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Guantánamo and beyond: The continuing pursuit of unchecked executive power

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I used to think that America had respect for human rights when it came to prison.
Mohammed Nechle, extrajudicially removed from Bosnia and Herzegovina by US agents[1]

My husband is a tall man with black hair and black eyes…He is now imprisoned in Guantánamo. We don't know why.
Wife of Mohammed Nechle, Algerian national, 2004[2]

[1] Mohammed Nechle, 19 October 2004. *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.
[2] *Ibid*. The name of the detainee's wife is redacted.

1. Summary: The pursuit of unfettered executive power

It seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want, whatever they want without a check.
US Supreme Court Justice Stephen Breyer, 20 April 2004[3]

In late December 2001, a memorandum was sent from the United States Justice Department to the Department of Defense.[4] 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. The memorandum remained secret until it was leaked to the media in mid-2004 in the wake of the Abu Ghraib torture scandal.

Not long after this leak, on 28 June 2004, the US Supreme Court ruled, in *Rasul v. Bush*, that the federal courts in fact do have jurisdiction to hear appeals from foreign nationals detained in Guantánamo Bay.[5] Yet almost a year later, none of the more than 500 detainees of some 35 nationalities still held in the base – believed to include at least three people, from Canada, Chad and Saudi Arabia, who were minors at the time of being taken into custody – has had the lawfulness of his detention judicially reviewed. The US administration continues to argue in the courts to block any judicial review of the detentions or to keep any such review as limited as possible and as far from a judicial process as possible. Its actions are ensuring that the detainees are kept in their legal limbo, denied a right that serves as a basic safeguard against arbitrary detention, "disappearance" and torture or other cruel, inhuman or degrading treatment. Amnesty International believes, as explained in Section 3, that all those currently held in Guantánamo are arbitrarily and unlawfully detained.

The administration responded to the *Rasul* decision by setting up Combatant Status Review Tribunals (CSRTs), panels of three military officers, to determine if each detainee was an "enemy combatant" as labelled. The detainee has no access to secret evidence used against him in this process or to legal counsel to assist him. The CSRT, meanwhile, can draw on evidence extracted under torture or other ill-treatment in making its determinations. The CSRTs began in July 2004 and were completed for the current detainee population in January 2005, with the final decisions issued in late March 2005. In 93 per cent of the 558 cases, the CSRT affirmed the detainee's "enemy combatant" status. Eighty-four per cent of the 38 cases where the detainee was found not to be an "enemy combatant" were decided later than 31 January 2005, when a federal judge, District Judge Joyce Hens Green, found that the CSRT process was unlawful, but before the government's appeal against her ruling was heard (see Sections 7 and 8, and Appendix 2).

At the end of April 2005, three years and three months after "war on terror" detentions in Guantánamo Bay began, the government filed a brief in the US Court of Appeals arguing that Judge Green's opinion should be overturned and that the purely executive CSRT process should be accepted as a substitute for judicial review. The government emphasised the CSRT's "findings in favor of 38 detainees" as a sign of a constitutionally fair system. The brief did not point out – or explain if it was pure coincidence – that all but six of these 38 cases had been decided after Judge Green's ruling. In any event,

[3] *Rasul v. Bush*, oral argument, US Supreme Court, 20 April 2004.
[4] 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.
[5] *Rasul v. Bush*, 000 U.S. 03-334, decided 28 June 2004.

the appeal brief shows an administration in unapologetic mood, in continuing pursuit of unfettered executive authority under the President's war powers as Commander-in-Chief of the Armed Forces, and maintaining a disregard for international law and standards. Among the arguments in the legal brief are that:

- The US Constitution's Fifth Amendment prohibition on the deprivation of liberty without due process of law "is inapplicable to aliens captured abroad and held at Guantanamo Bay." This, the government argues, repeating its pre-*Rasul* position, is because the "United States is not sovereign over Guantanamo Bay". In addition, "if the courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's lead role in foreign policy, but also compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."
- Even if the Fifth Amendment did apply to foreign nationals held at Guantánamo, the brief argues, the CSRT procedures would exceed whatever process was due in the case of these detainees. The need for deference to the executive on the question of the withholding of classified information and legal counsel from the detainees is "greatly magnified here, where the issue is not the administration of domestic prisons, but the Executive Branch carrying out incidents of its war-making function."
- According to the administration, "the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch." The executive, the executive argues, "has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers."
- On the question of the Geneva Conventions, the brief argues, Judge Green's contention that Taleban detainees picked up in Afghanistan should have been presumed to have prisoner of war status is "inconsistent with the deference owed to the President as Commander-in-Chief" who had unilaterally decided otherwise.[6]

This brief is perhaps an unsurprising response from an administration whose outgoing Attorney General decried what he characterized as "intrusive judicial oversight and second-guessing of presidential determinations";[7] whose Justice Department formulated the position, accepted by the White House Counsel, that the President – who apparently believes that there are people who are "not legally entitled" to humane treatment[8] – could override the national and international prohibition on torture;[9] and whose Secretary of Defense has authorized interrogation techniques that violate international law and standards.[10] This is an administration that has sought unchecked power throughout the "war on terror" and shown a

[6] *Al Odah et al. v. USA et al.* Opening brief for the United States. In the US Court of Appeals for the District of Columbia Circuit, 27 April 2005 (internal quotation marks omitted).
[7] See, for example, *Ashcroft criticizes judicial oversight*, Associated Press, 13 November 2004.
[8] President George W. Bush. Subject: Humane treatment of al Qaeda and Taliban detainees. The White House, 7 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.
[9] 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, http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.
[10] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. Counter-Resistance Techniques. 27 November 2002. Approved by Secretary of Defense Donald Rumsfeld, 2 December 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.

chilling disregard for international law. The USA's policies and practices have led to serious human rights violations and have set a dangerous precedent internationally.

USA's "war on terror" detainees, April 2005 (approximate totals/estimates)[11]	
USA: Naval Brig, Charleston, South Carolina	2 "enemy combatants"
Cuba: Guantánamo Bay naval base	520 (234 releases/transfers)
Afghanistan: Bagram air base	300
Afghanistan: Kandahar air base	250
Afghanistan: other US facilities (forward operating bases)	Unknown: estimated at scores of detainees
Iraq: Camp Bucca	6,300
Iraq: Abu Ghraib prison	3,500
Iraq: Camp Cropper	110
Iraq: Other US facilities	1,300
Worldwide: CIA facilities, undisclosed locations	Unknown: estimated at 40 detainees
Worldwide: In custody of other governments at behest of USA	Unknown: estimated at several thousand detainees
Worldwide: Secret transfers of detainees to third countries	Unknown: estimated at 100 to 150 detainees
Foreign nationals held outside the USA and charged for trial	4
Trials of foreign nationals held in US custody outside the USA	0
Total number of detainees held outside the USA by the US during "war on terror"	70,000

Section 5 of the report points to an overarching war mentality adopted by the US administration since 11 September 2001 which has led it to manipulate or jettison basic human rights protections for detainees, including instances of the USA refusing to recognize that United Nations human rights experts have the mandate to raise concerns about US actions in the "war on terror". For example, UN Special Rapporteurs have raised allegations of extrajudicial executions by US forces, only to have the US reject such concerns out of hand. In April 2005, the mandate of the UN Independent Expert on the Situation of Human Rights in Afghanistan was not renewed. This is alleged to have been the result of US government pressure. The former postholder has said that he believes the non-renewal of his mandate was due to the USA's dislike of his insistence that he should be allowed to visit detainees in US custody in Afghanistan, particularly in light of allegations of torture and ill-treatment of such detainees.

Over a year after the Abu Ghraib torture scandal broke, and as evidence of torture and other cruel, inhuman or degrading treatment by US forces in the "war on terror" continues to mount, not one US agent has been charged with "war crimes" or "torture" under US law (see Section 12). In over 70 per cent of announced official actions taken in response to substantiated allegations of abuse, the punishment has been non-judicial or administrative. While a small

[11] Sources: *US to expand prison facilities in Iraq*. Washington Post, 9 May 2005; *Detainee transfer announced*, Department of Defense News Release, 26 April 2005; *ICRC operational update*. International Committee of the Red Cross, 29 March 2005; Department of Defense Briefing on Detention Operations and Interrogation Techniques, US Department of Defense, 10 March 2005; *Rule change lets CIA freely send suspects abroad to jails*. New York Times, 6 March 2005.

number of mainly low-ranking soldiers have been subjected to courts-martial, members of the administration, who from the outset have claimed that the USA treats all detainees humanely and that any abuses have been the actions of a few aberrant soldiers, have remained free of independent investigation despite possible criminal responsibility in abuses. Congress has failed to initiate an independent commission of inquiry, as Amnesty International has sought. The current Attorney General, like his predecessor possibly involved in a conspiracy to immunize US agents from criminal liability for torture and war crimes under US law, has not appointed a special prosecutor to pursue this matter as Amnesty International and others have urged.

As the culture of impunity and military leniency grows, including in cases in which Afghan and Iraqi detainees have died as a result of abuses by US agents (see Section 13 and Appendix 1), the administration continues to seek to try members of the "enemy" for war crimes in front of military commissions – executive bodies, not independent or impartial courts. It has appealed a federal court ruling that the military commission procedures are unlawful because the defendant can be excluded from proceedings. In Section 10, Amnesty International reiterates its total opposition to the military commissions, which violate international fair trial standards in numerous ways.

Only foreign nationals can be tried by military commissions, violating the international rule that "all persons shall be equal before the courts and tribunals".[12] However, the administration is also violating fundamental human rights at home. As described in Section 16, a US "enemy combatant", José Padilla, will soon enter his fourth year in untried executive detention on the US mainland. The administration has appealed a recent federal court ruling that he should be released. A court decision is awaited in the case of a Qatari national who remains in military custody in South Carolina nearly two years after he was removed from the ordinary criminal justice system by President Bush who designated him as an "enemy combatant". Ali Saleh Kahlah al-Marri has now been detained for almost three and a half years, all in solitary confinement, raising serious concerns for his well-being and providing further evidence of the US administration's willingness to violate human rights in the name of national security. Meanwhile, the administration is continuing to seek the execution of Zacarias Moussaoui, so far the only person charged in the USA in relation to the attacks of 11 September 2001. The case of this French national is described in Section 11.

Thousands of detainees remain in US custody in Iraq – a country which President Bush repeated on 12 April 2005 has become "a central front in the war on terror" since the US-led invasion in March 2003.[13] Hundreds remain in US custody in Afghanistan, with some in Bagram air base having been detained without trial and virtually incommunicado for more than a year. The International Committee of the Red Cross (ICRC), the only international organization with access to some of the detainees in Afghanistan, reiterated on 29 March 2005 that it was "increasingly concerned by the fact that the US authorities have not resolved the question of their legal status and of the applicable legal framework".[14] In addition, the USA is holding an unknown number of detainees in secret incommunicado custody in unknown locations and unknown conditions in cases that may amount to "disappearance". Evidence that the US authorities have "outsourced" torture via secret detainee transfers to other countries continues to come to light, as described in Section 14.

Now, as it faces possible further setbacks in the courts, the administration is said to be intending to outsource some of its Guantánamo detentions to other countries. In late March 2005, a federal court issued an order directing the government to give 30 days' notice before

[12] Article 14(1), International Covenant on Civil and Political Rights, ratified by the USA in 1992.
[13] *President discusses war on terror*. Fort Hood, Texas. 12 April 2005.
[14] ICRC operational update, 29 March 2005.

transferring any one of 13 Yemeni detainees. Other judges have issued similar orders, but on 14 April 2005, a federal judge refused to issue such an order in the case of six Bahraini nationals, and a week later another judge did the same. Section 15 of this report highlights the question of transfers from Guantánamo, and also describes the recent case of a US national held in Saudi Arabia, Ahmed Abu Ali. His is alleged to have been a case of an outsourced detention, during which he was allegedly subjected to torture and ill-treatment. It appears to have been only the threat of US court action forcing the administration to reveal information on the case that secured the detainee's return to the USA. In the "war on terror", it seems, the USA is prepared to have countries it annually criticizes in its State Department human rights reports do its dirty work for it. The judiciary and the legislature must do all they can to assert a check on the executive.

On 6 May 2005, three and a half years late, the USA submitted its Second Periodic Report to the Committee against Torture, the expert body established by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to oversee implementation of that treaty. The USA's Initial Report to the Committee had been submitted in October 1999, with the Committee's findings and recommendations made in May 2000.[15] On 21 May 2004, a few weeks after the Abu Ghraib scandal became public, the Committee had asked the USA to provide it with updated information on US detentions in Iraq as part of its Second Periodic Report. In an Annex to this report just filed, which covers the period up to 1 March 2005, the US government provides information on detentions in Iraq, Afghanistan and Guantánamo Bay, including the post-*Rasul* legal framework. The US administration prefaces this information with the following:

> "*Since the Initial Report, with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world. In fighting terrorism, the US remains committed to respecting the rule of law, including the US Constitution, federal statutes, and international treaty obligations, including the Torture Convention*."[16]

The USA's report makes the welcome assertion, using the words of Article 2 of the CAT, that the "United States is unequivocally opposed to the use and practice of torture. No circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture. This is a longstanding commitment of the United States, repeatedly reaffirmed at the highest levels of the US Government". This latter sentence serves as a reminder that words alone can never be enough and that torture must be condemned in deed as well as in word. For, at least between August 2002 and June 2004, a Justice Department memorandum to the White House narrowing the definition of torture, arguing that the President could authorize torture, suggesting defences for those accused of torture, and promoting acts that amount to cruel, inhuman or degrading treatment, represented the position of the US administration, albeit in secret. The USA's Second Periodic Report notes that "concerns have been generated" by the 1 August 2002 memorandum, which was withdrawn on 22 June 2004, two months after the Abu Ghraib torture evidence became public. The USA's report to the Committee against Torture notes that the 2002 memorandum was replaced in late December 2004. As Amnesty International points out in Section 12 below, the replacement Justice Department memorandum, while undoubtedly an improvement on its

[15] UN Doc. A/55/44. See USA: A briefing for the UN Committee against Torture, AI Index: AMR 51/56/2000, 4 May 2000, http://web.amnesty.org/library/Index/ENGAMR510562000, and *USA: A call to action by the UN Committee against Torture*, AI Index: AMR 51/107/2000, 1 July 2000, http://web.amnesty.org/library/Index/ENGAMR511072000.

[16] Second Periodic Report of the United States of America to the Committee against Torture, submitted, 6 May 2005. http://www.state.gov/g/drl/rls/45738.htm. The report had been due in November 2001.

now infamous predecessor, has left numerous concerns unanswered and left the door open to possible future abuses.

It is clear from the Second Periodic Report that the USA intends to adhere to its long-standing pick-and-choose approach to international law and standards. In its May 2000 recommendations, for example, the Committee against Torture had urged the USA to withdraw all the conditions it had attached to its ratification of CAT in 1994. This included the USA's reservation to Article 16 of the treaty which calls on the State Party to prevent cruel, inhuman or degrading treatment "in any territory under its jurisdiction". Upon ratification, the USA had said that would be bound by Article 16 only to the extent that it already was so bound under the US Constitution. In its 6 May 2005 submission to the Committee against Torture, the US administration stated that it would not withdraw this or any other conditions attached to its ratification of the CAT, as the Committee had requested, because "there have been no developments in the interim which have caused the United States to revise its view of the continuing validity and necessity of the[se] conditions".

However, there have been developments on this issue, with the USA's reservation to Article 16 being linked to abuses that have been authorized and alleged in the "war on terror", as Amnesty International pointed out in its report, *USA: Human dignity denied: Torture and accountability in the 'war on terror',* issued in October 2004.[17] Indeed, in January 2005, the then nominee for US Attorney General, Alberto Gonzales, wrote the following among his responses to a US Senator concerned about the nominee's possible responsibility for human rights violations in the "war on terror" and his earlier refusal to given an unequivocal answer to the question of whether or not it was legally permissible for US personnel to engage in cruel, inhuman or degrading treatment "that does not rise to the level of torture":

> "[T*]he only legal prohibition on cruel, inhuman or degrading treatment comes from the international legal obligation created by the CAT itself. The Senate's reservation, however, limited Article 16 to requiring the United States to prevent conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. Those amendments, moreover, are themselves limited in application. The Fourteenth Amendment* [right to equality before the law] *does not apply to the federal government, but rather to the States. The Eighth Amendment* [prohibition on cruel and unusual punishments] *has long been held by the Supreme Court to apply solely to punishment imposed in the criminal justice system. Finally, the Supreme Court has squarely held that the Fifth Amendment* [right to due process] *does not provide rights for aliens unconnected to the United States who are overseas. Thus, 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*".[18]

The USA's May 2005 submission to the Committee against Torture also paints a picture of the US judicial system reasserting itself over the detentions in Guantánamo. It notes that the *habeas corpus* petitions filed in federal court involve detainees from many countries, including Yemen, Saudi Arabia, Kuwait, Morocco, Algeria, Bahrain, Tunisia, Jordan, Sudan, Syria, Mauritania, China, Egypt, Libya, Palestine, Chad, Qatar, Kazakhstan, Tajikistan, Uganda, Iraq, Australia, Canada, Somalia, Turkey, Afghanistan, Pakistan and Ethiopia. It notes that the courts have access to the CSRT records from Guantánamo, that lawyers have

[17] See pages 170-172, *USA: Human dignity denied: Torture and accountability in the 'war on terror',* AMR 51/145/2004, 27 October 2004, http://web.amnesty.org/library/Index/ENGAMR511452004.
[18] Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein. January 2005.

been able to visit detainees in Guantánamo,[19] and that the courts "may address allegations of mistreatment that have arisen with respect to Guantanamo Bay."

The picture the administration provides to the Committee is far from full, however. It does not portray the extent to which the government is resisting due process every step of the way. By seeking the narrowest possible interpretation of the *Rasul* decision, and by appealing every court ruling that goes against it, it is ensuring that the detainees remain in their legal vacuum. Although the government's report to the Committee notes that about 55 *habeas corpus* petitions involving 153 detainees had been filed by 27 April 2005[20], it did not explain that one reason why only about a third of those still held in Guantánamo had had petitions filed on their behalf was because the government has placed obstacles in the way of detainees finding lawyers to represent them and in the way of lawyers identifying the detainees who want representation. As described in Section 6 below, there is also evidence that Guantánamo interrogators have adopted ploys to undermine detainee/lawyer relationships in those cases where legal representation has been initiated.

On the question of the treatment of detainees, the USA's report to the Committee paints a similarly one-sided picture. All "enemy combatants", it claims, "get state-of-the-art medical and dental care". Yet, as detailed further below, numerous detainees have alleged that the medical and dental care provided has been slow and on some occasions withheld as part of a punitive and coercive regime. The USA insists to the Committee that "detainees write to and receive mail from their families and friends". Yet, throughout the detentions, there has been evidence that this system of communications has been slow, over-censored, and even manipulated by the authorities to punish or coerce detainees. US *habeas* lawyers for some Yemeni detainees in Guantánamo have recently revealed that their "clients report that mail from their relatives arrives months later, if at all, and is very heavily redacted. Often the only part that they can read is the greeting, conclusion, and signature… In December 2004, [Abd Al Malik Abd Al Wahab] reported that his last piece of mail he received had been five months ago – a letter that had taken ten months to reach him. [Fellow detainee] Jamal Mar'i receives one out of every ten letters sent to him by his family. A recent letter from his seven-year-old daughter referred to many other letters that he never received." The USA's report to the Committee against Torture goes on to assert that "enemy combatants at Guantanamo may worship as desired and in accordance with their beliefs". As Amnesty International has detailed elsewhere, and updates in Section 12 of this current report, there is evidence that detainees have been subjected to religious intolerance by their captors, and to interrogation techniques that play on their particular religious sensitivities.[21]

In this report, illustrated with cases throughout, Amnesty International concludes that hypocrisy, an overarching war mentality, and a disregard for basic human rights principles and international legal obligations continue to mark the USA's "war on terror". Serious human rights violations, affecting thousands of detainees and their families, have been the result. The rule of law, and therefore, ultimately, security, is being undermined, as is any moral credibility the USA claims to have in seeking to advance human rights in the world. Indeed, the USA's conduct threatens to legitimize repressive conduct by other governments. With this report, the latest in a series of papers on US conduct in the "war on terror", Amnesty International continues to campaign for the USA to change course and bring its policies and practices into line with international law and standards.

[19] As of late April 2005, according to the US submission to the Committee, only 74 out of more than 500 detainees, including some since released, had been seen by lawyers.
[20] By 3 May 2005, this had risen to 168 detainees (not all nationalities known) named in 61 petitions.
[21] See, for example, pages 30-36, *USA: Human dignity denied*, *supra*, note 17.

2. Violating human rights erodes security and trust in government

The United States strengthens its national security when it promotes… a world in which states have governments that are responsible and obey, as it were, the rules of the road.
US Under Secretary of Defense, February 2005[22]

The Department of Defense recently published on its website a six-page unclassified document giving information about the Guantánamo detainees.[23] Even providing the minimal information contained in it was an unusual step for an administration that has been highly secretive about those held in the naval base. The document begins with the following:

> "*The US Government currently maintains custody of approximately 550 enemy combatants in the Global War on Terrorism at Guantanamo Bay, Cuba.*[24] *Many of these enemy combatants are highly trained, dangerous members of al-Qaida, its related terrorist networks, and the former Taliban regime. More than 4,000 reports capture information provided by these detainees, much of it corroborated by other intelligence reporting. This unprecedented body of information has expanded our understanding of al-Qaida and other terrorist organizations and continues to prove valuable…*
>
> *The Joint Task Force, Guantanamo Bay (JTF-GTMO) remains the single best repository of al-Qaida information in the Department of Defense… GTMO is currently the only DoD strategic interrogation center and will remain useful as long as the war on terrorism is underway and new enemy combatants are captured and sent there. The lessons learned at GTMO have advanced both the operational art of intelligence, and the development of strategic interrogations doctrine*."

The document claims that the detainees in Guantánamo, despite most of them having been held for more than three years, continue to provide "useful information" to support ongoing military operations in Afghanistan. It states that the detainees have "provided information on individuals connected to al-Qaida's pursuit of chemical, biological, and nuclear weapons". It claims that detainees have also provided "information about al-Qaida operatives who remain at large as well as numerous al-Qaida, Taliban, and anti-coalition militia members who remain active in Central Asia, Europe, and the United States." In addition, it says that detainees "provide information that helps sort out legitimate financial activity from illegitimate terrorist financing information". It gives details of the sort of skills and training that individual detainees allegedly possess:

- "Many detainees have been implicated in using, constructing, or being trained to construct IEDs [improvised explosive devices]".
- "Over 25 GTMO detainees have been identified by other detainees as being facilitators who provided money, documentation, travel, or safe houses".
- "More than 10 percent of the detainees possess college degrees or obtained other higher education, often at western colleges, many in the United States. Among these educated detainees are medical doctors, airplane pilots, aviation specialists, engineers, divers, translators, and lawyers."

[22] Douglas J. Feith, Under Secretary of Defense for Policy, Speech to the Council of Foreign Relations, 17 February 2005.
[23] JTF-GTMO Information on Detainees.
http://www.defenselink.mil/news/Mar2005/d20050304info.pdf
[24] By 26 April 2005, according to the Pentagon, "approximately 520" detainees remained in Guantánamo, following the release that day of two detainees "to the control of the Belgian government".

In addition, the Pentagon document asserts that "we know of several former detainees from JTF-GTMO that have rejoined the fight against coalition forces. We have been able to identify at least ten by name… Several former GTMO detainees have been killed in combat with US soldiers and Coalition forces." The document also lists some alleged statements and actions by detainees which "provide valuable insights into the mindset of these terrorists and the continuing threat they pose to the United States and the rest of the world". It provides as an example a case of a detainee who, when informed about the Combatant Status Review Tribunal process (see below), is alleged to have responded, "Not only am I thinking about threatening the American public, but the whole world". Another detainee has allegedly repeatedly stated that "the United States government is criminals". The document concludes with some "contrasting detainee comments", such as from a detainee who allegedly said: "If people say there is mistreatment in Cuba with the detainees, those type speaking are wrong, they treat us like a Muslim not a detainee".

It is, of course, impossible to verify the claims made in the Pentagon's document, precisely because of the secrecy and rejection of judicial or other independent scrutiny that has marked the US administration's detention policies and practices. It should further be noted that the document has been issued at a time when the administration is doing all it can to persuade the US courts to leave this policy broadly free of judicial scrutiny. In addition, Amnesty International would make a number of points in response to the Pentagon document.

- The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them;
- Respect for human rights is the route to security not an obstacle to it. This is recognized by the USA's own National Security Strategy, which devotes an entire chapter to asserting that in its pursuit of security, the USA will "stand firmly for the non-negotiable demands of human dignity", including the rule of law. Likewise, the USA's National Strategy for Combating Terrorism concludes that "a world in which these values are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism";
- There have been massive failures in US intelligence-gathering, both prior to the attacks of 11 September 2001 and in the context of the stated reasons for invading Iraq. Using detainees held indefinitely outside the rule of law in order to attempt to make up for past intelligence failures through prolonged interrogation is immoral, unlawful, unreliable and counter-productive;
- Throughout the "war on terror", senior members of the US administration have shown contempt for the presumption of innocence by collectively labelling the Guantánamo detainees as "terrorists" and "killers". The Pentagon document persists in this attitude. This repeated contravention of a basic principle is also dangerous for the detainees. To be labelled as a "terrorist" is no small thing, and can put a detainee at future risk when eventually released. Mohammad Nechle, seized by US agents in Bosnia and Herzegovina in January 2002 and transported to Guantánamo Bay where he remains more than three years later, has summed it up thus: "*In the end the way that this happened, the way I was brought here and the accusations that brought*

against me, I feel that my future has been destroyed. A person does not even know what to say to their kids now. That's a really big thing." [25]

- Prior to the publication of this document, scores of people had been released from Guantánamo without charge or trial. They, too, had been labelled by the administration as "enemy combatants" and "terrorists". On return to their countries, the vast majority have been released. Their home governments evidently either believed that there was no evidence against the detainees, or that any evidence was inadequate, unreliable or inadmissible.

Yet, still, the Pentagon document asks the reader to take its claims on trust. The problem faced by the US administration is that its record in relation to detentions in the "war on terror" has undermined the credibility of its assertions, whether those assertions take the form of a stated commitment to human rights, or claims of threats averted due to intelligence gathered through interrogation. The administration has sought, and continues to seek, unchecked power for itself. As it has done so, violations of fundamental human rights have occurred or been proposed, including prolonged incommunicado, secret and arbitrary detentions, torture and other cruel, inhuman or degrading treatment, unfair trial proceedings, detainee transfers without protections, and denial of and resistance to judicial review.

In a recent report to the UN General Assembly, Secretary General Kofi Annan wrote:

"*The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability. No security agenda and no drive for development will be successful unless they are based on the sure foundation of respect for human dignity…*

I strongly believe that every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home…

It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our actions."[26]

A much repeated but so far hollow promise of President Bush's administration has been that the USA will adhere to fundamental principles of human dignity and the rule of law, including in the context of the "war on terror". The USA cannot have it both ways. It cannot speak the language of human rights while at the same time violating human rights and disregarding international law. Either it is for human rights in deed as well as in word, or it will continue to be denounced as a human rights violator and, especially given its power, reach and influence in the world, a global threat to the rule of law and security.

Whatever the truth about the identities, motivations, associations, previous activities of and threats posed by the detainees in US custody, none of them fall outside the protections of international law as the US administration's policies and practices would suggest.

[25] *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.
[26] *In larger freedom: towards development, security and human rights for all.* Report of the Secretary General, UN Doc. A/9/2005, 21 March 2005, paras. 128, 133 and 140.

3. Guantánamo detainees – the international legal framework

Conformity with international human rights and humanitarian law is not a weakness in the fight against terrorism but a weapon, ensuring the widest international support for actions and avoiding situations which could provoke misplaced sympathy for terrorists or their causes… [T]he Assembly considers that the US Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror". These errors have perhaps been most manifest in relation to Guantánamo Bay.
Parliamentary Assembly of the Council of Europe, 26 April 2005[27]

The international armed conflict in Afghanistan ended in June 2002.[28] When that armed conflict ended, those who were captured by the USA during hostilities[29] - and who the USA was obliged to treat as prisoners of war in the absence of a determination "by a competent tribunal" that they were not[30] - were required to be released, unless charged with criminal offences.[31]

Civilians detained in that conflict were entitled to have their detention ("internment") reviewed "as soon as possible" by a "court or administrative board."[32] They too were required, when that conflict ended, to be released, unless charged with recognized criminal offences.[33]

Those detained later in Afghanistan, for reasons related to the subsequent non-international armed conflict there[34] and transferred to Guantánamo were required, as a minimum, to have their detention promptly, and thereafter periodically, reviewed.[35]

Those detained in countries outside of the zones of armed conflict and transferred to Guantánamo should always have been treated as criminal suspects, therefore subject to international human rights law, including the right to a prompt judicial review of the lawfulness of their detention and to release if that detention is deemed unlawful, and if prosecuted to be tried in proceedings which meet international standards of fairness (see below).[36]

The USA has applied none of the above-mentioned provisions of international humanitarian law and international human rights law in determining the status of the Guantánamo detainees:

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[27] *Lawfulness of detentions by the United States in Guantánamo Bay*, Resolution 1433 (2005) http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm

[28] 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.

