.

[161] E.g. the Human Rights Committee stated that its concern about alleged human rights violations committed against detainees in US custody was "deepened by the so far successful invocation of State secrecy in cases where the victims of these practices have sought a remedy before the State party's courts". Concluding observations on the USA, 28 July 2006, *op. cit*. The Committee against Torture stated that it considered the USA's "no comment policy regarding the existence of secret detention facilities, as well as on its intelligence activities, to be "regrettable". Concluding observations on the USA on 18 May 2006, *op.cit*. See also Amnesty International, pages 100-117, *Human dignity denied*, op.cit; pages 116-130, *Guantánamo and beyond*, op. cit., and *Memorandum to the US Government on the report of the UN Committee against Torture and the question of closing Guantánamo, op.cit*.

yet, according to President Bush has been found by the Department of Justice to comply with US law – highlights the need for all possible fair trial guarantees, and extreme caution, if not outright rejection of the creation of extraordinary procedures and rules for the admission into evidence of information which has been "classified".

In September 2005 – in a case involving an "alleged presidential directive authorizing the CIA to establish detention facilities outside the United States and outlining interrogation methods that may be used against detainees", and a "purported memorandum from the Department of Justice to the CIA specifying interrogation methods that the CIA may use against top al-Qaeda members" – a US District Court noted the danger of such secrecy. The court observed that the procedures encourage "an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already know, or that which is more embarrassing than revelatory of intelligence sources or methods". The judge suggested that:

> "*historians will evaluate, and legislators debate, how wise it is for a society to give such regard to secrecy. The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society*". [162]

In regard to the specifics of the documents in contention in the case before him, the judge acknowledged that the discussion about the documents in the media raised concern that the purpose of the CIA's position neither to confirm nor deny the existence of the documents, let alone their contents, was "less to protect intelligence activities, sources or methods than to conceal possible violations of law in the treatment of prisoners, or inefficiency or embarrassment of the CIA".

Whatever future historians might conclude about the wisdom of such executive secrecy, no defendant should be put in the position of being excluded from his trial or rendered unable effectively to challenge evidence of human rights violations that may impact his case. The administration's proposed Military Commissions Act, if adopted, would threaten to achieve precisely this result.

4(i) Exclusion of coerced evidence

Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The Constitution recognized the evils that lay behind these practices and prohibited them in this country.

[162] *ACLU et al v. Department of Defense et al*. Opinion and order granting in part and denying in part motions for partial summary judgment. US District Court, Southern District of New York, 29 September 2005.

Mississippi Supreme Court, 1926[163]

Dr Daryl Matthews, a forensic psychiatrist who visited Guantánamo in 2003 at the invitation of the Pentagon, testified in 2004 that Salim Ahmed Hamdan – put into prolonged solitary confinement after he was named under the Military Order – had considered making false confessions in order to ameliorate his detention conditions.[164] International standards provide that: "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".[165]

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt.[166] Fair trial standards require the exclusion as "evidence" in any proceedings of any statement where there is knowledge or belief that it has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.[167] Article 15 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the USA is a state party, prohibits statements obtained as a result of torture being used as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. Other coercive techniques – cruel, inhuman or degrading interrogation methods or detention conditions – are similarly prohibited under international law and statements extracted as a result of them must be inadmissible in any court.[168] In its authoritative interpretation of article 7 of the ICCPR (prohibition on torture or other cruel, inhuman or degrading treatment or punishment), the UN Human Rights Committee has stated: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment".[169] In its July 2006 conclusions on the USA's compliance with its obligations under the ICCPR, the Human Rights Committee called on the USA to "refrain from relying in any proceedings on evidence obtained by treatment incompatible with article 7".

Amnesty International believes that this exclusionary rule is an inseparable part of the general prohibition on torture and other cruel inhuman and degrading treatment. The admission of evidence that has been or might have been obtained by torture or other cruel,

[163] *Fisher v. State*, 145 Miss. 116, 134, 110 So. 361, 365 (1926). Cited in *Brown v. Mississippi*, 297 U.S. 278 (1936).
[164] *Swift v. Rumsfeld*. US District Court, Western District of Washington. Declaration of Daryl Matthews, 31 March 2004. See *USA: Human dignity denied, op.cit.*, page 124.
[165] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.
[166] Article 14.3(g), International Covenant on Civil and Political Rights. Article 75.4(f) of Additional Protocol 1 to the Geneva Conventions.
[167] UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, par. 12, in UN Doc. HRI/GEN/Rev.7.
[168] Article 12 of the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[169] General Comment 20, para. 12 (1992).

inhuman or degrading treatment is antithetical to and would seriously damage the integrity of the proceedings. In 1952, the US Supreme Court stated:

> "*Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct that naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society*."[170]

United States law prohibits evidence obtained from coerced confessions from being used in a criminal proceeding, whether in civilian or military court. Under the 2001 Military Order, military commissions could admit as evidence statements obtained as a result of torture or other ill-treatment.[171]

Under the administration's proposed Military Commissions Act "no person shall be required to testify against himself *at a commission proceeding*" (emphasis added). It does not expressly prohibit the admission as evidence of information earlier coerced from the detainee. The earlier leaked draft of the legislation noted that this provision is based on Article 31 of the UCMJ, but in fact it is less than the protection under the latter which states that: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." The burden of proof is on the prosecution to show that the statement was voluntarily made (Military Rule of Evidence 304.e).

The proposed Act would prohibit the use of statements obtained by torture, as defined in US law rather than international law. Due to the US government's narrow definition of torture, however, the ban falls short of the requirements of the UN Convention against Torture.[172] In addition, it makes no mention of evidence extracted under the equally prohibited cruel, inhuman or degrading treatment (as defined under international law); or under treatment that violated the state's obligation to treat anyone deprived of their liberty "with humanity and with respect for the inherent dignity of the human person" (ICCPR,

[170] *Rochin v. California* 342 U.S. 165 (1952).

[171] On 24 March 2006, four days before the Supreme Court was to hear the *Hamdan* case, the Department of Defense issued Military Commission Instruction 10, which purported to exclude statements or information obtained through torture from being admitted as evidence. Its protection was minimal, however. Its wording – "the prosecution shall not offer any statement determined by the prosecution to have been made as a result of torture" – kept the matter entirely within the remit of the (military) prosecution.

[172] In May 2006, the Committee against Torture called on the USA to "ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the [USA's] understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or duration". UN Doc: CAT/C/USA/CO/2, 18 May 2006.

article 10.1); or under treatment that amounted to "outrages upon personal dignity, in particular degrading and humiliating treatment" under common Article 3 of the Geneva Conventions.

The Third Geneva Convention states: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever" (Article 17). In similar vein, the Fourth Geneva Convention states: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties" (Article 31).

In addition, the Military Commissions Act as written does not prohibit hearsay. As a result, evidence obtained through torture or other ill–treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo and elsewhere. The defence may not be able to question how the statement was obtained, its credibility or the condition of the person who made it. Access to information which might permit the defence to challenge such statements may be difficult if not impossible to come by as it may itself be classified.

As well as the consistent and specific allegations of torture and ill-treatment from detainees in US custody in Afghanistan, Guantánamo and elsewhere, Amnesty International considers that the conditions in which many of the detainees have been held amount to cruel, inhuman or degrading treatment and are in themselves coercive. The length of detention must also be considered an element in the coercive nature of the regime. The 14 individuals transferred to Guantánamo in early September 2006 from secret CIA custody had spent up to four and a half years in incommunicado custody in secret locations during which time they had been subject to "alternative" interrogation techniques (see Appendix 2). President Bush has indicated that they will face trial if Congress authorizes his administration's proposals for military commissions.

In its recent conclusions on the USA, the Committee against Torture said that indefinite detention without charge *per se* violates the Convention against Torture. Five UN experts have written the following, illustrating the coercive nature of the detention regime:

> "*Reports indicate that the treatment of detainees since their arrests, and the conditions of their confinement, have had profound effects on the mental health of many of them. The treatment and conditions include the capture and transfer of detainees to an undisclosed overseas location, sensory deprivation and other abusive treatment during transfer; detention in cages without proper sanitation and exposure to extreme temperatures; minimal exercise and hygiene; systematic use of coercive interrogation techniques; long periods of solitary confinement; cultural and religious harassment; denial of or severely delayed communication with family; and the uncertainty generated by the indeterminate nature of confinement and denial of access to independent tribunals. These conditions have led in some instances to serious mental illness, over 350 acts of self-harm in 2003 alone, individual and mass suicide attempts and widespread, prolonged hunger strikes. The severe mental health*

consequences are likely to be long term in many cases, creating health burdens on detainees and their families for years to come."[173]

This coercive regime has been compounded by the fact that none of the detainees has been given access to lawyers during interrogations.

The UN Guidelines on the Role of Prosecutors require that:

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

In the administration's proposed Military Commissions Act, the procedures governing the appointment of prosecutors are prescribed by the Secretary of Defense, raising concern about their independence and impartiality including in relation to matters of human rights violations that have been authorized or condoned by the administration. It is also a matter of serious concern that the chief law enforcement officer in the USA, Attorney General Alberto Gonzales, argued to the Senate Armed Services Committee on 2 August 2006 that coerced testimony should be admitted at trial so long as it is "reliable" and "probative". At a hearing in front of the Senate Judiciary Committee on 11 July, acting Assistant Attorney General Steve Bradbury suggested that "there are gradations of coercion much lower than torture… So I think there's room for discussion on that point."

International law is clear, however. Fair trial standards require the exclusion as "evidence" in any proceedings of any statement where there is knowledge or belief that it has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.[174] The proposed Military Commissions Act fails to meet this standard.

4(j) Right to appeal

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal according to law.[175] The review of the conviction and sentence

[173] UN Doc. E/CN.4/2006/120, para. 71. *Situation of detainees at Guantánamo Bay:* Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 27 February 2006.

[174] UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, par. 12, in UN Doc. HRI/GEN/Rev.7.

[175] Article 14(5) of the ICCPR, article 8(2)(h) of the American Convention, article 2 of Protocol 7 to the European Convention, article 106 of the Third Geneva Convention. Article 25 of the ICTY Statute, Article 24 of the ICTR Statute, article 81(b) of the ICC Statute. See also: article 7(1)(a) of the African Charter; article 75(4)(j) of Additional Protocol I; article 6(3) of Additional Protocol II.

must take place before a higher tribunal, according to law. The right to review ensures that there will be at least two levels of judicial scrutiny of a case, the second of which is by a higher tribunal than the first. The Human Rights Committee has stated that this "guarantee is not confined to only the most serious offences".[176] The Committee has also stated that 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 likewise be a competent, independent and impartial tribunal established by law".

No right of appeal to a higher court from decisions handed down by military commissions was included under President Bush's November 2001 Military Order. However, under the Detainee Treatment Act (DTA) passed in December 2005, a limited right of appeal was formulated. The court could only review the military commission's decision to the extent that it was "consistent with the standards and procedures" set out in the commission rules established by the Department of Defense and, "to the extent that the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States".[177] As explained below, the administration continues to argue that Guantánamo detainees have no substantive rights under the Constitution or international law.

Under the administration's proposed Military Commissions Act, anyone convicted by a military commission could have the commission's findings and sentence reviewed by the "convening authority" (i.e. the Secretary of Defense or his designee). In addition, the Secretary of Defense would establish a Court of Military Commission Review made up of panels of not less than three appellate military judges. This Court would reside within the Department of Defense.[178] Anyone convicted under a military commission could appeal to this Court "in accordance with procedures prescribed under regulations of the Secretary of Defense". The Court would only be able to act "with respect to matters of law".

Up to this point, then, the review process would not fulfil the requirements that any appeal court be independent and impartial and established by law.

In addition, the proposed Act reiterates that the DTA's (limited) right of appeal would apply, adding that the DC Circuit Court of Appeals may not review the final judgment until the review by the "convening authority" and the Court of Military Commissions Review have been exhausted or waived. Unlike under the DTA, according to the White House, all those convicted by military commission would be "entitled to an appeal to the US Court of Appeals for the DC Circuit, regardless of the length of their sentence".[179] In addition, the proposed

[176] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 17, in UN Doc. HRI/GEN/Rev.7.
[177] Detainee Treatment Act of 2005, § 1005(e)(3)(D).
[178] Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html.
[179] Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html. Under the DTA, anyone sentenced by military commission to death or to a term of imprisonment of 10 years or more

legislation states that the US Supreme Court "may" review decisions of the DC Circuit Court of Appeals. In the ordinary criminal justice system, the Supreme Court agrees to hear appeals in only a tiny percentage of cases that come before it.

The speed with which appeals would be required under the Military Commissions Act raises serious concerns. The convicted person has a maximum of 40 days to submit "matters for consideration" to the convening authority. The proposed legislation does not specify a timeline for review by the Court of Military Commissions Review, but procedures for that Court will be prescribed by the Secretary of Defense. After the accused or his legal counsel has received notice of that court's final decision, a petition for review must be filed with the DC Court of Appeals within 20 days.

Apart from this limited right of appeal, the proposed Act states that no other "court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,… relating to the prosecution, trial, or judgment of a military commission convened under this section, including challenges to the lawfulness of the procedures of military commissions under this chapter".

Given the shortcomings of the Act's proposals, and the abuses that have occurred against detainees during the time of their detentions, including unlawful transfers, incommunicado detention, torture or other cruel, inhuman or degrading treatment, and lack of access to the courts, lawyers, families and independent medical care, this denial of the ability to seek post-conviction remedies is a serious problem that must be remedied.

5. No death penalty

Amnesty International opposes the death penalty under all circumstances and has repeatedly called on the USA to join the clear majority of countries which have abolished capital punishment in law or practice.[180] The international community has ruled out the death penalty as a sentencing option in international courts for even the worst crimes – genocide, war crimes and crimes against humanity. International human rights law is abolitionist in outlook, and in the case of retentionist countries international standards require that any trial that may end in the death penalty meet all possible safeguards to ensure a fair trial, "at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights".[181] This standard is applicable even in a state of emergency because the protections on the right to life are non-derogable, applying even when the life of the nation is threatened.[182]

would have the right to appeal to the US Court of Appeals for the District of Columbia Circuit. There would be no such right for any other person; it would be up to the discretion of the Court of Appeals as to whether to hear an appeal.

[180] For example, see *USA: Blind faith. An appeal to President George W. Bush to admit that the USA's 30-year experiment with the death penalty has failed*, AI Index: 51/100/2006, 1 July 2006, http://web.amnesty.org/library/pdf/AMR511002006ENGLISH/$File/AMR5110006.pdf.

[181] UN Safeguards guaranteeing protection of the rights of those facing the death penalty. 1984.

[182] Human Rights Committee, General Comment 29. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

In an increasingly abolitionist world, resort to the death penalty by any particular country threatens to undermine international law enforcement cooperation. Many countries will not extradite a suspect to an executing country as long at the death penalty remains an option in the case. Amnesty International will continue to campaign both for worldwide abolition and for guarantees that no one facing trial will be returned to a country where he or she would face the death penalty on return. In addition, Amnesty International calls on countries not to provide information for use in judicial proceedings taking place abroad in any case where the death penalty is being sought or could be imposed, unless that information could be used to help prevent that sentence being imposed or carried out. A country should only provide information for use at any trial in another country once the death penalty has permanently and assuredly been removed as a sentencing option in that case.

The administration's proposed Military Commissions Act includes the death penalty as a sentencing option for a variety of offences. Although a number of the crimes listed in the Act are expressly noted to carry the possibility of the death penalty, others are accompanied by the phrase "shall be subject to whatever punishment the commission shall direct". In addition, a more general clause states that "the punishment which a military commission may direct for an offense may not exceed such limits as the President or Secretary [of Defense] may prescribe for that offense". It is not specified whether certain categories of defendant would be exempted from the death penalty, as required under international law and standards, including those who were under 18 at the time of the crime or those with mental disabilities.