[29] Geneva Convention III, Art. 4 uses the term "persons [belonging to certain categories]… who have fallen into the power of the enemy".

[30] Geneva Convention III, Art. 5.

[31] Geneva Convention III, Part III, Part IV Section II.

[32] Geneva Convention IV, Art. 43.

[33] Geneva Convention IV, Art. 133.

[34] The current conflict in Afghanistan is a non-international armed conflict, to which an international legal framework applies that is different from an international one, mainly Article 3 Common to the Geneva Conventions, rules of customary international law and international human rights law.

[35] Under rules of customary international law applicable to non-international armed conflict, comprising also of relevant rules of international law human rights law. See, for instance, The International Committee of the Red Cross (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.), *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: Cambridge University Press, 2005), pp. 347-352.

[36] See for instance International Covenant on Civil and Political Rights, Articles 9(3) and 9(4).

- it has not treated those captured during the international armed conflict in Afghanistan initially as prisoners of war, pending determination of their status by a court;
- it has not convened a court to determine whether or not persons captured during the international armed conflict in Afghanistan are entitled to prisoner of war status;
- it has not reviewed promptly the detention of those captured during the subsequent non-international armed conflict in Afghanistan;
- it has not brought the detention of civilians promptly under judicial review, tried or released them;
- it did not, at the close of international hostilites, release the detainees captured during hostilities, with the exception of those against whom criminal procedures had been initiated – in fact, the USA initiated no such procedures.

More than 200 people have been released or transferred from the base, but the USA was expressly acting, in this as well as in other matters, in pursuit of it own perceived interests, rather than in compliance with its international legal obligations. As noted further below, the USA has denied having any such obligations regarding the detainees in Guantánamo.

In view of the above, Amnesty International believes that all those currently held in Guantánamo are arbitrarily and unlawfully detained. It continues to call on the USA to either:

- Release and repatriate the Guantánamo detainees, subject to international law and standards, including the prohibition of returning or transferring a person to a country where he or she faces a risk of torture, other ill-treatment, unfair trial, "disappearance", arbitrary detention or the death penalty;

or:

- Prosecute those suspected of committing internationally recognizable criminal offences[37] in proceedings that meet international standards of fairness, and which do not include the imposition of the death penalty.

Fair trial standards

Any trials, whatever the status of the person being tried, must be carried out in proceedings that meet international standards of fairness.[38] These standards include:

- All persons must be equal before the courts and tribunals;
- Charges must be for internationally recognisable criminal offences;
- Trials must commence within a reasonable time;
- All persons are entitled to a fair and public[39] hearing by a competent, independent and impartial tribunal established by law; [40]

[37] Prisoners of wars cannot be charged in connection with their lawful conduct of hostilities.
[38] See especially Article 14 of the ICCPR, Articles 1, 2(2), 15 and 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
[39] According to Article 14(1) of the ICCPR, "*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; but any judgement rendered in a criminal case or in a suit at law shall be made public except*

- 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 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 not be admissible 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.

Amnesty International believes that the death penalty must never be imposed, as it violates the right to life and is the ultimate cruel, inhuman and degrading punishment.

4. Hypocrisy vs. human rights

Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest.

United Nations High Commissioner for Human Rights, 2004[41]

On or around 29 November 2003, an unidentified shepherd was taken into custody by US soldiers near Husaybah in Iraq. A year later, documents obtained under a freedom of information lawsuit filed by the American Civil Liberties Union (ACLU) and others revealed that about an hour after the man was detained, one of the soldiers had made a video recording described as "his own version of the MTV show 'Jackass'".[42] A little under a minute in length, the video begins with the handcuffed detainee being asked to wave to the camera. The soldier then turns to the camera and states, "I am going to punch this guy in the stomach, this is Jackass Iraq". He goes to punch the detainee who manages to avoid a direct hit, causing the

where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

[40] Principle 5 of the UN Basic Principles on the Independence of the Judiciary states: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals". Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[41] *Security under the rule of law*. Keynote address of Louise Arbour, UN High Commissioner for Human Rights. Biennial Conference of the International Commission of Jurists, Berlin, 27 August 2004.

[42] In the MTV series *Jackass*, consenting adults are filmed engaged in dangerous and puerile stunts.

soldier to respond, "oh, he moved, hold up, he's a trickster, we need a camera man". The video then shows "an elbow com[ing] straight down in between the detainee's shoulder blade [sic]". It "shows the detainee's face and what appears to be an expression of pain as he is going down to the ground…The detainee is helped back up by [a soldier] lifting him by the flexi cuffs on his wrists… His face is noticeably distressed…"[43]

The film, variously called "Jackass Iraq", "Our first Iraqi prisoner" and "Our Prisoner (The Smash)", was then shown widely on digital camera and laptop computers to other soldiers. An army investigation found that "none of the soldiers took it seriously", rejecting the notion that the detainee was being abused. Neither of the soldiers directly involved in making the video "thought that anything they were doing was wrong."[44] Neither, it would seem, does the US administration believe that it has done anything fundamentally wrong in its "war on terror" detention and interrogation policies and practices.

In the build-up to declaring war on Iraq, the US administration cited the Iraqi government's disregard for UN Security Council resolutions as well as findings by UN bodies that the government of Saddam Hussein had committed human rights violations.[45] In an address to the UN General Assembly on 12 September 2002, President George W. Bush asked: "Are Security Council resolutions to be honoured and enforced, or cast aside without consequence?" He continued: "We want the United Nations to be effective, and respected, and successful. We want the resolutions of the world's most important multilateral body to be enforced. And right now those resolutions are being unilaterally subverted by the Iraqi regime."

The USA must look to its own conduct. Both before and since the invasion of Iraq in March 2003, which itself was premised on flawed intelligence[46] as well as information allegedly extracted under torture or ill-treatment,[47] the US administration's own policies and practices in the "war on terror" have contravened Security Council resolutions as well as recommendations of UN experts and bodies. For example, in Resolution 1456, adopted two months before the US-led invasion of Iraq, the United Nations Security Council declared that

[43] Department of the Army. Headquarters and Headquarters Company, 187th Infantry Regiment. Memorandum for Col [Redacted]. Subject: Commander's inquiry. Dated: 10 May 2004. This was released to the American Civil Liberties Union pursuant to a Freedom of Information Act request (see below and see www.aclu.org. www.aclu.org.

[44] *Ibid*. Nevertheless, the army investigation concluded, "the fact that this incident was done as entertainment…does not change the fact that a detainee under US military custody was abused and publicly humiliated". Amnesty International does not know what action, if any, was taken against the soldiers involved.

[45] *A Decade of Deception and Defiance. Saddam Hussein's Defiance of the United Nations*. The White House, 12 September 2002. http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf.

[46] "We conclude that the Intelligence Community was dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction. This was a major intelligence failure". Letter to President George W. Bush from the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, transmitting the Commission's final report. 31 March 2005.

[47] Secretary of State Colin Powell told the UN Security Council in February 2003 that a "senior terrorist operative" had provided information that the government of Iraq had offered chemical and biological weapons training to *al-Qa'ida*. This is believed to refer to Ibn al-Shaikh al-Libi, a Libyan national who was arrested in Pakistan in November 2001 and transferred to secret US custody in January 2002. According to a former FBI officer, the CIA and FBI vied with each other for control of the detainee. The CIA eventually gained the upper hand, and was given permission to use "enhanced interrogation techniques" against "high-value" detainees. Al-Libi was reportedly later transferred to Egypt for interrogation. Al-Libi is said to have since recanted this information. See, for example, *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005. Al-Libi's whereabouts remain unknown, although it has been reported that he was eventually taken to Guantánamo Bay.

"States must ensure that any measures 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".[48] Further resolutions adopted by the Security Council and the General Assembly since then have reminded states of this obligation.[49] The USA has failed to amend its conduct accordingly. At the same time, it has continued to promote itself as a global human rights champion. According to the US State Department, launching its latest report on human rights in countries other than the USA, "Promoting human rights is not just an element of our foreign policy – it is the bedrock of our policy, and our foremost concern".[50]

For the past three years, the entry on Bosnia and Herzegovina in the US State Department's annual Country Reports on Human Rights Practices has, under the heading "arbitrary arrest, detention or exile", reported developments in the case of "six Algerian terrorism suspects" who were transferred "to the custody of a foreign government" in January 2002.[51] The transfer bypassed the courts and an order of the Human Rights Chamber of Bosnia and Herzegovina, and violated international law.[52] The US State Department reported that in 2002 and 2003, the Human Rights Chamber ruled that the treatment of the men had violated their treaty-based human rights, including the right not to be arbitrarily deported in the absence of a fair procedure. In its latest report, issued on 28 February 2005, the State Department noted that the families of the men "transferred to a foreign government's custody" had not yet been paid the compensation ordered by the Human Rights Chamber.

What the State Department has so far failed to point out is that the mysterious "foreign government" in question is that of the United States of America. It fails to report that the men in question, extrajudicially removed from the sovereign territory of Bosnia and Herzegovina, have for the past three years been held in virtually incommunicado executive detention without charge or trial in the US Naval Base in Guantánamo Bay in Cuba. There is no mention by the State Department of the fact that the US authorities have responded to the recent *habeas corpus* petitions of the men by asserting that they have no rights under treaty or customary international law to be able to challenge the lawfulness of their detention. It failed to reveal that in hearings in 2004 the men were instead given a purely executive review of their detention for which they were allowed neither legal counsel nor access to classified evidence. At his so-called Combatant Status Review Tribunal (CSRT) hearing in October 2004 one of the six men, Mohammed Nechle, said:

> "*We were surprised that we were handed over to the American forces that are present in Bosnia. We were bound by our hands and our feet, and we were treated the worst treatment. For 36 hours without food, sleep, water or anything and we were treated*

[48] UN Doc. S/RES/1456 (2003), 20 January 2003.
[49] UN Doc. S/RES/1535 (2004); UN Doc. S/RES/1566 (2004); UN Doc. A/RES/58/187, 22 March 2004.
[50] Remarks upon the State Department's release of its Country Reports on Human Rights Practices for 2004, Paula J. Dobriansky, Under Secretary of State for Global Affairs, Washington, 28 February 2005.
[51] Country Reports on Human Rights Practices 2004. Bureau of Democracy, Human Rights and Labor, US Department of State. Issued on 28 February 2005. For the reports and entries cited in this paper, see http://www.state.gov/g/drl/hr/c1470.htm.
[52] Under the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Accords), the Human Rights Chamber was vested with the authority to issue decisions binding on both entities as well as the state authorities of Bosnia and Herzegovina (BiH). The Human Rights Chamber closed down in December 2003. A special Human Rights Commission within the BiH Constitutional Court has been established with the task of dealing with the backlog of cases registered with the Human Rights Chamber before its closure.

the worst treatment… I used to think that America had respect for human rights when it came to prison." [53]

The State Department also failed to report that another of the men, Mustafa Ait Idir, alleged at his CSRT hearing in 2004 that he has been subjected to torture or ill-treatment at Guantánamo. A lawsuit filed in US court in April 2005 alleges that the following occurred against him during a cell search:

"*The guards secured his hands behind his back and, while he was so restrained, the guards picked him up and slammed his body and his head into the steel bunk in his cell. They then threw him on the floor and continued to pound his body and bang his head into the floor. The guards picked him up again and banged his head on the toilet in his cell. The guards picked him up again, stuffed Mr Ait Idir's face in the toilet and repeatedly pressed the flush button. Mr Ait Idir was starting to suffocate, and he feared he would drown. The guards then carried Mr Ait Idir outside the cell and threw him on the ground. His hands still were manacled behind his back. They held him down and pushed a garden hose into his mouth. They opened the spigot. As the water rushed in, Mr Ait Idir began to choke. The water was coming out of his mouth and nose. He could not breathe, and he could not yell to stop or for help. The guards then took the hose out of his mouth and held it approximately 6 to 10 inches in front of his face. He was still being restrained. The water ran full force into his face; he could not breathe*."

On another occasion, it is alleged that members of an Immediate Response Force (IRF) at Guantánamo assaulted him:

"*While Mr Ait Idir sat on the floor as instructed, the officer sprayed chemical irritant directly into Mr Ait Idir's face. Two or three guards immediately entered the cell while he was lying on the floor. One forced Mr Ait Idir's body onto the steel floor of the cell and jumped on his back, using his knees to pound Mr Ait Idir's body into the floor. The second guard did the same thing. While they had Mr Ait Idir pinned, the guards secured his hands behind his back. He was carried out and thrown onto the crushed stones that surround the cell building. While Mr Ait Idir was lying bound on the stones, an IRF member jumped onto the side of Mr Ait Idir's head with his full body weight, causing extreme pain. Another IRF member climbed onto Mr Ait Idir's back, and while on his back, the IRF members twisted his middle finger and thumb on his right hand almost to the point of breaking. Two of his knuckles were dislocated, and he screamed in pain. His middle finger has almost no strength now. He requested and was refused any medical treatment for the permanent injuries inflicted by the guards.*

Upon information and belief, as a result of that beating, Mr Aid Idir suffered a stroke. Shortly after that incident, one half of his face became paralyzed. He was in pain. He could not eat normally; food and drink leaked from his non-functioning mouth. Guards teased him because of his condition. Despite visible impairment and his request to go to the hospital, he did not receive medical treatment for ten days."[54]

The six men of Algerian origin had been arrested in October 2001 by the Bosnian Federation police on suspicion of involvement in an alleged plot to bomb the US Embassy in

[53] *Nechle v. Bush*. Unclassified records of Combatant Status Review Tribunal, In the US District Court for the District of Columbia.

[54] *Oleskey v. US Department of Defense and Department of Justice*. Complaint. US District Court, District of Massachusetts. The lawsuit is seeking enforcement of a Freedom of Information Act request for the government to release any photographic, medical or other evidence on the cases.

Sarajevo. On 17 January 2002, the Investigative Judge of the Federation Supreme Court ordered their release on the basis that there were no further grounds for their detention. Although the US Embassy had indicated that it had evidence linking the men to *al-Qa'ida* networks and substantiating the allegations of planning the embassy attacks, the US authorities did not submit any such evidence to the Supreme Court. One of the men, Boudella Al Haji, questioned about the alleged bombing conspiracy at his CSRT hearing in Guantánamo on 18 October 2004, said:

> "*I've been here for three years and these accusations were just told to me. Nobody or any interrogator ever mentioned any of these accusations you are talking to me about now. I've been here for three years, been through many interrogations and no interrogator ever mentioned any of these accusations, so how did they come up just now*?"[55]

Another of the six men told Sabir Lahmar said the same thing at his CSRT hearing on 8 October 2004:

> "*From my first day in Cuba, I asked the interrogators to question me regarding the bombing of the Embassy. They tried to avoid asking me questions regarding that matter. On occasion, they told me they knew I didn't attempt to blow up the Embassy; they only brought me to Cuba for information. They told me if I gave them information, they would let me go. I refused to talk to them until they addressed the accusation of the bombing of the Embassy. This lasted for eight months before they gave up on me talking. I was punished and placed in solitary confinement for three months.*"[56]

In similar vein, Mohammad Nechle told the CSRT on 19 October 2004:

> "*We came to this place so they could interrogate us. Now I have been here three years. Unfortunately I thought the case was about an American embassy and up until now, no one has directed one question towards me regarding this case. Believe me, I came to this place as a mistake and I think that I was wronged. It was unfair to me… I have a clear conscience that I am not part of these terrorist organizations. I am not afraid of anything because I am not a terrorist. If you interrogated me for 20 years you would find that I am Mohammed Nechle…*"

In March 2005, the Bosnia and Herzegovina Council of Ministers sent an official request to the USA calling for the release of the detainees. The US Secretary of State reportedly responded in a letter indicating that the men would not be released as the US authorities needed to investigate them further. It remains to be seen how the State Department will report on these developments in its next human rights publication.

As this case suggests, three and a half years into its broadly-defined "war on terror", the United States administration is still seeking – and assuming – *carte blanche* to detain without judicial review any foreign national it broadly defines as an "enemy combatant", regardless of where outside the USA the detention takes place, and regardless of whether the person seized was directly involved in any armed hostilities. According to the administration, such a detainee can be detained without charge or trial until it, the executive, determines that he or she has no "intelligence value" or poses no threat to the USA or its allies, or until the end of the "war", which, even if recognized, could occur after a detainee's natural lifespan.

Meanwhile, the USA criticizes other countries for their failure to comply with international human rights law and standards. For example, the State Department's latest

[55] *Al Haji v. Bush*, Factual return from CSRT hearings. US District Court for the District of Columbia.
[56] *Lahmar v. Bush*. CSRT unclassified factual return. US District Court for the District of Columbia.

entry on human rights in North Korea includes the following under the heading "arbitrary arrest or detention":

> "*There are no restrictions on the ability of the Government to detain and imprison persons at will and to hold them incommunicado. Family members and other concerned persons reportedly find it virtually impossible to obtain information on charges against detained persons or the length of their sentences. Judicial review of detentions does not exist in law or practice*".

Iran is likewise criticized by the USA for the lack of a time limit, in practice, on incommunicado detention and the absence of "any judicial means to determine the legality of detention". In similar vein, Myanmar (Burma) is brought to task by the US State Department for its record of arbitrary arrest and incommunicado detention facilitated by the fact that "there is no provision in the law for judicial determination of the legality of detention".

Amnesty International welcomes the State Department reports in principle. Under the Universal Declaration of Human Rights, countries are required to "promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance". A government makes a mockery of this commitment, however, when it violates the same rights it says it expects others to respect.[57] Moreover, such an approach undermines the whole system of legal protections. Why should any other government not then follow the example set, especially if that example is being set by one of the most powerful and influential countries in the world?

The US Supreme Court's ruling in *Rasul v. Bush* on 28 June 2004 that the federal courts have jurisdiction to consider *habeas corpus* appeals from foreign detainees held in Guantánamo Bay raised hopes that, at a minimum, judicial review of the lawfulness of these detentions, and eventually the detention of foreign nationals held in incommunicado or secret detention elsewhere outside US sovereign territory, would occur forthwith. These hopes have been put on hold in the face of an executive arguing for the courts to effectively empty the *Rasul* decision of any real meaning.

In January 2005, two federal judges issued the first interpretations of the *Rasul* ruling when they responded to *habeas corpus* petitions from Guantánamo detainees, some of whom by now had been held for three years without charge or trial. One of the judges ruled in favour of the government, while the other showed respect for the fundamental human rights of the detainees (see further below). The administration is appealing to have the conflict between the two rulings resolved in its favour. Its refusal to recognize international law and standards relating to detention is keeping the detainees in their legal limbo and their families in distress. Even if the government eventually loses again in the US Supreme Court, such a ruling may not occur until some time in 2006, and only then would judicial review on the merits begin.

[57] The State Department reports do not include an entry on the USA. In the context of the "war on terror", this has led to bizarre gaps in reporting on the countries that the USA has invaded. So, for example, the entry on human rights in Iraq in 2003 covers only up to the fall of the government of Saddam Hussein on 9 April 2003. The next report published in February 2005, picks up only from 28 June 2004 when the Interim Iraqi Government took office. The gap in reporting from 10 April 2003 to 27 June 2004 covers a period when US forces were allegedly responsible for widespread abuses against detainees in Iraq, including the torture scandal at Abu Ghraib prison. The report covering 2003 describes Abu Ghraib as one of the prisons "infamous for routine mistreatment of detainees and prisoners" under Saddam Hussein. When the report was published in February 2004, the photographs of US soldiers torturing and ill-treating detainees in Abu Ghraib had not been leaked, although the US authorities already had them in their possession. However, even in the latest report, no reference to this scandal was made.

Judicial review of the lawfulness of detentions is a fundamental safeguard against arbitrary detention, torture and ill-treatment, and "disappearance". Unsurprisingly, then, with the US courts having been kept out of reviewing the cases for more than three years, there is evidence that all these categories of abuse have occurred at the hands of US authorities in the "war on terror". Indeed, Amnesty International believes that abuses have been the result of official policies and policy failures and linked to the executive decision to leave detainees unprotected by not only the courts, but also by the prohibition on torture and other cruel, inhuman or degrading treatment as defined under international humanitarian and human rights treaties binding on the USA. The US administration still does not believe itself legally bound by the Geneva Conventions in relation to the detainees in Guantánamo, Afghanistan and in secret locations, by customary international law, or by the human rights treaty prohibition on the use of cruel, inhuman or degrading treatment in the case of foreign detainees in US custody held outside of US sovereign territory. Nor has it expressly abandoned the notion that the President may in times of war ignore all the USA's international legal obligations and order torture, or that torturers may be exempted from criminal liability by entering a plea of "necessity" or "self-defence" (see below).

Neither, apparently, does the administration consider itself bound by the international prohibition against transferring or returning anyone to a country where they may face torture or other cruel, inhuman or degrading treatment. Indeed, there is evidence that the USA has turned this prohibition on its head and "outsourced" torture. It is alleged that countries with a record of torture – as documented by the US State Department annually – have been specifically selected to receive certain "war on terror" detainees for interrogation. A recent report quotes a former counterterrorism agent as saying that after 11 September 2001, "Egypt, Jordan, Malaysia, Thailand, Indonesia, Pakistan, Uzbekistan and even Syria were all asked to make their detention facilities and expert interrogators available to the US".[58]

Numerous detainees are alleged to have been threatened by US interrogators that they will be sent to such countries. For example, Yemeni Guantánamo detainee Abd Al Malik Al Wahab has allegedly been threatened with transfer to Egypt or Jordan where, he says he was told by interrogators, "they will torture you".[59] A Bahraini detainee in Guantánamo has alleged that he was told that he would be "sent to a prison where he would be raped", and another Bahraini alleged that he was threatened with being sent to a prison that "would turn him into a woman".[60] Threatening to transfer a detainee to a third country that he is "likely to fear would subject him to torture or death" is one of the interrogation techniques recommended by the Pentagon's Working Group report on interrogations in the "war on terror", dated April 2003, which remains operational.[61] Set along side this, the State Department annual report risks becoming a dual-purpose manual – promoting human rights on the one hand, while providing ideas for US interrogators on how to abuse them on the other. An FBI document from December 2004, originally classified as secret for 25 years but released under a freedom of information request in early 2005, included reference to the following observation by FBI agents in Guantánamo Bay: "Agents have seen documentary evidence that a detainee was told that his family had been taken into custody and would be moved to Morocco for interrogation if he did not begin to talk" (see section 12 below).

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[58] *'One huge US jail'*. The Guardian Weekend (UK), 19 March 2005.
[59] He also claims to have been interrogated in Guantánamo by Jordanian intelligence agents, one of whom allegedly whipped him with a belt.
[60] See *Almurburti et al. v. Bush et al.* Memorandum Opinion. United States District Court for the District of Columbia, 14 April 2005.
[61] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

The latest State Department report entry on Sweden notes that "the 2001 repatriation of two Egyptians gained attention during the year as the result of allegations that the deportees were subjected to torture in Egypt". It further notes "calls for a parliamentary inquiry into the legality of the deportations…and alleged improper cooperation with a foreign country in the deportations". What the State Department again fails to record is that the "foreign country" in question was the USA.

The two Egyptians were seized by Swedish security police in Stockholm on 18 December 2001, handed to CIA agents at Bromma airport and flown to Egypt on board a US-registered Gulfstream jet. According to a Swedish police officer who was present at the deportations, "the Americans they were running the whole situation".[62] The detainees had their clothes cut from them by the masked US agents, were reportedly drugged, made to wear diapers and overalls, and were handcuffed, shackled, hooded, and strapped to mattresses on the plane. The alleged torture they subsequently faced in Egypt included electric shocks. While the State Department's entry on Sweden notes that a parliamentary investigation into these events was opened in 2004, its entries on other European countries fail to record that similar investigations were being conducted elsewhere. In Italy and Germany, for example, officials were investigating allegations that individuals were seized and secretly flown by US agents to Egypt and Afghanistan where they were allegedly subjected to torture and other cruel, inhuman or degrading treatment (see Section 14).

Next year, in its report on human rights in 2005, the State Department will be able to report that on 22 March 2005, the Chief Parliamentary Ombudsman in Sweden, having reviewed the Swedish government's role in the transfer to Egypt of the two detainees, concluded that the treatment of the two men by the US agents "must be considered to have been inhuman and thus unacceptable". He was highly critical of the home authorities, saying that "the Swedish Security Police lost control of the situation at the airport and during the transport to Egypt. The American security personnel took charge… Such total surrender of power to exercise public authority on Swedish territory is clearly contrary to Swedish law".[63] His words are echoed in those of a Guantánamo detainee taken from Gambia by US agents in late 2002 and still in the US Naval Base in Cuba more than two years later. He told his Combatant Status Review Tribunal in September 2004, "in Gambia, the Americans were running the show…The US was there and in charge from day one. They were not very respectful to the Gambians".[64]

International complicity in apparently unlawful activities in the context of the "war on terror" has had other manifestations. In November 2002, for example, with Yemen's cooperation, the USA killed six people in a car in Yemen in what appear to have been extrajudicial executions (see also Section 5).[65] They were targeted because Abu Ali al-Harithi and the other five occupants of the car were alleged members of *al-Qa'ida*.[66] A little over a year earlier, the US State Department had said of Israel's resort to targeted killings:

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[62] Paul Forell, Police Inspector, Bromma Airport, Sweden. Interviewed for *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

[63] *Expulsion to Egypt – a review of the execution by the Security Police of a Government decision to expel two Egyptian citizens*. The Parliamentary Ombudsman, 22 March 2005, http://www.jo.se/Page.aspx?Language=en&ObjectClass=DynamX_Document&Id=1625.

[64] *El-Banna et al. v. Bush et al*. CSRT unclassified factual returns for Bisher al-Rawi (see below).

[65] Amnesty International wrote to President Bush about the killings. It has never received a reply. See: *Yemen/USA: government must not sanction extra-judicial executions*, AI Index: AMR 51/168/2002, 8 November 2002, http://web.amnesty.org/library/Index/ENGAMR511682002.

[66] Although what we now know about the quality of intelligence that the USA has relied upon to detain individuals in the "war on terror" (see, for example, the case of Murat Kurnaz, below), as well as to invade Iraq, all such claims must be treated with caution.

> "*We remain opposed to targeted killings. We think Israel needs to understand that targeted killings of Palestinians don't end the violence..*"[67] *"We have long made very clear – we have made known the US Government's opposition to the policy and practice of targeted killings, and we are going to continue to urge the Israelis to desist from this policy*."[68]

The killing of the six people in Yemen was not mentioned in the Yemen entry in the State Department's human rights report covering 2002 (or 2003 or 2004). Rather than ordering a thorough, prompt and impartial investigation into the killings, as required under international standards,[69] senior US officials instead adopted a celebratory stance. US Deputy Secretary of Defense Paul Wolfowitz described the killings as "a very successful tactical operation, and one hopes each time you get a success like that, not only have you gotten rid of somebody dangerous, but to have imposed changes in their tactics and operations and procedures".[70] Secretary Rumsfeld responded to questions about the attack by saying that "it would be a very good thing if [Abu Ali al-Harithi] were out of business".[71] Today, the White House website notes the killings under "accomplishments" in "waging and winning the war on terror". [72] A few weeks after the killings, President Bush later said "you can't hide from the United States of America. You may hide for a brief period of time, but pretty soon we're going to put the spotlight on you, and we'll bring you to justice… We're working with friends and allies around the world. And we're hauling them in, one by one. Some have met their fate by sudden justice; some are now answering questions at Guantánamo Bay. In either case, they're no longer a problem to the United States of America and our friends."[73]

In the "war on terror", allies and enemies have been defined in broad and malleable terms by the USA.[74] One of those held under the catch-all label of "enemy combatant" in Guantánamo is Omar Deghayes, who was born in Libya but fled to the United Kingdom (UK) as a child refugee after his father was allegedly tortured and killed. He has alleged that at least four other governments have been involved in his detention, torture or ill-treatment. He was detained in Pakistan in April 2002, and alleges that the authorities there told him he was being held at the behest of the USA. He has said that he was tortured and ill-treated by government agents in Pakistan, including by "systematic beatings", having his head pushed under water "until I was almost drowned", stress positions, being subjected to electric shocks from a hand-held device, possibly a stun weapon, and being put in a room which was "all painted black and white, with dim lights" in which there were "very large snakes in glass boxes". He said that he was threatened with being left in the room with the snakes let out of the boxes. He has also alleged that he was interrogated by British and US intelligence officers in Pakistan during a period when he was further ill-treated. He has stated that, once transferred to US custody in Afghanistan, he was subjected to food deprivation, stripping, beatings, hooding,

[67] Richard Boucher, State Department Daily Press Briefing, 27 August 2001.
[68] Phillip Reeker, State Department Daily Press Briefing, 21 August 2001.
[69] Principle 9, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
[70] Deputy Secretary Wolfowitz interview with CNN International, 5 November 2002, Department of Defense news transcript.
[71] Department of Defense news briefing. 4 November 2002.
[72] "In November 2002, Yemeni authorities allowed a US Predator drone to kill six al Qaeda operatives in Yemen, including senior al Qaeda leader Abu Ali al-Harithi". *Waging and winning the war on terror:* The White House.
[73] *President Rallies Troops at Fort Hood*. Fort Hood, Texas, 3 January 2003. White House transcript.
[74] See, for instance, *Official pariah Sudan valuable to America's war on terrorism*. Los Angeles Times, 29 April 2005.

shackling, and forced kneeling, and in Guantánamo that he was subjected to solitary confinement and brutal cell extractions (see Section 12).[75]

Omar Deghayes has also claimed that he was twice interrogated by Libyan agents in Guantánamo, on 9 and 11 September 2004. He alleged that the US military authorities took him to an interrogation room with the air-conditioning on maximum and left him there for several hours, shackled and freezing cold. Eventually, at around midnight on 9 September 2004, four Libyan agents and three US personnel in civilian clothes entered the room. He was interrogated for around three hours by the Libyan agents, and again two days later. The agents allegedly made veiled threats of violence and death against him if he should ever be returned to Libya, and showed him pictures of severely beaten Libyan dissidents.

Amnesty International has since been informed that on 8 September 2004, the day before Omar Deghayes says he was first interrogated by Libyan agents, a US-registered Gulfstream jet, registration N8068V, flew direct from Tripoli in Libya to Guantánamo Bay. The same plane has allegedly been used in secret transfers of detainees, including the above case of the two Egyptians deported from Sweden in December 2001 to alleged torture in Egypt (also see Section 14). Was it carrying Libyan agents this time? Did such agents interrogate other Libyan nationals held in Guantánamo, of whom there are at least two?

The State Department's latest human rights report notes that allegations of torture in Libya "were difficult to corroborate because many prisoners were held incommunicado"; so, too, in the case of detainees in US custody in Guantánamo, Afghanistan and elsewhere (Omar Deghayes' allegations have only emerged since a lawyer gained access to him in 2005). In May 2004, Amnesty International raised allegations that a Chinese government delegation had visited Guantánamo in September 2002 and participated in interrogations of Chinese ethnic Uighur detainees held there. It is alleged that during this time, the detainees were subjected to intimidation and threats, and to interrogation techniques such as environmental (temperature) manipulation, forced sitting for many hours, and sleep deprivation, some of which was on the instruction of the Chinese delegation.[76] There has been no satisfactory response to these allegations from the US government, whose State Department annually criticizes the Chinese authorities for failing to take "sufficient measures to end [torture and ill-treatment]".

Amnesty International and other international human rights organizations continue to be denied access to the detainees in Guantánamo, exactly what the US State Department criticizes the Chinese authorities for. In its latest report, the Department noted that the UN Working Group on Arbitrary Detention was given access to some detention facilities in China during 2004. Not so in the case of the USA, which has denied the Working Group and other UN experts access to its "war on terror" detainees and has rejected their criticisms of the USA's treatment of the detainees (see below).

While torture and ill-treatment are facilitated by the absence of external scrutiny that characterizes secret or incommunicado detention, such conditions can in themselves amount to such treatment and also be used to coerce detainees into making "confessions" or other statements against themselves or others. Evidence extracted under torture or other coercion – the reliability of which will always be suspect – can be admitted by the Combatant Status Review Tribunals and Administrative Review Boards – executive bodies that, respectively, determine whether each Guantánamo detainee is an "enemy combatant" and then, annually, whether he remains a security risk or of intelligence value.

[75] Unclassified information on Omar Deghayes, dated 30 March 2005.
[76] Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004.

Similarly, the rules for US military commissions – set up under a presidential Military Order to "try" only foreign nationals – do not exclude the use of evidence extracted under torture or other coercion, in violation of international standards against torture and ill-treatment and for fair trial.[77] These military commissions are executive bodies – not independent or impartial courts – whose rules are determined by the executive, whose personnel are selected by the executive, and whose final decisions the executive vets, including whether a condemned defendant lives or dies. Time spent in executive detention as an "enemy combatant", however long, is not to be considered as time already served if an individual is sentenced to a term of imprisonment by a military commission. In the event of an acquittal, it is the executive who will decide whether to release the detainee or place him or her back in indefinite detention as an "enemy combatant".

President George W. Bush – under whose "wartime" powers as Commander-in-Chief of the Armed Forces all this is being justified – said of the Guantánamo detainees shortly after making six of them the first to be eligible for trial by military commission that "the only thing I know for certain is that these are bad people".[78] It seems that, according to this administration, "bad people", as determined by the President, have no rights. Thus, the Military Order under which the commissions are set up states that no one held under it will "be privileged to seek any remedy or maintain any proceeding" in any US, foreign, or international court. It states that it "is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies or other entities, its officers or employees, or any other person".[79] This is repeated in the instructions for the military commissions themselves, which also add that: "alleged non-compliance with an Instruction does not, of itself, constitute error, give rise to judicial review, or establish a right to relief for the Accused or any other person."[80] As the American College of Trial Lawyers wrote in March 2003: "It appears that the content of the [Military] Order and the [military commission] Procedures, particularly the exclusion of US citizens from their reach and the placement of the detainees at Guantanamo, were carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority."[81] More than two years later, the administration is still engaged in this bid for unchecked executive power.

Surely such executive excess would be condemned by the USA if it were happening in another country? In its latest human rights report, for example, the State Department's entry on Syria contains the following under "Denial of Fair Public Trial":

> "*The Constitution provides for an independent judiciary; however, the Supreme State Security Court (SSSC), in dealing with cases of alleged national security violations, was not independent of executive branch control… The SSSC did not observe the constitutional provisions safeguarding defendants' rights… In April 2001, the UN Commission on Human Rights stated that the procedures of the SSSC are*

[77] See 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. See also Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/I/Rev.1 at 30 (1994), para. 12; CCPR General Comment 13: the right to a fair trial and public hearing by an independent court-established by law (Art. 14), UN Doc. A/39/40 (1984), para. 14.

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

[79] Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001.

[80] Department of Defense, Military Commission Instruction No. 1. 30 April 2003.

[81] *Report on Military Commissions for the Trial of Terrorists*. American College of Lawyers, March 2003.

incompatible with the provisions of the International Covenant on Civil and Political Rights, to which the country is a party".

The USA has also been criticized by the UN for its plans for trials by military commissions which would violate fair trial rights under international standards.[82] The criticism has not only been international. In November 2004, a US federal judge ruled that, at least in one respect, the rules of the US military commissions were unlawful. Specifically, he noted, "The accused himself may be excluded from proceedings… and evidence may be adduced that he will never see." The judge pointed out that "such a dramatic deviation" from the US constitutional right to a fair trial "could not be countenanced in any American court", and added that the right to trial "in one's presence" is "established as a matter of international humanitarian and human rights law".[83]

In its most recent human rights report, as in previous reports, the State Department criticized Libya's special revolutionary or national security courts, such as the People's Court, noting that trials in these bodies "often are held in secret or even in the absence of the accused." The State Department will be able to report next year that, in a historic ruling on 12 January 2005, Libya's parliament abolished the People's Court. Amnesty International has welcomed this development as an important step forward for human rights in Libya. There has been no such move on the USA's military commissions, however. The administration has appealed the judge's ruling, which it has characterized as "an extraordinary intrusion into the Executive's power".[84]

It was the case of a Libyan national held in Guantánamo Bay, Faren Gherebi, which led the US Court of Appeals for the Ninth Circuit to issue the following rejection of the US administration's theory that it possesses "unchecked authority". The court said that "even in times of national emergency – indeed, particularly in such times – it is the obligation of the Judicial Branch…to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike". It continued:

"*Under the government's theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind… Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or it was summarily executing the detainees. To our knowledge, prior to the current detention at Guantanamo, the US government has never before asserted such a grave and startling proposition*."[85]

[82] On 7 July 2003, after President Bush made six foreign nationals eligible for trial by military commission, the UN Special Rapporteur on the independence of judges and lawyers expressed "alarm" at a move he said violated UN General Assembly and Security Council resolutions. He recalled his 16 November 2001 urgent appeal to the USA concerning President Bush's Military Order of 13 November which allows for trial by military commission. The Special Rapporteur expressed his concerns over a number of issues, including "the rule of law and equality before the law; fair trial procedures…; the selection and composition of those who sit on the commission, and appeal procedures which violate fundamental principles of judicial independence." See *United Nations rights expert 'alarmed' over United States implementation of Military Order*. UN Press Release, 7 July 2003.More than two and a half years later, the USA had still not replied to his appeal.

[83] *Hamdan v Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

[84] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004.

[85] *Gherebi v. Bush*, US Court of Appeals for the Ninth Circuit, opinion filed 18 December 2003, amended 8 July 2004.

By the end of April 2005, Faren Gherebi remained in custody in Guantánamo Bay in essentially unchanged conditions.[86] Despite the US Supreme Court's *Rasul* ruling, and widespread international condemnation, including from its allies as well as from UN experts and bodies, the US administration continues to cling to policies that deny fundamental human rights. It has not expressly and for all agencies rejected interrogation techniques that violate the prohibition on torture or ill-treatment. It has not rejected the use of secret or incommunicado detention. It has not rejected the use of military commissions. It maintains its attachment to the denial of the full rights of *habeas corpus* to hundreds of foreign detainees.

Indeed the administration appears to view its problem as one of presentation rather than substance. In 2002, the White House announced that it would set up the Office of Global Communications in part to counter perceptions around the world that that "the United States is arrogant, hypocritical, self-absorbed, self-indulgent, and contemptuous of others".[87] Amnesty International pointed out that in the area of human rights, at least, the US administration would need to "move beyond public relations and into substantive change if it wished to improve its reputation abroad."[88] Two and a half years later, the organization regrets that the same advice is still valid.

The Director of the Defense Intelligence Agency pointed out to the Senate Armed Services Committee in March 2005 that: "Multiple polls show favourable ratings for the United States in the Muslim world at all-time lows. A large majority of Jordanians oppose the War on Terrorism, and believe Iraqis will be 'worse off' in the long term… Across the Middle East, surveys report suspicion over US motivation for the War on Terrorism. Overwhelming majorities in Morocco, Jordan, and Saudi Arabia believe the US has a negative policy toward the Arab world."[89]

The US State Department has said that "it's obvious that the American image in the world has suffered", and has pointed to the need for "a more effective portrayal of the United States".[90] On 14 March 2005, announcing the nomination of Karen Hughes as Under Secretary of State for Public Diplomacy and Public Affairs, Secretary of State Condoleezza Rice noted that "too few in the world… know of the value we place on international institutions and the rule of law". The nominee herself stated her commitment to "share our country's good heart and our idealism and our values with the world", and to "always do my

[86] A CSRT determined that he was an "enemy combatant" on 27 September 2004. The detainee did not attend the hearing. The CSRT panel of three military officers relied on classified and unclassified evidence in reaching their unanimous decision on the same day as the hearing.
[87] *Public diplomacy: A strategy for reform.* A report of an Independent Task Force on Public Diplomacy sponsored by the Council on Foreign Relations. 30 July 2002.
[88] *USA: Human rights v. public relations*, AI Index: AMR 51/140/2002, August 2002, http://web.amnesty.org/library/Index/ENGAMR511402002.
[89] *Current and Projected National Security Threats to the United States*. Vice Admiral Lowell E. Jacoby, US Navy, Director, Defense Intelligence Agency. Statement for the Record, Senate Armed Services Committee, 17 March 2005. A Pentagon taskforce noted in September 2004 that there is "widespread animosity toward the United States and its policies. A year and a half after going to war in Iraq, Arab/Muslim anger has intensified…The war has increased mistrust of America in Europe, weakened support for the war on terrorism, and undermined US credibility worldwide." The taskforce stated that "nothing shapes US policies and global perceptions of US foreign and national security objectives more powerfully than the President's statements and actions, and those of senior officials… Policies will not succeed unless they are communicated to global and domestic audiences in ways that are credible… Words in tone and substance should avoid offence where possible; messages should seek to reduce, not increase, perceptions of arrogance, opportunism, and double standards." Report of the Defense Science Board Task Force on Strategic Communication. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, Washington, DC. September 2004.
[90] Richard Boucher, State Department Daily Press Briefing, 14 March 2005.

best to stand for what President Bush has called the non-negotiable demands of human dignity", including "the rule of law", "limits on the power of the state", and "equal justice".[91] She faces an uphill task in the absence of substantive change in her government's policies, which tell a different story.

The State Department's annual criticisms of the human rights records of other countries will inevitably lead to accusations of double standards and be drained of moral power as long as the USA fails to put its own house in order. Why, for example, should the Cuban authorities respond constructively to the State Department's criticism that in 2004 Cuba "did not permit independent monitoring of prison conditions by international or national human rights monitoring groups", or that members of the Cuban security forces "sometimes beat and otherwise abused" detainees and prisoners? After all, in the southeast corner of Cuba, the US government continues to operate a military detention camp in which detainees have been kept virtually incommunicado without charge or judicial review for more than three years. With international human rights monitors denied access, evidence that detainees held in the base have been subjected to torture and ill-treatment continues to mount.

As the new Under Secretary of State for Public Diplomacy and Public Affairs pointed out, President Bush has repeatedly professed the USA's commitment to the "non-negotiable demands of human dignity", including the rule of law, limits on the power of the state, and equal justice. Such promises, however, have been rendered meaningless by the USA's conduct towards detainees held in the "war on terror". The executive must change its policies, not the way that it presents them. At the same time, the judiciary and the legislature must provide the necessary check on the executive.

> "*The rule of law and separation of powers not only constitute the pillars of the system of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency… [Judicial] monitoring should not be perceived as part of an institutional rivalry between the judicial, executive and legislative powers, but acts as a means of containing any authoritarian excesses and ensuring the supremacy of the law under all circumstances…[T]he desire to restrict or even suspend this judicial power would be tantamount to impairing the independence of justice*".[92]

5. Human rights law rejected by a war mentality

America is a nation at war… At the direction of the President, we will defeat adversaries at the time, place, and in the manner of our choosing… 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.
US National Defense Strategy, March 2005[93]

In the early hours of 10 December 2003, human rights day, a 20-year-old Iraqi youth heard a knock on the door of his home in Mosul. He later recalled through an interpreter:

> "*I was studying in the morning because I am a student. It was around 05.00. It was a Wednesday. There was a knock at my door so I answered it. American soldiers came in and took me outside and arrested me. They told me they were there for my father.*

[91] Announcement of nominations of Karen P. Hughes as Under Secretary of State for Public Diplomacy and Public Affairs and Dina Powell as Assistant Secretary of State for Educational and Cultural Affairs. Benjamin Franklin Room, State Department, Washington, DC. 14 March 2005. State Department transcript.
[92] Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. E/CN.4/2004/60, 31 December 2003, paras. 28 and 29.
[93] The National Defense Strategy of the United States of America, March 2005.

They also arrested my brother and my father. I complained because my father is old and my brother is sick. My brother has many physical problems. My mother was crying."

In a handwritten statement, among documents released under the ACLU's freedom of information lawsuit, he told army investigators how he came to have a broken lower jaw:

"*After that, they tied my brother and father and my hands and took us to their quarters. There, they put bags on our heads and took us to a room which contains a vocal device (so big recorder) and rised its voice so loudly and started torturing us with many kinds of torture like stand and sit down, pour cold water on our bodies at night and beat us during the day and didn't give us food and even water except one time for two days. (The period of our torture).*

During the time of torture, the bag was on my head, when one of the soldiers drew me till I came near the wall, then he kicked me a very strong kick on my face even my teeth were broken. Also my down jaw broke (several fractures). After I've injured, they took me to another room and told me to say that I've fallen down and no one beated me. Then they transferred me from Mosul to Baghdad without treatment of my wounds."

An army investigator concluded that the detainee's jaw had been broken as the result of an "intentional act". A factor that contributed to the injury was a detention regime in the US facility where abuses were systematic – detainees were physically exercised to the point of exhaustion, subjected to sleep deprivation, physical assault, loud music blasted from metre-high loudspeakers, and hooding. "There is evidence", the investigator wrote, that military intelligence personnel and/or translators "engaged in physical torture of the detainees".[94]

In its October 2004 report on torture and accountability in the "war on terror", Amnesty International concluded that senior US military and civilian officials had set a climate, both through words and actions, conducive to torture and ill-treatment.[95] Indeed, one of the members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel), which reported in August 2004, suggested that a degree of responsibility "for the confusion about permissible interrogation techniques extend[s] all the way up the chain of command to include the Joint Chiefs of Staff and the Office of the Secretary of Defense". [96] Evidence of a permissive climate contributing to abuses is provided among documents released in April 2005 to the ACLU.

In November 2003, a US army Staff Sergeant received a letter of reprimand for failing to "properly supervise detainee interrogation operations" at a US detention facility in Tikrit, Iraq, in which detainees had been abused.[97] In rebutting the reprimand, the Staff Sergeant suggested that at least one of the soldiers in question had committed abuses believing that such actions would be approved of by those higher up the chain of command:

"*I firmly believe that* [redacted] *took the actions he did, partially, due to his perception of the command climate of the division as a whole. Comments made by senior leaders regarding detainees such as 'They are not EPWs* [enemy prisoners of war]. *They are terrorists and will be treated as such' have caused a great deal of*

[94] Memorandum for Record. AR 15-6 investigation into the broken jaw injury of [redacted]. Department of the Army, Office of the Staff Judge Advocate, Mosul, Iraq, 31 December 2003.
[95] *USA: Human dignity denied: supra*, note 17.
[96] Dr Harold Brown, former US Secretary of Defense, written testimony to Senate Armed Services Committee, 9 September 2004.
[97] Memorandum for Staff Sergeant [redacted], 104th Military Intelligence Battalion, 4th Infantry Division (Mechanized), Tikrit, Iraq. Subject: Written Reprimand. Date: 6 November 2003.

> *confusion as to the status of the detainees. Additionally, personnel at the* [Interrogation Control Element] *regularly see detainees who are, in essence, hostages. They are normally arrested by Coalition Forces because they are family members of individuals who have been targeted by a brigade based on accusations that may or may not be true, to be released, supposedly, when and if the targeted individual surrenders himself… I know that* [redacted] *has himself witnessed senior leaders at briefings, reporting that they have taken such detainees, with the command giving their tacit approval. In hindsight, it seems clear that, considering the seeming approval of these and other tactics by the senior command, it is a short jump of the imagination that allows actions such as those committed by* [redacted], *to become not only tolerated, but encouraged. This situation is made worse with messages from higher echelons soliciting lists of alternative interrogation techniques and the usage of phrases such as '…the gloves are coming off'*. [98]

Such a tone has been set by senior US officials. Members of the administration, including the President as Commander-in-Chief, have repeatedly referred to detainees as "terrorists" and "killers". This stance has been adopted throughout the military chain of command, and throughout the "war on terror". [99] Other officials have referred to "the gloves coming off". [100]

Meanwhile, hostage-taking by US troops in Iraq reportedly occured a year and a half after the Staff Sergeant wrote the above reference to such abuses. On 2 April 2005, two Iraqi women, Salima al-Batawi and her daughter Aliya al-Batawi, were allegedly taken hostage by US soldiers who were looking for their male relatives. The two women were held for six days without charge in a US detention facility after being seized at their home in Baghdad. A note allegedly left on the gate of their home by the soldiers threatened that the women would remain in detention unless a male relative gave himself up. Although military personnel claimed that the women were detained as suspected insurgents in their own right, after her release Salima al-Batawi was quoted as saying that she had been told that she would be

[98] Memorandum for Commander, 104th Military Intelligence Battalion, 4th Infantry Division (Mechanized), Tikrit, Iraq. Subject: Rebuttal of [redacted] to written reprimand. Date: 9 November 2003. The solicitation of "alternative interrogation techniques", referred to by the Staff Sergeant, led to the development and e-mail circulation of "wish lists" of techniques developed by military interrogators in Iraq. One such list included the following: "Open Hand Strikes (face and midsection)(no distance greater than 24 inches)"; "Pressure Point Manipulation"; "Close Quarter Confinement"; "White Noise Exposure"; "Sleep Deprivation"; "Stimulus Deprivation". On this list was also suggested a number of other "coercive techniques that may be employed that cause no permanent harm to the subject. These techniques, however, often call for medical personnel to be on call for unforeseen complications. They include but are not limited to the following: "Phone Book Strikes" [i.e. hitting with a telephone directory]; "Low Voltage Electrocution"; "Closed-Fist Strikes"; "Muscle Fatigue Inducement". Alternative Interrogation Techniques (Wish List), 4th Infantry Division [Tikrit, Iraq).

[99] "These killers – these are killers…. These are killers. These are terrorists." President George Bush 28 January 2002. "Remember, these are – the ones in Guantánamo Bay are killers. They don't share the same values we share". President Bush, 20 March 2002. The Guantánamo detainees are "terrorists, enemies of the United States of America". Army Brigadier General Jay Hood, commander of Joint Task Force Guantanamo, 21 March 2005.

[100] On 26 September 2002, the former chief of the CIA's Counterterrorist Center, Cofer Black, told the Senate and House Intelligence Committees that the only detail he would give of the "highly classified area" of "operational flexibility" was that "there was bfore 9/11 and after 9/11" and that "after 9/11 the gloves come off". It is alleged that the General Counsel of the Department of Defense authorized US detainee John Walker Lindh's interrogator to "take the gloves off" during his interrogation in late 2001 in Afghanistan. *Prison interrogators' gloves came off before Abu Ghraib*. New York Times, 9 June 2004.

detained until her sons gave themselves up.[101] International humanitarian and human rights law prohibits the taking of hostages and arbitrary detentions.[102]

In a keynote address to the International Summit on Democracy, Terrorism and Security, in Madrid, Spain, on 10 March 2005, UN Secretary General Kofi Annan pointed out that "international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms." He continued:

> "*Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element*".[103]

A month earlier, on 4 February 2005, six United Nations human rights experts – whose mandates include torture, "disappearances", arbitrary detention, the independence of judges and lawyers, and health, had expressed "serious concerns" about the USA's "war on terror" detainees. and reiterated that:

> "*the right and duty of all States to use all lawful means to protect their citizens against death and destruction brought about by terrorists must be exercised in conformity with international law, lest the whole cause of the international fight against terrorism by compromised*".[104]

In his report of March 2005, the UN's Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, wrote of the reports of abuses by Coalition forces in Afghanistan that he had received from victims, the Afghan Independent Human Rights Commission and others. The alleged abuses include: "forced entry into homes, arrest and detention of nationals and foreigners without legal authority or judicial review, sometimes for extended periods of time, forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods of time in stress positions, sexual abuse, beatings, torture and use of force resulting in death".[105] The UN Independent Expert continued:

> "*When these forces directly engage in practices that violate or ignore international human rights and international humanitarian law, they undermine the national*

[101] *US accused of seizing Iraqi women to force fugitive relatives to give up*. The Guardian (UK), 11 April 2005.
[102] Common Article 3 to the Geneva Conventions (see further below) and Article 9.1 of the International Covenant on Civil and Political Rights.
[103] *A global strategy for fighting terrorism*. Secretary-General Kofi Annan's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security. Madrid, Spain, 10 March 2005.
[104] *UN rights experts raise 'serious concerns' over detainees at US naval base*. UN News Centre, 4 February 2005. The six experts are: Leïla Zerrougui, Chairperson-Rapporteur of the Working Group on Arbitrary Detention; Stephen J. Troope, Chairperson-Rapporteur of the Working Group on Enforced or Involuntary Disappearances; Manfred Nowak, Special Rapporteur on torture; Paul Hunt, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Leandro Despouy, Special Rapporteur on the independence of judges and lawyers; and Cherif Bassiouni, Independent Expert appointed by Secretary-General on the situation of human rights in Afghanistan.
[105] UN Doc: E/CN.4/2005/122, 11 March 2005, para. 44.

project of establishing a legal basis for the use of force. The impact of abusive practices and the failure to rectify potential problems create a dangerous and negative political environment that threatens the success of the peace process and overall national reconstruction."[106]

Professor Bassiouni's mandate as UN independent expert on Afghanistan was not renewed at the UN Commission for Human Rights in April 2005. In an interview with the BBC on 25 April, he suggested that one reason for this was because of his "insistence that I should be allowed to go to the Bagram and Kandahar military bases as well as the 14 other firebases in which the US by its own regulations detains people for up to 14 days without even allowing the ICRC to see them." He reiterated that he had "interviewed a number of persons who have indicated that they had been arbitrarily arrested, that they had been tortured" by US forces in Afghanistan. The reason his mandate had not been renewed, he suggested, was not because "anybody felt the job was done", but because of US government pressure not to renew. The interview continued:

Q. *Let's be clear about this, what you are suggesting is that an independent human rights monitor mandated by the UN in Afghanistan has been prevented from doing that job because, you say, the Americans didn't want you, to put it bluntly, poking your nose into what they were getting up to in various camps where they were holding detainees.*

A. *That is correct. In fact what my report does not contain is an exchange of correspondence I've had with the US ambassador to Geneva… in which he basically says the United Nations mandate does not include going into areas where American bases are. He takes the position that the American bases there are above and beyond the reach of the law.*[107]

Whether or not it was US pressure that led to the UN expert's mandate not being renewed – at the time of writing, information received by Amnesty International indicates that it was – an overarching war mentality adopted by the US administration since 11 September 2001 has led it to manipulate or jettison basic human rights protections for detainees. As noted further below, this has included instances of the USA refusing to recognize that UN human rights experts have the mandate to raise concerns about US actions in the "war on terror" on the grounds that the detentions are controlled by the law of armed conflict rather than human rights law. At the same time, the US administration has adopted its own unilateral interpretation of international humanitarian law.

Indeed, "following the events of September 11, 2001, a new category of detainee, enemy combatant (EC), was created for personnel who are not granted or entitled to the privileges of the Geneva Convention [sic]".[108] In its broadly-defined global "war", the administration has defined "enemy combatant" broadly:

[106] *Ibid*, para. 43. The independent expert has recommended that the Afghan Government establish a formal Status of Forces Agreement with the Coalition forces, "detailing the basis for arrests, search and seizure and detentions and specifying that these activities must be in accordance with international human rights and humanitarian law. Detentions must take place in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners, and Coalition forces should be required to abide by basic human rights standards contained in relevant United Nations instruments. In addition, detainees should be provided with some form of judicial supervision to ensure that no one is held without a legal valid basis." (para. 88).

[107] *The World Tonight*. Interview with Robin Lustig. BBC Radio 4, 25 April 2005.

[108] Joint Doctrine for Detainee Operations. Joint Publication 3-63. Final Coordination. Joint Chiefs of Staff, US Department of Defense, 23 March 2005. This notes that "enemy combatants" may be sub-

> "*Any person that US or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror an enemy combatant includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which the United States is engaged in an armed conflict*."[109]

Not only are these so-called "enemy combatants" denied the protections of the Geneva Conventions, they are also denied the protections of international human rights law because the US administration considers that they are held exclusively under "the laws and customs of war", regardless of where in the world they were taken into custody.

The leading authority on provisions of international humanitarian law, or the law of war, is the ICRC which has stated:

> "*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… 'Terrorism' is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted 'fight against terrorism' rather than a 'war on terrorism'…What is important to know is that no person captured in the fight against terrorism can be considered outside the law. There is no such thing as a 'black hole' in terms of legal protection*."[110]

Yet, in seeking to have the post-*Rasul habeas corpus* petitions of Guantánamo detainees dismissed, the executive has rejected the notion that the detainees have any rights under human rights treaty law or customary international law:

> "*Customary law is constantly evolving, thus implying that states can modify their practices to adapt to new or unanticipated circumstances or challenges… Even if customary international law proscribed 'prolonged arbitrary detention', it is not at all clear that petitioners' detention fall within this rubric. The detention here is not arbitrary, but based on the Military's determination that petitioners are enemy combatants. The treaties cited by petitioners as evidence of customary international law do not appear to deal with wartime detentions of this type, but rather with criminal-like matters, and petitioners cite no clear evidence of a consistent and widespread norm, followed as a matter of legal obligation, that detention of enemy combatants in a worldwide war against a terrorist organization is improper*."[111]

Such an argument, if accepted, would give a government – any government – a blank cheque to ignore its obligations under international law for any situation that it defined as a "war", "new" or "unanticipated" or for any person that it defined as the "enemy". In this case, it follows President Bush's assertion that the "war against terrorism ushers in a new paradigm [which] requires new thinking in the law of war".[112] As revealed by a series of previously

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categorized into "Low Level Enemy Combatant (LLEC)", "High Value Detainee (HVD)", "Criminal Detainee"; "High Value Criminal (HVC)"; "Security Detainee".