Under the proposed Act, approved by President Bush and sent to Congress on 6 September 2006, the final decision on whether to execute a person sentenced to death under the Act would be taken by the President.

Amnesty International urges the USA to end its use of the death penalty in this and all other contexts. In the context of the "war on terror", the organization also recalls the following from its 1989 report on the use of capital punishment worldwide, and an earlier statement by France's then Minister of Justice:

> "*Executions for politically motivated crimes may result in greater publicity for acts of terror, thus drawing increased public attention to the perpetrators' political agenda. Such executions may also create martyrs whose memory becomes a rallying point… For some men and women convinced of the legitimacy of their acts, the prospect of suffering the death penalty may even serve as an incentive. Far from stopping violence, executions have been used as the justification for more violence…*"[183]
>
> "*…history and contemporary world events refute the simplistic notion that the death penalty can deter terrorists. Never in history has the threat of execution halted terrorism or political crime. Indeed, if there is one kind of man or woman who is not deterred by the threat of the death penalty, it is the terrorist, who frequently risks his*

[183] *When the state kills… The death penalty: a human rights issue*. AI Index: ACT 51/07/89, Amnesty International Publications, 1989, page 19.

life in action. Death has an ambiguous fascination for the terrorist, be it the death of others by one's own hand, or the risk of death for oneself."[184]

6. Indefinite detention without charge or trial

At a minimum, the government has conceded that the war could last several generations, thereby making it possible, if not likely, that 'enemy combatants' will be subject to terms of life imprisonment at Guantanamo Bay… [T]he uncertainty of whether the war on terror – and thus the period of incarceration – will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term.
US District Court Judge Joyce Hens Green, 31 January 2005

Part of the US administration's response to the *Hamdan* ruling is to seek explicit congressional authorization for its policy of indefinitely detaining without charge or trial those it designates as "enemy combatants". The administration's proposed Military Commissions Act seeks to have Congress adopt a number of "findings".[185] Among them are:

"*In exercising the authority vested in the President by the Constitution and laws of the United States, including the Authorization for Use of Force Joint Resolution, and in accordance with the law of war, the President has detained enemy combatants in the course of this armed conflict and issued the Military Order of November 13, 2001, to govern the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism'.*"

In addition, it states that:

"*This Act shall take effect on the date of the enactment of this Act and shall apply retroactively, including to any aspect of the detention, treatment, or trial of any person detained at any time since September 11, 2001, and to any claim or cause of action pending on or after the date of the enactment of this Act*."

By endorsing the Military Order, Congress would be endorsing indefinite executive detentions without charge or trial. As well as establishing the military commissions blocked in

[184] Former French Minister of Justice, Robert Badinter, statement at a seminar on the abolition of the death penalty and arbitrary, summary and extrajudicial executions, organized by Amnesty International at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 27 August 1985. AI Index: ACT 05/27/85, 1985.

[185] The draft version of the Act leaked in July 2006 would have sought congressional approval of the following: "*Pursuant to the President's authority under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, and in accordance with the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The authority to detain enemy combatants until the cessation of hostilities is wholly independent of any pre-trial detention or sentence to confinement that may occur as a result of a military commission. An enemy combatant may always be detained, regardless of the pendency or outcome of a military commission, until the cessation of hostilities as a means to prevent their return to the fight*".

the *Hamdan* ruling four and a half years later, the Military Order signed by President Bush on 13 November 2001 also provided for detention without charge or trial of anyone held under the Order. In May 2006, the US government told the Committee Against Torture that individuals detained by the Department of Defense in Afghanistan and at Guantánamo were now held pursuant to the Military Order.[186] This suggested yet more improvisation by the administration, as this is entirely contrary to what it argued in the litigation leading up to *Rasul v. Bush* ruling by the US Supreme Court in June 2004. The government at that time had categorically denied that any detainee was held under the Order, and asserted instead that they were held more generally under the President's Commander-in-Chief powers. Amnesty International has called for precise clarification as to when the detainees, apart from the 15 who have been made eligible for trial by military commission (see Appendix 1), were made subject to the Military Order.[187] The organization has received no response.

> "*It is a part of the acceptance of the rule of law that the courts will be able to exercise jurisdiction over the executive. Otherwise, the conduct of the executive is not defined and restrained by law. It is because of that principle, that the USA, deliberately seeking to put the detainees beyond the reach of the law in Guantánamo Bay, is so shocking an affront to the principles of democracy… Without independent judicial control, we cannot give effect to the essential values of our society. To give effect to our democratic values needs the participation of executive, legislature, and judiciary together* ".
> Lord Falconer, UK Secretary of State for Constitutional Affairs and Lord Chancellor, 13 September 2006.

Amnesty International urges that any new legislation adopted denies authorization for indefinite detention without charge or trial and that any measures that any measures it authorizes the executive to take be those that ensure US compliance with international law and standards.

The administration's policy began in secret five years ago, bypassing Congress. In late December 2001, the US Justice Department sent a memorandum to the Department of Defense.[188] It advised the Pentagon that no US District Court could "properly entertain" appeals from "enemy aliens" detained at the US Naval Base in Guantánamo Bay, Cuba. Because Cuba has "ultimate sovereignty" over Guantánamo, the memorandum asserted, US Supreme Court jurisprudence meant that a foreign national in custody in the naval base should not have access to the US courts. The first "war on terror" detainees were transferred to the base two weeks later.

Some two and a half years after these detentions began, the US Supreme Court ruled in *Rasul v. Bush* that the federal courts in fact do have jurisdiction to hear appeals from

[186] Page 17, Written response of the USA to the Committee against Torture, http://www.state.gov/documents/organization/66172.pdf.
[187] *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), June 2006, http://web.amnesty.org/library/Index/ENGAMR510932006.
[188] Memorandum for William J. Haynes, II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba. From Patrick F. Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General. 28 December 2001. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/01.12.28.pdf.

foreign nationals detained in Guantánamo Bay. Indeed, "consistent with the historical reach of the writ of *habeas corpus*", "aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [the federal *habeas* statute]".[189] Yet over two years after the *Rasul* ruling, none of the more than 400 detainees still held in the base has had the lawfulness of his detention judicially reviewed.[190]

The US administration responded to the *Rasul* decision by arguing to the courts that they could not conduct any meaningful form of review. Ten days after the *Rasul* ruling, the Department of Defense had announced the formation of the Combatant Status Review Tribunal (CSRT) to "serve as a forum for detainees to contest their status as enemy combatants". This inadequate administrative procedure consisted of panels of three military officers allowed to rely on classified and/or coerced evidence against a detainee denied legal representation and presumed to be an "enemy combatant", as broadly defined, unless he showed otherwise. To take the example of a Kuwaiti detainee held without charge or trial in Guantánamo:

> "*One of the primary pieces of evidence upon which the CSRT designated Abdullah Al Kandari to be an enemy combatant is that, more than a year after he was brought to Guantánamo…, his 'alias' allegedly was found on a list of names on a document saved on a computer hard drive allegedly 'associated with a senior al Qaida member'. Mr Al Kandari stated that he is not known by any aliases and asked what name appeared on the list, but the CSRT told him that the information was classified. The name of the 'senior al Qaida member' was likewise classified, as was the place where the hard drive was found. Mr Al Kandari was thus left to defend himself against the accusation that an unknown alias of his appeared on a list on a computer found somewhere in the world associated with someone. It is impossible to rebut such a charge, and Mr Al Kandari said so: 'The problem is the secret information, I can't defend myself*."[191]

[189] *Rasul v. Bush*, 000 U.S. 03-334, decided 28 June 2004.

[190] The only cases reviewed on the merits occurred in the case of two Uighur detainees, since released. On 22 December 2005 a federal judge ruled that the continued indefinite imprisonment of Abu Bakker Qassim and Adel Abdul Hakim at Guantánamo was unlawful. However, the court was not in position to order their release on parole until the government could arrange for their transfer to another country. The ruling held that their release onto the US mainland would have national security and diplomatic implications beyond the competence or authority of the court. The judge noted: "Ordinarily, a district judge reviewing a *habeas* petition does not need to proceed very far beyond determining that the detention is unlawful before ordering a petitioner's release…The question in this case is whether the law gives me the power to do what I believe justice requires. The answer, I believe, is no." *Qassim v. Bush*, US District Court for the District of Columbia, Memorandum of 22 December 2005. Shortly before this judgment was due to be appealed in a higher court, these and three other Uighur detainees were transferred from Guantánamo by the US authorities and released in Albania.

[191] *Al Odah et al v. USA et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005. Abdullah al-Kandari was transferred from Guantánamo to Kuwait on 14 September 2006 nearly five years after he had been taken into custody.

According to the administration, the illusory remedy provided by the CSRT is more generous that the due process the government is required to provide. At the same time, the government argued in the District Court for the District of Columbia (DC) that the Guantánamo detainees had no grounds under constitutional, federal or international law on which to challenge the lawfulness of their detention. In other words, according to the administration's Kafkaesque vision for Guantánamo, the *Rasul* ruling should be interpreted as mandating no more than a purely procedural right – the detainees could file *habeas corpus* petitions, but only in order to have them necessarily dismissed. The administration's position was that detainees had no single substantive right that could be reviewed by the courts. The government continued to argue, as it had done before the *Rasul* ruling, that because the Guantánamo base is outside US sovereign territory, the constitutional right to due process (under the Fifth amendment) is inapplicable to foreign nationals held there, the ICCPR did not apply extraterritorially and anyway international law was not enforceable in the courts.[192]

In May 2006, the UN Committee against Torture added its voice to those individuals and organizations, including Amnesty International, calling for the Guantánamo detention facility to be closed. The Committee noted that "detaining persons indefinitely without charge constitutes *per se* a violation of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]". The following month, three detainees died in the base, after apparently hanging themselves in their cells. The deaths occurred after numerous detainees had attempted suicide, and some three years after the ICRC had publicly expressed its concern about the serious psychological impact the indefinite detention regime was having on a large number of the detainees.

In January 2005, appeals by Guantánamo detainees seeking to challenge the lawfulness of their detentions led to two contradictory rulings from the DC District Court. One judge deferred to the administration and dismissed the appeals. The second did not. She rejected the government's position that the detainees had no substantive rights, held the CSRT to be an inadequate procedure, and also noted that many of the detainees "may never have been close to an actual battlefield". The divergent opinions from these two judges required that the matter would have to go for resolution by a higher court, the US Court of Appeals for the DC Circuit.

An appeal filed in the Court of Appeals on behalf of Guantánamo detainees in May 2005 argued:

> "*The government now asks this Court to disregard the Supreme Court's [Rasul] decision, arguing again that these cases must be dismissed because the Detainees have no enforceable constitutional due process rights. The government argues that, after more than two years of litigation, the Supreme Court granted these petitioners a meaningless right to file habeas petitions that must be immediately dismissed without*

[192] For instance, see *Boumediene v. Bush*, Brief for the federal government appellees, In the US Court of Appeals for the District of Columbia Circuit, 25 May 2005.

judicial review of the merits of the claims. This could not have been the Supreme Court's intent."[193]

Over a year later, the issue has still not been resolved by the DC Circuit Court of Appeals and the merits of the current detainees' claims remain unexamined. This delay is due to the passage of the Detainee Treatment Act (DTA) in December 2005 and the impact of the US Supreme Court's consideration of the *Hamdan* case.

6.1 Habeas corpus after the DTA and Hamdan

The Government asks this Court to turn the clock back to the early 1600s when the Executive could detain people without cause and without question

Brief for Guantánamo detainees, January 2006[194]

The Detainee Treatment Act was signed by President Bush on 30 December 2005 as Title X of the Department of Defense Appropriations Act 2006. Amnesty International believes that Sections 1004 and Sections 1005 of the DTA should be repealed or substantially amended. Section 1004 facilitates impunity for human rights violations committed in the "war on terror" (see Section 7 below). Meanwhile Section 1005, the Graham-Levin Amendment, severely curtails the right of Guantánamo detainees to federal judicial review of the legality of their detention. It states:

"*...no court justice or judge shall have jurisdiction to hear or consider (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense.*"

Instead, Section 1005 provides that the US Court of Appeals for the DC Circuit can only consider appeals brought by detainees against the decision of the CRST, and on what are seemingly narrow procedural grounds.[195] As already outlined, Amnesty International believes that the CSRTs are inadequate and in no way a lawful or appropriate substitute for judicial review.[196] Section 1005(e)(2) of the DTA prevents detainees "currently in military custody" in

[193] *Al Odah et al v. USA et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005.

[194] *Boumediene v. Bush*, Supplemental brief of petitioners Boumediene et al., and Khalid regarding Section 1005 of the Detainee Treatment Act of 2005. In the US Court of Appeals for the District of Columbia Circuit, 18 January 2006.

[195] These are limited to the consideration of whether the CRST status determination is "consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals". Appeals may also consider whether the use of such standards and procedures are consistent with US law and the Constitution "to the extent the Constitution and laws of the United States are applicable"; the government is likely to seek a narrow interpretation of the latter based on its previous assertion of the constitutional authority of the president to detain "enemy combatants"

[196] For more on the CSRTs, see pages 54-63 of *USA: Guantánamo and beyond, op.cit*. Amnesty International agrees with the following criticism of the CSRT – "The CSRTs do not meet any due

Guantánamo from seeking relief in the federal courts "relating to any aspect of the detention", which would include actions concerning their treatment or detention conditions. In May and July 2006 respectively, the Committee against Torture and the Human Rights Committee called on the USA to amend Section 1005 or otherwise ensure that the detainees had access to independent and thorough judicial review as required under international law. The administration's proposed Military Commissions Act would in effect reject this call, endorse the CSRT and make the Graham-Levin amendment apply to all the detainees.

The US administration has sought to have the courts apply Section 1005 of the DTA retroactively, to all detainees whether they already had *habeas* appeals before the courts or not. In January 2006 it filed a motion in the DC Court of Appeals to dismiss some 200 pending cases in which Guantánamo detainees had challenged their detentions (including their treatment and conditions), arguing that the federal courts no longer had jurisdiction to hear such cases. The administration has complained that *habeas corpus* petitions filed after the *Rasul v. Bush* decision "collectively have consumed enormous resources and disrupted the operation of the Guantanamo Naval Base during time of war".[197] The DC Circuit Court of Appeals subsequently stayed proceedings pending the outcome of the Supreme Court's consideration of the *Hamdan* case.

The government had argued to the Supreme Court that it should dismiss the *Hamdan* case on the grounds that the DTA removed the Court's jurisdiction from it. The Court rejected this argument. Following the *Hamdan* decision, the DC Circuit Court of Appeals asked the government and lawyers for the Guantánamo detainees to file written briefs arguing their interpretation of its impact. For its part, the administration has continued to argue that the Court of Appeals should rule that the DTA precluded detainees having *habeas corpus* claims considered in any court and that the Court of Appeals for the DC Circuit itself should now move to review final CSRT decisions, as outlined in the DTA. Because the government views the CSRT as more than the due process owed to the detainees, it considers that by seeking to challenge the lawfulness of their detention in their post-*Rasul* petitions, the detainees "are necessarily challenging the validity of the final CSRT decisions that each of

process standard: (1) they gave the Detainees no notice of the secret evidence against them and no opportunity to rebut that evidence; (2) they did not involve a neutral decisionmaker; (3) they denied the Detainees legal representation; (4) the may have relied upon statements obtained through torture; (5) they employed a definition of enemy combatant so broad as to encompass persons who undertook no hostile acts against the United States; and (6) they were not provided at a meaningful time" (i.e. they took place more than two years after most of the detainees had been taken into custody). *Al Odah et al v. USA et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005.