[109] Deputy Secretary of Defense global screening criteria, 20 February 2004. Cited in Joint Doctrine for Detainee Operations, 23 March 2005, *ibid*.

[110] *International humanitarian law and terrorism: questions and answers*. International Committee of the Red Cross, 5 May 2004.

[111] Respondents reply memorandum in support of motion to dismiss or for judgment as a matter of law. *In re Guantanamo Detainee Cases*. In the United States District Court for the District of Columbia, 16 November 2004.

[112] President George W. Bush. Memorandum for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, the Chief of Staff to the President, the Director of Central

secret government documents, the thinking that has been done has been of a sort that looks to manipulate and bypass the USA's fundamental international legal obligations. Thus, whatever "new thinking" has been done, the result has been old abuses, abuses which when committed by other countries warrant an entry in the US State Department annual human rights report.

For itself, the US administration maintains that the President's war powers as Commander-in-Chief of the Armed Forces provide the executive with a clear mandate to run this broadly-defined "war on terror" without judicial interference or external scrutiny. Whatever the case may be under the US Constitution – the administration has sought to rely on US jurisprudence restricting the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals[113] – the fact is that there is no such potential leeway under international law.[114]

The administration is even still engaged in an attempt to extend presidential authority to seizing US citizens in civilian settings on US soil and subjecting them to indefinite military detention without criminal charge or trial.[115] José Padilla, a US citizen arrested at Chicago airport in 2002 on the suspicion of planning to detonate a radioactive "dirty" bomb in the United States, was removed from the criminal justice system a month later under an executive order signed by President Bush labelling Padilla as an "enemy combatant". Since then he has been held in indefinite military custody without charge or trial (see further below). On 28 February 2005, a federal judge ruled in José Padilla's case, concluding that "this is a law enforcement matter, not a military matter". The judge said that "[t]here were no impediments whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing." He continued:

Intelligence, the Assistant to the President for National Security Affairs, the Chairman of the Joint Chiefs of Staff. Subject: Humane treatment of al Qaeda and Taliban detainees. The White House, 7 February 2002. http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf.

[113] For example, see US Supreme Court decisions *Johnson v. Eisentrager*, 339 US 763 (1950) and *United States v. Verdugo-Urquidez*, 494 US 259 (1990).

[114] Any situation or individual is covered or protected by existing international human rights law or international humanitarian law (in case of armed conflicts). Human rights are inherent in the human person, as recognized by the Universal Declaration of Human Rights. Human rights treaty law applies to everyone within the territory or subject to the jurisdiction of the state concerned, except to the extent that treaty provisions have been (permissibly) derogated from, in times of emergency, or a provision of another body of law, specifically international humanitarian law, justifiably supplants it. Provisions for the most fundamental human rights, including the right to life, freedom from torture or ill-treatment and basic fair trial rights, cannot be derogated from in any circumstances. Since both bodies of law aim at protecting the individual, they should be interpreted in a way that gives the greatest possible protection to the individual. A recent study by the International Committee of the Red Cross notes that: "international human rights law continues to apply during armed conflicts, as expressly stated in the human rights treaties themselves, although some provisions may, subject to certain conditions, by derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been confirmed on numerous occasions in State practice and by human rights bodies and the International Court of Justice." Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*. International Review of the Red Cross, Volume 87, Number 857, March 2005. The study states that the "general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public."

[115] At the time of writing, the US Supreme Court was being asked to consider the question: "Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial? *Padilla v. Hanft*, Brief of petitioner for writ of *certiorari* before judgment. In the Supreme Court of the United States, 7 April 2005.

> "*The civilian authorities captured [Padilla] just as they should have. At the time that [Padilla] was arrested…any alleged terrorist plans that he harbored were thwarted. From then on, he was available to be questioned – and was indeed questioned – just like any other citizen accused of criminal conduct. This is as it should be. There can be no debate that this country's laws amply provide for the investigation, detention and prosecution of citizen and non-citizen terrorists alike*." [116]

The executive disagreed, and immediately annouced its intention to appeal the order to release José Padilla from military custody. The administration appears to lack confidence in both its laws and its courts. At the same time, it is showing scant regard for international law and standards in its "war on terror".

The UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, wrote in his recent report to the UN Commission on Human Rights: "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". He continued:

> "*If committed during an armed conflict, such acts may constitute war crimes. However, when such acts take place during peacetime or an emergency not involving hostilities, as is frequently the case, they simply do not constitute war crimes, and their perpetrators should not be labelled, tried or targeted as combatants. Such situations are governed not by international humanitarian law, but by international human rights law, domestic law and, perhaps, international criminal law…*
>
> *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*."[117]

Human dignity has fallen victim to the USA's "war on terror" detention and interrogation regime, as the administration has not only rejected international human rights law, but also adopted a selective disregard for international humanitarian law, despite being a state party to the principle treaties of both strands of law, and thereby obliged to apply their provisions. This was made clear as the first prisoners arrived at Guantánamo Bay on 11 January 2002, when Secretary of Defense Donald Rumsfeld said: "We have indicated that we do plan to, *for the most part*, treat [the prisoners] in a manner that is *reasonably consistent* with the Geneva Conventions, *to the extent they are appropriate*, and that is exactly what we have been doing." [emphasis added].[118] Such a policy is clearly "vague and lacking", to use the words of the panel appointed by Secretary Rumsfeld to revew the Pentagon's detention operations.[119]

Such vagueness opens the door, whether inadvertently or by design, to torture and other cruel, inhuman or degrading treatment. For example, the Third and Fourth Geneva Conventions allow a maximum of 30 days isolation of a detainee *as punishment* for a disciplinary offence. The US authorities, including as authorized by Secretary Rumsfeld, have

[116] *Padilla v. Hanft*, Memorandum opinion and order. US District Court for the District of South Carolina, 28 February 2005.
[117] 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, para. 17 and 23.
[118] Department of Defense news briefing, 11 January 2002.
[119] Final Report of the Independent Panel to Review Department of Defense Detention Operations [The Schlesinger Report], August 2004.

used isolation as an *interrogation technique* across its theatres of operation. In Afghanistan, techniques included "isolating people for long periods of time".[120] The ICRC found that the US authorities were using "excessive isolation" in Guantánamo for not cooperating in interrogations.[121] In at least two cases of Guantánamo detainees, Salim Ahmed Hamdan and Moazzam Begg, the isolation was for a year or more. Yet Major General Geoffrey Miller, former commander of Guantánamo detentions, has said: "We're enormously proud of what we had done at Guantánamo, to be able to set that kind of environment where we were focused on gaining the maximum amount of intelligence. But we detained the people in a humane manner, in accordance with the Third and Fourth Geneva Conventions."[122] This is not the case. Indeed, even in Iraq, where the USA held that it was adhering to the Geneva Conventions, interrogators resorted to the systematic use of isolation to obtain detainee co-operation.[123]

On 7 February 2002, it was announced that President Bush had determined that the Geneva Conventions applied to the conflict with the Taleban. However, at the same time it was made clear that no detainee, whether a suspected member of the Taleban or of *al-Qa'ida*, would be granted prisoner of war status or in cases of doubt presumed to be prisoners of war unless or until a "competent tribunal" determined otherwise, as required by Article 5 of the Third Geneva Convention.[124] In a unilateral executive decision, the President had determined that there would be no doubt in any case. This decision followed advice that not applying the Geneva Conventions would make future prosecutions of US agents for war crimes less likely.[125] Allegations of torture and ill-treatment in secret and incommunicado detention have followed. No US agent has so far been charged with war crimes or torture under the USA's War Crimes Act or Anti-Torture Act.

President Bush's memorandum of 7 February 2002, originally classified as secret for 10 years, was made public on 22 June 2004 in the wake of the revelations about torture and ill-treatment of detainees in US custody in Abu Ghraib prison in Iraq. In this memorandum, not only did the President determine that neither Taleban nor *al-Qa'ida* detainees captured in the international armed conflict in Afghanistan would be eligible for prisoner of war status, but also that common Article 3 to the Geneva Conventions – which prohibits, among other things, torture, cruel, humiliating and degrading treatment – did not apply to either category of detainee. The protections of common Article 3 "constitute a minimum yardstick" reflecting "elementary considerations of humanity", according to the International Court of Justice[126],

[120] *Ibid*.
[121] *USA: Human dignity denied, supra*, note 17, pages 122-123..
[122] Detainee Operations Briefing, 4 May 2004, Department of Defense transcript.
[123] Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation. February 2004.
[124] The ICRC, the authority on the provisions of the Geneva Conventions disagreed with the US decision (see for instance ICRC press release, 9 February 2002), as did the USA's closest ally in the "war on terror", the UK government. The latter regarded "all personnel captured in Afghanistan as protected by the Geneva Conventions", adding that "the US authorities have not shared [this] view…". *The handling of detainees by UK intelligence personnel in Afghanistan*, Guantanamo Bay and Iraq. The UK Intelligence and Security Committee. March 2005, paras 8-9.
[125] 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. http://msnbc.msn.com/id/4999148/site/newsweek/.
[126] Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits, Judgment of 27 June 1986, ICJ Rep., para. 218. 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

and "are generally accepted throughout the world as customary international law," according to the USA's bi-partisan Congressional commission into the attacks of 11 September 2001.[127] However, the current administration takes a dismissive approach to customary international law, which it believes is not binding on the President in the context of the "war on terror".[128] This would appear even to contradict the USA's own March 2005 National Defense Strategy, which asserts that states "must exercise their sovereignty responsibly, in conformity with the customary principles of international law".[129]

Trials by military commissions – executive bodies viewed within the administration as "entirely the creatures of the President's authority as Commander-in-Chief"[130] – are currently on hold following the decision of a federal judge. In *Hamdan v. Rumsfeld* in November 2004, Judge James Robertson examined President Bush's 7 February 2002 decision on the non-applicability of the Geneva Conventions to detainees picked up in Afghanistan. Judge Robertson rejected the administration's assertion that the presidential determination was "not reviewable":

> "*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 Conventions purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of the conflict, and not the particular faction a fighter is associated with. 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*".[131]

The government had also argued to Judge Robertson that even if the Third Geneva Convention could theoretically apply to an individual captured in Afghanistan, members of *al-Qa'ida* did not fulfil the criteria for prisoner of war status under Article 4 of the treaty because of their failure to carry arms openly or operate according to the laws and customs of war. The President had determined that this was the case, and such determinations are due "extraordinary deference", according to the government. However, Judge Robertson said that the President is not a "tribunal". Moreover, the Combatant Status Review Tribunal (see

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Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". *Ibid*, para. 220.

[127] 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.

[128] "[W]e concluded that neither the federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions in Guantanamo Bay, Cuba, or to trial by military commission of al Qaeda or Taliban prisoners. We also conclude that customary international law has no binding legal effect on either the President or the military…". John Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel. *Application of Treaties and Laws to al Qaeda and Taliban Detainees.* Memorandum for William J. Haynes II, General Counsel, Department of Defense. 9 January 2002. "Although not consistent with US views, some international commentators maintain that various human rights conventions and declarations (including the Geneva Conventions) represent 'customary international law' binding on the United States." *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.

[129] National Defense Strategy of the United States of America, March 2005, page 1.

[130] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.

[131] *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

further below) was not established to address the issue of prisoner of war status, and was therefore not the "competent tribunal" envisaged by the Third Geneva Convention. Until or unless such a tribunal decides otherwise, Judge Robertson wrote, the Guantánamo detainee whose petition was before him should be presumed to be a prisoner of war and treated as such.[132]

Judge Robertson rejected the government's argument that common Article 3 to the Geneva Conventions does not apply, citing among other things the International Court of Justice's opinion (above). He continued that the government's position was one "that can only weaken the United States' own ability to demand application of the Geneva Conventions to Americans captured during armed conflicts abroad". Judge Robertson noted evidence that other governments had already begun to use the example being set by the USA's Guantánamo policy to justify their own repressive conduct.

Finally, the government had argued that any provisions of the Geneva Conventions were not enforceable in US court as the treaty was not "self-executing", that is that does not give rise to private cause of action in the US courts in the absence of specific implementing legislation. However, Judge Robertson took issue with this:

> "*Because the Geneva Conventions were written to protect individuals, because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and because nothing in the Third Geneva Convention itself manifests the contracting parties' intention that it not become effective as domestic law without the enactment of implementing legislation, I conclude that, insofar as it is pertinent here, the Third Geneva Convention is a self-executing treaty.*"

The government responded that Judge Robertson's decision "should not be followed because it not only failed to accord the deference that is due to the President's interpretation of the Conventions, it cannot withstand scrutiny".[133] The administration is seeking to have the ruling overturned by a higher court.

The US administration is not only resisting domestic judicial scrutiny of its actions in Guantánamo, but is rejecting the findings of international expert bodies. In 2002, the UN Working Group on Arbitrary Detention challenged President Bush's 7 February 2002 prisoner of war determinations. The Working Group pointed out that the authority competent to make such determinations "is not the executive power but the judicial power". It went on to assert that in cases where POW status was not recognized by a competent tribunal, the "situation of the detainees would be governed by the relevant provisions of the [International] Covenant [on Civil and Political Rights] and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial".[134]

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[132] In her ruling on the Guantánamo detainees in January 2005, Judge Joyce Hens Green concluded that President Bush's determination that Taleban detainees captured during the armed conflict in Afghanistan were not entitled to prisoner of war status was wrong. A presidential determination, she wrote, cannot substitute for a "competent tribunal" determination of status in cases where there is doubt about prisoner of war status, as Article 5 of the Third Geneva Convention requires.

[133] *In re Guantanamo detainee cases*. Respondents' reply memorandum in support of motion to dismiss or for judgment as a matter of law. In the US District Court for the District of Columbia, 16 November 2004.

[134] Report of the Working Group on Arbitrary Detention. UN Doc. E/CN.4/2003/8, 16 December 2002, para. 64.

The USA responded that the Working Group did not have the mandate to consider whether the Guantánamo detentions were arbitrary, on the grounds that the detentions were controlled by the laws of armed conflict and not human rights law.[135] The USA further asserted to the Working Group on Arbitrary Detention that "enemy combatants are not entitled to be released or to have access to court or counsel".[136] The Working Group responded that it was concerned that the "war on terror" was being "invoked to set aside certain norms of international law, particularly those on the guarantees available to supected terrorists in detention". It continued:

> "*The Working Group is even more concerned that, in the context of the fight against terrorism, classified information and the protection of national security are often put forward as grounds for refusing to cooperate, and that its competence to judge the lawfulness of the detention of suspected terrorists is challenged on the pretext that the Group's mandate does not cover situations of armed conflict…*
>
> *The Working Group stresses that it attaches particular importance to the existence and effectiveness of international controls over the legality of detention. In its experience, the right to challenge the legality of detention is one of the most effective means of preventing and combating arbitrary detention. As such, it should be regarded not as a mere element in the right to a fair trial but, in a country governed by the rule of law, as a personal right which cannot be derogated from even in a state of emergency*."[137]

The Chairperson-Rapporteur of the Working Group on Arbitrary Detention is one of the four UN experts for whom access to US "war on terror" detainees has been requested by the UN. A joint statement issued by a group of UN experts on 25 June 2004 noted "recent developments that have seriously alarmed the international community with regard to the status, conditions of detention and treatment of prisoners in specific places of detention". The statement called for four UN experts to be allowed to visit detainees held in Iraq, Afghanistan and Guantánamo Bay.[138] On 9 November 2004, the US government responded that it was unable to grant the request. Instead it offered to provide the UN experts with a briefing in Washington, DC. The experts only agreed to such a briefing, in Geneva, to the extent that it would be a preliminary step in preparation for their requested access to the detainees.[139] On 4 April 2005, a meeting took place in Geneva between US officials and three UN Special Rapporteurs.[140]

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[135] At the same time, the USA was in disagreement on this issue with the International Committee of the Red Cross, the authority on the provisions of the Geneva Conventions.

[136] Letter dated 2 April 2003 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Commission on Human Rights. UN Doc. E/CN.4/2003/G/73, 7 April 2003.

[137] Report of the Working Group on Arbitrary Detention. UN Doc. E/CN.4/2004/3, 15 December 2003, paras. 57, 63.

[138] *Joint statement on the protection of human rights and fundamental freedoms in the context of anti-terrorism measures*. United Nations press release, 25 June 2004. The other three experts for whom access to the detainees was requested are the Special Rapporteur on the Independence of Judges and Lawyers, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

[139] See: UN Doc. E/CN.4/2005/6, para. 33. UN Doc. E/CN.4/2005/51/Add.1, para 79. UN Doc. E/CN.4/2005/62, para. 6.

[140] The USA reported that the meeting had been "very positive" and "we agreed with the Special Rapporteurs that they would provide the United States with further information for us to get a better understanding of the scope of the activities in which they wish to engage. We look forward to receiving additional information from the Special Rapporteurs and to continuing to engage with them on this

While the executive has assumed sweeping powers to detain, interrogate, charge or try suspected "terrorists" or their associates, at the same time its "war" scenario has also brought with it a disturbing attitude to the use of torture and other cruel, inhuman or degrading treatment (see Section 12) as well as to the use of lethal force.[141] The relatively low value that appears to have been placed by the US administration on the lives of Afghanistan and Iraq citizens killed by US forces in the past three years – as demonstrated by the failure to thoroughly investigate or even quantify such casualties – is exemplified by an incident in Yemen on 3 November 2002, when six men were killed in a car, blown up by missiles fired from a CIA-controlled Predator unmanned aerial vehicle.[142] One of the people in the car was alleged to be a senior member of *al-Qa'ida*, Abu Ali al-Harithi, and the strike was carried out with the cooperation of the Government of Yemen. In Amnesty International's view, the USA and Yemen should have cooperated to try to arrest the suspects in the car rather than kill them. Rather than opting for killing them by remote control, lethal force should have been used only as a last resort.[143] To the extent that the US authorities deliberately decided to kill, rather than attempt to arrest these men, their killing would amount to extrajudicial executions.

> "*Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any public emergency many not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority*."[144]

On 17 September 2001, President Bush is reported to have signed an executive order giving the CIA broad new authorities, including the use of lethal force, in the "war on terror".[145] In January 2003, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions described the CIA killings in Yemen as "truly disturbing" and "an alaming precedent", adding that in her opinion "the attack in Yemen constitutes a clear case of extrajudicial killing".[146] In April 2003, the US authorities responded to the UN Special

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matter, in order to facilitate the requested visits to Guantanamo." *Statement by Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper on Meeting with UN Special Rapporteurs Regarding Guantanamo*. 20 April 2005. http://www.humanrights-usa.net/2005/0422ProsperGuantanamo.htm.

[141] On 5 May 2005, the Joint Staff Director of Operations, Lieutenant General James T. Conway, describing the USA's operations against *al-Qa'ida* suspects, said: "We will hunt you to your dying days and either capture you, or kill you if you resist." Defense Department regular briefing.

[142] For Amnesty International's early concerns about the USA's failure to conduct appropriate investigation into killings by US forces in Afghanistan, see pages 17-21 of *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002, http://web.amnesty.org/library/Index/ENGAMR510532002.

[143] UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principles 4 and 5.

[144] UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principles 1 and 9.

[145] See pages 107-109, *USA: Human dignity denied*, note 17, *supra*.

[146] Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Asma Jahangir, UN Doc. E/CN.4/2003/3, 13 January 2003, paras. 37, 39.

Rapporteur, disagreeing that "military operations against enemy combatants could be regarded as extrajudicial executions", and adding that the "conduct of a government in legitimate military operations, whether against Al Qaida operatives or any other legitimate military target, would be governed by the international law of armed conflict." It concluded that "enemy combatants may be attacked unless they have surrendered or are otherwise rendered hors de combat", and that any "Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attacks in appropriate circumstances". It stated that the mandate of the Special Rapporteur does not extend to "allegations stemming from any military operations conducted during the course of an armed conflict with Al Qaida", and that both the Special Rapporteur and the UN Commission on Human Rights lack competence "to address issues of this nature arising under the law of armed conflict".[147]

In December 2004, the new Special Rapporteur on extrajudicial, summary or arbitrary executions followed up on this issue. He stated:

> "*Empowering Governments to identify and kill "known terrorists" places no verifiable obligation upon them to demonstrate in any way that those against whom lethal force is used are indeed terrorists, or to demonstrate that every other alternative had been exhausted. While it is portrayed as a limited 'exception' to international norms, it actually creates the potential for an endless expansion of the relevant category to include any enemies of the State, social misfits, political opponents, or others. And it makes a mockery of whatever accountability mechanisms may have otherwise constrained or exposed such illegal acts under either humanitarian or human rights law.*"[148]

An earlier case of a possible extrajudicial killing left unpunished occurred on 28 August 2002, when US soldiers shot dead an Afghan man near Lwara, southeast of Kabul. The soldiers involved claimed that Mohammad Sayari was shot after he lunged for a weapon. The case remained out of the public domain until redacted documents were released in late 2004 under a freedom of information request (see Section 12). These reveal that an investigator, who in August 2002 had only recently arrived at the US base at Lwara, was called upon to respond to the shooting. In a sworn statement given to investigators with the US Army Criminal Investigation Command (CID) on 9 October 2002, he described finding Mohammad Sayari's body:

> "*His right hand and arm were near his head and in his right hand, clenched in a fist, were prayer beads…*[149] *There was massive trauma to his head that appeared to be the exit wound caused by a bullet... Th[e] splatter pattern, I felt, was consistent with the person laying in the prone and the bullet path coming from an angle that was slightly behind and from the left side of the body. Additionally, I noticed approximately 5 small bullet entry holes on the back of the shirt… I became nervous at this time realizing that the man had been shot in the back…*"

The investigator said that during his subsequent time in Lwara, he would "hear small pieces of information that described the attitudes" of the Special Forces unit implicated in the case, which he concluded to be a unit "operating without any oversight". He said that the unit was described as the "door kicker types", and recalled how one of its members described to

[147] UN Doc: E/CN.4/2003/G/80, 22 April 2003.
[148] Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, UN Doc: E/CN.4.2005/7, 22 December 2004, para. 41.
[149] An interpreter told investigators that "when an Afghan national is holding beads in their right hand, they are offering themselves in peaceful mode and would not have reached for a weapon or acted aggressively".

him how to use mock executions as an interrogation technique when detaining groups of people. The investigator also said that he heard comments that led him to believe that one of the soldiers implicated in the shooting "wanted to kill a local Afghan before he left Afghanistan to return to the US". The investigator further alleged to the CID investigators that he was told by an officer with the Special Forces unit to delete certain photographs that he had taken at the scene of the shooting. The investigator said that "it was obvious to me that he didn't want the pictures to exist". He also feared reprisals for his investigation, concluding from the unit's "actions…that they would not threaten me, they would kill me". His sworn statement contains the following exchange with CID investigators:

> Q: *What do you think were the circumstances of Sayari's death*?
>
> A: *I believe Sayari to have been executed*.
>
> Q: *Why do you think they executed Sayari*?
>
> A: *How do you say just for the fun of it? I think that members of the team felt that the Afghan life was less than human*.

The CID investigation into the killing, completed in May 2003, concluded that there was probable cause to believe that five soldiers had committed crimes, and recommended their prosecution for conspiracy, murder, dereliction of duty and obstruction of justice. Their recommendations were forwarded to the US Army Special Forces Command in Fort Bragg, North Carolina. There, the decision was taken not to prosecute. One of the soldiers received a letter of reprimand and no action was taken against the other four.[150]

The Special Rapporteur on extrajudicial, summary or arbitrary executions noted that the USA's position in response to the November 2002 Yemen killings (and again when the USA rejected the Special Rapporteur's concerns about reports of the use of excessive force against civilians in Iraq)[151] would appear to suggest that (i) extrajudicial, summary or arbitrary executions, falling within the Special Rapporteur's mandate, can take place only in situations where international human rights law applies; and (ii) where humanitarian law is applicable, it operates to exclude human rights law. The Special Rapporteur pointed out that such an analysis is not supported by general principles of international law:

> "*It is now well recognized that the protection offered by international human rights law and international humanitarian law are coextensive, and that both bodies of law apply simultaneously unless there is a conflict between them. In the case of a conflict, the lex specialis should be applied but only to the extent that the situation at hand involves a conflict between the principles applicable under the two international legal regimes*."[152]

Thus, the Special Rapporteur concluded, echoing the language of the Human Rights Committee, "the two bodies of law are in fact complementary and not mutually exclusive".[153]

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[150] Army criminal investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom. US Army Criminal Investigation Command, 25 March 2005. http://www.cid.army.mil/Documents/OIF-OEF%20Homicides.pdf.

[151] On 12 May 2003, the Special Rapporteur wrote to the US government about incidents in Fallujah, Iraq, in which a number of civilians were allegedly shot dead by US forces during demonstrations in unclear circumstances. In a response dated 8 April 2004, the US authorities said that inquiries relating to military operations in Iraq did not fall within the Special Rapporteur's mandate.

[152] UN Doc: E/CN.4.2005/7, 22 December 2004, para. 50.

[153] In an authoritative interpretation of the International Covenant on Civil and Political Rights (ICCPR) handed down in 2004, the UN Human Rights Committee stated: "*The Covenant 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*

He stressed that "efforts to eradicate terrorism must be undertaken within a framework clearly governed by human rights law as well as international humanitarian law, and that executions occurring in the context of armed conflict that violate that framework fall squarely within the remit of the Special Rapporteur".

The fact that it was a CIA-controlled Predator drone that was used to blow up the vehicle in Yemen can now be set against what has since been learned about the CIA's role in torture and ill-treatment of "war on terror" detainees, and what appears to have been efforts within the administration from early in the "war on terror" to immunize CIA personnel from possible future prosecutions for torture and war crimes (see below). It has recently been alleged that under a series of "findings" and executive orders signed by President Bush, the Pentagon's role in covert military activities will be expanded and the CIA's role downgraded. Under this scenario, it is alleged, congressional oversight of military covert operations will be minimal or absent. A former high-level intelligence official is quoted as saying: "The Pentagon doesn't feel obligated to report any of this to Congress. They don't even call it 'covert ops' – it's too close to the CIA phrase. In their view, it's 'black reconnaissance'… Do you remember the right-wing execution squads in El Salvador? We founded them and we financed them. The objective now is to recruit locals in any area we want. And we aren't going to tell Congress about it." Avoiding congressional oversight, according to comments attributed to a Pentagon adviser, "give[s] power to Rumsfeld – giving him the right to act swiftly, decisively, and lethally. It's a global free-fire zone".[154]

Responding to an earlier article (which he said he had not read), Secretary of Defense Donald Rumsfeld described the allegations about the "Salvador Option" as "nonsense" and "simply fanciful".[155] Amnesty International is not in a position to substantiate the allegations or dismiss them. However, it points out that the record of the US administration during the "war on terror" means that its assurances must be treated with caution. On 26 June 2003, for example, President George W. Bush proclaimed to the world that "the United States is committed to the worldwide elimination of torture and we are leading this fight by example". At the time he made this proclamation, a now notorious 1 August 2002 Justice Department memorandum had been the US administration's position, albeit in secret, for almost a year and would be so for another year. This memorandum advised on how US interrogators could escape criminal liability for torture, on how to narrow the definition of torture, on how officials could get away with using cruel, inhuman or degrading treatment that purportedly fell short of torture, and on how the President could override international or national prohibitions on torture.[156]

Another administration document originally classified for 10 years, but made public in June 2004 in the wake of the Abu Ghraib scandal, is the Pentagon *Working Group Report on Detainee Interrogations in the Global War on Terrorism*, dated 4 April 2003 and believed

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specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive". UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. Human Rights Committee, General Comment 31. The nature of the general legal obligation imposed on States Parties to the Covenant, adopted on 29 March 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 11. The Human Rights Committee is the expert body established under the ICCPR to oversee implementation of that treaty. The USA ratified the ICCPR in 1992.

[154] *The coming wars*. By Seymour M. Hersh. The New Yorker, 24 and 31 January 2005.

[155] Secretary Rumsfeld was speaking at a news briefing on 11 January 2005. The article in question was *'The Salvador Option'*, by Michael Hirsh and John Barry, Newsweek, 8 January 2005.