[197] *Al Odah v USA*, Supplemental brief addressing Section 1005 of the Detainee Treatment Act of 2005. In the US Court of Appeals for the DC Circuit, 18 January 2006. Almost unbelievably, this government brief also complains that some of the names on the petitions "cannot be matched with actual detainees". The Pentagon did not release a list of names of detainees until more than four years into detainee operations (in May 2006) – and had to be ordered by a court to do so.

them is properly detained as an enemy combatant".[198] At the same time, the government argued that any and all claims under the Geneva Conventions are without merit and anyway judicially unenforceable.

Lawyers for the detainees argue that the DTA created a system in which pending *habeas* appeals are preserved in the federal courts' traditional jurisdiction, while challenges to final CSRT decisions may be raised under Section 1005(e)(2) of the Act. Thus, the petitioners argue, the Court of Appeals should send the pending cases back to the District Court for it to consider the merits of each detainee's claim that he is unlawfully held. The lawyers urge the Court of Appeals to reject the government's position that "*any* challenge to detention by a Guantánamo prisoner 'necessarily' qualifies as a challenge to a CSRT decision. The Government's *post hoc* CSRT procedures, hastily assembled and unfairly conducted over two years after Petitioners were imprisoned at Guantánamo, cannot diminish the scope of the petitions at issue here."[199]

At the time of writing, a decision from the Court of Appeals was pending. Meanwhile, the administration is seeking to have Congress make Section 1005 of the DTA retroactive, that is applicable to all pending cases. In a post-*Hamdan* hearing in the Senate Armed Services

No substitute for judicial review

Each detainee in Guantánamo is supposed to have a one-off hearing before the Combatant Status Review Tribunal (CSRT), set up more than two years after the first detainees arrived at the base. CSRTs were completed in March 2005 – out of 558 detainees, 520 were found to be "enemy combatants". Each detainee, except those facing trial by military commission, then has an annual review by the Administrative Review Board (ARB) to determine whether he should be released, transferred to the custody of another government or detained. As with the CSRT, the ARB is made up of a panel of three military officers who can rely on secret and coerced evidence used against a detainee who is not represented by a lawyer. In its first round which ended in February 2006, 14 detainees were found eligible for release and 119 for transfer to the custody of their home government. This meant that 330 would remain in US custody. In ARB-2, still underway, decisions had been made on 58 of the 330 cases by 14 August 2006. Of these, 27 detainees were slated for transfer to their government, none for release, and 31 for continued detention.

Under the administration's proposed Military Commissions Act, any foreign national determined by or under the authority of the President or the Secretary of Defense to be an "unlawful enemy combatant", expansively defined, would be eligible for trial by military commission. The Act does not explain how this determination is made. The proposed Act would implicitly endorse the CSRT system. Anyone previously found to be an "enemy combatant" under the CSRT would automatically be transformed into an "unlawful enemy combatant".

[198] *Boumediene et al v. Bush et al*, *Al Odah et al. v. USA et al*. Government's supplemental brief addressing *Hamdan v. Rumsfeld*, In the US Court of Appeals for the District of Columbia Circuit, 1 August 2006.

[199] *Boumediene et al v. Bush et al*, *Al Odah et al. v. USA et al*. Supplemental brief of petitioners Boumediene et al., and Khalid regarding the Supreme Court's decision in *Hamdan v. Rumsfeld*, In the US Court of Appeals for the DC Circuit, 8 August 2006.

Committee on 2 August 2006, Attorney General Alberto Gonzales said that the administration would recommend that Congress pass legislation to make section 1005 of the DTA retroactive. He repeated the administration's view that the CSRT process combined with review of its decisions by the Court of Appeals "provide sufficient process to detainees".

On 6 September 2006, President Bush announced that he was sending his administration's proposed Military Commissions Act to Congress. The bill seeks to make Section 1005 of the Detainee Treatment Act retroactive, stripping jurisdiction to hear *habeas corpus* appeals from any courts apart from the DC Circuit Court of Appeals. The bill seeks to endorse the CSRTs and any decisions they have already made, and states that "the exclusive judicial review for which this Act, and the Detainee Treatment Act of 2005, provides is without precedent in the history of armed conflicts involving the United States, [and] exceeds the scope of judicial review historically provided for by military commissions". It goes on to require that, except as provided under the DTA,

> "*no court, justice or judge shall have jurisdiction to hear or consider any claim or cause of action, including an application for a writ of habeas corpus,* ***pending on or filed after*** *the date of enactment of this Act, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement*" (emphasis added).

The Military Commissions Act also adds a provision to the DTA allowing the Department of Defense to conduct a new CSRT hearing in the case of any detainee whose case the Court of Appeals for the DC Circuit agrees to review.

The administration has explained why it believes the DTA should be made retroactive and why "enemy combatants" held in Guantánamo should have their right to *habeas corpus* restricted. In so doing, the administration revealed not only its determination to curtail this basic safeguard against arbitrary detention, but also its continuing undermining of the presumption of innocence and its willingness to eradicate legal challenges based on allegations of torture or other cruel, inhuman or degrading treatment, including in relation to conditions of detention:

> "*The Bill makes clear that the DTA does govern all challenges by detainees to their detention or trial before a military commission, allowing review only of final Combatant Status Review Tribunal (CSRT) determinations and military commission judgments. The Administration believes this was Congress's intent under the DTA, that it makes sense to restrict the accused's ability to pursue appellate remedies until after the CSRT or military commission trial has been completed, and that our courts should not be misused to hear all manner of other challenges by terrorists lawfully held as enemy combatants in wartime*".[200]

[200] Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html.

As the Human Rights Committee has affirmed in its authoritative interpretation of article 4 of the International Covenant on Civil and Political Rights, even in an emergency that threatens the life of the nation, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished".[201] In July 2006, the Human Rights Committee called on the USA to ensure, in accordance with article 9(4) of the ICCPR, that:

> "*persons detained in Guantánamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard*."[202]

The administration's proposed legislation would authorize a violation of international law. Congress should reject any such call.

7. A pattern of impunity

I can't imagine, frankly, why the people want to go back over those things at this stage

Secretary of Defense on allegations of past US abuses, including Abu Ghraib[203]

A third issue on which the *Hamdan* decision has implications is the matter of the treatment of detainees, including those held in the CIA's program of secret detention. This is due to the Supreme Court's central finding that Article 3 common to the four Geneva Conventions of 1949 was applicable. As well as requiring certain standards for trial, common Article 3 also prohibits torture, cruel treatment, and "outrages upon personal dignity, in particular humiliating and degrading treatment".

During the "war on terror", detainees in US custody have been subjected to torture and other cruel, inhuman or degrading treatment. Some practices constituting such treatment have been authorized by senior officials in the US administration. However, investigations into allegations of torture or other ill-treatment have not been independent of the executive, have not applied international legal standards, and have not had the scope to reach up into the highest levels of office. While a number of members of the US armed forces have been brought to trial in courts-martial under the UCMJ, there is a level of impunity and leniency that has raised the concern, among others, of the Committee against Torture and the Human Rights Committee.

[201] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001.
[202] Human Rights Committee. Conclusions on the USA, 28 July 2006, Available at http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf.
[203] Radio Interview with Secretary Rumsfeld on the Eileen Byrne Show, WLS Chicago, 7 July 2006 http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=42.

The UCMJ is applicable to US troops worldwide, and can also be used to prosecute certain civilians "in time of war… serving with or accompanying an armed force in the field".[204] However, this may not cover civilian contractors who have no military status in peacetime. It may also not cover CIA personnel even if they are accompanying the armed forces. To Amnesty International's knowledge, only one CIA contractor has been brought to trial for abuses committed in the "war on terror". David Passaro was charged in the beating of Afghan detainee Abdul Wali, who died in a US military base in Afghanistan in 2003. In August 2006, a jury in the US District Court for the Eastern District of North Carolina convicted David Passaro on four counts of assault.[205]

The death in custody of Abdul Wali was one of 20 allegations of abuse referred to the US Department of Justice by other agencies, because the cases involved civilian personnel such as contractors or CIA personnel. They include the case of Manadel al-Jamadi who died in CIA and Navy SEAL custody in Abu Ghraib on 4 November 2003 after 45 minutes of interrogation. [206] Nine members of the Navy SEAL team were given "non-judicial punishment" by their commanding officer. None of the CIA personnel allegedly involved has been prosecuted. The lead interrogator is reportedly continuing to work for the agency.[207] Yet this is a case in which the CIA Inspector General found a "possibility of criminality.[208] Two years after these cases were referred, the Justice Department has not brought charges against anyone but David Passaro.[209]

Charges against David Passaro were brought under a provision of the USA PATRIOT Act of 2001. The US Justice Department has not made clear why it chose to prosecute David Passaro under this law rather than under other applicable laws, including the War Crimes Act (18 U.S.C. § 2441) or the Torture Statute (18 U.S.C. § 2340). The death of Abdul Wali occurred in June 2003 during the non-international armed conflict in Afghanistan. Article 3 common to the four Geneva Conventions of 1949 applied (as the *Hamdan* ruling found). The

[204] 10 U.S.C. § 802(a)(10).

[205] This break in the pattern of impunity also smacks of the exception that proves the rule. "As CIA paramilitary officer David Passaro beat Afghan prisoner Abdul Wali three years ago, four Army soldiers restrained the detainee, blinded him with lights and propped him up for more abuse, according to the soldiers' testimony at Passaro's trial. The 82nd Airborne soldiers' testimony helped convict Passaro of felony assault Thursday but also raised questions about why they didn't face charges as well. Not only could the four guards who assisted Passaro have been charged as accomplices, but all six of the guards who knew about the abuse could have been charged under military law with failing to report a crime, according to experts and witness testimony". *Passaro trial raises issues of soldiers' roles*, The News Observer, 19 August 2006.

[206] See page 148 of *USA: Human dignity denied, op.cit.*

[207] *Homicide unpunished*. Washington Post, 28 February 2006.

[208] Statement by Senator Patrick Leahy, US Senate Committee on the Judiciary, on the nomination of Paul McNulty to the position of Deputy Attorney General, 2 February 2006.

[209] His was the only case assigned to the US Attorney (federal prosecutor) of the Eastern District of North Carolina. The other 19 were assigned to the Eastern District of Virginia. From 14 September 2001 to 17 March 2006, Paul J. McNulty served as the US Attorney for the Eastern District of Virginia. On 17 March 2006, Paul J. McNulty was sworn in as Deputy Attorney General of the United States, after being nominated to the position by President Bush.

War Crimes Act makes violations of common Article 3 prosecutable as war crimes in the USA. No one has ever been prosecuted under the War Crimes Act or the Torture Statute. In May 2006, the Committee against Torture expressed its concern to the US government that, "despite the occurrence of cases of extraterritorial torture of detainees, no prosecutions have been initiated under the extraterritorial criminal torture statute" and called for this situation to be rectified.[210]

Far from rectifying this problem of impunity, however, the administration's response to the *Hamdan* decision is one that will facilitate impunity, by narrowing the scope of the USA's War Crimes Act (see Section 7.1 below). This is part of a pattern. Congress has already passed what amounts to an impunity clause in the Detainee Treatment Act.[211] Earlier in the "war on terror", the USA rejected the jurisdiction of the International Criminal Court (ICC). In May 2002, the Bush administration informed the UN Secretary General that the USA will not ratify the Rome Statute of the ICC and therefore does not consider itself bound under international law not to undermine its object and purpose. At the time, Secretary of Defense Rumsfeld stated that the ICC's "flaws… are particularly troubling in the midst of a difficult, dangerous war on terrorism. There is the risk that the ICC could attempt to assert jurisdiction of US service members, as well as civilians, involved in counter-terrorist and other military operations – something we cannot allow".[212] Seven months later, Secretary Rumsfeld authorized interrogation techniques for use in Guantánamo which violated international law (see Appendix 4). Such techniques were also being used in Afghanistan, the government of which is one of several that have entered into impunity agreements with the USA. Such agreements provide that a government will not surrender or transfer US nationals accused of genocide, crimes against humanity or war crimes to the ICC, if requested by the

[210] Committee against Torture, Conclusions and recommendations, UN Doc. CAT/C/USA/CO/2, 18 May 2006, para. 13.

[211] Section 1004 of the Detainee Treatment Act includes the following: "In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."

[212] *Secretary Rumsfeld statement on the ICC treaty*. US Department of Defense news release, 6 May 2002, http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=3337.

Court.[213] In the case of Afghanistan, the Status of Forces Agreement between the two countries also holds that no US personnel may be transferred to an international tribunal.[214]

In May 2005, President Bush said of the ICC, "we're not going to join it. And there's a reason why we're not going to join it: We don't want our soldiers being brought up in front of unelected judges. But that doesn't mean that we're not going to hold people to account, which we're doing now in America."[215] The pattern of impunity and leniency tells a different story.

On 6 September 2006, President Bush confirmed that in the "war on terror" the CIA has been operating a program of secret detentions, wherein certain detainees are held in indefinite incommunicado detention – some of them for years – and subject to "alternative" interrogation techniques. Amnesty International considers that at least some of these individuals had become the victims of enforced disappearance, a crime under international law. Anyone responsible for such crimes must be brought to justice.

Instead it seems that the US administration is seeking to have Congress grant US officials immunity from prosecution for such crimes under US law. In addition, the administration's proposed Military Commissions Act would include that:

> "*No person in any habeas action or any other action may invoke the Geneva Conventions or any* protocols *thereto as a source of rights, whether directly or indirectly, for any purpose in any court of the United States or its States or territories*".

The proposed legislation would amend the USA's War Crimes Act as described below.

7.1 No narrowing of the War Crimes Act

The United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years.
President George W. Bush, June 2004[216]

The Supreme Court ruled in *Hamdan v. Rumsfeld* that common Article 3 to the four Geneva Conventions applied to the case before it. At a post-*Hamdan* hearing before the Senate Armed Services Committee on 13 July 2006, the witnesses – six former or current members of the Judge Advocate General Corps of the US Army, Navy and Air Force – all agreed that

[213] US threats to the International Criminal Court, http://web.amnesty.org/pages/icc-US_threats-eng.
[214] See pages 6-7 of *USA: Updated briefing to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights*, AI Index: AMR 51/111/2006, 13 July 2006, http://web.amnesty.org/library/Index/ENGAMR511112006.
[215] Interview of the President by Dutch TV, 5 May 2005, http://www.whitehouse.gov/news/releases/2005/05/20050505-18.html.
[216] President's Statement on the UN International Day in Support of Victims of Torture, 26 June 2004, http://www.whitehouse.gov/news/releases/2004/06/20040626-19.html.

some of the interrogation techniques authorized in the "war on terror" had violated common Article 3. As Justice Kennedy noted in his concurring opinion in the *Hamdan* ruling, under US law – specifically the War Crimes Act (18 U.S.C. § 2441) – violations of common Article 3 are prosecutable as war crimes. The *Hamdan* ruling on this issue has caused concern within the administration.

In an early "war on terror" policy memorandum, dated 7 February 2002, President Bush stated that common Article 3 did not apply "to either al-Qaeda or Taliban detainees".[217] This had followed advice drafted by the then White House Counsel, Alberto Gonzales, recommending such a determination on the grounds, *inter alia*, that it would make future prosecutions of US agents under the War Crimes Act more difficult.[218] Former Attorney General John Ashcroft had also advised President Bush that not applying the Geneva Conventions to the Afghanistan situation would "provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".[219]

Subsequent human rights violations by the USA in the "war on terror" have been systemic, and detention conditions and interrogation techniques that violate common Article 3 have been authorized. No one has been tried under the War Crimes Act.

On 2 August 2006, repeating his opinion on common Article 3 drafted four and half years earlier, Alberto Gonzales, now Attorney General, told the Senate Armed Services Committee at a post-*Hamdan* hearing that the prohibition on "outrages upon personal dignity, in particular, humiliating and degrading treatment" is "vague" and a phrase "susceptible of uncertain and unpredictable application". On 15 September 2006, President Bush explained that: "This debate is occurring because of the Supreme Court's ruling that said that we must conduct ourselves under the common Article 3 of the Geneva Convention. And that common Article 3 says that there will be no outrages upon human dignity. It's very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation."[220] This phrase is, of course, no more vague and open to interpretation than terms in the US Constitution such as "cruel and unusual" or "due process".

War crimes in violation of common Article 3 have been prosecuted before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), two international tribunals established by the UN Security Council. The war crime of "outrages upon personal dignity" has been prosecuted in the ICTY on numerous occasions without the slightest hint in the decisions that this crime

[217] *Re: Humane treatment of al Qaeda and Taliban detainees, op.cit.*
[218] Memorandum for the President from Alberto R. Gonzales. *Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban*. Draft 25 January 2002.
[219] Letter to President Bush from Attorney General John Ashcroft, 1 February 2002, available at http://news.findlaw.com/wp/docs/torture/jash20102ltr.html.
[220] Press conference, http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html.

was too "vague" or a phrase "susceptible of uncertain and unpredictable application".[221] In the *Akayesu* case before the ICTR, the accused was convicted, among other things, of "inhumane acts," "outrages upon personal dignity" and "serious bodily or mental harm" – acts prohibited in Article 3 common to the Geneva Conventions and Additional Protocol II – for ordering the local militia "to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd." These acts are reminiscent, for example, of those committed by US military personnel in Abu Ghraib.[222]

At a hearing on 2 August 2006 in front of the Senate Armed Services Committee, Deputy Secretary of Defense Gordon England said that the "international interpretation" of common Article 3 was "generally frankly different than our own". At the same hearing, Attorney General Gonzales referred to "foreign decisions" relating to common Article 3 "that provide a source of concern" and heightened the need to define the Article in US terms. Senator Levin asked the Attorney General whether he believed that techniques such as "water-boarding, stress positions, intimidating use of military dogs, sleep deprivation, forced nudity" would be "consistent with common Article 3". The Attorney General did not answer this question, instead confining his answer to the likely unreliability of statements obtained under such techniques. In response to a question by Senator Dayton, the Attorney General said that the administration was considering, and that Congress should also consider, giving retroactive immunity for prior violations committed by US personnel "who've relied in good faith upon decisions made by their superiors".

The Attorney General's emphasis on the need for Congress to define common Article 3 in US terms raises concern because, as Amnesty International has repeatedly pointed out, it is clear from the USA's conduct in the "war on terror", that the definition of "humane treatment" used by US officials clearly does not comply with the international prohibition on torture and ill-treatment (see also Appendix 4).

The administration's proposed Military Commissions Act sent to Congress on 6 September 2006 states that the Supreme Court's reversal of President Bush's 2002 determination on common Article 3 "makes it appropriate to clarify the standards imposed by common Article 3". The Act would amend the War Crimes Act by listing a number of "serious violations" of common Article 3 which would constitute war crimes under the Act. The list omits any reference to violations of the prohibition of "outrages upon personal dignity, in particular humiliating and degrading treatment". The administration claims that the list is aimed at bringing "clarity and certainty" to the Act for the benefit of those US personnel "called upon to handle detainees in the war on terror".[223] Without such statutory clarification,

[221] *Prosecutor v. Kunarac*, Appeals Chamber, 12 June 2002, paras. 161 - 162, and Trial Chamber, 22 February 2001, para. 501; *Prosecutor v.Kovaka*, Trial Chamber, 2 November 2001, para. 172; *Prosecutor v. Aleksovski*, Trial Chamber 25 June 1999, paras. 54-57; *Prosecutor v. Furundzija*, Trial Chamber, 10 December 1998, paras. 172 - 173.

[222] See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, paras. 688, 692-7.

[223] Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html.

the administration asserts, the application of common Article 3 might "be influenced by foreign tribunals", and might change over time as a result of "evolving interpretations of tribunals and governments outside the United States".[224] Whatever the stated motivation for such an amendment, however, Amnesty International believes that the end result of such legislation would be to facilitate impunity and to undermine the protections guaranteed in common Article 3.

As written, the entire Act "shall apply retroactively, including to any aspect of the detention, treatment, or trial of any person detained at any time since September 11, 2001". It also seeks to have Congress adopt the "finding" that "the prohibitions against cruel, inhuman or degrading treatment found in the Detainee Treatment Act of 2005 fully satisfy the obligations of the United States with respect to the standards for detention and treatment established by…common Article 3".[225] The DTA's definition of cruel, inhuman or degrading treatment does not meet international standards due to US reservations to the ICCPR and the Convention against Torture (see Section 8). The proposed Military Commissions Act also adopts the narrow definition of torture contained in the US anti-torture statute (18 U.S.C. § 2340), which the UN Committee against Torture in May 2006 called on the USA to amend in line with international law. [226] Amnesty International is also concerned that the administration's proposal would undermine the prohibition against rape, and other forms of sexual violence and abuse, including forced nudity used to humiliate and degrade detainees and would create a precedent of denying victims of sexual violence and abuse in detention access to justice**.**

Within Congress, there is some support for the administration's view of common Article 3 and its legislative proposal to "clarify" the Article.[227] However, the administration's proposed legislation has caused serious concern. On 13 September 2006, former Secretary of State General Colin Powell wrote to Senator McCain that "the world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those

[224] *Ibid*.

[225] As already noted, Amnesty International is concerned that Section 1004 of the DTA amounts to an impunity clause for US personnel who have committed cruel, inhuman or degrading treatment.

[226] UN Doc. CAT /C/USA/CO/2, page 13. As with the War Crimes Act, no one has been prosecuted under the anti-torture statute for crimes committed in the "war on terror". The Committee against Torture expressed its regret at this fact.

[227] E.g., "Article 3 of the Geneva Conventions – that is a very antiquated standard, I guess, if you will, to warfare as we know it today in a war on terror… [I]n a state like where I'm from in South Dakota, when you talk about humiliating or degrading or those types of terms and applying them to terrorists… these types of terms are not things that – I think that's not something that people in my state would be real concerned that we might be infringing on the sense of inferiority that terrorists might have." Senator John Thune, post-*Hamdan* hearing, Senate Armed Services Committee, 13 July 2006. In the House of Representatives, Rep. Peter King, chairman of the Homeland Security Committee, expressed his support for the administration's position, stating that "if we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that". *An unexpected collision over detainees*, New York Times, 15 September 2006.

doubts. Furthermore, it would put our own troops at risk".[228] In addition, a group of retired military leaders of the US Armed Forces and former officials of the US Department of Defense wrote to Senators Graham and Levin on 12 September 2006 to express their concern that "language that would redefine Common Article 3 of the Geneva Conventions as equivalent to the standards contained in the Detainee Treatment Act violates the core principles of the Geneva Conventions and poses a grave threat to American service-members, now and in future wars".[229]

Amnesty International believes that the amendment to the War Crimes Act proposed in the Military Commissions Act could reasonably be seen to be as much about protecting senior administration officials – including those who have authorized interrogation techniques and detention conditions that violate common Article 3 – as about the administration protecting soldiers, CIA personnel and others from prosecution.[230] It could also been seen as part of the effort by the administration to obtain congressional authorization for the CIA program of "alternative" interrogation techniques and secret detentions which President Bush has said had been called into question by the *Hamdan* ruling.

In August 2006, the 1949 Geneva Conventions became the first international treaties in modern history to achieve universal acceptance. The accessions of the Republic of Nauru and the Republic of Montenegro to the Geneva Conventions in June and August 2006 respectively brought to 194 the number of states who are party to them.[231] It would be a tragedy and a further stain upon the USA if it were to begin to undermine the Geneva Conventions by narrowing its War Crimes Act.

8. Broader protections against torture & ill-treatment

Whoever degrades another degrades me, and whatever is done or said returns at last to me.
Song of Myself, Walt Whitman, poet, 1819-1892

In US custody in late 2001 Afghanistan, Salim Ahmed Hamdan was allegedly "beaten…held for about three days in a bound position, cold… dragged, kicked, punched." His US military lawyer, Lieutenant Commander Charles Swift, has described the allegations as "credible".[232] In Guantánamo, after Salim Hamdan was made eligible for trial by military commission in 2003, he was put into solitary confinement in Camp Echo, where he would remain for almost

[228] Letter available at http://graphics8.nytimes.com/packages/pdf/politics/PowellLetter.pdf.
[229] Letter available at http://www.nytimes.com/packages/pdf/politics/military_letter.pdf.
[230] See Michael Scherer, *Will Bush and Gonzales get away with it*? Salon Magazine, 2 August 2006 ("Cronin, an active Republican, sees the proposed changes, which have not yet been spelled out publicly, as an attempt by the civilian leadership to cover its tracks. 'These guys are talking about trying to protect soldiers in the field. I think they are lying through their teeth', Cronin said. 'They are talking about trying to protect themselves'." It was retired Navy pilot Mike Cronin's efforts that led to enactment of the War Crimes Act in 1996.)
[231] ICRC news release, 21 August 2006, *Geneva Conventions of 1949 achieve universal acceptance*, http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList578/243C2BF92A9D86F9C12571D1004AB04D.
[232] *Is torture a good idea?* Dispatches. Channel 4 TV (UK), 28 February 2005.

a year in conditions described by the ICRC as "extremely harsh".[233] It seems that he was only moved out of solitary confinement in order that his plight would avoid judicial scrutiny.[234]

Independent external scrutiny of the USA's treatment of "war on terror" detainees has been resisted from the outset by the administration. United Nations experts, as well as Amnesty International and other human rights organizations, have been denied access to detainees in US custody. Even the ICRC has been refused access to detainees held in secret locations, and for periods to some detainees in known detention facilities (see Appendix 4). Allegations of torture or other cruel, inhuman or degrading treatment by US forces began to emerge soon after the US-led intervention in Afghanistan in October 2001.

President Bush's speech of 6 September 2006 in which he confirmed the existence of a secret CIA detention and interrogation program once again highlights the need for a full independent, impartial and non-partisan commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices, including renditions.[235] Such a commission should consist of credible independent experts, have international expert input, and have subpoena powers and access to all levels of government, all agencies, and all documents. In addition, Amnesty International continues to call for the appointment of an independent Special Counsel to carry out a criminal investigation into the conduct of any administration officials against whom there is evidence of involvement in crimes in the "war on terror".

It is not enough for the President to say that "the United States does not torture. It's against our laws, and it's against our values".[236] Indeed, in the very same speech, President Bush revealed that the CIA has been operating a program of secret incommunicado detentions, in which detainees have been held for years. In May 2006, the UN Committee against Torture made clear to the USA that secret detention and indefinite detention without charge *per se* constitute violations of the Convention against Torture (CAT). In its conclusions on the USA in July 2006, the UN

"*The government was responsible for cases of disappearance. Defectors in recent years claimed that individuals suspected of political crimes often were taken from their homes by state security officials and sent directly, without trial, to camps for political prisoners. There are no restrictions on the ability of the government to detain and imprison persons at will and to hold them incommunicado*".
US State Department entry on North Korea, Human Rights reports, 2006

"*In recent years authorities have severely abused and tortured prisoners in a series of 'unofficial' secret prisons and detention centers outside the national prison system. Common methods included prolonged solitary confinement with sensory deprivation…*"
US State Department entry on Iran, Human Rights reports, 2006

[233] According to a leaked Pentagon document, the ICRC had expressed shock in October 2003 on discovering that Camp Echo had expanded and relayed its concern that conditions in the facility were "extremely harsh". See pages 124 of *USA: Human dignity denied, op.cit.*
[234] He was moved out of Camp Echo one working day before a federal court was due to hear a challenge to this treatment. See *USA: Guantánamo and beyond, op. cit.* page 72.
[235] See pages 49-54 of *USA: Human Dignity Denied*, op.cit.
[236] *President discusses creation of military commissions to try suspected terrorists*. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.

Human Rights Committee stated that holding people in secret or prolonged incommunicado detention violated the prohibition on torture and other cruel, inhuman or degrading treatment, and violated the rights of the detainees' relatives also.

In January 2005, 11 months before the Detainee Treatment Act (DTA) was passed, US Attorney General Alberto Gonzales revealed that "as a direct result of the reservation the Senate attached to the CAT, the Department of Justice has concluded that under Article 16 there is no legal obligation under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas".[237] As both the Committee against Torture and the Human Rights Committee have recently once again urged, the USA should withdraw the reservations it attached to its ratification of the Convention against Torture and the ICCPR. Among other things, these reservations mean that the USA only considers itself, including under the DTA, bound by the prohibition on cruel, inhuman or degrading treatment or punishment to the extent that it matches existing US law. Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience".[238] Justice Department lawyers reportedly view this as allowing courts to consider the context in which abuse of detainees occurs.[239] Amnesty International is concerned that if the administration weighs abuse against national security or similar notions, the end result may be less than an absolute ban. Thus, if a detainee is believed to have information considered by the government to be important to national security, the "shocks the conscience" test could be interpreted by the government as allowing detention conditions and interrogation techniques that would otherwise be unlawful.

In his announcement on 6 September 2006 confirming the existence of the secret CIA detention and interrogation program, President Bush justified the past use and continued existence of the program against certain "high-value" detainees on the grounds of necessity. He said that "it has been "necessary to move these individuals to an environment where they can be held secretly [and] questioned by experts" using unspecified "alternative" techniques to extract information from detainees allegedly resistant to interrogation. Concern is further heightened by repeated reports that the "alternative" interrogation techniques referred to by President Bush include techniques that would violate the international prohibition on torture or other cruel, inhuman or degrading treatment,[240] and by what is now known about "special

[237] Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein. January 2005.
[238] *Rochin v. California* 342 U.S. 165 (1952).
[239] *Detainee abuse charges feared*. Washington Post, 28 July 2006.
[240] For example, see *CIA's harsh interrogation techniques described*, ABC News, 18 November 2005, available at http://abcnews.go.com/WNT/Investigation/story?id=1322866. (listing techniques grabbing, slapping, and: "*Long Time Standing*: …Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions… *The Cold Cell*: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water… *Water Boarding*: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt."

interrogation plans" authorized for use against allegedly resistant detainees in Guantánamo under the concept of "military necessity" (see Appendix 4).

In addition, Amnesty International urges President Bush to withdraw his signing statement to the Detainee Treatment Act, which carries the risk of being used to undermine the protections against cruel, inhuman or degrading treatment contained in that legislation. If this is not its purpose, as the US delegation told the Committee against Torture in Geneva in May 2006, then Amnesty International can see no reason not to withdraw the statement. In view of the administration's opposition to the McCain Amendment prior to its passage through Congress as part of the DTA, the need for the administration to prove its commitment to the international prohibition on torture and other cruel, inhuman or degrading treatment remains pressing.