[156] "That memo represented the position of the executive branch at the time it was issued"; and: "It represented the administrative branch position". "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.

to still be operational, states: "The United States has maintained consistently that the Covenant does not apply outside the United States or is special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict".[157]

The International Court of Justice (ICJ) has explicitly rejected the notion that the International Covenant on Civil and Political Rights (ICCPR) only applies in peacetime:

> "... [T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 [derogation in a time of national emergency]. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[158]

The ICJ has recently restated this, namely that "the protection offered by human rights conventions does not cease in case of armed conflict…"[159]

In 2001, the Human Rights Committee, the expert body established by the ICCPR to oversee its implementation, issued an authoritative interpretation of rights under states of emergency (General Comment 29).[160] Under Article 4 of the treaty, states may derogate from certain obligations under certain very strict and narrow conditions (the USA, which ratified the ICCPR in 1992, has not announced any such derogation). The Committee stressed 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"[161] – in other words, human rights law applies during times of armed conflict even though rules of international humanitarian law become applicable at such a time.

Article 4.2 of the ICCPR states that, in any event, there can be no derogation from certain provisions, including Article 6 (right to life) and Article 7 (prohibition on torture or other cruel, inhuman or degrading treatment or punishment). In its General Comment 29, the Human Rights Committee stressed that the category of peremptory norms extends beyond the list of non-derogable provisions contained in Article 4, including the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person. The Committee further 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 do decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant*."[162]

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[157] *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, 4 April 2003. http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf.
[158] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), para. 25.
[159] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 106.
[160] Human Rights Committee, General Comment 29. States of Emergency (Article 4). CCPR/C/21/Rev.1/Add 11, 31 August 2001.
[161] *Ibid*., para. 3.
[162] *Ibid*., para. 7.

Within months of the Human Rights Committee's comment, the USA had transferred the first detainees to Guantánamo in conditions of transfer and detention that shocked international opinion and violated the prohibition on cruel, inhuman or degrading treatment. Judicial review was denied, with the USA arguing that foreign nationals captured and held outside US sovereign territory had no rights. Secret memorandums were drafted within the US administration arguing that torture could be authorized by the President and that a wide array of interrogation techniques that amounted at least to cruel, inhuman or degrading treatment could be used without making the interrogator criminally liable under US law. In violation of the presumption of innocence, detainees were repeatedly labelled as "killers" and "terrorists" by the US administration. President Bush signed a military order providing for trials by military commissions – not independent and impartial courts of law, but executive bodies. This is serial international law-breaking.

Three months before the US Supreme Court handed down its ruling that the federal courts could consider appeals from the Guantánamo detainees, the Human Rights Committee issued its authoritative interpretation of the general obligations that the ICCPR imposes on states which are party to it (General Comment 31).[163] It made clear that the obligations of the ICCPR are "binding on every State Party as a whole" including all branches of government – executive, legislative and judicial – and all levels of government – national, regional or local.[164] It emphasised that each State Party must respect and ensure the rights in the Covenant to anyone "within the power or effective control of that State Party, even if not situated within the territory of that State Party".[165] Where there are inconsistencies between domestic law and the ICCPR, the domestic law must be changed "to meet the standards imposed by the Covenant's substantive guarantees". No domestic political, social, cultural or economic considerations can be used to justify failure to comply with this obligation.[166]

General Comment 31 shows that the US administration was ignoring its international obligations when it argued to the US Supreme Court in the *Rasul* case that "the ICCPR is inapplicable to conduct by the United States *outside* its sovereign territory".[167] Yet some 10 months after the Supreme Court decision, the US administration is still attempting to keep its detention regime in Guantánamo and elsewhere as free from judicial or other external scrutiny as it can on the basis that foreign nationals captured and held outside sovereign US territory have no rights under national or international law.

6. Seeking to render the *Rasul* decision meaningless

Petitioners could not be more wrong. On a fundamental level, petitioners' objection to the Executive's power to capture and detain alien enemy combatants in foreign territory during ongoing hostilities is flatly inconsistent with the historical understanding of the President's role as Commander in Chief of the Armed Forces
US Justice Department, legal brief, October 2004[168]

It has been said that a week is a long time in politics.[169] It seems that the same could be said about the law, or at least judicial interpretations of it. In the space of two weeks in January

[163] General Comment 31. The nature of the general legal obligation imposed on States Parties to the Covenant. Adopted on 29 March 2004. UN Doc. CCPR/C/21/Rev.1/ Add.13, 26 May 2004.
[164] *Ibid*., para. 4.
[165] *Ibid*., para. 10.
[166] *Ibid*., para. 13.
[167] *Rasul v. Bush*, Brief for the Respondents in Opposition, In the Supreme Court of the United States, October 2003.
[168] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

2005, two diametrically opposed responses to the same question of law were handed down by judges on the same federal court in Washington, DC. The first displayed a troubling degree of deference to the executive's attempts to ignore its human rights obligations, while the second showed a welcome respect for human rights. The US administration supports the former ruling and rejects the latter. It should change direction.

Each of the two judges in question – Judge Richard Leon and Judge Joyce Hens Green of the District Court for the District of Columbia – was faced with petitions from detainees labelled as "enemy combatants" and held in indefinite executive detention in Guantánamo. The petitions were asking the judges to issue writs of *habeas corpus* so that the detainees could challenge the lawfulness of their detention, a basic protection under international law against arbitrary arrest, torture and "disappearance", also explicitly provided in the US Constitution (Article 1, Section 9)[170]. The petitions had been filed following the US Supreme Court's decision of 28 June 2004, *Rasul v. Bush*, which held that the federal courts "have jurisdiction to consider challenges to the legality of the detentions of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo Bay".[171] The decision was widely welcomed as a first step to restoring the rule of law to Guantánamo, but the US administration has sought to drain it of real meaning, and to keep any review of the detentions as narrow and as far from a judicial process as possible.[172]

For this, the US Supreme Court bears some responsibility. Judge Green, for one, "would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights" of the detainees.[173] However, the executive is not forced to adopt a regressive interpretation of narrowly-defined Supreme Court opinions. A government, not least one which promotes itself as a progressive force for human rights, should do all it can to ensure that its conduct conforms to domestic and international law without waiting for the courts to order it to do so. Regrettably, in its "war on terror" detention policy, the US administration has opted for executive fiat over the rule of law and hypocrisy over human rights. Even the current Attorney General has admitted that the US administration's post-*Rasul* stance would be unlikely to "meet international scrutiny".[174]

In a press release issued immediately after the *Rasul* ruling, the US Justice Department interpreted it as holding that "individuals detained by the United States as enemy combatants have certain procedural rights to contest their detention".[175] The Department's use

[169] Saying attributed to Harold Wilson, United Kingdom Prime Minister in the 1960s and 1970s.
[170] In addition widely considered to be provided elsewhere within the Constitution, for instance in the requirement of "due process of law" in the Fifth and Fourteenth Amendments.
[171] *Rasul v. Bush*, 000 U.S. 03-334 (2004).
[172] For example, at a press conference in Geneva on 10 December 2004, the UN High Commissioner for Human Rights expressed relief at the Supreme Court's decision, noting that the US courts had historically played a leadership role in the protection of civil liberties. The UN Working Group on Arbitrary Detention also welcomed the ruling. UN Doc. E/CN.4/2005/6, 1 December 2004, para. 64.
[173] *In re Guantanamo detainee cases*. Memorandum opinion denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. US District Court for the District of Columbia. 31 January 2005. Unclassified version.
[174] During oral questioning by the Senate Judiciary Committee in January 2005 in relation to his nomination to the post of Attorney General, Alberto Gonzales was asked by Senator Graham whether he thought that now that "the Supreme Court decided that Gitmo was not Mars…, you're confident that [the Pentagon] is going to come up with some due process standards that will meet international scrutiny?" Alberto Gonzales responded: "Well, I'm not sure it'll meet international scrutiny… What I can say is…what is in place now at Guantánamo should meet our legal obligations as described in the recent Supreme Court cases."
[175] *Statement of Mark Corallo, Director of Public Affairs, regarding the enemy combatant cases*. Department of Justice news release, 28 June 2004.

of the word "procedural", rather than "substantive", is telling. It would later argue in the DC District Court 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. Any further action would be an "unprecedented judicial intervention into the conduct of war operations, based on the extraordinary, and unfounded, proposition that aliens captured outside this country's borders and detained outside the territorial sovereignty of the United States can claim rights under the US Constitution".[176] This was the same position the administration had adopted before the *Rasul* ruling.

At the same time, the administration has done nothing to facilitate the Guantánamo detainees' access to legal counsel so that they can file petitions to challenge the lawfulness of their detention. Efforts by US lawyers to gain access to, or information about, the detainees in order to be able to assist them in filing habeas *corpus* petitions if the detainee so chooses, have been stymied by the administration.[177]

Moreover, in the cases where individuals do have lawyers for their *habeas corpus* appeals, there is concern that the authorities have tried to undermine the relationships between detainees and their counsel. For example, a lawyer representing Kuwaiti detainees has alleged that the interrogators in Guantánamo "have engaged in practices to destroy the trust of the Kuwaiti nationals in us as their lawyers". During his visits to the base, at least two of the detainees have told him that interrogators have told them not to trust their lawyers, including "because they are Jewish". One of the detainees said that an interrogator had told him that he would be tortured if he was returned to Kuwait. When he replied that his lawyer had assured him that this would not happen, "the interrogator laughed and said 'don't trust your lawyers'. She also said "did you know your lawyers are Jews?'" Another of the Kuwaiti detainees said that he, too, had been told by his interrogator: "Your lawyers are Jews. How could you trust Jews?" A Yemeni detainee has reported that another detainee had a "lawyer" who made him multiple visits. The "lawyer" subsequently turned up in military uniform. Detainees are reported to have become suspicious of civilian attorneys, suspecting that they may be military personnel in disguise. Some have said that since lawyers have started visiting the base, punishments for those detainees with lawyers have increased. A Yemeni detainee has alleged that after a visit from his US *habeas* lawyer in November 2004, he was immediately subject to interrogation. Another Yemeni has alleged that after a visit, all his items were removed from his cell and he was forced to wear only shorts for a month.

In addition, it would appear that the detaining authorities have offered little or no practical advice to the detainees about how they might go about seeking a lawyer. Official advice has been limited to telling the detainees that they can file petitions in federal court (while at the same time the government has argued in court that any such petitions should be necessarily dismissed). By 3 May 2005, only 168 named detainees (including at least 11 since released or transferred out of Guantánamo) had had petitions filed on their behalf in the US courts (in 61 petitions). By that date there were approximately 520 detainees held in the base.

[176] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

[177] See, for example, Declaration by Attorney Barbara Olshansky. *John Does 1-570 v. Bush et. al.* In the US District Court for the District of Columbia, 9 February 2005. In 2004, Amnesty International organized a conference in Sana'a, Yemen, at which US lawyers obtained affidavits from relatives of detainees from the Gulf region held in Guantánamo. The affidavits authorized the lawyers to act on the detainees behalf. Later in the year, more such affidavits were gathered in Bahrain.

In a bid to reach all the detainees, lawyers have filed a *habeas corpus* petition for "John Does Nos 1-570" to include "every detainee being held at Guantánamo whom the United States has not officially confirmed to be in its custody by disclosing his or her identity and who has not yet filed a petition for a writ of habeas corpus", and to include detainees held by any agency.[178] At the time of writing, the government was seeking to have this petition dismissed.

In its post-*Rasul* news release, the Justice Department added that it would review the decision in order to determine how to "modify existing processes to satisfy the Court's ruling". Clearly, the administration was in no mood for a clean start if all it wanted to do was to "modify existing processes" – after all, what "process" was there to be modified for a detainee held indefinitely without charge or trial, access to legal counsel, relatives or the courts? International human rights law – under which each and every Guantánamo detainee has the right to full judicial review of his detention and to release if that detention is unlawful – demanded a U-turn in policy, not tinkering around its edges.[179]

Nevertheless, having argued for two and a half years to keep the Guantánamo detainees out of the reach of the courts, the administration was unwilling to abandon its quest. Ten days after the *Rasul* ruling, the Department of Defense announced the formation of the Combatant Status Review Tribunal (CSRT) to "serve as a forum for detainees to contest their status as enemy combatants".[180] The term "enemy combatant" – which as noted above was invented by the USA for the "war on terror" – is defined broadly for the CSRT.[181] In one of the subsequent CSRT hearings, the following exchange took place between the President of the three-military officer panel and the detainee, Bisher al-Rawi, an Iraqi national/UK resident:

> Detainee: *I still don't fully understand the actions I have committed, to be classified as an enemy combatant. I have read the definition of 'enemy combatant' several times. I find it to be very vague and to have many meanings… I would like to fully understand this, so I can defend myself.*
>
> Tribunal President: *As you have heard from the Oath we took, we are to apply our common sense, our knowledge, our sense of justice to this definition and to you, in order to come to a conclusion as to whether you have been properly classified as an enemy combatant or not. That is what we are going to do today. We are going to go over the evidence that the government provided. You are going to see the unclassified portion. I am going to make an assumption at this point that there is classified evidence you won't be able to read…*"[182]

The Pentagon asserted that the CSRT's procedures were intended to "reflect the guidance the Supreme Court provided" in *Rasul v. Bush* coupled with another ruling issued on

[178] *John Does 1-570 v. George W. Bush*, et al. Petition for writ of habeas corpus. In the United States District Court for the District of Columbia, 10 February 2005.
[179] *USA: Restoring the rule of law: The right of Guantánamo detainees to judicial review of their detention*, AI Index: AMR 51/093/2004, June 2004, http://web.amnesty.org/library/Index/ENGAMR510932004.
[180] *Combatant Status Review Tribunal order issued*. US Department of Defense News Release, 7 July 2004.
[181] "*The term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces or partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces*." Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.
[182] *El-Banna et al. v. Bush et al*. CSRT unclassified factual returns for Bisher al-Rawi. On 25 September 2004, a CSRT found unanimously that Bisher al-Rawi was an "enemy combatant".

the same day, *Hamdi v. Rumsfeld*.[183] The latter decision concerned Yaser Esam Hamdi, a US citizen captured in the armed conflict in Afghanistan and held without charge or trial as an "enemy combatant" on the US mainland (see further below). The plurality in the split *Hamdi* decision said that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker". The *Hamdi* plurality held that "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator".

With this reference to "military operations" in mind, it should be stressed that the CSRT was not devised to conduct battlefield determinations of the status of detainees. It was devised more than two years after detentions began, for use thousands of miles away from the point of capture, regardless of whether that capture occurred on the battlefield of an international conflict long since over or on the street of a city in a country not at war in the first place.

Meanwhile, in Afghanistan, were some detainees have been US custody for more than a year, not even the CSRT process is being applied. Once detainees in the custody of the US Department of Defense in Afghanistan are designated as an "enemy combatant", they have an initial review of that status by a Commander or designee within 90 days of being taken into custody. After that, "the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat."[184]

The administration's penchant for secrecy and disregard for the fundamental rights of detainees was again on display in the rules for the Combatant Status Review Tribunal, as Amnesty International pointed out at the time they were announced.[185] The detainees would have no access to legal counsel (only to a "personal representative" – a military officer) or to classified evidence to assist them in the CSRT process, yet the burden was on the detainee to disprove his "enemy combatant" status:

> "*Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine in closed session by majority vote whether the detainee is properly detained as an enemy combatant. Preponderance of the evidence shall be the standard used in reaching this determination, but there shall be a rebuttable presumption in favour of the Government's evidence*".[186]

The presumption by the CSRT that the detainee is an "enemy combatant" is clear from some of the transcripts of the hearings. For example, Bisher al-Rawi asked why he had to wear shackles for his hearing. The Tribunal President responded:

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[183] *Hamdi v. Rumsfeld*, 03-6696, decided 28 June 2004. The Pentagon said: "The Supreme Court held that the federal courts have jurisdiction to hear challenges to the legality of the detention of enemy combatants held at Guantanamo Bay. In a separate decision – involving an American citizen held in the United States (i.e. *Hamdi*) – the Court also held that due process would be satisfied by notice and an opportunity to be heard, and indicated that such process could properly be provided in the context of a hearing before a tribunal of military officers". Department of Defense, Combatant Status Review Tribunals.

[184] USA's Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.

[185] *USA: Administration continues to show contempt for Guantánamo detainees' rights,* AI Index: AMR 51/113/2004, 8 July 2004, http://web.amnesty.org/library/Index/ENGAMR511132004.

[186] Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.

> "*You are classified as an enemy combatant against the United States until we make a determination otherwise. I treat all enemy combatants fairly but the same. I won't allow anyone in here without the shackles. I am treating you like I treat everyone else*."[187]

The CSRT – a panel of three "neutral" military officers – was "free to consider any information it deems relevant and helpful", including "hearsay evidence, taking into account the reliability of such evidence in the circumstances". Evidence extracted under torture or other coercion was not excluded. As the Principal Deputy Associate Attorney General of the US Justice Department argued to Judge Richard Leon:

> "*If in fact information came to the CSRT's attention that was obtained through a non-traditional means, even torture by a foreign power, I don't think that there is anything in the due process clause [of the US Constitution], even assuming they were citizens, that would prevent the CSRT from crediting that information for purposes of sustaining the enemy combatant class[ification]*".[188]

The Justice Department's representative said that this would also be the case if the torture was carried out by US agents, adding that "we don't think anything qualifying remotely as torture has occurred at Guantánamo". In other words, the CSRT process would presume that "evidence" extracted under torture is genuine and accurate, and it would be up to the detainee, with no legal assistance, to refute it. Even without the allegations of torture and ill-treatment that have been raised in the context of the interrogation process in Guantánamo, as well as in Afghanistan, the totality of the detention conditions themselves – harsh, indefinite, and isolating – may amount to cruel, inhuman or degrading treatment in violation of international law. These conditions themselves may be coercive, and feed into the CSRT process. For example, the CSRT determined that Faruq Ali Ahmed was an "enemy combatant" based on the testimony of a fellow detainee who according to Faruq Ali Ahmed's "personal representative" "with some certainty... has lied about other detainees to receive preferable treatment and to cause them problems while in custody". Faruq Ali Ahmed testified to the CSRT that he was in Afghanistan to teach the Koran to children. His "personal representative" said that had the CSRT dismissed the fellow detainee's evidence as unreliable, "then the position we have taken is that a teacher of the Koran (to the Taliban's children) is an enemy combatant (partially because he slept under a Taliban roof)".[189]

The 7 July 2004 order establishing the CSRT was intended "solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States…".[190] Guantánamo began receiving "war on terror" detainees following legal advice from the Justice Department that "a district court cannot properly entertain an application for a writ of habeas corpus by an enemy alien detained at Guantánamo Bay Naval Base, Cuba."[191] The *Rasul* ruling showed otherwise, but the

[187] *El-Banna et al. v. Bush et al*. CSRT unclassified factual returns for Bisher al-Rawi.
[188] *Benchellali et al v. Bush et al*. Transcript of motion hearing before the Honorable Richard J. Leon, US District Judge, in the US District Court for the District of Columbia, 2 December 2004.
[189] *Ahmed et al. v. Bush et al*. Personal representative comments regarding the record of proceedings, Ahmed factual return. In the US District Court for the District of Columbia.
[190] Memorandum for the Secretary of the Navy. Subject: *Order establishing Combatant Status Review Tribunal*. Signed by Paul Wolfowitz, Deputy Secretary of Defense. 7 July 2004.
[191] *Re: Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, 28 December 2001. Although the memorandum

administration has refused to admit that this legal advice, like the legal advice on torture contained in other previously secret administration memorandums, disregarded international law and fundamental human rights standards. The CSRT process is an improvised minimalist response to the US Supreme Court's rulings designed to keep the lawfulness of the detentions away from judicial or other external scrutiny for as long as possible.

The CSRT Order added that nothing contained in it should be construed to "limit, impair, or otherwise affect" the President's Commander-in-Chief powers. This has been reflected in the subsequent statistics. On 29 March 2005, the authorities announced that they had completed all the CSRTs for the current detainees in Department of Defense custody in Guantánamo.

- Of the 558 CSRT decisions finalized by 29 March 2005, all but 38 (93 per cent) affirmed that the detainee was indeed an "enemy combatant" as broadly defined by the Order.
- Amnesty International's review of 60 cases filed in the DC District Court by April 2005 reveals that most were decided inside a single day, and that in all 58 cases which gave the voting details, the CSRT panel was unanimous in finding the detainee to be an "enemy combatant". These 58 cases were all finalized in late 2004.
- Eighty-four per cent of the cases (32 out of 38) where the detainee was found not to be an "enemy combatant" were decided later than 1 February 2005, after Judge Joyce Hens Green ruled that the CSRT process was inadequate and unconstitutional, but before the appeal against her decision was heard. In its 27 April 2005 brief appealing to the US Court of Appeals for the District of Columbia Circuit to overturn Judge Green's ruling, the government emphasised these 38 cases as a sign of a constitutionally fair system. The brief did not point out – or explain whether it was pure coincidence – that all but six of them had been decided after Judge Green's finding that the CSRT process was unlawful.[192]
- This sudden and marked increase in findings that a detainee was no longer an "enemy combatant" also coincided with a period during which the Pentagon was said to be looking to reduce the number of detainees held in the base in the wake of the administration's losses in the courts, including by "outsourcing" detentions to other countries (see Section 15).

Creating procedures that bypass international norms and avoiding judicial scrutiny for its actions should be unacceptable to any government which believes that fundamental human rights principles are non-negotiable, as the USA claims to. As Judge Green said in her recent ruling on the Guantánamo detainees:

> "*Of course, it would be far easier for the government to prosecute the war on terrorism if it could imprison all suspected 'enemy combatants' at Guantanamo Bay without having to acknowledge and respect any constitutional rights of detainees. That, however, is not the relevant legal test... Although this nation unquestionably must take strong action under the leadership of the Commander in Chief to protect itself against enormous and unprecedented threats, that necessity cannot negate the*

concluded that no federal court could "properly entertain" a *habeas corpus* petition from a Guantánamo detainee, it warned that there was some possibility that a court could do so.

[192] *Al Odah et al. v. USA et al.* Opening brief for the United States, et al. In the United States Court of Appeals for the District of Columbia Circuit, 27 April 2005, page 51. The USA also noted these 38 cases in its Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, *supra*, note 16, Annex 1.

existence of the most basic fundamental rights for which the people of this country have fought and died for well over two hundred years."

For consistency's sake, it had been agreed to have a single judge, Judge Joyce Hens Green, a senior judge appointed to the court in 1979, resolve issues common to the Guantánamo cases.[193] Thus, when the government filed its motion to dismiss the petitions for a writ of *habeas corpus*, the motion being common to all the cases, other judges on the court transferred this issue to Judge Green. However, Judge Richard Leon declined to participate in this arrangement. He subsequently became the first judge to issue a ruling interpreting the *Rasul* decision.[194] He sided with the government and dismissed the petitions.

On 19 January 2005, just over three years after the Guantánamo detentions began, Judge Leon in essence determined that whereas under the Supreme Court ruling Guantánamo detainees have the right to petition federal courts for a *habeas corpus* writ, they nevertheless do not have the right to obtain such writs. He ruled that there was "no viable legal theory" by which he could issue writs of *habeas corpus* to foreign detainees held without charge or trial in the naval base. In Judge Leon, appointed to the court by President George W. Bush in 2002, the administration found an ally for its position that the "war on terror" is a global armed conflict and that under the President's Commander-in-Chief powers, individuals broadly defined as "enemy combatants" could be picked up by the USA anywhere in the world and be subjected to executive detention for the duration of the "war". He agreed with the government that the detainees have no rights under constitutional law to challenge the lawfulness of their detention because they are non-resident foreign nationals captured abroad and held in a naval base whose "ultimate sovereignty" was Cuba's.[195] Similarly, he concluded that they had no rights under federal or international law. He seemed satisfied to give the government the benefit of the doubt on the question of torture and ill-treatment, despite the mounting evidence of such abuses by US forces in the "war on terror". He maintained a similar blind faith in the CSRT process. Amnesty International concluded that Judge Leon placed too much trust in the executive and not enough in the rule of law and fundamental human rights principles which the USA is obliged to uphold.[196]

7. A judge with security credentials takes a more critical view

[A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

US Supreme Court, *Hamdi v. Rumsfeld*, 28 June 2004

Judge Joyce Hens Green, who stressed that she had served as the Chief Judge of the United States Foreign Intelligence Surveillance Court, "the focus of which involves national security

[193] United States District Court for the District of Columbia, Resolution of the Executive Session, 15 September 2004.
[194] *Khalid v. Bush*, Memorandum opinion, US District Court for the District of Columbia, 19 January 2005. http://www.dcd.uscourts.gov/opinions/2005/Leon/2004-CV-1142~7:40:40~3-2-2005-a.pdf
[195] The USA occupies the Guantánamo base under a 1903 lease, in which "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]", while the "Republic of Cuba consents that during the period of occupation by the United States…the United States shall exercise complete jurisdiction and control over and within said areas". In 1934, the two parties entered into a treaty whereby, absent their agreement to amend or repeal the lease, it would remain in effect as long as the USA "shall not abandon the …naval station of Guantanamo".
[196] *USA: Guantánamo: Trusting the executive, prolonging the injustice*, AI Index: AMR 51/030/2005, 26 January 2005, http://web.amnesty.org/library/Index/ENGAMR510302005.

and international terrorism", cast an apparently far more critical eye over the situation.[197] Her decision, handed down on 31 January 2005, offered the detainees and their families hope that justice will yet be done and their legal limbo ended.[198]

Judge Green noted that the Guantánamo detainees seeking *habeas corpus* relief included men taken into custody as far away from Afghanistan as Gambia, Zambia, Bosnia and Thailand. She wrote that "although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States or its allies, the military nonetheless has deemed them detainable as 'enemy combatants'". She noted that the government had chosen to submit to the court as factual support for the detentions only CSRT records, despite claiming that the detainees' cases had been subjected to unspecified "multiple levels" of administrative review. The "nature and thoroughness" of these alleged multiple levels of review, she said, must be called into "serious question".[199] CSRT proceedings had only commenced from late July 2004, at which point most of the detainees had already been held for more than two years.[200]

Unlike Judge Leon, Judge Green rejected the government's argument that the detainees have no substantive rights, concluding that they must have more than just the procedural right "to file papers in the Clerk's Office". She rejected the government's notion – which lay behind its choice of Guantánamo as a location for "war on terror" detentions – that because Cuba retains "ultimate sovereignty" over Guantánamo, US Supreme Court precedent meant that the detainees have no rights under the US Constitution. On this point, she noted the irony that, while the Cuban government had claimed that the USA was violating the human rights of the Guantánamo detainees and had demanded their humane treatment, the US government "does not appear to have conceded the Cuban government's sovereignty over these matters". The executive will only point to Cuba's "sovereignty" over the base when it suits the US agenda.

In the *Rasul* ruling, the Supreme Court majority had said in a footnote: "Petitioners' allegations – that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing – *unquestionably describe custody in violation of the Constitution or laws or treaties of the United States*" (emphasis added). The government argued to Judge Leon that "it is not for us to speculate…

[197] The Foreign Intelligence Surveillance Court was created under the Foreign Intelligence Surveillance Act (FISA) of 1978. It used to have seven judges on it, but the USA PATRIOT Act of 2001 amended FISA to increase the number to 11. Among the current 11 are Judges Coleen Kollar-Kotelly and James Robertson of the DC District Court. The former ruled against the Guantánamo detainees on the question of jurisdiction which was subsequently reversed by the US Supreme Court in *Rasul v. Bush* on 28 June 2004. She noted at the time that her opinion "should not be read as stating that these aliens do not have some form of rights under international law". The ruling of the Judge Robertson in November 2004 led to suspension of trials by military commission (see further in text).

[198] *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/2002-CV-299~8:57:59~3-2-2005-a.pdf.

[199] Despite the administration's claims about "multiple levels of review", it appears that numerous individuals have been detained in Guantánamo on flawed intelligence, their release only coming after many months if not years of detention. Some detainees, for example Salim Ahmed Hamdan (see below), were reportedly "sold" to the USA by individuals in Afghanistan and Pakistan – the CIA was reportedly offering US$5,000 for *al-Qa'ida* suspects.

[200] The final CSRT hearing was held on 22 January 2005.

on the basis of mood music from the [Rasul] opinion".[201] In his subsequent ruling dismissing the Guantánamo detainees' petitions, Judge Leon characterized the reliance of the petitioners on the footnote as "misplaced and unpersuasive".

Judge Green, however, adopted a different stance, writing that "it is difficult to imagine that the Justices would have remarked that the petitions 'unquestionably describe custody in violation of the Constitution or laws or treaties of the United States' unless they considered the petitioners to be within a territory in which constitutional rights are guaranteed." Thus, Judge Green ruled, "it is clear that Guantánamo Bay must be considered the equivalent of a US territory in which fundamental constitutional rights apply." Specifically, she held that the detainees had the Fifth Amendment right not to be deprived of liberty without due process of law.

Judge Green said that a relevant factor in the Guantánamo cases is the potential length of the incarcerations. She noted that the administration was asserting the right to hold "enemy combatants" until the "war on terror" is over or the executive determines that the individual no longer poses a threat to national security. She noted that the government had been unable to inform her of how long it believed the "war on terror" might last, or even how it will determine when it has ended. She continued:

> "*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. Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the 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*."

At the end of his Combatant Status Review Tribunal on 1 September 2004, Yemeni national Fahmi Abdullah Ahmed said:

> "*Just know that I have been here for three years and have [not] been in touch with my family. I don't think this is just and it's not right for the American legal system to not allow people to talk to their families. It is a very small right that is allowed to all detainees around the world*."[202]

The Tribunal President responded that "we are here today to determine your enemy combatant status, and that alone is what we focus our attention on today." On that same day, the panel of three military officers unanimously decided that Fahmi Abdullah Ahmed was an "enemy combatant", as has been done in 519 other cases. He remains held without charge or trial or access to his relatives.[203]

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[201] *Benchellali et al v. Bush et al*. Transcript of motion hearing before the Honorable Richard J. Leon, US District Judge, in the US District Court for the District of Columia, 2 December 2004.

[202] *Ahmed et al. v. Bush et al.* CSRT unclassified factual returns. In the US District Court for the District of Columbia.

[203] Principle 19 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations". Rule 37 of the UN Standard Minimum Rules for the Treatment of Prisoners states: "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits".

8. The Combatant Status Review Tribunal – no laughing matter

I hope this Tribunal is a fair one. I've already been classified as an enemy combatant but from what I know of the American justice system is that a person is innocent until they are proven guilty. Right now, I'm guilty trying to prove my innocence. This is something I haven't heard of in a justice system.

Kuwaiti detainee, CSRT hearing, Guantánamo, 1 November 2004[204]

Although the government had urged Judge Green to dismiss the petitions on the grounds that the detainees had no right to challenge the lawfulness of their detentions, it had also argued that if she did find that the detainees were entitled to due process under the Fifth Amendment of the Constitution, she should accept that the Combatant Status Review Tribunal fully met that requirement. In its legal brief to the DC District Court in October 2004, for example, the Justice Department insisted that "the enemy combatant status proceedings that the Department of Defense is completing provide all the process that petitioners are due (and then some)".[205]

Yet the CSRT is a purely administrative process claiming to be lawful under US law while disregarding international law.[206] For example, Qatar national Jarallah al-Marri chose to attend his CSRT hearing on 30 October 2004. As the hearing opened he asked "Does this Tribunal follow the law of the United States?" The Tribunal President responded that it did, to which Jarallah al-Marri responded that: "I don't understand or I don't know who makes the laws, and because of this I will require a lawyer." The Tribunal President responded that because "this is not a criminal court… it is not necessary for you to have a lawyer". From this moment on, Jarallah al-Marri responded to any question with "no comment". After the hearing, the same day, the tribunal of three military officers unanimously determined that he was an "enemy combatant".[207]

UK national Moazzam Begg had sought to have a witness from the ICRC at his CSRT hearing. The ICRC employee apparently would have testified that Moazzam Begg had been issued with a prisoner of war identity card when in US custody in Kandahar in Afghanistan. The CSRT President had initially determined that such a witness would be relevant, but later changed her mind. This followed advice from a legal advisor to the CSRT process that the CSRT did not have the discretion to determine that a detainee should have been classified as a prisoner of war, only whether the detainee falls within the US administration's own definition of "enemy combatant". Moazzam Begg, who did not attend his CSRT hearing, was found to be an "enemy combatant" by a unanimous vote of the CSRT panel. He was transferred to the UK a few weeks later, and released.

Another UK national, Feroz Abbasi, asked for a lawyer at his CSRT hearing. He was told that he could not have one because "this is not a legal proceeding". When the detainee

[204] The CSRT determined on 1 November 2004 that Omar Rajab Amin, a Kuwaiti national held in Guantánamo for more than two years without charge or trial, was an "enemy combatant". On 10 December 2004, international human rights day, this determination was confirmed by the Director of Combatant Status Review Tribunals in the Department of Defense. Unclassified CSRT records from *Amin et al v. USA et al.* In the US District Court for the District of Columbia.

[205] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.

[206] As the Pentagon itself acknowledges. The CSRT is "not a legal proceeding. This is an administrative proceeding." Special Department of Defense Briefing with Navy Secretary Gordon England, 30 July 2004, Department of Defence transcript.

[207] *Al Marri v. Bush*, CSRT unclassified factual returns, In the United States District Court for the District of Columbia.

himself tried to raise the question of the lawfulness of his detention under international law, the CSRT President replied that "international law does not apply, Geneva Conventions do not apply". When Feroz Abbasi questioned this, the CSRT President repeated,

> "*Once again, international law does not matter here. Geneva Convention does not matter here. What matters here and what I am concerned about and what I really want to get to, is your status as enemy combatant based upon the evidence that has been provided and your actions while you were in Afghanistan. If you deviate from that one more time, you will be removed from this Tribunal and we will continue to hear evidence without you being present*".

Subsequently, Feroz Abbasi made another reference to international law, which drew the following response from the Tribunal President:

> "*Mr Abbasi, your conduct is unacceptable and this is your absolute final warning I don't care about international law. I don't want to hear the words international law again. We are not concerned with international law*".

Feroz Abbasi was eventually removed from the hearing and the process continued in his absence. Abbasi had sought to have a number of witnesses and records for his CSRT hearing. For example, he had requested certain US government employees to address issues relating to his health and alleged ill-treatment at Guantánamo Bay, and for his medical records to substantiate his claims of ill-health and abuse. The CSRT President determined that such witnesses and records were not relevant to the CSRT process. Feroz Abbasi was found by a unanimous vote of the CSRT to be an "enemy combatant". He was transferred to the UK three months later and released.

Unlike Judge Leon, Judge Green rejected the notion that the CSRT process was sufficient. She found that the CSRT procedures "fail to satisfy constitutional due process requirements in several respects."

Judge Green wrote that the "fundamental deficiencies" of the CSRTs included its reliance on classified evidence to which the detainee did not have access, and the refusal to allow the detainees access to legal counsel to compensate for this. She noted that in all of the cases before her, the CSRT had "substantially relied upon classified evidence". Yet none of the detainees "was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf". As Yemeni national Ali Husayn Abdullah Al Tays his CSRT panel at his hearing in September 2004: "What can I do if the information is classified and it's all lies?"[208] Another Yemeni detainee, Saeed Ahmed Mohammed Abdullah Sarem Jarabh, expressed his nervousness at being in front of the panel unrepresented:

> Q: *You understand that nobody here in the Tribunal is forcing you to either say things or not to say things? Is that clear to you*?
>
> A: *My emotional state right now, I'm nervous. I didn't want to say anything… the story before. Even just the mental state, being in a prison, you can't say everything you want to say. I'm telling you, I'm talking to you right now and I'm scared that you might take me to Romeo Block or any of the other blocks you take people to*.[209]

[208] *Al Tays v. Bush*, CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[209] *Jarabh et al. v. Bush et al*. CSRT unclassified factual returns. In the US District Court for the District of Columbia. According to the unclassified report of a lawyer who met with Libyan national Omar Deghayes in January 2005, "Romeo Block in Camp Delta is for prisoners who they think are not cooperating properly. There are pictures of hellfire all around the block. The prisoners have all of their

Part of the evidence against Yemeni national Emad Abdalla Hassan was that he had been arrested in a house by Pakistan authorities in Faisalabad along with several others from Yemen, Saudi Arabia, Palestine, Russia and Pakistan. He agreed, explaining that he had been studying at a university and that the house where he was arrested was a "university dorm, so we have international students from all over the world, so it makes sense that we have so many different nationalities". The central accusation against him is that he travelled to Afghanistan "to fight in the Jihad". He denied ever having been to Afghanistan, apart from when he was handed over to USA by Pakistan authorities after two months detention in Pakistan and taken to Bagram and Kandahar air bases in Afghanistan prior to his removal to Guantánamo. During the CSRT hearing, the following exchange took place:

> Q: *Have you told [the interrogators] the same thing that you are telling us? You have never been to Afghanistan.*
>
> A: *Yes*.
>
> Q: *Then why do you believe you are here*?
>
> A: (Laughter) *How can you ask me this question? This question should be asked to you*.
>
> Q: *You've been here almost three years. Surely the interrogators have given you an idea of why they believe you should be here*.
>
> A: *In Bagram, they told me I was definitely going to go home. They told us we were captured by mistake. We're still under the error*.[210]

Emad Abdalla Hassan was not allowed to see the classified evidence on which the CSRT based its unanimous decision on 30 September 2004 that Emad Hassan had been in Afghanistan and was an "enemy combatant".

A number of detainees boycotted their CSRT proceedings. Yemeni national Adil Said Al Haj Obeid Al Busayss declined to participate in the CSRT on the grounds that he did not have anything with which to counter the government's brief summary of unclassified evidence against him, the only evidence he was allowed to see.[211] In the case of Khalid Bin Abdullah Mishal Thamer Al Hameydani, his "personal representative" informed the CSRT that "detainee [was] unresponsive" during a meeting prior to the scheduled CSRT hearing: "Sat in chair with head down, did not speak at any time." The CSRT decided that "because the Personal Representative fully explained the Tribunal process to the detainee, the Tribunal finds the detainee made a knowing, intelligent and voluntary decision not to participate in the Tribunal process". On 29 September 2004, the CSRT, describing the unclassified evidence on the case as "unpersuasive", relied wholly upon classified evidence to find that the detainee was an "enemy combatant".[212]

Judge Green also noted from the cases before her "the lack of any significant advantage" for a detainee to have a US military officer as his "personal representative". In the

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clothes taken away save for their shorts, in a calculated attempt to humiliate them, given the Islamic prohibition against men going naked between the knees and the navel. Omar suffered this treatment for one month between April and May 2004. The prisoners protested, and the administration responded by ordering that these prisoners be stripped naked altogether."

[210] *Hassan et al. v. Bush et al*. CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[211] *Al Busayss et al. v. Bush et al*. CSRT unclassified factual returns, In the US District Court for the District of Columbia.

[212] Al Hameydani et al. v. USA. CSRT unclassified factual returns, In the US District Court for the District of Columbia.

case of Jamil Al-Banna, a Jordanian national with refugee status in the UK, the CSRT determined that he was an "enemy combatant" despite his "personal representative's position that it was unsupported by the record before the tribunal".[213] Judge Green noted that the personal representative in the CSRT process "is neither a lawyer nor an advocate"; nor is there a confidential relationship between the representative and the detainee. The former must relay to the CSRT any inculpatory information learned from the detainee.

In the case of Yemeni detainee Adnan Farhan Abdul Latif, his personal representative wrote to the CSRT panel that the detainee "rambles for long periods and does not answer questions. He has clearly been trained to ramble as a resistance technique and considered the initial [meeting] as an interrogation. This detainee is likely to be disruptive during the Tribunal." He also described him as "evasive". At the CSRT hearing, when confronted with the accusation that he was an al-Qa'ida member, he stated that he was from Orday City, "very far from the city of al Qaida". The panel said that *al-Qa'ida* was not a place but an organization. The detainee said that "whether it is a city or an organization, I am not from al Qaida. I am from Orday City." Al-Qaidah is a town in Yemen. Later, the following exchange took place:

> Detainee: *Why have I been here for three years? Why have I been away from my home and family for three years?*
>
> CSRT: *That is what we are trying to determine today.*
>
> Detainee: *Why did you come after three years? Why wasn't it done much sooner after my arrest?*
>
> CSRT: *I cannot answer to what has happened in the past...*
>
> Detainee: *Why am I not allowed freedom here?*
>
> CSRT: *Because you have been classified as an enemy combatant.*
>
> Detainee: *How can they classify me an enemy combatant? You don't have the right documents.*
>
> CSRT: *That is what we are here to determine.*
>
> Detainee: *For three years I haven't been treated very well because of wrong information. Would you let that happen to you? What will be your position if you find out what happened to me was based on wrong information and I am innocent?*
>
> CSRT: *Your current conduct is unacceptable. If you keep interrupting the proceedings, you will be removed and the hearing will continue without you.*

The CSRT also relied upon classified evidence in reaching its decision that he was an "enemy combatant".[214]

The case of another detainee, Murat Kurnaz, is further instructive. On 30 September 2004, a Combatant Status Review Tribunal consisting of two US Air Force officers and a Lieutenant Commander in the US Navy, determined "by a preponderance of the evidence" that Murat Kurnaz was an "enemy combatant", specifically finding that he "is a member of al-Qaida". Nineteen-year-old Kurnaz, a Turkish citizen who was born in Germany, was taken off a bus from Peshawar to Lahore by Pakistan police in late 2001. He was transferred to US custody in Afghanistan, before being transported to Guantánamo Bay in January 2002 where

[213] Jamil Al-Banna and Bisher Al-Rawi, an Iraqi national resident in the UK, were arrested in Gambia in November 2002, before being secretly transferred to Afghanistan and thence to Guantánamo.
[214] CSRT unclassified factual returns, In the US District Court for the District of Columbia.

he has been ever since. He is now 23. The Pentagon confirmed the CSRT's decision as final on 15 October 2004.

The CSRT reached its decision after considering unclassified information and one classified document. The unclassified evidence found that Murat Kurnaz attended a mosque in his home town of Bremen in Germany, which was moderate in its views but housed a branch of Jama'at-Al-Tabliq, a missionary organization "alleged to support terrorist organizations". Murat Kurnaz also had a friend, Selcuk Belgin, who the authorities said "is possibly the Elalanutus suicide bomber" (see below). Murat Kurnaz himself testified to the CSRT, denying that he was a member of *al-Qa'ida*, but confirming that he had gone to Pakistan in October 2001 to study the Koran on the advice of an Imam at Jama'at-Al-Tabliq. On the question of his relationship to Selcuk Belgin, he was told by the CSRT that any other information on him was classified. Murat Kurnaz responded:

> "*I am here because Selcuk Belgin had bombed somebody? I wasn't aware he had done that. My association with him is not as a terrorist. We exercised together at the gym and played sports. We both raised dogs, and because of this common interest, we became very good friends…Now I hear Jama'at-Al-Tabliq supports terrorism. I never knew that… I never supported terrorists and I still don't support terrorism. I just want peace, to be a Muslim, and pray to God. That is the reason I wanted to study Islam…*
>
> *I have never supported terrorism. I hate terrorists. I am here having lost a few years of my life because of Usama Bin Laden. His beliefs show Islam in the wrong way. I am not angry with Americans. Many Americans died on 11 September in the terrorist attack. I realize the Americans are trying to stop terrorism… I went to study in Pakistan at the wrong time… If I go back home, I will prove that I am innocent. If I learn of any terrorist groups or plots, I will notify the German authorities to show them that I don't support terrorism, so I can sleep well*."

The CSRT, which had been informed that the German authorities had investigated Murat Kurnaz after he went to Pakistan and had concluded that there was no evidence that he had been or was involved in or associated with any criminal activity, said that it "found certain aspects of the detainee's testimony persuasive, but also turned to classified sources for further clarification".

Murat Kurnaz's case was of those one filed with Judge Joyce Hens Green. In her ruling of 31 January 2005, Judge Green pointed out that:

> "*even if all of the unclassified evidence were accepted as true, it alone would not form a constitutionally permissible basis for the indefinite detention of the prisoner… Nowhere does the CSRT express any finding based on unclassified evidence that the detainee planned to be a suicide bomber himself, took up arms against the United States, or otherwise intended to attack American interests. Thus the most reasonable interpretation of the record is that the classified document formed the most important basis for the CSRT's ultimate determination. That document, however, was never provided to the detainee, and had he received it, he would have had the opportunity to challenge its credibility and significance*."

Judge Green's ruling subsequently had some small amendments made to the unclassified version for public release. In a sentence that was previously redacted, but is now public, Judge Green states that the classified evidence relied upon by the CSRT in Murat Kurnaz's case "fails to provide any significant details to support its conclusory allegations, does not reveal the sources for its information, and is contradicted by other evidence on the record". Thus, she said, the Court cannot at this stage of the litigation give the document the weight the CSRT afforded it. She wrote that

> "*absent other evidence, it would appear that the government is indefinitely holding the detainee – possibly for life – solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself. Such detention… would be a violation of due process. Accordingly, the detainee is entitled to fully litigate the factual basis for his detention in these habeas proceedings and to have a fair opportunity to prove that he is being detained on improper grounds*".

Since her ruling, evidence has come to light suggesting that the US authorities themselves do not believe there is a basis for holding Murat Kurnaz. Previously classified statements in his file include the following:

- "CITF [Command Information Task Force] has no definite link/evidence of detainee having an association with al-Qaida or making any specific threat toward the US."
- "The Germans confirmed that this detainee has no connection to an al-Qaida cell in Germany."
- "CITF is not aware of any evidence that Kurnaz has knowingly harboured any individual who was a member of al-Qaida or who has engaged in, aided or abetted, or conspired to commit acts of terrorism against the US, its citizens or its interests."

In addition, Selcuk Belgin, found by the CSRT possibly to have engaged in a suicide bombing, is reported to be alive and well and has never been charged with a criminal offence. German prosecutors are said to have closed their investigative file on him for lack of evidence.[215] Thus it would appear that Murat Kurnaz has been held for more than three years without charge or trial on the basis of his association with a friend who he did not know was involved in "terrorism" because, it seems, he was not. In addition, Murat Kurnaz has alleged that he has been subjected to torture and ill-treatment in US custody (see below).

Meanwhile, the Pentagon continues to defend the CSRT process. On 29 March 2005, the Secretary of the Navy, Gordon England, said:

> "*Is the system perfect? It's human beings, so obviously it's not perfect, but it is as perfect as we can make the system for the detainee while protecting America. Keep in mind we do have an obligation to protect America from terrorists. So we make this as fair as we can… So we've made it open, transparent and available, and I believe we're doing this the very best way we can*."[216]

The administration's "very best", then, is clearly not good enough, and cries out for judicial intervention. For her part, Judge Green illustrated the "inherent lack of fairness" of the CSRT process by reprinting part of the transcript of one of the CSRT hearings. It was not one of the cases before her, but one before Judge Leon. He, it should be recalled, had said that the court's role in reviewing the executive's detention of "enemy combatants" must be "highly circumscribed", and that he would "not probe into the factual basis" for the detainees' detention. Amnesty International points out that such an approach, in the words of the US Supreme Court in its *Hamdi* decision of June 2004, "serves only to *condense* power into a single branch of government".[217]

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[215] It is not clear what the US authorities mean by the "Elalanutus suicide bomber". The Washington Post has reported that "in November 2003, an Istanbul synagogue was bombed and suspected bomber Gokhan Elaltuntas died". *Panel ignored evidence on detainee*, Washington Post, 27 March 2005.
[216] Defense Department Special Briefing on Combatant Status Review Tribunals, 29 March 2005.
[217] In *Hamdi v. Rumsfeld*, the plurality said: "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forego any examination of the individual case

The case which Judge Leon refused to probe and which Judge Green chose to highlight involved Mustafa Ait Idir. He is one of six Algerian men who were extrajudicially removed from Bosnia and Herzegovina by US agents in January 2002 and transferred to Guantánamo.[218] At his CSRT hearing some two and a half years later, the following exchange took place after the Recorder (not a member of the tribunal) read out the allegation that: "While living in Bosnia, the detainee associated with a known Al Qaida operative":

Detainee: *Give me his name*.

Tribunal President: *I do not know.*

Detainee: *How can I respond to this*?

Tribunal President: *Did you know of anybody that was a member of Al Qaida*?

Detainee: *No, no*.

Tribunal President: *I'm sorry, what was your response*?

Detainee: *No*.

Tribunal President: *No*?

Detainee: *No. This is something the interrogators told me a long while ago. I asked the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but not if this person is a terrorist. Maybe I knew this person as a friend. Maybe it was a person that worked with me. Maybe it was a person that was on my team. But I do not know if this person is Bosnian, Indian or whatever. If you tell me the name, then I can respond and defend myself against this accusation.*

Tribunal President: *We are asking you the questions and we need you to respond to what is on the unclassified summary*.

Subsequently, the Recorder read out the allegation that Mustafa Ait Idir had been arrested because of his involvement in a plan to bomb the US Embassy in Sarajevo. The detainee asked to see the evidence against him. He said that in the absence of such evidence, "to tell me I planned to bomb, I can only tell you that I did not plan". He continued:

I was hoping you have evidence that you can give me. If I was in your place – and I apologize in advance for these words – but if a supervisor came to me and showed me accusations like these, I would take these accusations and I would hit him in the face with them. Sorry about that.

The transcript reveals that "everyone in the Tribunal room laughs", after which the Tribunal President said to Mustafa Ait Idir: "We had to laugh, but it is okay". The detainee continued:

Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me what I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

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and focus exclusively on the legality of the broader detention scheme cannot be mandated in any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."

[218] See, for example, *Unlawful detention of six men from Bosnia-Herzegovina in Guantánamo Bay*, AI Index: EUR 63/013/2003, 30 May 2003, http://web.amnesty.org/library/Index/ENGEUR630132003.

On 20 October 2004, the CSRT determined that Mustafa Ait Idir was an "enemy combatant". For her part, Judge Green wrote that "[t]he laughter in the transcript is understandable, and this exchange might have been truly humorous had the consequences of the detainee's 'enemy combatant' status not be so terribly serious and had the detainee's criticism of the process not been so piercingly accurate." She ruled that the CSRT process is unconstitutional, violating detainees' right to due process of law.

Judge Leon sided with the government, which argued that the CSRTs "provide each [detainee] with process than is more than constitutionally adequate".[219] Judge Leon said that "to the extent these non-resident detainees have rights, they are subject to both the military review process already in place and the laws Congress has passed defining the appropriate scope of military conduct towards these detainees".

The US administration reacted in predictable fashion to Judge Green's ruling on the Guantánamo detentions. The Justice Department said that Judge Leon had been correct to dismiss the petitions and that the Department would "explore options for expeditiously resolving" the conflicts between his and Judge Green's rulings.[220] On 4 February 2005, Judge Green stayed her ruling to allow the government to appeal it.

Meanwhile, the lawyers who are representing named detainees in *habeas corpus* challenges (petitioner-detainees) are being denied certain information that is redacted from the records of the CSRT hearings. Amnesty International understands, for example, that Adnan Abdul Latif is being detained on the basis of a classified document that the government has refused to show to either his *habeas* lawyer or to the DC District Court.

In late August 2004, the government had agreed to provide the CSRT records, "on a rolling basis, as CSRT proceedings for petitioner-detainees are completed". This, the government stated, would accommodate "the interests of counsel for petitioner-detainees in receiving in the coming weeks a complete statement of the factual basis for a detainee's status as an enemy combatant".[221] The government failed to meet its own schedule and on 30 September 2004, Judge Green issued an order for the government to comply with the schedule.[222] By mid-October 2004, the government had filed only around half of the CSRT returns for the petitioner-detainees, and then only the unclassified portions. At a hearing in front of Judge Green on 13 October 2004, the government pointed out that "obviously the unclassified portions of the factual returns, the CSRT records, are not as informative as the full record will be" and promised to begin filing the complete factual returns including the classified portions as soon as the system for lawyers seeing such material had been finalized. Then the government said all lawyers for petitioner-detainees "will have the benefit of the full combatant status review tribunal record". By 29 October 2004, the government still had not produced all the unclassified portions of the CSRT records. Judge Green ordered the government to file with the court, by 3 November 2004, the records in the remaining seven cases.[223] Judge Green added that "there shall be no further extensions", and pointed out that

[219] *Hicks v. Bush*. Response to petitions for writ of habeas corpus and motion to dismiss or for judgment as a matter of law and memorandum in support. In the US District Court for the District of Columbia, 4 October 2004.
[220] Statement of the Justice Department regarding today's ruling in the Guantanamo detainee cases. Department of Justice news release, 31 January 2005.
[221] Re: Guantanamo Bay Detainee Cases. Letter to The Honorable Joyce Hens Green from Thomas R. Lee, Deputy Assistant Attorney General, US Department of Justice, Civil Division, 31 August 2004.
[222] Coordination order setting filing schedule and directing the filing of correspondence previously submitted to the court. Rasul et al. v. Bush et al. and other cases, US District Court for the District of Columbia, 30 September 2004.
[223] Omar Rajab Amin, Moazzam Begg, Martin Mubanga, Mohammed Nechla, Hadj Boudella, Abdullah Majed Sayyah Hasan Alnoaimi and Salman Bin Ibrahim Bin Mohammed Bin Ali Al-Khalifa.

these detainees "were initially detained nearly three years ago and have remained in custody since that time".[224] On the same day she also ordered that complete factual returns, including unredacted classified material, to the court by 5 November 2004. Even if all the lawyers did not yet have security clearance to view the classified material, she said, "this Judge and her staff have appropriate security clearances and it is the Court's wish and responsibility to examine promptly the full, classified versions of the factual returns."[225]

On 5 November 2004, the government filed the classified CSRT records with the court. It added that the records show that each detainee had been found to be an "enemy combatant" and is "therefore, lawfully subject to detention pursuant to the President's Power as Commander in Chief or otherwise". It called again for the detainees' petitions for a writ of *habeas corpus* to be dismissed.[226] Three days later the court entered a "protective order" under which the detainees' lawyers would be able to view the classified records. The government began making redacted versions of the classified records available to the detainees' lawyers at a secure facility. The lawyers filed a motion requesting the judge to order the government to provide lawyers with security clearance access to the complete, unredacted records. The government opposed the motion. On 31 January 2005, Judge Green ruled that the classified information that the government was seeking to have withheld from the lawyers was "relevant to the merits of this litigation and that counsel for the petitioners are entitled to have access to that information", as long as they complied with the relevant security procedures.[227]

By 15 April 2005, the government had still not complied with the order. It has argued that Judge Green's decision to stay her 31 January 2005 ruling denying the government's motion to dismiss the *habeas corpus* appeals, pending the government's appeal of that decision, also puts on hold her order of 31 January for the lawyers to have access to the full CSRT records. The lawyers for the detainees are asking the court to reject the government's position and ensure that the lawyers have access to the full CSRT records, so that they can help the detainees prepare for their upcoming Administrative Review Board hearings (see below), and also to prepare for the time when, hopefully, Judge Green's stay is lifted.

The conflict between Judge Green's and Judge Leon's interpretations of the detainee's post-*Rasul* rights will have to be resolved in a higher court, either the US Court of Appeals for the District of Columbia Circuit, or possibly eventually, in the US Supreme Court. At the end of April 2005, the administration filed its opening brief in the Court of Appeals arguing that Judge Green's opinion should be overturned. Its arguments show an administration in unapologetic mood, in continuing pursuit of unfettered executive authority under the President's war powers as Commander-in-Chief, and disregarding international law and standards. Among its arguments are that:

- The due process clause of the US Constitution's Fifth Amendment "is inapplicable to aliens captured abroad and held at Guantanamo Bay, Cuba." This, the government argues, repeating its pre-*Rasul* position, is because the "United States is not sovereign over Guantanamo Bay" and US Supreme Court precedent makes it clear

[224] *In re Guantanamo detainee cases*. Order setting final deadline for submission of factual returns. US District Court for the District of Columbia, 29 October 2004.
[225] *In re Guantanamo detainee cases*. Order requiring submission of classified factual returns. US District Court for the District of Columbia, 29 October 2004.
[226] *In re Guantanamo detainee cases*. Respondents' notice of in camera submission of factual returns to petitions for writ of habeas corpus under seal. In the US District Court for the District of Columbia, 5 November 2004.
[227] In re Guantanamo detainee cases. Order granting November 8, 2004 motion to designate 'protected information' and granting November 18, 2004 motion for access to unredacted factual returns. US District Court for the District of Columbia, 31 January 2005.

that the applicability of the Fifth Amendment to aliens "turns on whether the United States is sovereign, not whether it merely exercises control, over the territory at issue". Moreover, "to construe a single, oblique footnote [in the *Rasul* decision, see above] as implicitly overruling decades of settled precedent would be utterly implausible…". In addition, "if the courts were to second-guess an Executive-Branch determination regarding who is sovereign over a particular foreign territory, they would not only undermine the President's lead role in foreign policy, but also compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."

- Even if the Fifth Amendment did apply to foreign nationals held at Guantánamo, the CSRT procedures would exceed whatever due process requirements there were. The CSRT process, the administration argues, "manifestly satisfies the requirements of due process (if any) in the unique context of ongoing armed hostilities". Moreover, the CSRT procedures criticized by Judge Green "are not constitutionally problematic". The need for deference to the executive on the question of withholding classified information and legal counsel from the detainees is "greatly magnified here, where the issue is not the administration of domestic prisons, but the Executive Branch carrying out incidents of its war-making function."

- The definition of "enemy combatant" is not overbroad, as Judge Green found. According to the administration, "although there may be difficult calls at the margin, that has been true in every war, and… the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch." The executive, the executive argues, "has a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers. These concerns are especially pronounced given the unconventional nature of the current war and enemy…".