Finally, Amnesty International reiterates its call for the USA to ratify the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This came into force on 22 June 2006. By 14 September 2006, there were 24 State Parties and a further 34 signatories to the Optional Protocol, which establishes a new international visiting body and requires states that are party to the Protocol to put in place "national preventive mechanisms" meeting strict requirements. This international visiting body and the national mechanisms will conduct regular unrestricted visits to all places of detention; states that ratify the Optional Protocol must accept visits by these bodies to all places of detention without the need for prior consent and must work with them to implement their recommendations. If the USA is serious about preventing torture and other cruel, inhuman or degrading treatment, ratifying the Optional Protocol would be an excellent way to demonstrate this commitment.

9. AUMF – surely not meant to be a "blank check"?

Since the Force Resolution was adopted one week after the attacks of September 11, 2001, it naturally speaks with some generality… But…it never so much as uses the word detention

US Supreme Court Justice David Souter, 28 June 2004[241]

More than two centuries ago, one of the framers of the US Constitution, James Madison, wrote: "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it".[242] Another of the framers, Alexander Hamilton, wrote that "it is of the nature of war to increase the executive at the expense of the legislative authority".[243] It is widely agreed that the framers of the Constitution responded to the possibility of presidents assuming unilateral war powers by giving Congress the sole and exclusive power to declare and resource offensive military operations. They restricted the president to launching emergency defensive military action and overseeing the conduct of congressionally approved offensive war. James Madison wrote

[241] *Hamdi v. Rumsfeld* (2004), Justice Souter concurring in part, dissenting in part, and concurring in the judgment.
[242] Letter to Thomas Jefferson, 2 April 1798.
[243] The Federalist Papers, No. 8.

that "in no part of the Constitution is more wisdom to be found than in the clause which confides the question of peace and war to the legislature, and not to the executive branch".[244] However, in particular since President Truman dispatched US troops to Korea in 1950 without seeking congressional authorization, US Presidents have tended to bypass Congress or in effect to use it as a rubber stamp for military interventions overseas.[245]

On 14 September 2001, Congress passed the Authorization for the Use of Military Force (AUMF), a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The administration had initially sought even broader wording.[246] Nevertheless, as passed, the resolution gave the president the freedom to decide who was connected to the attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any temporal or geographical limits.

Signing the resolution into law on 18 September 2001, President Bush stated that he was holding to "the longstanding position of the executive branch regarding the President's constitutional authority to use force...and regarding the constitutionality of the War Powers Resolution."[247] He would repeat this a year later when signing a broadly defined resolution for use of force against Iraq. In other words, he did not believe that he had needed congressional

[244] Quoted in Karl K. Schonberg, *Global security and legal restraint: Reconsidering war powers after September 11*. Political Science Quarterly, Volume 119, Number 1, 2004, pages 115-142.
[245] See generally, David M. Ackermann and Richard F. Grimmett, *Declarations of war and authorizations for the use of military force: Historical background and legal implications*. Report for Congress, Congressional Research Service, updated 14 January 2003. The CRS is Congress's non-partisan public policy research arm. Also Louis Fisher, *Presidential wars*. Chapter 10 in Eugene R. Wittkopf and James M. McCormick (Eds.), *The Domestic Sources of American Foreign Policy*. Rowan and Littlefield Publishers, 2004. Also: *Deciding to use force abroad: War powers in a system of checks and balances*. War Powers Initiative of The Constitution Project, 2005.
[246] Schonberg (2004), *op.cit*., page 117.
[247] President signs Authorization for Use of Military Force bill. 18 September 2001. http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html. In 1970, the Senate voted to terminate the Gulf of Tonkin resolution, the broadly-worded congressional resolution passed six years earlier that provided legal authority for President Lyndon Johnson's escalation of the Vietnam War. Only two legislators had dissented against that resolution, despite doubts about the basis on which the administration was seeking it. Part of the fallout from this episode was the War Powers Resolution (WPR), passed by Congress in 1973 in an attempt to rein in presidential war-making undertaken without congressional authorization. The WPR is widely viewed as having failed due to poor drafting and numerous loopholes. In any event, all US presidents since its enactment (which overrode President Nixon's veto) have taken the position that the WPR is an unconstitutional violation of their war powers. During the AUMF debate, Rep. Jackson said that in discussions the previous day "some Members noted the similarity to the open-endedness of this resolution to the Tonkin Gulf Resolution."

authorization in either case.[248] Indeed, the Justice Department's advice, still in force, is that "military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon" and that neither the AUMF nor the War Powers Resolution can "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make".[249] As the US non-profit public policy research foundation, the Cato Institute, put it in 2006, "the administration's legal position can be summed up starkly: When we're at war, anything goes, and the president gets to decide when we're at war".[250]

Authorization for the use of force against *organizations* and *individuals* was unprecedented in US history, "with the scope of its reach yet to be determined".[251] The scope of the AUMF has already been enormous, however, at least as interpreted by the executive. For example, the Military Order signed by President Bush on 13 November 2001, providing for trials by military commission as well as indefinite detention without charge, trial or judicial review, cites the AUMF as a supporting authority. In *Hamdan*, the Supreme Court rejected the government's assertion that the AUMF had authorized the commissions as established under the Military Order.[252] The other main provision of the Order – detention without trial – remains in force, however. In May 2006, the administration told the UN Committee against Torture that all those held in US custody in Afghanistan and Guantánamo were held pursuant to it (see below). Prior to voting for the AUMF, at least one member of the House of Representatives was concerned that the resolution might grant the President the authority to conduct "extra-legal and extra-constitutional assassinations".[253] Amnesty

[248] A decade earlier, President George H.W. Bush had obtained a resolution from Congress to support military action in Iraq, but he and Secretary of Defense Dick Cheney stated that they did not believe congressional authorization was needed (Fisher, *Presidential wars*. *op.cit.*). President Bush himself subsequently remarked: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait". Remarks at the Texas State Republican Convention in Dallas, Texas, 20 June 1992, available at http://www.presidency.ucsb.edu/ws/index.php?pid=21125.

[249] Memorandum opinion for the Deputy Counsel to the President. *The President's constitutional authority to conduct military operations against terrorist organizations and the nations that harbour or support them.* John C. Yoo, Deputy Assistant Attorney General, Department of Justice, 25 September 2001, available at http://www.usdoj.gov/olc/warpowers925.htm. A version of this memorandum subsequently appeared in the Harvard Journal of Law and Public Policy (volume 25, pages 487-517).

[250] *Power surge: The constitutional record of George W. Bush*. By Gene Healy and Timothy Lynch, Cato Institute, 2006, page 10.

[251] *Declarations of war and authorizations for the use of military force…. Report for Congress, op. cit.*

[252] "First, while we assume that the AUMF activated the President's war powers, and that those powers include the authority to convene military commissions in appropriate circumstances, there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ". *Hamdan v. Rumsfeld*, page 29.

[253] Representative Jackson said during the AUMF debate: "In private meetings all day yesterday, Members raised serious questions and concerns that troubled me greatly…. Another Member asked: 'By voting for this resolution, are we granting the President new authority to conduct extra-legal or extra-constitutional assassinations?'"

International is concerned that US officials have apparently committed extrajudicial executions in the "war on terror".[254]

A now notorious Justice Department "torture" memorandum from August 2002 argued that if a US agent "were to harm an enemy combatant during an interrogation in a manner that might arguably [amount to torture under US law], he would be doing so in order to prevent further attacks on the United States by the al Qaeda network". The memorandum cites the AUMF as among those authorities that "recognized" the President's constitutional power to use force to defend the USA.[255] It is not known if other documents, their existence not yet confirmed, allegedly authorizing secret CIA detention facilities outside the USA and interrogation methods that the agency can use (see above), cite the AUMF. What is known, however, is that the administration continues to refer to the AUMF in defending President Bush's authorization of a secret wiretapping program by the National Security Agency.[256] Responding to a federal judge's recent finding that the warrantless wiretapping was not authorized by the AUMF and was unconstitutional, President Bush reiterated that "this country of ours is at war" and stressed his strong disagreement with the ruling which he had instructed the Justice Department immediately to appeal.[257]

The administration's proposed Military Commissions Act of 2006 seeks to have Congress endorse the AUMF as an authority for President Bush's Military Order of 13 November 2001 and his detention of "enemy combatants" in the "war on terror".[258] Amnesty International urges Congress reflect carefully upon this and instead to consider repealing the AUMF or amending the legislation to define clearly the full scope and limitations of executive authority in conformity with international law and standards. Although the resolution was adopted by near unanimity in both houses of Congress, it is clear that, at least for some legislators, the executive has read into the resolution more than was intended.[259] There seemed to be some confusion among legislators as to whether they were voting for a

[254] See Section 5.2 of *USA: Updated briefing to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights*, July 2006, AMR 51/111/2006, available at http://web.amnesty.org/library/Index/ENGAMR511112006.

[255] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.

[256] See, for example, *Legal authorities supporting the activitities of the National Security Agency described by the President*, US Department of Justice, 19 January 2006 ("the AUMF places the President at the zenith of his powers in authorizing the NSA activities"), available at http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.

[257] President Bush meets with economic advisors, 18 August 2006, http://www.whitehouse.gov/news/releases/2006/08/20060818-1.html. The ruling was *ACLU et al. v. National Security Agency et al*, Memorandum Opinion, US District Court, Eastern District of Michigan, Southern Division, 17 August 2006.

[258] Section 2, para. 4.

[259] See, for example, *Power we didn't grant*, by Tom Daschle, Washington Post, 23 December 2005. *Spy court judged quits in protest*. Washington Post, 21 December 2005. The vote in the House of Representatives was 420-1 for the resolution, and in the Senate was 98-0.

declaration of war or not.[260] Some felt the resolution did not go far enough, others felt it went too far.[261] Some opined that the President had all the power he needed without a resolution.[262] Others stressed the limiting effect of the resolution and the need for continuing congressional oversight.[263] One legislator addressed President Bush rhetorically: "I will be asked by my constituents did we give you the power to declare war? Many in this Congress will argue that we are not giving you the power to declare war. Others will argue that we are giving you the power to do anything from assassinate an individual, to declare war on an entire country…" She urged him: "Mr President, do not misuse this authority. Mr President, do not abuse this awesome power". She said that she would be voting for the resolution "with great reservations" because "to be honest, I do not know what this means. The language of this resolution can be interpreted in different ways".[264]

The courts have offered varying interpretations of the AUMF. The Ninth Circuit Court of Appeals has attributed a narrower reach to it than the Fourth Circuit, for example.[265] Meanwhile, the Supreme Court's rulings in *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006) are being interpreted by the executive as having authorized the indefinite

[260] E.g. Rep. Kolbe: "It is nothing less than a declaration of war"; Rep. Hoyer: "We do not make a formal declaration of war today"; Rep. Schiff: "Make no mistake; it is a broad delegation of authority to make war"; Rep. Barr: "We ought to be here this evening debating a declaration of war… This is war. The President has said it is war"; Rep. DeFazio suggested that it was an "authorization of force, a 21st century declaration of war". Of those who did not believe the resolution was a declaration of war, Representative Conyers (who did not vote on the resolution) explained in his role as a member of the House Judiciary Committee that "by not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that…authorize the President to apprehend 'alien enemies'."

[261] Rep. Smith (Texas): "this joint resolution is well intended, but it does not go far enough". Rep. Shadegg: "I am concerned that it may not go far enough…" Rep. Jackson: "…it is too broad. The literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power." Rep. Stark: "I do not believe – even in times of extreme crisis – that the Congress should turn over our constitutional responsibilities to the President. The resolution we are debating today, I fear, begins to do just that".

[262] Rep. Lofgren: "The President likely already has the legal authority needed". Rep. Blumenauer: "I am one who believes that the American President [already] has these powers".

[263] Rep. Norton: "Congress must remain vigilant to ensure that his power is always sufficient but never unchecked". Rep. Doggett: "[W]e cannot let the executive branch become the exclusive branch. Our approval must represent not the end but the beginning of congressional involvement".

[264] Rep. Waters. Congressional Record – House, 14 September 2001. H5652.

[265] After taking account of the AUMF, the Ninth Circuit nonetheless stated: "we share the desire of all Americans to ensure that the Executive enjoys the necessary power and flexibility to prevent future terrorist attacks. However, even in times of national emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike. Here, we simply cannot accept the government's position that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included…" *Gherebi v. Bush*, 18 December 2003. In *Hamdi v. Rumsfeld* on 8 January 2003, the Fourth Circuit found that the AUMF did authorize Hamdi's detention.

detention of "enemy combatants" and to have confirmed the global "war on terror" as an armed conflict to which the laws of war apply. In military commission hearings in Guantánamo after the *Hamdi* ruling but before the *Hamdan* decision, for example, the military prosecution argued that "it is clear that the [Supreme] Court considers the AUMF to be the functional equivalent of a declaration of war".[266] Whatever the grounds for such a view, Amnesty International again points to the apparent confusion of legislators in the debate on the resolution as to precisely what they were authorizing. It is notable that one of the Senators who voted against the Iraq war resolution in October 2002 did so on the grounds that it amounted to a "blank check".[267] In the case of the AUMF a number of legislators stressed that they did not believe that the AUMF would constitute a "blank check" and voted for it.[268] Amnesty International urges all legislators in Congress to reflect upon whether the AUMF has in fact amounted to just such an expansive open-ended resolution, and whether it has been abused by the executive. They might consider the following words from half a century ago:

> *The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority…A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labours under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford. I know no more impressive words on this subject than those of Mr. Justice Brandeis: 'The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.'* [269]

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[266] For example, see *USA v. Hamdan*, Prosecution response to defense motion for dismissal (lack of personal jurisdiction), 15 October 2004, contained in 5th volume of review exhibits (Re)-Re 30-33 for November 8, 2004 session (redacted version) http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol11.pdf.

[267] "This resolution, when you get through the pages of whereas clauses, is nothing more than a blank check. The President can decide when to use military force, how to use it, and for how long. This Vermonter does not sign blank checks." Address by Senator Patrick Leahy on the Iraq War Resolution, Senate, 9 October 2002, available at http://leahy.senate.gov/press/200210/100902a.html.

[268] Rep. Smith (New Jersey): "The resolution is not a blank check"; Rep. Watson: "the resolution is not a carte blanche"; Rep. Schakowsky: "It is not a carte blanche…"; Rep. Jackson: "I'm not willing to give President Bush carte blanche authority to fight terrorism. We need to agree to fight it together within traditional constitutional boundaries."

[269] *Youngstown v. Sawyer*, 343 U.S 579 (1952), Justice Frankfurter concurring (and quoting Justice Louis Brandeis in *Myers v. United States* (1926).)