- On the question of the Geneva Conventions, Judge Green "should have deferred to the view of the Executive as to whether the treaty was intended to grant those captured during an armed conflict judicially enforceable rights." Judge Green's contention that the Taleban detainees should have been presumed to have prisoner of war status is "inconsistent with the deference owed to the President as Commander-in-Chief."[228]

Thus, at every step, the executive continues to place obstacles in the way of the detainees having their cases subjected to judicial scrutiny. It continues to appeal every decision that goes against it. By continuing its bid for unfettered executive power, rather than heed the ever-mounting criticism, it is inflicting further damage on the rule of law, human rights principles and the international reputation of the USA. Meanwhile, the detainees are kept in a legal black hole created by the US administration. Forced to share in this limbo, their families are subjected to what may amount to cruel, inhuman or degrading treatment.[229] The situation remains a human rights scandal.

[228] *Al Odah et al. v. USA et al.* Opening brief for the United States, et al. In the United States Court of Appeals for the District of Columbia Circuit, 27 April 2005 (internal quotation marks omitted).

[229] Amnesty International has spoken to many relatives of Guantánamo detainees who themselves are in deep distress from the lack of transparency and information about their loved ones and their inability to visit them. In other contexts, the suffering of the relatives of the "disappeared" has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman or degrading treatment. Similar

9. Administrative Review Board – more of the same

There are ongoing processes to review the status of detainees. A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time. The circumstances in which detainees are apprehended can be ambiguous, and many of the detainees are highly skilled in concealing the truth.
US Department of Defense, 26 April 2005[230]

For any detainee affirmed as an "enemy combatant" by the Combatant Status Review Tribunal detainee – except those pending trial by military commission (see below) – it will be up to another purely administrative process to review each case once a year to determine if the detainee should be released, transferred to the custody of another country, or continue to be detained. The Administrative Review Board (ARB) process will consist of:

> "*an administrative proceeding for consideration of all relevant and reasonably available information to determine whether the enemy combatant represents a continuing threat to the US or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters (e.g., Taliban), and whether there are other factors that could form the basis for continued detention (e.g., the enemy combatant's intelligence value and any law enforcement interest in the detainee)*."[231]

As with the CSRT, the detainee will have no access to legal counsel or to secret evidence, and there is no rule excluding evidence extracted under torture or other coercion. In the case of the CSRT, the decision is made by the panel of three military officers; for the ARB, the panel makes a recommendation to the Designated Civilian Official (DCO) overseeing the process who takes the final decision. This position is currently held by the Secretary of the Navy, Gordon England, appointed to the role of DCO by Secretary of Defense Donald Rumsfeld.[232]

According to the Pentagon, the detainees are informed of the ARB in the following way:

> "*A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you. An Administrative Review Board (ARB) will now be held to determine whether you still pose a threat to the United State or its allies… If you believe you do not pose a threat to the United States or its allies, we recommend you immediately*

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cruelty is inflicted upon the relatives of people held in indefinite virtual incommunicado detention without charge or trial. See *Maria del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay*, Communication No. 107/1981 (17 September 1981), UN GAOR Supp. No. 40 (A/38/40) at 216 (1983), para. 14. Regional human rights courts reached similar conclusions, see for instance *Velasquez Rodriguez Case*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989 Inter-Am.Ct.H.R. (Ser. C) No. 7 (1990), para. 51; *Kurt v. Turkey*, Case No. 15/1997/799/1002 Judgment of 25 May 1998, paras. 133-4.

[230] Detainee transfer announced. US Department of Defense news release, 26 April 2005.

[231] Implementation of administrative review procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba. Department of Defense, 14 September 2004.

[232] His appointment to the position was announced by the Pentagon on 23 June 2004. Gordon England was nominated by President Bush to be Secretary of the Navy in August 2003 and confirmed by the Senate the following month. On 31 March 2005, President Bush announced his intention to nominate Gordon England to replace Paul Wolfowitz as Under Secretary of Defense. Mr Wolfowitz was nominated by President Bush to be the President of the World Bank, a nomination since accepted. Gordon England was Deputy Secretary of Homeland Security from January 2003 to September 2003.

gather any information that you believe will prove that you are no longer a threat and why you should be released from detention."

This notification offers few ideas as to how a detainee held thousands of miles from home in virtually incommunicado detention, with limited and censored communication with his family, and no legal counsel, can so gather the requisite information. The following exchanged that took place in a CSRT hearing on 26 September 2004 for Bahraini detainee Adil Kamil Abdullah Al Wadi is illustrative:

Q: *Adil, do you have any other evidence to present to this Tribunal*?

A: *I don't have any other proof or evidence. All what I have is my biography. Everybody knows me in Bahrain. I am a very correct person. I have never had any problems with the government or anything*.

Q: *Anything else*?

A: I *have no proof. I have been here for two years. I don't have anything*.

The ARB notification states that the Board will consider written statements from family members or "other persons" who can explain "why you are no longer a threat". The detainee does not have to attend the ARB hearing, which will be conducted regardless of whether the detainee is there or not. The detainee may have a US military officer to help him if he wishes – an "Assisting Military Officer" (AMO). As with the "personal representative" in the CSRT, the detainee/AMO relationship is not confidential and the AMO can discuss any meetings with the detainee at the ARB hearing.

Hearings by the ARB began in December 2004. On 5 May 2005, Amnesty International was informed that "over 90" ARB hearings had been held to that date.[233] However, the military spokesperson said that no other information was currently being made public, including any results of the hearings, whilst any litigation relating to the ARBs was pending in the US courts. The spokesperson pointed out that the authorities were anticipating running some 520 ARBs given that that was the number of people who had been determined to be "enemy combatants" by the CSRT. In at least one case, the CSRT had recommended that an ARB be held as soon as possible to consider the detainee for release. [234] In another, the CSRT had said that an ARB should consider the detainee's apparent sincerity when he said that he was not an enemy of the USA and had not engaged in any "terrorist" activity.[235] Despite these recommendations, the CSRT had still found the men to be "enemy combatants". It has been reported that in at least 40 of the ARBs so far conducted, the detainee did not attend.

The ARB process was announced shortly before the US Supreme Court decided the *Rasul* case. As such, it could be seen as having been an additional attempt to persuade the Justices to rule in the government's favour and keep the detentions away from judicial review.

[233] Captain Beci Brenton, Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC). Telephone interview with Amnesty International, International Secretariat, London, UK. At this stage, it seems that ARBs were being run at a rate of about 10 per week, as Amnesty International was told by Captain Brenton on 22 April 2005 that the total completed to that date was "approximately 75".

[234] Mohammed Fenaitel Mohamed Al Dahaini was found to be an "enemy combatant" by a CSRT on 30 September 2004. The CSRT also recommended that "his case be reviewed by an Administrative Review Board to be considered for release as soon as possible".

[235] Boudella Al Haji, taken by the USA from Bosnia-Herzegovina to Guantánamo via Afghanistan, was found to be an "enemy combatant" on 18 October 2004. The CSRT said that he had "acquitted himself well at the hearing" and that he was "particularly respectful" and "appeared sincere".

With the Pentagon now reportedly seeking to transfer a number of detainees to other countries (see below), the ARB may be one way in which the authorities seek to do this.

In any event, neither the CSRT or ARB, whether in combination or standing alone, go any way to meeting the USA's obligation to provide judicial review of the lawfulness of the each and every detainee's detention.

10. Military commissions – yet more executive injustice

Judicial interference in Hamdan's trial would improperly intrude on the Executive's conduct of war

US Justice Department, appeal brief, December 2004[236]

In addition to labelling Guantánamo detainees as broadly-defined "enemy combatants" in a broadly-defined global "war" the end of which it can neither predict nor define, the US administration has repeatedly labelled the detainees as "killers" and "terrorists", in violation of the presumption of innocence. This label has been pinned to all detainees, including those subsequently released without any evidence made available that they had committed any wrongdoing. At the same time, the administration states that the reason that a detainee may find himself in Guantánamo Bay is not necessarily because he is guilty of any offence, but because he might commit an offence in the future or might have knowledge of or association with such unlawful activities.[237]

Military commissions, meanwhile, established under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001, provide for the prosecution of "enemy combatants who violate the laws of war". The administration sees the military commissions as "entirely creatures of the President's authority as Commander-in-Chief… and are part and parcel of the conduct of a military campaign".[238] In essence, the proposed military commissions are a case of the law being made and administered by the executive.

In the context of the "war on terror", the US administration defines both the enemy and the war very broadly. In its *Hamdi* decision of 28 June 2004, the US Supreme Court noted that "the Government has never provided any court with the full criteria that it uses in classifying individuals as ['enemy combatants']". The administration subsequently wrote the CSRT Order of 7 July 2004 which states that:

> "*the term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces or partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces*."

In her January 2005 ruling, Judge Joyce Hens Green concluded that this overbroad definition of "enemy combatant", with its use of the word "includes", showed that the government considers that it can subject to indefinite executive detention even individuals who had never committed a belligerent act or who never directly supported hostilities against the USA or its allies. This, she gleaned from the government, could include "a little old lady

[236] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004. Salim Ahmed Hamdan is facing trial by military commission.

[237] For example, at a military commission pre-trial hearing for Salim Ahmed Hamdan in Guantánamo Bay on 24 August 2004, the military prosecutor asked a military commission panel member, "*Do you understand that just because someone was transported to Guantánamo does not mean that they are guilty of an offence*?"

[238] Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.

in Switzerland" whose charitable donation to an orphanage in Afghanistan ends up supporting *al-Qa'ida*.[239]

As already noted, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism wrote in his recent report that: "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".[240] Yet the Pentagon's instructions for the military commissions extend the concept of armed conflict to include "a single hostile act or attempted act", or conspiracy to carry out such acts, a definition so broad that it could encompass many acts that would normally fall under the jurisdiction of the ordinary criminal justice system. The instructions specifically state:

> "*This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis so long as its magnitude or severity rises to the level of an "armed attack" or an "act of war", or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the requirement*".[241]

Despite these broad definitions, by March 2005, only four people had been charged under the Military Order. This small number could be for any of several reasons – a dearth of evidence against the detainees even given the fact that the military commission rules allow a conviction on lesser standards of evidence than pertain in the ordinary courts; a preference on the part of the US administration for detention without trial; or official sensitivity in the face of the widespread international criticism about the military commission process, even from close allies. "We deeply value the close relationship between our two countries", US Secretary of State Condoleezza Rice said of United Kingdom (UK)/US relations on 4 February 2005, adding that "we stand together on the war on terror".[242] The military commission process publicly divides the two governments, however. The UK government has asserted that "the proposed military commissions would not provide sufficient guarantees of a fair trial according to international standards".[243]

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[239] During a hearing in her court on 1 December 2004, Judge Green had asked the government a series of hypothetical questions to ascertain how broadly it interpreted its detention powers. The government responded that it could subject to indefinite executive detention: "'A little old lady in Switzerland who writes cheques to what she thinks is a charity that helps orphans in Afghanistan, but [what] really is a front to finance al-Qaeda activities'; a person who teaches English to the son of an *al-Qa'ida* member; and a journalist who knows the location of Osama Bin Laden, but refuses to disclose it to protect her source." In front of Judge Leon, the Principal Deputy Associate Attorney General suggested that in the example of the Swiss woman, he had been misquoted and that what he had said was that "in the fog that is often the case in these situations that it would be up to the military applying its process and in going through its classification function to determine who to believe. If in fact this woman, there was some reason to believe this woman did know she was financing a terrorist operation, that would certainly merit a detention both theoretically and practically". The government's position would still be that she could be held indefinitely without charge or trial or judicial review of the merits of her case.

[240] UN Doc. E/CN.4/2005/103, 7 February 2005, para. 17.

[241] Department of Defence. Military commission instruction no.2: Crimes and elements for trials by military commission. Section 5(c).

[242] Remarks With British Foreign Secretary Jack Straw After Meeting Secretary Condoleezza Rice Foreign and Commonwealth Office, London, United Kingdom, 4 February 2005.

[243] UK Foreign and Commonwealth Office, Human Rights Report 2004, Chapter 1: Challenges and progress.

Military commission proceedings against two UK nationals were suspended following the widespread public concern in the UK that followed their naming under the Military Order in July 2003.[244] From facing the possibility of being charged with war crimes and tried by military commission with the power to sentence them to death, the two detainees in question, Feroz Abbasi and Moazzam Begg, were transferred to the UK in January 2005 and released. Their cases further illustrate how the US has detained people, indefinitely and in cruel conditions, against whom whatever evidence it has is considered by other governments to be inadequate, unreliable or inadmissible even for a simple felony, let alone war crimes. It also suggests a political as well as an additionally arbitrary aspect to the detention – namely that any detainee's treatment depends upon the response and influence of his home government.

Human rights are the "equal and inalienable rights of all members of the human family".[245] All detainees must be treated in accordance with international law and standards rather than such treatment being dependent on the relationship their government has with the detaining power. The UK government, and all other governments, regardless of whether they have nationals in Guantánamo, should press the USA to abandon military commissions. Their opposition should be based on their own respect for international law and standards of justice and commitment to see universal application of such standards. For example, governments of countries that have ratified the Geneva Conventions (currently numbering over 190) are under obligation not only to themselves "respect" them, but also to "ensure respect" for them.[246] If they believe that the military commissions do not meet Geneva Convention requirements, then they must actively oppose them, regardless of whether they have nationals facing trial by such commissions. Similarly, all states which are members of the UN are obliged under the Charter of the United Nations "to promote universal respect for, and observance of, human rights and freedoms", and must actively oppose the military commissions, as well as indefinite executive detention without trial.

The UK parliamentary Foreign Affairs Committee has concluded that the UK government's "position on the detentions at Guantánamo Bay" – namely that it will only assist UK nationals detained there, not UK residents let alone detainees of other nationalities – "does not sit easily" with its human rights commitments, not least its claim to "speak loudly and clearly on the international stage" against abuses.[247] The Foreign Affairs Committee concluded that:

> "*now that the British nationals have been released from detention at Guantánamo Bay, the Government need no longer keep its diplomacy quiet in the interests of increasing leverage over individual cases. We recommend that the Government make strong representations to the US administration about the lack of due process and*

[244] According to the Pentagon, President Bush decided on 18 July 2003 "to discuss and review potential options for the disposition of British detainee cases and not to commence any military commission proceedings against British nationals pending the outcome of those meetings [with the UK authorities]". *DoD statement on British detainee meetings*. Department of Defense news release, 23 July 2003.

[245] Universal Declaration of Human Rights, preamble. According to the US Department of State, "the protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago. Since then, a central goal of US foreign policy has been the promotion of respect for human rights, as embodied in the Universal Declaration of Human Rights. The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises." http://www.state.gov/g/drl/hr/.

[246] Article 1 common to the four Geneva Conventions (1949). See similarly Article 1 of Protocol I Additional to the Geneva Conventions (1977).

[247] Human Rights Annual Report 2004. House of Commons Foreign Affairs Committee, March 2005, para 78, page 28.

oppressive conditions in Guantánamo Bay and other detention facilities controlled by the US in foreign countries".[248]

Unlike Feroz Abbasi and Moazzam Begg, the other four detainees named as eligible for trial by military commission in July 2003, were charged in 2004 by the US authorities and are facing trial by military commission. They are Yemeni nationals Salim Ahmed Hamdan and Ali Hamza Ahmed Sulayman al Bahlul; Ibrahim Ahmed Mahmoud al Qosi, a Sudanese national, and David Matthew Hicks, an Australian. Either their governments' persuasiveness over, or access to, the US authorities is less than that of the UK government, or they have no qualms about abandoning their nationals to the possibility of life imprisonment or execution following unfair trials.[249]

Amnesty International reiterates that the proposed trials by military commission – executive bodies set up to obtain the conviction of foreign nationals on lower standards of evidence than would hold in the US courts – would flagrantly violate international fair trial standards and result neither in justice being done nor being seen to be done.[250] It is particularly shocking that people could face execution after such trials.

- The commissions entirely lack independence from the executive.
- The right to counsel of choice and to an effective defence is severely restricted.
- The defendant can face secret evidence which he will be unable to rebut.
- The defendant can be excluded from certain parts of the proceedings.
- The commission rules can admit evidence extracted under torture or other coercion.
- There will be no right of appeal to an independent and impartial court.
- Only foreign nationals are eligible for such trials, violating the prohibition on the discriminatory application of fair trial rights.

A US citizen, whether soldier or civilian, charged with a similar crime would not face trial by military commission, and would have the right to appeal to higher courts of law.

As well as the four detainees already charged, another nine detainees have been determined by President Bush to be subject to the Military Order, but had not been charged by

[248] *Ibid*, para 79.

[249] For example, the Australian government "welcomed" the news that David Hicks had been "included in the first list of detainees from Guantanamo Bay to be eligible for United States Military Commission trials. *David Hicks Eligible for US Military Commission Trial*. Joint Media Release issued by the Australian Attorney-General and Minister of Foreign Affairs, 6 July 2003. More recently, it has been reported that there is growing unease within the Australian government, although not about the military commissions *per se*. One official is quoted as saying "We are very frustrated. The process is taking much longer than people might reasonably have expected. We don't want this guy [David Hicks] in limbo forever". *Australia uneasy about US detainee case*. New York Times, 10 April 2005.

[250] *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. *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002, http://web.amnesty.org/library/Index/ENGAMR510532002. *USA: The threat of a bad example - Undermining international standards as "war on terror" detentions continue*, AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003. *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, August 2004, http://web.amnesty.org/library/Index/ENGAMR511302004.

early April 2005.[251] One of these nine detainees has been transferred to his country of nationality and released.[252] His identity, or the identity of the other eight and whether they are held in Guantánamo, remain unknown. Another reason why the administration may be delaying charging them or any others is because it is waiting for resolution of the litigation over the legality of these commissions in the US federal courts. In November 2004, the post-*Rasul* petition for a writ of *habeas corpus* filed with District of Columbia District Judge James Robertson on behalf of Salim Ahmed Hamdan, challenging the lawfulness of the US administration's plans to try this Yemeni detainee, led to the suspension of the military commissions.

Judge Robertson reasoned that Salim Ahmed Hamdan, captured during the international armed conflict in Afghanistan, should have been presumed to be a prisoner of war until a "competent tribunal" determined otherwise, as required under Article 5 of the Third Geneva Convention (see above). The judge pointed out that as a presumed prisoner of war, Hamdan could not be tried by a military commission; under Article 102 of the Third Geneva Convention "a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power". US forces would normally be tried by court martial under the Uniform Code of Military Justice (UCMJ). "The Military Commission is not such a court", stressed Judge Robertson; "Its procedures are not such procedures".

Judge Robertson ruled that, even if a "competent tribunal" determined that Salim Ahmed Hamdan was not a prisoner of war, he could not be tried by military commission because their rules were unlawful. Specifically, the treatment of classified or otherwise "protected" information did not meet the necessary standards. Judge Robertson pointed out that in front of a military commission,

> "*The accused himself may be excluded from proceedings… and evidence may be adduced that he will never see (because his lawyer will be forbidden to disclose it to him). Thus, for example, testimony may be received from a confidential informant, and Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts. The [commission authorities] may receive it in evidence if it meets the 'reasonably probative' standard but forbid it to be shown to Hamdan.*"

Judge Robertson pointed out that "such a dramatic deviation" from the US constitutional right to a fair trial "could not be countenanced in any American court", and added that the right to trial "in one's presence" is "established as a matter of international humanitarian and human rights law".[253] However, he said that he needed to look no further

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[251] *Presidential military order applied to nine more combatants*. Department of Defense news release, 7 July 2004.

[252] USA's Second Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.

[253] Including under Article 14 of the International Covenant on Civil and Political Rights and Article 75 of Protocol Additional I to the Geneva Conventions. The latter has long been considered by the USA to reflect customary international law, but the current administration, as part of its pursuit of unfettered executive power and disregard for international law, has refused to accept the applicability of this norm. 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, available at http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, states that among the international instruments not binding on the USA is Article 75 of the First Additional Protocol to the Geneva Conventions, overturning the USA's long-held recognition of the "fundamental guarantees" of Article

than to the fact that, at least in this critical respect, the rules for the military commissions were contrary to, or inconsistent with, the requirements for US courts-martial which allow the defendant to be present in all proceedings except during the panel's deliberation and vote.

Judge Robertson emphasized that this issue was far from hypothetical, pointing out that Salim Ahmed Hamdan had already been excluded from parts of the commission panel selection process and that the government had already indicated that he would be excluded from two days of his trial during which the prosecution would present evidence against him.

Judge Robertson abstained on the question of whether such a trial would violate common Article 3 of the Geneva Conventions which prohibits trials by any tribunal other than "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples". However, as Judge Robertson noted elsewhere in his opinion, the International Court of Justice has said that the protections of common Article 3 "constitute a minimum yardstick" reflecting "elementary considerations of humanity". Amnesty International would also submit that the fair trial guarantees provided in the International Covenant on Civil and Political Rights (ICCPR), ratified by 154 countries including the USA, and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratifed by 139 countries including the USA, reflect judicial guarantees "recognized as indispensable by civilized peoples". The military commission process does not meet these standards.

The question of coerced evidence is significant, both for the rights of persons being tried and for its wider implications. 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. While the military commission rules give the defendant the right not to testify at trial, and for no adverse inference to be drawn from such a decision, the rules also state that this "shall not preclude admission of evidence of prior statements or conduct of the accused." This violates Article 14 of the ICCPR, which provides the defendant the right "not to be compelled to testify against himself or to confess guilt". Article 15 of the of the CAT states:

> "*Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked 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 also internationally illegal and statements extracted as a result of them should be inadmissible in court. 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 states that:

> "*Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as*

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75 as reflecting customary international law (see footnote 128 and 137 in *USA: Restoring the rule of law: The right of Guantánamo detainees to judicial review of the lawfulness of their detention,* AI Index: AMR 51/093/2004, June 2004, http://web.amnesty.org/library/Index/ENGAMR510932004. Article 75 prohibits, inter alia, physical and mental torture, outrages upon personal dignity, in particular humiliating and degrading treatment, as well as trial by any tribunal other than "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure. While not expressly referring to the right to appeal to a higher tribunal, it states that "no provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law". Consistent with the Human Rights Committee's General Comment 31, then, this would include the provisions of the ICCPR, which does include such right to appeal.

evidence against the person concerned or against any other person in any proceedings."

The Human Rights Committee has stated that "it is important for the discouragement of violations under article 7 [which prohibits torture and other cruel, inhuman or degrading treatment or punishment] that the law must prohibit the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[254] The Committee has also stated that "confessions obtained under duress should be systematically excluded from judicial proceedings".[255]

Again, this concern is more than mere speculation. Salim Ahmed Hamdan, for example, detained in Afghanistan and transferred to Guantánamo, has told his military lawyer that in US custody in Afghanistan he was "beaten, that he was held for about three days in a bound position, cold… dragged, kicked, punched." Lieutenant Commander Charles Swift, who describes the allegations as "credible", added that "two prisoners had been beaten to death and died during their interrogations. Everyone in the prison camp knew about it and decided, 'hey, not for me. I'll tell them anything they want to hear'". [256]

In Guantánamo, after being charged, Salim Ahmed Hamdan was transferred to Camp Echo, the part of the detention facility used to house detainees facing trial by military commission. The military has claimed that "detainees at Camp Echo are not in solitary confinement".[257] However, Salim Ahmed Hamdan was held for almost a year in solitary confinement in Camp Echo:

"*Since December 2003 Mr Hamdan has been confined alone in a cell, in a house that is guarded by a single non-Arabic-speaking guard. A translator is rarely available. He receives 60 minutes of exercise outdoors three times a week, only at night... Mr Hamdan has described his moods during his period of solitary confinement as deteriorating, and as encompassing frustration, rage (although he has not been violent), loneliness, despair, depression, anxiety, and emotional outbursts. He asserted that he has considered confessing falsely to ameliorate his situation*."[258]

Ten months after Salim Ahmed Hamdan was moved to Camp Echo, and less than one working day before his conditions of detention were to be challenged in Judge Robertson's court, the government informed the judge that the detainee had been moved out of isolation out of Camp Echo and into a pre-commission wing of Camp Delta, the main prison camp. This attempt to avoid judicial scrutiny did not stop Judge Robertson noting that the "the government is capable of repeating" its use of solitary confinement which had so far "evaded review".[259] He ordered that Salim Ahmed Hamdan be moved back to the general population

[254] General Comment 20, para 12.
[255] Concluding Observations of the Human Rights Comité, Georgia. UN Doc: CCPR/C/79/Add.75, para. 26 (5 May 1997). Guidelines 15 and 16 of the UN Guidelines on the Role of Prosecutors state: "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law…"; "When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods…, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice".
[256] *Is torture a good idea?* Dispatches. Channel 4 TV (UK), 28 February 2005.
[257] Fact sheet: Camp Echo and Camp Five. Updated: June 2004. JTF Public Affairs.
[258] *Swift v. Rumsfeld*, Declaration of Daryl Matthews, M.D., Ph.D., US District Court, Western District of Washington, 31 March 2004.
[259] *Hamdan v. Rumsfeld*, Memorandum Opinion, US District Court for the District of Columbia, 8 November 2004.

of detainees. It subsequently transpired that the authorities had responded by moving him into the general population wing of Camp Delta, but had removed other detainees from the cells that were within four cells of his. Under the camp rules, there can be no communication between detainees more than four cells apart from each other. In other words, the government had placed Salim Ahmed Hamdan into *de facto* isolation. His mental health reportedly began to deteriorate again. His military lawyer challenged that the government was in contempt of Judge Robertson's ruling. Although the government rejected this assertion, Salim Ahmed Hamdan was moved out of this isolation on 21 January 2005, more than two months after the judicial order.

Before this matter had come to oral argment before Judge Robertson in late October 2004, the government had refused to move Salim Ahmed Hamdan out of solitary confinment – despite "credible evidence of the risk of harm to Hamdan should his detention under these conditions continue" – on the grounds that it "would create an undue risk of destroying the environment that the military is trying to create at Guantanamo in order to facilitate intelligence gathering".[260] From this example alone, it seems clear that the US administration is willing to subject people to torture or other cruel, inhuman or degrading treatment in the name of national security, and avoid judicial scrutiny for as long as possible. It is unsurprising, then, that it has devised military commissions rules that will allow evidence extracted under torture or ill-treatment to be admitted.

Indeed, the military commission rules require the commissions to violate several provisions of international treaties to which the USA is a state party. If the commission decides that a piece of evidence would have "probative value to the reasonable person", it "shall" be admitted. In other words, if, for example, a detainee makes a statement after being subjected to the humiliation of urinating on himself while shackled for 18 hours and kept in extreme temperature conditions, and if the commission panel believes that that statement would have probative value to the reasonable person, it must be entered into evidence.

Other basic fair trial rights enshrined in Article 14 of the ICCPR include:

- **The right to equality before the courts** [Article 14.1] – only foreign nationals will face trial by military commission, in violation of the prohibition on the discriminatory application of fair trial rights. The Military Order gives no justification for restricting military commissions to foreign nationals. The Human Rights Committee has stated that "Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge…Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights".[261] Respect for human dignity and freedom from discrimination are at the heart of international human rights and humanitarian law. For example, Article 75 of Additional Protocol 1 to the Geneva Conventions, guarantees freedom from discrimination, including on the basis of race, religion or nationality.
- **The right to a fair and public hearing before a competent, independent and impartial tribunal established by law** [Article 14.1] – the military commissions will neither be, nor be seen to be, independent of the executive. The executive selects the defendant; the chief prosecutor; the chief defence counsel; the commission panel (ie,

[260] *Swift v. Rumsfeld*, Order granting motion to hold petition in abeyance. US District Court, Western District of Washington, 11 May 2004.
[261] Human Rights Committee, General Comment 15, The position of aliens under the Covenant (Twenty-seventh session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 18 (1994), para. 7.

the "judge" and "jury"); and the panel that reviews verdicts. The executive will make the final decision in any case, including whether a condemned defendant will live or die. The whole system is an entirely closed executive loop. Even if the defendant is acquitted, it is the executive which will determine whether he is released or sent back into potentially indefinite administrative detention as an "enemy combatant".

The fact that they are made up of members of the armed forces judging members of the presumed "enemy", under the auspices of the Commander-in-Chief of the Armed Forces, raises concerns about the commissions' impartiality.

Neither, in Amnesty International's opinion, are the commissions "competent" or properly "established by law". The right to a hearing before a competent tribunal requires that the tribunal has jurisdiction to hear the case. A competent tribunal is given this power by law: it has jurisdiction over the subject matter, territory and person, and the trial is conducted within an applicable time as prescribed by law. The US military commission is an executive body set up by presidential order. Although the Military Order cites legal references as its basis, there is no express congressional statute establishing the military commissions. Nor should there be. There is a growing international legal consensus against the use of military tribunals of any kind to try international crimes, and in any event they should not be used to try civilians (see below).