In *Hamdi*, the Supreme Court majority ruled that Congress had authorized the detention of Yaser Esam Hamdi, a US citizen taken into custody in Afghanistan during the international armed conflict there (although it found that Hamdi must be allowed "a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker", something that had so far been denied). The Court noted that the detention of "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network" were individuals whom "Congress sought to target in passing the AUMF". The Court concluded that the detention of this "limited category" of individuals, "for the duration of the particular conflict in which they were captured" clearly fell into the use of "necessary and appropriate force" authorized in the AUMF. However, the Court merely observed that the conflict in Afghanistan was continuing, without noting that the international armed conflict in which Hamdi had been captured had ended two years earlier, at which time he should have been released or charged. The Court added that "indefinite detention for the purpose of interrogation is not authorized". Indeed, four US Supreme Court Justices have said, the government cannot justify executive detention "by the naked interest in using unlawful procedures to extract information".[270] Yet the extraction of information is precisely one of the purposes for which those in Guantánamo and elsewhere have been kept in indefinite detention without charge or trial.[271]

The Justice Department responded to the *Hamdi* ruling by stating that it was "pleased" that the Court had "upheld the authority of the President as Commander-in-Chief of the armed forces to detain enemy combatants, including US citizens". As already noted the Justice Department has similarly responded to the *Hamdan* ruling by interpreting it as confirming "that we are involved in an armed conflict with al Qaeda to which the laws of war apply." However, the *Hamdan* ruling did not elaborate a clear distinction between the global "war on terror" and the international armed conflict in Afghanistan during which Hamdan, like Hamdi, was taken into custody, and the government has persisted in conflating the two.[272] Amnesty International reiterates what the ICRC has emphasised: "Whether or not an international or non-international armed conflict is part of the 'global war on terror' is not a legal, but a political question. The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict".[273]

[270] *Rumsfeld v. Padilla*, 28 June 2004, Justice Stevens dissenting (jointed by Justices Souter, Breyer and Ginsburg).
[271] See, e.g., Declaration of Donald Woolfolk, Deputy Commander, Task Force 170, Guantánamo Bay, 13 June 2002, http://files.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdi61302wlflkdec.pdf.
[272] "The [Court of Appeals for the DC Circuit] accepted the Executive's assertions that Hamdan was captured in connection with the United States' war with al Qaeda and that that war is distinct from the war with the Taliban in Afghanistan. It further reasoned that the war with al Qaeda evades the reach of the Geneva Conventions. We…disagree with the latter conclusion." The Supreme Court then stated that it did not need to decide the merits of the administration's arguments that the Third and Fourth Geneva Conventions did not apply to the conflict with *al-Qa'ida* because common Article 3 did apply.
[273] *The relevance of IHL in the context of terrorism*, Official statement of the International Committee of the Red Cross, 21 July 2005, http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.

In 1788, Alexander Hamilton wrote: "In the legislature, promptitude of decision is oftener an evil than a benefit".[274] Two centuries later, on 14 September 2001, the single legislator who voted against the AUMF, Representative Barbara Lee, said: "Some of us must say, let us step back for a moment. Let us just pause for a minute and think through the implications of our actions today so that this does not spiral out of control".[275] Amnesty International urges Congress to take the pause for thought that Representative Lee requested five years ago, and act to terminate or modify the AUMF. From now on, Congress and the executive should ensure that the USA's policies and practices fully comply with international humanitarian, human rights, and refugee law.

10. Conclusion

We must call countries to account when they retreat from their human rights commitments.

US Secretary of State, March 2006[276]

The USA has retreated from its human rights commitments. The Supreme Court's ruling in *Hamdan v. Rumsfeld* has presented the administration and Congress with an opportunity to put things right. They should seize this opportunity with both hands.

In a central memorandum impacting on the treatment of detainees, dated 7 February 2002, President Bush stated that the "new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war".[277] The "new thinking" that was done – reflected in a number of memorandums and directives – has resulted in old, familiar abuses: executive detentions, enforced disappearance, curtailment of *habeas corpus*, torture and other cruel, inhuman or degrading treatment, a widespread denial of human dignity, impunity or leniency for US personnel, and proposed trials for "the enemy" that would fail to meet basic standards of fairness. The "new thinking" in the law of war has been used to justify a rejection of international human rights law and key principles of international humanitarian law.

The Supreme Court's *Hamdan* ruling has prompted the executive to halt one of its main pillars of "new thinking" – its resurrection after half a century of trials by military commission. The response to it should be a compete rethinking of the USA's detention policy in the "war on terror".

President Bush's confirmation on 6 September 2006 of the existence of a secret CIA interrogation and detention program, and his announcement that 14 "high-value" detainees had been transferred in early September to military custody and possible trial in Guantánamo, was made in the charged atmosphere of the fifth anniversary of the 11 September 2001

[274] The Federalist Papers, No. 70.
[275] Congressional Record – House, 14 September 2001. H5642-3.
[276] Briefing on the State Department's 2005 Country Reports on Human Rights Practices. Secretary Condoleezza Rice, Washington, DC, 8 March 2006 http://www.state.gov/secretary/rm/2006/62738.htm.
[277] *Re: Humane treatment of al Qaeda and Taliban detainees*, 7 February 2002, *op.cit.*

attacks and the forthcoming congressional elections.[278] Amnesty International calls for these human rights issues not to become partisan political footballs in the lead-up to the 7 November 2006 elections. Respect for human rights must transcend party politics, regardless of the emphasis placed on national security issues during the election campaign.

By reversing its retreat from its human rights commitments, the USA would begin to make real the promise of its own National Security Strategy:

> "*The United States must defend liberty and justice because these principles are right and true for all people everywhere…The United States Government will work to advance human dignity in word and deed, speaking out for freedom and against violations of human rights and allocating appropriate resources to advance these ideals.*"[279]

It would also be putting in place a central plank of the Global Counter-Terrorism Strategy, adopted by the United Nations General Assembly on 8 September 2006:

> "*We, the States Members of the United Nations, resolve…to recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.*"[280]

The USA rightly maintains that respect for human rights "helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises".[281] The government should take this prescription and as a matter of urgency set about restoring respect for the right not to be arbitrarily detained, the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, and the right to a fair trial.

11. Recommendations

Amnesty International urges the United States, in contemplating its legislative response to *Hamdan v. Rumsfeld* and other "war on terror" questions to:

- Ensure that the USA's response to the Supreme Court's ruling in *Hamdan v. Rumsfeld* fully complies with international law and standards;
- Ensure that any trial procedures, whatever forum adopted, fully comply with international law and standards, and that there is no resort to the death penalty;

[278] The 7 November 2006 elections will determine which party controls Congress; all 435 seats in the House of Representatives are up for election and 33 seats in the Senate.
[279] The National Security Strategy of the United States of America, March 2006, available at: http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.
[280] Available at: http://www.un.org/terrorism/strategy/#resolution.
[281] http://www.state.gov/g/drl/hr/.

- Use the existing ordinary courts to try foreign nationals charged with recognizably criminal offences;
- Ensure that any trial procedures adopted do not violate the prohibition on discriminatory application of fair trial rights, including on the basis of nationality;
- Ensure in any trials, the standards regarding the admissibility of hearsay and classified and coerced evidence do not fall below those that apply in ordinary US courts;
- Desist from adopting any legislation that would allow for prolonged or indefinite detention without charge or trial, or curtail the right of detainees to judicial review of the lawfulness of detention;
- Desist from adopting any legislation that would facilitate impunity for war crimes, crimes against humanity, torture, or other human rights violations which are crimes under international law.

In addition, Amnesty International urges Congress to:

- Act to repeal or modify the Authorization for the Use of Military Force passed on 14 September 2001 with a statement of concern that it has been over-expansively interpreted by the administration and used to justify violations of the USA's international obligations;
- Repeal or substantially amend Sections 1004 and 1005 of the Detainee Treatment Act to ensure that the non-derogable right to *habeas corpus* is fully protected and to ensure that the legislation does not support impunity for acts of torture or other cruel, inhuman or degrading treatment committed by US personnel;
- Establish an independent and impartial commission of inquiry into the USA's "war on terror" interrogation and detention practices, including renditions and secret detentions;
- Act to terminate the program of secret interrogation and detention operated by the Central Intelligence Agency, which operates in violation of international law.

In addition, Amnesty International urges the Administration to:

- Close the Guantánamo detention facility and any other facility operated by the USA in which detainees are removed from the protections of US and international law;
- Ensure that all detainees have access to judicial review to be able to challenge the lawfulness of their detention;
- End the secret interrogation and detention program operated by the Central Intelligence Agency;
- Identify all individuals who have been held in the CIA program, and clarify their fate and whereabouts, making this information available to the families and legal representatives of these persons as well as to the International Committee of the Red Cross;

- Ensure that all detainees are held in conditions and places that fully comply with international law and standards, and that they have access to the International Committee of the Red Cross, legal counsel, independent medical care and relatives;
- Withdraw or substantially amend the Presidential memorandum, dated 7 February 2002, in order to fully reflect the USA's obligations under international human rights and humanitarian law, including Article 3 common to the four Geneva Conventions of 1949. The position reflected in the memorandum that the humane treatment of detainees is a policy choice rather than a legal obligation must be reversed;
- Appoint an independent Special Counsel to carry out a criminal investigation into the conduct of any administration officials against whom there is evidence of involvement in crimes in connection with the "war on terror;
- Declassify, release and repudiate any documents that authorize, facilitate or condone any interrogation techniques or detention conditions, including secret detention and enforced disappearance, which violate international law and standards;
- Ensure full implementation of the recommendations to the USA by the UN Committee against Torture (18 May) and the UN Human Rights Committee (28 July).

In addition, Amnesty International urges the Administration and the Senate to:

- Withdraw all reservations and other limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ensure the full extraterritorial application by the USA of the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Reconsider the repudiation of the USA's signature to the Rome Statute of the International Criminal Court with a view to ratification.

Appendix 1: Detainees named under Military Order

This table lists 12 detainees made subject to the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism signed by President George W. Bush on 13 November 2001. Ten have been charged, and two have been released. In addition, another five were made subject to the Military Order in July 2004 but have not been publicly identified or charged.

Name	Nationality	Detained	Chronology and notes
Salim Ahmed Hamdan	Yemeni	Afghanistan	Detained by Northern Alliance in November 2001 during international armed conflict. Made subject to Military Order in July 2003. Assigned military lawyer in December 2003. Charged July 2004.
Ali Hamza al Bahlul	Yemeni	Afghanistan	Detained by Northern Alliance in December 2001 during international armed conflict. Transferred to US custody and held for several weeks on US Navy vessels. Transferred to Guantánamo in February 2002. Made subject to Military Order in July 2003. Charged in February 2004.
Ibrahim Ahmed al Qosi	Sudanese	Pakistan	Detained by Pakistani authorities in December 2001 after crossing the Afghanistan border. Taken to Peshawar and interrogated over a period of two weeks. Turned over to the USA and transferred to Afghanistan. Allegedly ill-treated by US agents in Kandahar. Allegedly coerced into making statements, particularly under threat of being sent to Egypt for interrogation. Made subject to Military Order in July 2003. Charged in February 2004. Assigned a military lawyer in February 2004.
David Matthew Hicks	Australian	Afghanistan	Detained by Northern Alliance in December 2001 during international armed conflict. Transferred to US Navy vessel for interrogation. Transferred to Guantánamo in January 2002. Made subject to Military Order in July 2003. Australian government assured that he would not face death penalty. In November 2003, Australian and US governments announced that they were in agreement that military commission process would provide "full and fair trials for any charged Australian detainees" held in Guantánamo. Assigned a military lawyer in December 2003. Charged in June 2004.

Abdul Zahir	Afghan	Afghanistan	Detained in July 2002. Made subject to Military Order in July 2004. Charged in January 2006. Charges include specific offence committed in March 2002 during international armed conflict.
Binyam Muhammad	Ethiopian	Pakistan	Detained in Karachi airport in April 2002. Transferred to Morocco, possibly aboard CIA-leased jet registration N379P on 21 July 2002, and thence to Guantánamo in 2004. Made subject to Military Order in July 2004. Charged in November 2005.
Omar Ahmed Khadr	Canadian	Afghanistan	Detained in late July 2002 during non-international armed conflict. Fifteen years old at the time he was taken into custody. Made subject to Military Order in July 2004. Charged in November 2005.
Sufyian Barhoumi	Algerian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005.
Jabran Said bin al Qahtani	Saudi Arabian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005.
Ghassan al Sharbi	Saudi Arabian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005.
Feroz Abbasi	British	Afghanistan	Made subject to Military Order in July 2003. Trial by military commission opposed by UK government. Not charged. Released without charge on return to UK.
Moazzam Begg	British	Pakistan	Abducted from his apartment in Karachi in early 2002. Unlawfully transferred to Afghanistan. Made subject to Military Order in July 2003. Trial by military commission, opposed by UK government. Not charged. Released without charge on return to UK.

Appendix 2: Transferred from secret CIA custody

On or around the weekend of 2/3 September 2006, the following 14 individuals were transferred from secret CIA detention outside the USA to military custody in Guantánamo Bay, Cuba. Having been gathered from various locations around the world, they were reportedly hooded, shackled, and sedated for the flight to Guantánamo.[282]

Name	Nationality	Country in which captured	Time held incommunicado in secret detention	Notes
ʻAli ʻAbd al-ʻAziz ʻAli	Pakistani	Pakistan	3 years and four months	Detained during a raid in Karachi on 29 April 2003 with six others including Walid bin Attash (see below).
Ahmed Khalfan Ghailani	Tanzanian	Pakistan	2 years	Detained on 25 July 2004 in Gujrat, southeast Islamabad with his Uzbek wife and at least 13 others. Handed over to CIA custody in August 2004.
Hambali (Riduan bin Isomuddin)	Indonesian	Thailand	3 years	Detained on 11 August 2003 with his wife in Ayutthaya, central Thailand and handed over to CIA.
Mustafa Ahmad al-Hawsawi	Saudi Arabian	Pakistan	3 years and six months	Detained on 1 March 2003 in Rawalpindi with Khalid Sheikh Mohammed (see below).
Mohammed Nazir bin Lep (Lillie)	Malaysian	Thailand	3 years	Detained in August 2003.
Majid Khan	Pakistani	Pakistan	3 years and six months	Detained in March or April 2003.
ʻAbd al-Rahim al-Nashiri	Saudi Arabian	United Arab Emirates	Almost 4 years	Detained in November 2002.
Abu Faraj al-Libi	Libyan	Pakistan	1 year and four months	Detained in Maran on 2 May 2005 with three others.

[282] See *Decision to move detainees resolved two-year debate among Bush advisers*. Washington Post, 8 September 2006.

Zain al-‘Abidin Abu Zubaydah	Palestinian	Pakistan	4 years and six months	Detained from an apartment in Faisalabad on 28 March 2002.
Ramzi bin al-Shibh	Yemeni	Pakistan	4 years	Detained in Karachi on 11 September 2002.
Mohd Farik bin Amin (Zubair)	Malaysian	Thailand	3 years and three months	Detained in June 2003.
Walid bin Attash	Yemeni	Pakistan	3 years and four months	Detained during a raid in Karachi on 29 April 2003 with six others including ‘Ali ‘Abd al-Aziz ‘Ali (see above). His brother, Hassan bin Attash is also detained at Guantánamo.
Khaled Sheikh Mohammed	Pakistani	Pakistan	3 years and six months	Detained on 1 March 2003 in Rawalpindi with Mustafa Ahmad al-Hawsawi (see above)
Gouled Hassan Dourad	Somali	Unknown. Possibly Djibouti	At least 2 years and six months	Believed to have been taken into detention in late 2003 or early 2004.

Appendix 3: Persons taken into detention outside of zones of armed conflict

The individuals listed in this table are all believed to be currently held in the US Naval Base in Guantánamo Bay in Cuba.

Name	Nationality	Capture	Notes
Mohamedou Ould Slahi	Maurit-anian	Maurit-ania	Held in Mauritanian custody for a week in December 2001. Transferred to Jordan for eight months. On 19 July 2002, flown to US air base in Bagram in Afghanistan, possibly aboard CIA-leased jet registration N379P. Transferred to Guantánamo on 4 August 2002. See Appendix 3 for case study.
Bisher al-Rawi	Iraqi (UK resident)	Gambia	Detained in Gambia in November 2002. Transferred to Bagram, possibly via Cairo aboard CIA-leased jet registration N379P, and thence to Guantánamo.
Jamil al-Banna	Jordanian (UK resident)	Gambia	Detained in Gambia in November 2002. Transferred to Bagram, possibly via Cairo aboard CIA-leased jet registration N379P, and thence to Guantánamo.
Mohammed Sulaymon Barre	Somalian	Pakistan	Detained at his home in Karachi in November 2001. He says that he was in Pakistan custody for four months before being handed over to the USA. He claims never to have been to Afghanistan until he was transferred to US custody in Kandahar and then Bagram, where he claims he was tortured. Later transferred to Guantánamo. He told his ARB hearing in 2005 that he "was taken from [his family] in the middle of a very dark night and from that day I don't know anything about my family."
Saifullah Paracha	Pakistani	Pakistan	Detained in July 2003 at Karachi airport on his way to Bangkok. After having "disappeared" for several weeks, it emerged that he had been taken to US custody in Bagram. Transferred to Guantánamo in September 2004.
Abdullah Mohammad Khan	Uzbek	Pakistan	Detained in January 2002 in a house in Peshawar.
Muhammad Saad Iqbal al-Madni	Pakistani	Indon-esia	Detained in Jakarta on 9 January 2002. Taken to Egypt two days later and held there until 12 April 2002. Thence flown to Afghanistan where he was held in US custody from 13 April 2002 to 22 March 2003 when he was transferred to Guantánamo.
Jamil Mar'i	Yemeni	Pakistan	Detained in Karachi in September 2001. Taken to Jordan. Transferred to Guantánamo.

Bensayah Belkacem	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Lakhdar Boumediene	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Mohammed Lechle	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Saber Lahmar	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Boudella al Haji	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Mustafa Ait Idir	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Mohammed Mubarek Salim al Qurbi	Saudi Arabian	Pakistan	Says that he was turned over to US custody by Pakistan on 25 November 2001.
Mohammed Ali Salem al Zarnuki	Yemeni	Pakistan	Arrested in Faisalabad in mid-2002. Claims to have never been to Afghanistan until the Pakistan authorities "sold me to the Americans" and he was taken to Kandahar and Bagram.
Musab Oma Ali al Mudwani	Yemeni	Pakistan	Arrested at an apartment in Karachi. He told his ARB hearing in December 2005 that "before I came to the prison in Guantanamo Bay I was in another prison in Afghanistan, under the ground; it was very dark. It was total dark, under torturing and without sleep. It was impossible that I could get out of there alive. I was really beaten and tortured". He stated that the prison had Afghan guards and Arab-American investigators.
Hassan bin Attash	Yemeni	Pakistan	Reportedly 17 when seized during a raid on his home in Karachi in September 2002. Transferred to CIA-run "dark prison" in Kabul for about a week, and then transferred, possibly aboard a CIA-leased jet registration N379P on 17 September 2002, to Jordan where he was held for 16 months and allegedly tortured. On 8 January 2004, he was reportedly returned to Kabul's "dark prison" and thence to Bagram and Guantánamo Bay.
Abdul Salam al Hela	Yemen	Egypt	Detained in Cairo in September 2002. Transferred later that month to Afghanistan, possibly via Azerbaijan aboard CIA-leased jet registration N379P. Held in CIA-run "dark prison" in Kabul for over a year, taken to Guantánamo in 2004.

Appendix 4: Rendition – torture – trial?

My country turned me over, short-cutting all kinds of due process of law, like a candy bar to the United States. They sent me to Jordan for torture and later on to Bagram and then to this place… I have been kept out of the world for more than four years and I really don't know what is going on outside.

Mohamedou Slahi, Guantánamo, 13 December 2005[283]

The case of Mauritanian national Mohamedou Ould Slahi, described in the 9/11 Commission Report as "a significant al Qaeda operative" who "recruited 9/11 hijackers in Germany", illustrates how US policies on detention and interrogation have jeopardized the prospect for trials. Mohamedou Slahi was not taken into custody in a zone of armed conflict, yet he has been labelled by the US administration as an "enemy combatant" to whom the "laws of war" apply and to whom human rights law does not. If charged and tried, according to the position of the administration, he would be subject to a military commission; yet he is a civilian. Moreover, he has suffered nearly five years of human rights violations, including unlawful transfers between countries, very lengthy incommunicado detention, torture or other cruel, inhuman or degrading treatment, denial of his non-derogable right to *habeas corpus*, and a presumption of his guilt without being brought to any court for trial. As the US authorities consider how to respond legislatively to the *Hamdan* ruling, they should keep such cases in mind and ask how they measure up to the US government's promise to champion the "non-negotiable demands of human dignity", including the rule of law, in the "war on terror".

Mohamedou Slahi was detained by the Mauritanian authorities in late November 2001 in the capital Nouakchott after he handed himself in. Suspected of involvement in the so-called millennium plot, an alleged conspiracy to bomb Los Angeles airport and sites in the Middle East on 31 December 1999, he says he had been questioned on a number of occasions previously in his country, as well as in Germany and Senegal. His questioning in Mauritania included interrogation in February 2000 by four US government personnel – three FBI agents and "another guy from the Department of Justice". In Nouakchott in 29 September 2001, he was again called in for questioning, and was told "the Americans told us to arrest you". On 13 October, a US agent participated in the interrogation during which Slahi was allegedly threatened with torture and hit. The US agent allegedly threatened that he would bring in "black people".[284] Mohamedou Slahi was released later in October.

After he returned for questioning in late November 2001 at the request of the Mauritanian authorities, he was held in intelligence custody. He was told that "the United States wants you to be turned over to Jordan. I said what do I have to do with Jordan? Turn

[283] Mohamedou Slahi's quotes are as reported by the Combatant Status Review Tribunal (CSRT) in Guantánamo in late 2004 and the Administrative Review Board (ARB) hearing in December 2005.
[284] This is reminiscent of an allegation in the case of Jamil al-Banna and Bisher al-Rawi, who were questioned by US agents in Gambia in 2002 prior to being transferred without the due process of law to Afghanistan and then Guantánamo. At least one of the men was allegedly threatened that unless he cooperated he would be handed over to the Gambian police who would beat and rape him.

me over to America. They said they have no general law basis to turn me over to the United States. They wanted to find first the proof then they were going to turn me over to the United States because there were not facilities to send me to yet."

After eight days, Mohamedou Slahi was transferred to Jordan – he describes it as having been "kidnapped". He told the ARB in Guantánamo in December 2005 that "the Jordanians have a very bad reputation when it comes to treatment of detainees". The US government is well aware of this. In its latest State Department report on human rights in other countries, for example, the entry on Jordan noted:

> "*Police and security forces allegedly abused detainees during detention and interrogation and reportedly also used torture. Allegations of torture were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers. The most frequently reported methods of torture included beating, sleep deprivation, extended solitary confinement, and physical suspension. Defendants charged with security-related offences before the State Security Court claimed they were tortured to obtain confessions and claimed to have been subjected to physical and psychological abuse while in detention.*"

A previously secret Department of Defense memorandum released in June 2006 under Freedom of Information Act (FOIA) litigation appears to be about Mohamedou Slahi, although he is not identified by name. The memorandum reads "He turned himself in to the Mauritanian authorities in November 2001." The next sentence is censored out. The memorandum continues: "In July 2002, he was turned over to the US in Bagram…"[285] In a post-*Hamdan* hearing in front of the Senate Armed Services Committee on 2 August 2006, US Attorney General Alberto Gonzales defended the USA's involvement in the practice of rendition. He said that "we seek assurances, whenever we transfer someone, that in fact that they will not be tortured." The transcript of his comments continues: "I cannot – you know, we are not there – (chuckles) – in the jail cell in foreign countries where we render someone."

Mohamedou Slahi has begun to fill in the gaps. He says that "what happened to me [in Jordan] is beyond description" as "they tried to squeeze information out of me". He says that he was not tortured everyday – "maybe twice a week, a couple times, sometimes more" – but that he was threatened "with a lot of torture". He describes being taken to a "room where they tortured and there was this guy who was beaten so much he was crying, crying like a child". Mohamedou Slahi said he was "terrorized" by the threats of being subjected to the same, and has stated that "under so much pressure and bad treatment" he falsely confessed to being part of the millennium plot.

On 19 July 2002, after eight months in incommunicado military detention in Jordan, he was turned over to US custody, and put on a plane (apparently one used for other unlawful transfers by the USA in the "war on terror").[286] According to reports, this is the same CIA-

[285] Memorandum for record. Possible torture allegations, see page 770 of http://action.aclu.org/torturefoia/released/061906/Schmidt_FurlowEnclosures.pdf.

[286] According to Human Rights Watch, flight records indicate a flight by a plane with the registration N379P. As Amnesty International has reported, this CIA-leased jet has been used in other so-called

leased plane used to subject other detainees to unlawful transfers between countries in the "war on terror" (see Appendix 2). Mohamedou Slahi recalls: "They took my clothes off and I said this is an American technique not an Arabic one because Arabs don't usually take all of your clothes off. So they stripped me naked like my mom bore me, and they put new clothes on me… I did not want them to take my picture. I was in chains, a very bad suit, I had lost so much weight in Jordan I was like a ghost and I did not want my family to see me in this situation – that was my worst fear in the world. Besides that I had to keep my water for eight hours straight. Because the Americans [had me put] on a diaper but psychologically I couldn't [urinate] in the diaper."

After his arrival, he heard a language he did not know and thought he had been taken to the Philippines, but "it turned out to be Bagram", the US airbase in Afghanistan. He says that he was "not really tortured in Bagram" although "one soldier grabbed me with chains and he dragged me over concrete stairs… from the cell to interrogation". He also alleges that a Japanese American interrogator "played with me a little bit. He made me sit on my knees for very long hours and I have very bad back pain, it's called sciatic nerve and he worked on my sciatic nerve giving me a lot of pain during the interrogation."

On 4 August 2002, Mohamedou Slahi was transferred to Guantánamo, apparently from Kandahar air base. He says he was glad to be out of Afghanistan because it was a "place of war" whereas Guantánamo was "American territory": "I believed that a vast majority of Americans did not believe in torture and I did not want to be tortured… I thought this is America, not Jordan…" However, the use of incommunicado detention against him did not end. Leaked Pentagon documents reveal that at a meeting on 9 October 2003, the ICRC complained that it had still not been able to visit detainee number 760 (Slahi), and the organization was informed by Major General Geoffrey Miller (the commander of Guantánamo detentions from November 2002 to March 2004) that access to him was not possible due to "military necessity".[287] On 2 February 2004, the ICRC again requested access to the detainee, but were told that they could not meet with him privately for the same reason.[288] It was now 18 months since Slahi had been in Guantánamo and more than two years since his detention began in Mauritania.[289]

Mohamedou Slahi says that during the "time era of Miller", the FBI released a list of the 15 highest priority detainees held there, and that he, Mohamedou Slahi, was top of the list.[290] Until 22 May 2003, Mohamedou Slahi's daily interrogations were conducted under

renditions by the USA. See *USA: Below the Radar: Secret flights to torture and 'disappearance'*, AMR 51/051/2006, April 2006, http://web.amnesty.org/library/index/engamr510512006.

[287] Department of Defense Memorandum for Record. *ICRC Meeting with MG Miller on 9 Oct 03*.

[288] *ICRC meeting*, 2 February 2004.

[289] The 9/11 Commission Report revealed that it had been "authorized to identify by name only ten detainees whose custody has been confirmed officially by the US government". Mohamedou Ould Slahi, branded by the report as a leading al-Qa'ida operative, was not among them, yet he had already been in US custody for two years by the time the report was issued on 22 July 2004.

[290] "We became aware of the other high value detainee later. And he's obviously the big – he's a bigger fish (than Mohamed al-Qahtani, see box in text). A much bigger fish. So this is – other high value

FBI control. On 23 May 2003, Amnesty International understands that his "hold status" was changed from FBI to the control of the Department of Defense (DoD) and possibly its military intelligence agency, the Defense Intelligency Agency (DIA).[291] The FBI's Military Liaison and Detainee Unit was said to have had "a long standing and documented position against use of some of DoD's interrogation practices".[292] According to a previously secret FBI memorandum, dated 30 May 2003, Major General Miller at that time still favoured the "aggressive interrogation methods" employed by the DIA's Defense HUMINT Service (DHS) which the FBI was concerned "could easily result in the elicitation of unreliable and legally inadmissible information".[293] The FBI document noted that members of the DHS were "being encouraged at times to use aggressive interrogation tactics" in Guantánamo. It continued:

> "*Not only are these tactics at odds with legally permissible interviewing techniques used by US law enforcement agencies in the United States, but they are being employed by personnel in GTMO who appear to have little, if any, experience eliciting information for judicial purposes. The continued use of these techniques has the potential of negatively impacting future interviews by FBI agents as they attempt to gather intelligence and prepare cases for prosecution*".

Another FBI email, dated 5 December 2003, referred to "torture techniques" that had been employed by DoD interrogators against an unidentified detainee at Guantánamo, and that the FBI's Criminal Investigation Task Force believed that the techniques had "destroyed any chance of prosecuting this detainee".[294]

According to Mohamedou Slahi, his FBI interrogator told him that he "was not going to enjoy the time to come". One of the new interrogators assigned to his case was "a special

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detainee is classified, Khatani is not." Testimony of Lieutenant General Randall M. Schmidt, taken 24 August 2005 at Davis Mountain Air Force Base, Arizona, for Department of the Army Inspector General,Virginia.

[291] It seems that the same happened in the case of Mohamed al-Qahtani (see text box). A military investigator has said of that case that "the FBI's approach wasn't working", and that when the FBI "saw that the DoD DIA piece of this going on, they went you know that's extreme. And in fact by their standards of evidence it is extreme." Testimony of Lt. Gen. Schmidt, 24 August 2005, *op.cit.* It is not known if there was any CIA involvement in Mohamedou Slahi's interrogation. The Schmidt/Furlow investigators interviewed nine DIA personnel, but no one from the CIA. The CIA did not provide the Church investigation with any information about the agency's activities in Guantánamo. Yet the CIA had "unfettered access to people they wanted to have and they had their own area [at Guantánamo]. They didn't use our [DoD] interrogation facilities because they used their own trailer operation". Lt. Gen. Schmidt, *op. cit.*

[292] See http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf.

[293] See http://action.aclu.org/torturefoia/released/022306/1261.pdf. See also page 3758 of http://www.aclu.org/torturefoia/legaldocuments/july_docs/(M)%20SCHMIDT-FURLOW%20DEFERRED.pdf (FBI agent recalling a military interrogator at Guantánamo saying that "it would take approximately four days to break someone doing an interrogation 16 hours on with the (strobe) lights and (two different kinds of loud) music and four hours off. The sleep deprivation and the lights and the alternating beats of the music would wear the detainee down.").

[294] http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf.

guy" who was always masked so "we would never see his face". On 17 June 2003, Slahi was put in "total isolation" in India Block of the detention facility, and "they took all of my stuff from me". He has described his cell as built of steel from floor to ceiling with a very cold temperature setting on the air conditioner. Another detainee has called this room the "freezer". Mohamedou Slahi recalled to his ARB in 2005 that "I could not bear sleeping on the metal because of my back and you never know how much pain I could take. I could end up dead or something." He says that he refused painkillers in protest, as what he needed was something to sleep on.

Heavily redacted documents made public under FOIA litigation contain references to this period such as "every morning the detainee was scared…", "the detainee stated that he refused to eat food when he was humiliated", and "the detainee was awaken [sic] every hour or two and only [sic] and forced to drink one liter of water."[295] Although pages of further details have been censored out, the detainee would appear to be Mohamedou Slahi.

In July 2003, interrogators requested a "special interrogation plan" for use against Mohamedou Slahi. Their request was approved by the Secretary of Defense on 13 August 2003. According to the Schmidt/Furlow military investigation in 2005, the special interrogation plan – the details of which remain classified – was not put into operation because the detainee "began to cooperate".[296] This claim should be set against the Schmidt/Furlow finding that the detainee's "cooperation" began on 8 September 2003, almost a month after the approval of the plan as well as Lt. Gen. Randall Schmidt's later testimony that "they started [the special interrogation plan]", but "never really got into it".[297] In addition, the earlier Church report said that the two special interrogation plans approved by Secretary Rumsfeld (the other was for Mohamed al-Qahtani, see text box below) "both successfully neutralized the two detainees' resistance training and yielded valuable intelligence." The Church report noted that both interrogations "were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of detainees."[298] Meanwhile, the Schlesinger report had concluded in 2004:

> "*It is clear that pressures for additional intelligence and the more aggressive methods sanction by the Secretary of Defense…resulted in stronger interrogation techniques that were believed to be needed and appropriate in the treatment of detainees defined as 'unlawful combatants'. At Guantanamo, the interrogators used those additional*

[295] A sleep deprivation procedure – the "frequent flyer program" – whereby detainees were moved every few hours to a different cell to disrupt their sleep was being used in 2003 and 2004.
[296] Army Regulation 15-6: Final Report: Investigation into FBI allegations of detainee abuse at Guantanamo Bay, Cuba Detention Facility, 2005 (Schmidt/Furlow report), unclassified version available at http://www.defenselink.mil/news/Jul2005/d20050714report.pdf.
[297] Testimony of Lt.Gen. Schmidt, 24 August 2005, *op. cit*.
[298] Naval Inspector General's review of detention procedures at Guantanamo Bay, Cuba (Church report) March 2005 unclassified summary at http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf.

techniques with only two detainees, gaining important and time-urgent information in the process".[299]

In his 2004 CSRT hearing, Mohamedou Slahi said that he was "not willing" to answer questions about whether he had been abused by US personnel. However, in his ARB hearing a year later, he made some allegations about his prior treatment that occurred during the period he was kept from the ICRC. At this stage in the ARB hearing, however, the government's transcript states that "the recording equipment began to malfunction". The ARB report therefore only summarizes the Board's recollection of what Mohamedou Slahi alleged. The report states: "The detainee discussed how he was tortured while here at GTMO by several individuals." Mohamedou Slahi alleged that he had been sexually harassed by a female interrogator. While attempting to relate this sexual abuse, he became "distraught and visibly upset". The Presiding Officer explained that he did not have to "tell the story", at which the detainee "was very appreciative and elected not to elaborate". Mohamedou Slahi went on to detail a beating he alleged he had received at the hands of two masked interrogators. He wanted to show the ARB members his scars and injuries, "but the board declined the viewing".

The recording equipment was then replaced and the transcript of Slahi's testimony continues with what he alleged occurred to him in August 2003. He states that he was taken on a boat for a trip that lasted about an hour: "They took me to a place… and I recognized a voice and he was talking to two Arab guys, one claiming to be Egyptian and one claiming to be Jordanian.[300] He was telling them how grateful he is that they are helping him. They told him in Arabic that they were there to torture me and they could not take me to Jordan or Egypt or something like that… Then they gave me to the Arabic team and they took me to a place for about an hour and they took me to a place I don't know. They were hitting me all over… They put ice in my shirt until it would melt. Then I arrived at that place and… they brought in a doctor, who was not a regular doctor, he was part of the team. He was cursing me and telling me very bad things. He gave me a lot of medication to make me sleep and I had special guards with masks so I couldn't see anybody. For like two or three weeks I was unconscious and after that I decided that it is not worth it. Because they said to me either I am

[299] Independent Panel to Review DoD Detention Operations, August 2004. None of the three reviews – Schmidt/Furlow, Church, or Schlesinger – had interviewed detainees. The Church review stated that it did not interview detainees "in order to minimize any impact on ongoing interrogation operations".

[300] As far as Amnesty International is aware, none of the investigations conducted to date has looked into allegations that detainees have been ill-treated by or with the involvement of agents of other countries – including China, Egypt and Libya – while held in Guantánamo. Amnesty International further notes that the Pentagon's *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003, recommended an interrogation technique known as "false flag" which consisted of "convincing the detainee that individuals from a country other than the United States are interrogating him". A heavily redacted witness statement given by the Lieutenant Commander who served as Special Projects Team Chief at the Guantánamo from around 28 June 2003 to 24 September 2003 indicates that when Mohamedou Slahi was moved during this period, he was hooded, and personnel would "have conversations in Arabic to further confuse the detainee".

going to talk or they will continue to do this. I said I am going to tell them everything they wanted… I just wanted to get some peace. If nobody understands then they don't understand because I am the one who suffered with no food, the guards beat me, and it was a very bad place… Since 2004, I really have no complaints and everything was good. I admitted to what they wanted…" Slahi has since recanted statements that he says were coerced out of him.

The Schmidt/Furlow military investigation into FBI allegations of abuse at Guantánamo had concluded in 2005 that during the period July to October 2003, Mohamedou Slahi had been subjected to "environmental manipulation", in other words to extremes of hot and cold using the air-conditioning. The investigation concluded that no disciplinary action was required as "environmental manipulation" was an interrogation technique that had been approved by the Secretary of Defense, and there was "no evidence in the medical records of the [detainee] being treated for hypothermia or any other condition related to extreme exposure." The investigation concluded that it was unable to corroborate Mohamedou Slahi's allegations that he had been beaten, or that he had been subjected to sexual humiliation by female interrogators (although it acknowledged that "female interrogators used their status as females to distract the [detainee]"). Not in the published report was the statement given to the investigators by a former psychiatrist with the

"I*n September or October of 2002 FBI agents observed that a canine was used in an aggressive manner to intimidate detainee #63 and, in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours*)." FBI memorandum, 14 July 2004

The torture and ill-treatment which Guantánamo detainee No. 063, Saudi national Mohamed al-Qahtani, suffered – including under techniques authorized by Secretary Rumsfeld – clearly violated international law, and yet no one has been brought to justice for it. Mohamed al-Qahtani was subjected to intense isolation for three months in late 2002 and early 2003. He was variously forced to wear a woman's bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number dog tricks; was forced to dance with a male interrogator while forced to wear a towel on his head "like a burka"; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, culturally inappropriate use of female interrogators, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of "swimsuit models" hung round his neck; was subjected to hooding, loud music, white noise, and to extremes of heat and cold through manipulation of air conditioning. Other forms of humiliation included being forced to urinate in his clothing when interrogators refused to allow him to go to the toilet. Mohamed al-Qahtani was interrogated for 18-20 hours per day for 48 out of 54 consecutive days. According to a military investigator, in the four hours that he was not under interrogation, "he was taken to a white room… with all the lights and stuff going on and everything…" During the period of his interrogation, al-Qahtani was allegedly subjected to a fake rendition, during which he was injected with tranquilizers, made to wear blackened goggles, and taken out of Guantánamo in a plane. The military investigation concluded that Mohamed al-Qahtani's treatment, while cumulatively "degrading and abusive", "did not rise to the level of prohibited inhumane treatment" (See, http://web.amnesty.org/library/Index/ENGAMR510932006).

Behavioural Science Consultation Team at Guantánamo who stated that "sexual tension" was one of many authorized interrogation techniques. This could incorporate "shocking behaviour [that] would be culturally taboo, disrespectful, humiliating…"[301]

The investigation did find that Mohamedou Slahi had been threatened with death and "disappearance" by military interrogators. The detainee had also been told that his family was in US custody, and that he should cooperate in order to help them. For example, on 20 July 2003, a masked interrogator told Slahi that his family had been "incarcerated". Again, on 2 August 2003 he told the detainee that his family were in US custody and was in danger. A letter was given to the detainee indicating that because of his lack of cooperation, US agents in conjunction with the Mauritanian authorities would interrogate his mother, and that if she was uncooperative she would be detained and transferred for long-term detention in Guantánamo. Not in the unclassified version of the investigators' report, but contained in a leaked subsequent interview of one of the investigators, was confirmation of Slahi's allegation that he was taken off from Guantánamo in a boat "where he thought this is where he goes away" (i.e. to be killed or "disappeared").[302]

The investigation concluded that the threats against Mohamedou Slahi did "not rise to the level of torture as defined under US law" (in comparison, for example, the most recent State Department report entry on human rights in Egypt notes that torture techniques employed there included threats against detainees and their families). It did, however, conclude that the threats violated the Uniform Code of Military Justice and recommended that the chief interrogator be disciplined. However, General Brantz Craddock, the Commander of US Southern Command, amended this recommendation and requested further (military) investigation, justifying this on the grounds that "evidence in mitigation and extenuation" could be discovered to help the interrogator's case.[303] Under international law, however, there

[301] Summarized witness statement, 28 February 2005, page 3771 of http://www.aclu.org/torturefoia/legaldocuments/july_docs/(M)%20SCHMIDT-FURLOW%20DEFERRED.pdf. Allegations of sexually abusive techniques used against Guantánamo detainees have included DHS interrogators forcing a detainee to view "homosexual porn movies" in a room lit by strobe lighting (http://action.aclu.org/torturefoia/released/022306/2600.pdf), to humiliation by female interrogators. For example, the witness statement of a civilian contractor states that a 17 April 2003 interrogation included the following: "the session advanced into what can only be described as the proverbial 'strip club lap dance'. The ICE personnel (interrogator) removed her overblouse behind the individual and proceeded stroking his hair and neck while uttering sexual overtones and making comments about his religious affiliation. The session progressed to where she was seated on his lap making sexual affiliated movements with her chest and pelvis while again speaking sexual oriented sentences. This then progressed to the individual being placed on the floor with her straddling him, etc." Page 1333 at http://action.aclu.org/torturefoia/released/072605/1243_1381.pdf.

[302] In November 2002, the General Counsel of the US Department of Defense, William J. Haynes, wrote that the following interrogation technique was one that may be "legally available", but for which at that time, "as a matter of policy, blanket approval" was not warranted: "The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family". Action memo to Secretary of Defense, 27 November 2002

[303] General Brantz Craddock testimony to hearing of the US Senate Armed Services Committee on the treatment of Guantánamo detainees. 13 July 2005;

can be no impunity for torture or other cruel, inhuman or degrading treatment. Those who commit such violations and those who authorize such conduct must be brought to account, and may not invoke any justification (such as "necessity", "self-defence" or "superior orders") in their defence. The investigation report made no mention, let alone criticism, of the fact that Mohamedou Slahi was kept from the ICRC for more than a year.

Mohamedou Slahi remains in Guantánamo without charge or trial. He has now been held for nearly five years, more than four of them in US custody. What is his future? If he is indeed a leading *al-Qa'ida* operative, as the US government has alleged, why has he not been charged and brought to trial? If he is not, then why has he not been released?

If he is to be brought to trial, he must be given the opportunity to challenge the classified evidence that the administrative review procedures have relied upon in their consideration of whether his detention should continue. There will have be scrupulous adherence to the international obligation to exclude any testimony coerced by torture or other cruel, inhuman or degrading treatment, including conditions of detention. This includes any statements coerced from detainees held in secret locations elsewhere, such as Yemeni national Ramzi Binalshibh. The latter's alleged statements made in secret custody after his capture in September 2002 have been used publicly against Mohamedou Slahi (including in the 9/11 Commission Report) to find him guilty without his having had his day in court.[304]

[304] The 9/11 Commission Report noted that "Assessing the truth of statements by these witnesses… is challenging. Our access to them has been limited to the review of intelligence reports based on communications received from the locations where the actual interrogations take place... Nor were we allowed to talk to the interrogators so that we could better judge the credibility of the detainees and clarify ambiguities in the reporting."

Appendix 5: A framework for closing Guantánamo

General[305]

1. Any detention facility which is used to hold persons beyond the protection of international human rights and humanitarian law should be closed. The detention camp at Guantánamo Bay Naval Base falls into this category, and in more than four years of detention operations there, the US administration has failed to bring the facility into compliance with international law and standards. Secret facilities operated by the CIA should also be immediately closed down and its secret detention program ended permanently.
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 standards, and, where relevant, international humanitarian law. All US detention centres must be open to appropriate external scrutiny, in particular that of the International Committee of the Red Cross (ICRC).
3. The responsibility for finding a solution for the detainees held in Guantánamo rests first and foremost with the USA. The US administration created the system of detention Guantánamo in which detainees – many of whom were transferred to the facility unlawfully – have been held without charge or trial, outside the framework of international law and without the possibility of full recourse to US courts. It is therefore the US administration's responsibility to redress this situation in full compliance with international human rights standards.
4. All US officials in the administration should desist from further undermining the presumption of innocence in relation to the Guantánamo detainees. The continued commentary on their presumed guilt applies a dangerous label to them – dangerous to the prospect for a fair trial and dangerous to the safety of any detainee who is released. This can only make the USA's task of resolving the Guantánamo issue more difficult.
5. President George W. Bush should rescind his 13 November 2001 Military Order establishing military commissions (blocked by the *Hamdan v. Rumsfeld* ruling) and authorizing detention without charge or trial.
6. Those currently held in Guantánamo should be released unless they are to be charged and tried in accordance with international standards of fair trial.
7. No detainees who are released should be forcibly sent to their country of origin or other countries where they may face serious human rights abuses.

[305] This proposed 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, *op.cit*.

Fair trials

8. Those to be charged and tried must be charged with a recognizable crime under law and tried before an independent and impartial tribunal, such as a US federal court, in full accordance with international standards of fair trial. There should be no recourse to the death penalty.

9. Any evidence obtained under torture or other cruel, inhuman or degrading treatment or punishment should not be admissible. In light of the years of legal, physical and mental abuse to which detainees held in Guantánamo have been subjected, any trials must scrupulously respect international standards of fairness and any sentencing take into account the length and conditions of detention in Guantánamo or elsewhere prior to be transported to Guantánamo.

Solutions for those to be released

10. There must be a fair and transparent process to assess the cases 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 ought to be found. In all cases detainees must be individually assessed, be properly represented by their lawyers and given a full opportunity to express their views. Relevant international agencies, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), could be invited to assist in this task, in line with their respective mandates. The options before the US Administration 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 of grave human rights violations, including prolonged arbitrary detention, enforced disappearances, unfair trial, torture or other ill-treatment, extrajudicial executions, or the death penalty. Among those to be returned 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.

    (b) **Asylum 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 requirements of the 1951 UN Convention on Refugees (well-founded fear of persecution on certain grounds if returned to their country of origin). 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 the opportunity to contact UNHCR. Asylum applicants should not be detained except in the most exceptional circumstances.

(c) **Other forms of protection in the USA**. Persons who do not meet the criteria of the 1951 UN Convention on Refugees, but are at risk of grave human rights abuses in the prospective country of return and wish to remain in the USA must receive other forms of protection and should be allowed to stay in the USA. They should not be detained, unless it is established that their detention is lawful, necessary and proportionate to the objective to be achieved, in accordance with international human rights law and standards.

(d) **Transfer to third countries**. The US authorities may seek 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 grave human rights abuses, and who do not wish to remain in the USA. Any such solution should address the protection needs of the individuals, respect their human rights and take into account their views. All 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. Other countries should consider accepting released detainees voluntarily seeking resettlement there, especially countries of former habitual residence or countries where released detainees had close family or other ties.

Reparations

11. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, rehabilitation and fair and adequate financial compensation to released detainees for the period spent unlawfully detained and other violations that they may have suffered, such as torture or other ill-treatment. [306] The right of victims to seek reparations in the US courts must not be limited.

Transparency pending closure

12. The US authorities should invite the five UN experts – four Special Rapporteurs and the Chairperson of the Working Group on Arbitrary Detention – to visit Guantánamo without the restrictions that led them to turn down the USA's previous invitation. There should be no restrictions on the experts' ability to talk privately with detainees.

[306] 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*, *op.cit.* pages 167-169.