- **The right to adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing** [Article 14.3(b)] – the defendant and his lawyer may be denied access to "protected information", so broadly defined that it could exclude a wide range of documents or other evidence.[262] The commission's presiding officer, either of his or her own accord or at the request of the prosecution, can either withhold the "protected information" from documents made available to the defendant and defence counsel or substitute a summary of what has been withheld, without the defence being able to examine if the substitution was a fair representation of the withheld evidence. The principle of equality of arms, included in the concept of a fair trial under the provisions of Article 14(1) as well as other provisions of Article 14, is thus undermined. The prosecution – but not the defence – would know the details of the "protected information". This impedes the defence's ability to prepare the case and to defend against the accusation. In addition, the military commission procedures expressly authorize the military to engage in "monitoring of communications" between the defendant and his lawyers "for security or intelligence purposes", in violation of Article 14.3(b) which the Human Rights Committee has said requires "counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications".[263] Overarching this issue of the right to prepare a defence is the fact that the executive can make up new rules and procedures at any time. The possibility of new procedures and rules being introduced at any time make planning and preparing effectively for trial an almost impossible task for defence lawyers.
- **The right to a trial without undue delay** [Article 14.3(c)] – the first charges were not made until February 2004, more than two years after the first detainees arrived at

[262] Under Military Commission Order No. 1, Section 6(D)(5)(a), the Presiding Officer may issue Protective Orders, including to safeguard "Protected Information" – the latter includes information that is "classified or classifiable", "protected by law or rule"; "concerning intelligence and law enforcement sources, methods, or activities"; "concerning national security interests"; or information "the disclosure of which may endanger the physical safety of participants in Commission proceedings".
[263] General Comment 13, para. 9.

Guantánamo (they had been held elsewhere before that). For example Salim Ahmed Hamdan was taken into custody in Afghanistan in late 2001, but not charged until July 2004. As already noted, he was held in solitary, virtually incommunicado, confinement for a year. In a case from Uruguay, where a detainee was held incommunicado for four to six months (the precise dates are disputed), and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after five to eight months, the Human Rights Committee held that Article 9(3) of the ICCPR had been violated "because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time".[264]

The executive maintains complete control over the timing of the proceedings. The executive could, if it so wanted, keep an individual in untried detention for any length of time before, if ever, bringing him to trial. If convicted and sentenced to a prison term, the length of time served in administrative detention as an "enemy combatant" will not be taken into account.[265] If acquitted, the defendant could be sent back into administrative detention if the executive determined that he remained a threat or had "intelligence value".

- **The right to a lawyer of one's own choosing** [Article 14.3(d)] – even if the defendant is able to retain a US civilian lawyer with national security clearance (he will not be able to choose a non-US national, for example, a lawyer from his own country) he will still be represented by a military lawyer, even if that goes against the defendant's wishes.
- **The right to trial in one's presence** [Article 14.3(d)]. This applies even if the press and public are excluded for reasons of national security [Article 14.1]. The military commission authorities can decide to close proceedings to the defendant as well as the media, for any one of a broad range of reasons, including to protect "intelligence and law enforcement sources, methods, or activities" or "other national security interests". Only the defendant's main military lawyer will be able to attend, but he or she will not be able to disclose details to the defendant. Thus, for example, if the evidence is a statement made by the defendant under torture or ill-treatment to a CIA agent in Afghanistan, and the evidence is heard in closed session, the military lawyer will not be able to discuss it with the defendant to get his version of events. The denial of the right to trial in one's presence is what Judge Robertson found rendered the military commission procedures unlawful (see above).
- **The right to defend oneself in person** [Article 14.3(d)]. As written, the military commission procedures state that a defendant "must be represented at all relevant times" by a military lawyer. In the preliminary hearings in 2004, Ali Hamza Ahmed Sulayman al Bahlul revealed that he wished to defend himself. Whether he can or not appears to be unresolved, and is still pending with the Appointing Authority of the military commissions. However, even if he is allowed to represent himself, he presumably will not have access to closed sessions or classified evidence, and therefore be unable to defend himself properly.
- **The right to review of conviction and sentence by a higher tribunal according to law** [Article 14.5] – The Human Rights Committee has stated that this "guarantee is not confined to only the most serious offences".[266] It has said that the words

[264] *Pietraroia v. Uruguay*, (44/1979), UN Doc. A/36/40, 27 March 1981, paras. 13.2 and 17.
[265] Department of Defense, Military Commission Instruction No. 7. Sentencing. Section 3A, 30 April 2003.
[266] General Comment 13, para. 17.

"according to law" mean that, if domestic law provides for more than one instance of appeal as part of the process in criminal cases, the convicted person must be given effective access to each of these instances of appeal.[267] 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". This will not be the case for those tried by military commission, who will have their convictions and sentences reviewed by a three-member panel of military officers, or civilians commissioned as military officers. They are selected by the Secretary of Defense, and can be removed by him for "good cause", which "includes, but is not limited to, physical disability, military exigency, or other circumstances". This compares unfavourably, for example, to the judges of the Court of Appeals for the Armed Forces, who review decisions of US courts-martial. These judges are nominated by the President and confirmed by the Senate. They are civilians, and can only be removed by the President for neglect of duty, misconduct or disability. One of the three review panellists so far selected by Secretary Rumsfeld for the military commission process is someone who is described as his "good friend and sometime neighbour".[268]

As also already noted, the Human Rights Committee, in a recent authoritative comment on "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant" (General Comment 31) has stated that, "the Covenant 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."[269] Judge Robertson noted that the common Article 3 requirement of trial before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" has no fixed meaning. The Human Rights Committee's General Comment clarifies that the meaning should be interpreted in a way that is complementary to international human rights law. In its pursuit of unfettered executive power, the US administration would like to ignore this. The judiciary should put it right. While Amnesty International has welcomed Judge Robertson's decision, it does not believe that he went far enough on all issues.[270]

Not only must the judiciary rein in the executive, the legislature must not be tempted into compounding the executive's violations of international law. Judge Robertson noted that the government was seeking dismissal of Hamdan's claim on the grounds that the President has "untrammelled power", inherent in his role as Commander-in-Chief, to establish military commissions. Judge Robertson disagreed: "If the President does have inherent power in this area, it is quite limited." He also noted that "Congress has the power to amend those limits and could do so tomorrow". Amnesty International emphasizes that any legislative proposals must ensure compliance with international law and standards. In this regard, Amnesty International notes the following stated by the UN Special Rapporteur on the independence of judges and lawyers:

[267] *Henry v. Jamaica*, (230/1987), 1 November 1991, Report of the HRC, UN Doc. A/47/40 (1992), p. 218, para. 8.4.
[268] For further information, see *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, August 2004, http://web.amnesty.org/library/Index/ENGAMR511302004.
[269] Human Rights Committee, General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/74/CRP.4/Rev.6, 21 April 2004, para. 11.
[270] For example, Judge Robertson accepted the adequacy of the review panel appointed by the executive to review convictions and sentences.

"*Using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism poses a serious problem. This regrettably common practice runs counter to all international and regional standards and established case law. The Human Rights Committee has time and again asserted that military courts may only hear cases involving military personnel charged with crimes or offences relating to military matters. The Inter-American Court of Human Rights has established a wealth of case law in this regard and has also considered that bringing civilians before military courts is a violation of due process and the principle of the 'lawful judge'. The European Court of Human Rights has also asserted this principle: although military courts are not competent to try civilians in the European system, it has had to pronounce on the action of national security courts composed of civilian and military judges. The African Commission on Human and Peoples' Rights has held that the trial of civilians by military courts is contrary to articles 6 and 7 of the African Charter and the Basic Principles on the Independence of the Judiciary*".[271]

Principle 5 of the UN Basic Principles on the Independence of the Judiciary states:

"*Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals*".

Clearly, the US military commissions violate this principle, having been expressly devised under President Bush's 13 November 2001 Military Order to bypass "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts".[272]

It is also clear that, for whatever reason, the US administration is intending to charge and try only a small number of the foreign detainees it has in its custody outside the sovereign territory of the USA. It cannot be argued that transferring those few detainees to the jurisdiction of the ordinary court system would place any insurmountable burdens on that system. Moreover, such a transfer to an independent and transparent system would send the message that the USA is serious about justice and human rights. The military commissions, in contrast, will be widely seen as the secretive, improvised, outdated and internationally illegal response that they are. Such show trials will undermine the very values that the USA claims to be in a struggle to uphold.

It was hardly a vote of confidence in this system, when the executive's chief military commission official, the Appointing Authority, said just before the pre-trial proceedings for the first four detainee charged, "this is the first time we've done commissions in 60 years, and we'll have to wait and see what happens as to how it goes and how smoothly it goes".[273] Amnesty International was allowed to send an observer to these hearings in 2004. Her observations only further confirmed the organization's worst fears that this is a system unable to deliver a fair trial, and entirely a creature of the executive.[274] In the pre-trial commission hearings for David Hicks, for example, the commission rejected the defence counsel's attempt

[271] UN Doc. E/CN.4/2004/60, 31 December 2003, para. 60.
[272] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Section 1(f).
[273] John Altenburg, Jr., Appointing Authority for the Office of Military Commissions. Defense Department Briefing on Military Commission Hearings, 17 August 2004.
[274] *USA: Guantánamo: Military commissions – Amnesty International observer's notes from proceedings, No 3,* http://web.amnesty.org/library/Index/ENGAMR511572004, *No.2,* http://web.amnesty.org/library/Index/ENGAMR511552004, and No. 1 http://web.amnesty.org/library/Index/ENGAMR511532004.

to bring in six expert witnesses to explain various aspects of international law and military law. This violates Article 8(2)(f) of the American Convention on Human Rights.[275] The prosecution asserted that the only law that binds the panel is "commission law", a set of rules and procedures drafted within the executive, with the President's Military Order as the final authority.[276]

The commission panel's ignorance of the law and the disparity of resources allocated to prosecution and defence team in a process controlled by the executive, were particularly obvious. So too was the low quality of interpreting and translation standards – on several occasions the defence had to request that proceedings be halted because the quality of interpreting was so bad. Improvements have since been made in the allocation of resources to the defence teams and in the quality of intepreting. The Pentagon has said that fixing such problems is important because "everything having to do with the military commissions process is 'like a fishbowl', being watched carefully by the media and representatives of non-governmental organizations".[277]

The office of the Appointing Authority in the Pentagon continues to work on making changes to the commission procedures. On 28 March 2005, the spokesperson for the Appointing Authority told Amnesty International that it had passed no finalized further proposals on to the administration for its consideration. The spokesperson was not willing to specify what proposals were being worked on. It has been reported that they might include giving the commission's Presiding Officer a role more akin to a judge. The Presiding Officer is currently the only commission member with any legal training, and yet all panel members can rule on questions of law. In other words each member serves as a "judge" as well as a "juror". This contravenes Principle 10 of the UN Basic Principles of the Independence of the Judiciary which states that anyone selected for judicial office shall be individuals "with appropriate training or qualifications in law". Proposals being worked on also reportedly include barring any "confession or admission that was procured from the accused by torture".[278] As reported, the proposal would still leave statements extracted under torture (however defined by the administration) from individuals other than the defendant admissible by the commissions, as well as evidence coerced from the defendant or anyone else by methods (including manipulation of conditions of detention) that amount to cruel, inhuman or degrading treatment.

In any event, partial reforms of the military commission process cannot resolve its fatal flaws. Despite claiming to be a progressive force for human rights, the US administration continues to pursue its attempt to conduct military commissions, more than half a century after it last ran such trials. The Justice Department immediately and "vigorously disagree[d]" with Judge Robertson's ruling and said that the government would "continue to defend" the President's power to wage the "war on terror" and to have the

[275] This provides for "the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts". The USA has signed the American Convention on Human Rights, thereby binding itself under international law not to undermine its object and purpose.

[276] The Pentagon's procedures for the military commissions themselves contain the caveat: "In the event of any inconsistency between the President's Military Order and… any regulations or instructions issued… the provisions of the President's Military Order shall govern." This system, invented by the executive, provides no precedents or case law to which defence lawyers can refer when devising their legal strategy.

[277] *Parties still working behind the scenes on military commissions*. American Forces Information Service, 8 March 2005.

[278] *US is examining a plan to bolster the rights of detainees*. New York Times, 27 March 2005.

military commission process "restored through appeal".[279] In its subsequent appeal brief, it argued that Judge Robertson's ruling "constitutes an extraordinary intrusion into the Executive's power to conduct military operations to defend the United States."[280] Judge Robertson's ruling should be reversed, according to the executive, on the grounds that the Geneva Conventions do not give individuals judicially enforceable rights, but are instead "a matter of state-to-state diplomatic relations". As to President Bush's decision not to apply Geneva Convention protections to detainees captured in Afghanistan, the government argues such a determination "is binding on the courts", and in such matters of foreign policy the "Executive must act without fear of judicial reversal". Oral arguments in the US Court of Appeals for the District of Columbia Circuit were held on 7 April 2005. It was anticipated that a ruling would come in May 2005. Whatever the result, it is likely that it will be appealed to the US Supreme Court.

If the US administration is allowed to proceed with its military commissions, it will set a dangerous precedent, and not just by setting an example that might be used in other countries to justify flouting international law. It will shift the balance between the state and the defendant in the USA. "Equality of arms" – the principle whereby both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case – is an essential criterion for a fair hearing, enshrined in Article 14(1) of the ICCPR.[281] The military commissions expressly tip the balance in favour of the government in order to make convictions easier. Thus, in future, if the government fails to get its way in "terrorism" cases in the ordinary domestic courts, it might turn to military commissions.

At a time when a majority of countries have turned against the death penalty, the US administration is proposing to allow military commissions to hand down death sentences against which there would be no right of appeal to any court. Under the Pentagon's procedures, the military commission is permitted "wide latitude in sentencing…The sentence determination should be made while bearing in mind that there are several principal reasons for a sentence given to those who violate the law", including punishment, protection of society, deterrence, and rehabilitation. While noting these criteria, however, the procedures stress that all sentences should be "grounded in a recognition that military commissions are a function of the President's war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence's effect on adherence to the laws and customs of war in general".[282] Given President Bush's widely known support the death penalty on the theory that it is a deterrent, this guideline could be read as an invitation for the death penalty.[283]

Once the President – or if he chooses, the Secretary of Defense – has made the final decision in any military commission case, the sentence "shall be carried out promptly".[284]

[279] Statement of Mark Corollo, Director of Public Affairs, on the *Hamdan* ruling. Department of Justice news release, 8 November 2004.
[280] *Hamdan v. Rumsfeld*, Brief for appellants. In the US Court of Appeals for the District of Columbia Circuit, 8 December 2004.
[281] The Human Rights Committee stated that the concept of "fair trial" in Article 14(1) "must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings," *D. Wolf v. Panama*, Communication No. 289/1988, (Views adopted on 26 March 1992), in UN Doc. A/47/40, pp. 289-290, para. 6.6.
[282] Military Commission Instruction No. 7. Subject: Sentencing. Section 3A. US Department of Defense, 30 April 2003.
[283] Only a unanimous vote by a commission panel of seven members may pass a death sentence.
[284] Department of Defense Fact Sheet: Military commission procedures, p.3

President Bush's record on clemency in capital cases to date is also well-known and is a matter for grave concern.[285]

11. An executive in pursuit of execution – Zacarias Moussaoui

The President believes the death penalty deters crime and saves lives.
US Attorney General Alberto Gonzales, January 2005[286]

The spectre that has haunted legal proceedings against French national Zacarias Moussaoui, an alleged would-be 20th hijacker in the attacks of 11 September 2001, is that if the administration at any point was not allowed to get its way in the civilian justice system, it might decide to transfer the case by executive order to trial by military commission where the executive could play by its own rules.[287] While recent events have caused this threat to diminish, the US administration's pursuit of the death penalty in this case has come into focus instead.

On 22 April 2005, after almost four years in solitary confinement, Zacarias Moussaoui pleaded guilty in federal court in Virginia to six counts of conspiracy in the 11 September attacks.[288] Four of the counts carry the death penalty, and following the guilty plea, Attorney General Alberto Gonzales confirmed that the US Justice Department would continue to seek a death sentence against Moussaoui at his forthcoming sentencing. The Attorney General insisted that the Justice Department has "acted fairly and patiently to bring Moussaoui to justice".[289] Amnesty International believes that the case has illustrated the willingness of the US administration to violate international standards in driving an individual towards the death chamber and a failure on the part of the judiciary to stop it.

Zacarias Moussaoui was arrested in Minneapolis in August 2001 on an immigration violation after he sought training on how to fly a Boeing 747 aircraft and raised suspicion within the US intelligence community.[290] Since the 11 September 2001 attacks, the US government has stated its intention to obtain a death sentence against him, while denying him access, on national security grounds, to potentially exculpatory witness testimony from alleged senior *al-Qa'ida* members in US custody elsewhere. A District Court ruled that the government could not seek the death penalty in such a case unless the defendant was allowed access to the witnesses. However, the government appealed and the US Court of Appeals for the Fourth Circuit overturned the decision.

The Fourth Circuit ruled that the government could pursue the death sentence while not giving Moussaoui access to the "enemy combatant" witnesses, even though it agreed with the District Court that those witnesses "could provide material, favourable testimony on

[285] George W. Bush's five-year term as Governor of Texas saw 152 executions in that state, including numerous cases which violated international law or safeguards, including child offenders, the mentally impaired, the inadequately represented and those whose guilt was in doubt. President Bush's first term in the White House saw the first federal execution in the USA since 1963.
[286] Responses of Alberto R. Gonzales, nominee to be Attorney General of the United States, to written questions of Senator Richard J. Durbin.
[287] If placed under the Military Order of 13 November 2001, a foreign national could also face indefinite detention without trial or indefinite administrative detention after an acquittal.
[288] Conspiracy to: commit acts of terrorism transcending national boundaries; commit aircraft piracy; destroy aircraft; use weapons of mass destruction; murder United States employees; and destroy property. Prepared remarks of Attorney General Alberto R. Gonzales on Zacarias Moussaoui, 22 April 2005. US Department of Justice, Washington, DC. Despite his guilty plea, he has reportedly maintained that he was not part of the 9/11 conspiracy, as the prosecution alleges, but a different one.
[289] *Ibid*.
[290] See pages 273-276, of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission Report), August 2004.

Moussaoui's behalf". It ruled, however that there was a "remedy adequate to protect Moussaoui's constitutional rights", namely "substitutions" – written extracts of summaries of the interrogation statements of the witnesses to present to the jury. One of the three judges dissented from the decision to allow the government to pursue a death sentence under such circumstances:

> "*This is a slim reed indeed upon which to base a jury verdict, especially where a man's life hangs in the balance…To say this is a 'remedy' must be of cold comfort to Moussaoui…The entire process is cloaked in secrecy, making if difficult, if not impossible, for the courts to ensure the provision of Moussaoui's rights… Because the majority decrees that this so-called 'remedy' will fulfil this court's obligation to protect Moussaoui's constitutional rights, today justice has taken a long stride backward… Here, the reliability of a death sentence would be significantly impaired by the limitations on the evidence available for Moussaoui's use in proving mitigating factors (if he is found guilty)… Because Moussaoui will not have access to the witnesses who could answer the question of his involvement, he should not face the ultimate penalty of death*."[291]

Article 14.3(e) of the ICCPR states 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". Safeguard 5 of the UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty require that capital defendants must only be tried by a process "which gives 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". The USA is already becoming more and more isolated in a world that is inexorably moving away from the death penalty, with 120 countries currently abolitionist in law or practice.[292] With its pursuit of the execution of Zacarias Moussaoui, it is moving still further into what is increasingly seen as an unacceptable government policy.

On 21 March 2005, the US Supreme Court declined to involve itself in the case. A month later, Zacarias Moussaoui pleaded guilty despite the government not having agreed to waive pursuit of the death penalty (in the US justice system, many defendants have pleaded guilty as part of an agreement with the prosecution to waive the death penalty). There have been questions raised about Moussaoui's mental competency on numerous occasions – making a guilty plea under such circumstances raises further such questions. He is reported to have both requested the death sentence and to have vowed to fight it. At the time of writing, it was being proposed that jury selection for his sentencing trial begin on 9 January 2006, and the hearing itself to begin on 6 February 2006.[293]

As Alberto Gonzales repeated numerous times in his written responses to Senators before they confirmed his nomination to Attorney General in February 2005, President Bush

[291] *USA v. Moussaoui*, US Court of Appeals for the Fourth Circuit, 13 September 2004, Judge Gregory, concurring in part and dissenting in part.

[292] In addition, under the Rome Statute of the International Criminal Court, the death penalty cannot be handed out for the worst crimes in the world, including genocide, war crimes, crimes against humanity and torture. In any event, the UN Safeguards guaranteeing the protection of the rights of those facing the death penalty prohibit retentionist countries from passing death sentences in any tribunal other than a "competent court after legal process which gives 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".

[293] *USA v Moussaoui*. Joint position regarding trial schedule. In the US District Court for the Eastern District of Virginia, Alexandria Division, 5 May 2005.

supports capital punishment on the grounds that it is a deterrent.[294] To Amnesty International's knowledge, neither President Bush nor Attorney General Gonzales has ever cited the evidence for this assertion. Indeed, the death penalty has not been shown to have any special deterrent effect, and there is some evidence that the opposite can be true under certain circumstances. In its 1989 report on the use of capital punishment worldwide, Amnesty International, citing examples, noted that:

> "*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…*"[295]

At a seminar organized by Amnesty International in 1985, France's then Minister of Justice, Robert Badinter, said:

> "*…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 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. Regardless of his proclaimed ideology, his rallying cry is the fascist 'viva la muerte' [long live death]*".[296]

The USA's well-known use of the death penalty did not deter the hijackers who committed the 11 September 2001 atrocities. The pursuit of the death penalty against the only person so far charged by the US government with being a part of that conspiracy threatens to make a martyr of the defendant, regardless of the reliability of his guilty plea.

In its September 2004 ruling allowing the administration to seek the death penalty, the Fourth Circuit majority noted that the case presented it with "questions of grave significance – questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes, and to the protection of our citizens against additional terrorist attacks. These questions do not admit of easy answers." What Zacarias Moussaoui's execution, like any execution, is guaranteed not to provide are any answers to the questions that arise from violent crimes, including the crime against humanity that was committed on 11 September 2001. An execution guarantees nothing but another dead body. It cannot guarantee relief from the suffering of the bereaved or a reduction in killing. Instead, it carries with it the potential to create more grieving relatives, diminish respect for fundamental human rights, and generate more violence.

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[294] Alberto Gonzales was legal counsel to George W. Bush for part of the latter's term as governor of Texas. As was raised during his Senate nomination hearings, Mr Gonzales' advice on clemency in Texas capital cases was disturbingly cursory and selective.

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

[296] 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. More recently, see *Execute terrorists at our own risk*. New York Times, 28 February 2001. The author of this article, Jessica Stern, served on the National Security Council from 1994 to 1995.

Another aspect of the Zacarias Moussaoui case is that the witnesses to whom he has sought access are believed to include individuals such as Khalid Sheikh Mohammed and Ramzi bin al-Shibh, who have been held in long-term secret custody, possibly amounting to "disappearance", a crime under international law.[297] They remain held without charge or trial despite the US authorities alleging their central role in criminal activity, including the attacks of 11 September 2001.[298] In addition, there are concerns that they may have been subjected to torture and other cruel, inhuman or degrading treatment during interrogations. The administration has said that it does not want to grant Zacarias Moussaoui access to such detainees on the grounds that it would disrupt their interrogations and threaten national security. Is the government concerned that bringing such detainees into the light of day might also reveal to the public how they have been treated in custody?

12. Torture and ill-treatment – the executive has a case to answer

Have any of these guys ever tried to talk to someone who's been deprived of his clothes? He's going to be ashamed, and humiliated, and cold. He'll tell you anything you want to hear to get his clothes back. There's no value in it… Brutalization doesn't work. We know that. Besides, you lose your soul.

Former FBI agent Dan Coleman[299]

On 29 March 2005, the International Committee of the Red Cross (ICRC), the only international organization with access to detainees held by the USA in Guantánamo and Afghanistan revealed that, more than three years into the "war on terror", it remained concerned that its "observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantánamo have not yet been adequately addressed".[300] It has characterized these issues as "significant problems".[301] For its part, Amnesty International is concerned that in the "war on terror" the USA has systematically violated the rights of those it has taken into custody, including the right of all detainees to be treated with respect for their human dignity and to be free from cruel, inhuman or degrading treatment. In some cases, the treatment alleged has amounted to torture.

Regardless of whether particular practices are described as torture or as cruel, inhuman or degrading treatment (ill-treatment), all forms of torture and ill-treatment are

[297] See for instance Rome Statue of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), entered into force 1 July 2001, Art. 7(1)(i) – "enforced disappearance of persons" is a crime against humanity in certain circumstances. Khalid Sheikh Mohammed and Ramzi bin al-Shibh were two of the 10 detainees that the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission) was authorized to name as "currently being in US custody". However, this minimal information does not clarify their fate and whereabouts, and they remain outside the protection of the law. Besides, the 9/11 Commission's final report is now almost a year old. The eight other named detainees are Abu Zubaydah, Riduan Isamuddin (also known as Hambali), Abd al Rahim al Nashiri, Tawfiq bin Attash (also known as Khallad); Mohamed al-Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul. See *USA: Human dignity denied*, *supra*, note 17.

[298] For example, the White House describes Khalid Sheikh Mohammed as the "mastermind of the September 11th attacks" and Ramzi bin al-Shibh as "a coordinator of the September 11th attacks". *Waging and winning the war on terror*. http://www.whitehouse.gov/infocus/achievement/chap1-nrn.html.

[299] The "guys" to whom Dan Coleman was referring were the administration lawyers responsible for redefining the scope of counter-terrorism interrogations. *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.

[300] ICRC operational update, 29 March 2005.

[301] *The ICRC's work at Guantanamo Bay*, ICRC news release 30 November 2004.

strictly and equally prohibited in all circumstances, and should be prosecuted.[302] In the "war on terror", the US administration has sought to narrow the definition of torture and to suggest that practices that "only" amount to cruel, inhuman or degrading can be tolerated. There has followed a marked refusal by members of the US administration to admit that "torture" by US forces has occurred in the "war on terror", preferring the term "abuse" (and then insisting that "abuses" have been aberrational rather than systematic). This has been echoed at many different levels including, for example, the Combatant Status Review Tribunal process at Guantánamo Bay. At the CSRT hearing for Yemeni detainee Khaled Qasim in September 2004, for example, the following exchange took place between the Tribunal President (TP) and the "Personal Representative" (PR) of the detainee (Khaled Qasim did not attend the hearing himself):

> PR: [Khaled Qasim] *said he was not tortured. All he said is that he heard people crying at night, but he was not tortured.*
>
> TP: *While here in Guantanamo Bay, Cuba*?
>
> PR: *He said he was not tortured here in Guantanamo Bay*.
>
> TP: *Did he say he was not tortured in Afghanistan or did he say he was not tortured here in Guantanamo Bay*?
>
> PR: *He said he was not tortured here in Guantanamo Bay*.
>
> TP: *Did he say he was tortured in Afghanistan*?
>
> PR: *He said he was treated bad and mistreated*.
>
> TP: *But he did not say he was tortured*?
>
> PR: *He did not say he was tortured*.[303]

In an interview on 6 May 2005, US Attorney General echoed this approach when he reportedly said that much of the alleged abuse by US forces in "war on terror" falls short of the legal definition of torture. He was quoted as saying: "Torture, as a matter of prosecution, is defined by Congress as the intentional infliction of severe physical and mental pain or suffering. Congress intended a very high bar here in order to be prosecuted for engaging in torture. There may be conduct that you may find offensive that falls far short of torture".[304]

The conditions conducive to torture and ill-treatment in US custody in the "war on terror" remain, and include the use of secret and incommunicado detention. On 17 February 2005, for example, US and Iraqi military personnel detained Huda Hafez Ahmad al-Azawi. She was taken away handcuffed and blindfolded, and the detaining soldiers also allegedly beat, handcuffed and blindfolded her daughters, and took jewellery and cash from the house. By 19 April 2005, she had still not been seen by a lawyer or her relatives, but was believed to be in US custody near Baghdad Airport.[305] Huda Hafez Ahmed al-Azawi was previously

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[302] See pages 41-46, *USA: Human dignity denied*, *supra*, note 17.
[303] *Qasim v. Bush*. Unclassified CSRT factual returns, In the US District Court for the District of Columbia. The Tribunal President was a Colonel in the US Air Force. The Personal Representative was a Lieutenant Colonel in the US Army. It is not known if Khaled Qasim's allegations of ill-treatment in Afghanistan have been investigated. There is no indication in the CSRT record that it has or that the CSRT has referred the matter on to the relevant Afghan or US authorities for investigation.
[304] *Gonzales: Prisoner abuse doesn't qualify as torture*. Houston Chronicle, 7 May 2005.
[305] See update to Amnesty International Urgent Action 42/05, 19 April 2005, http://web.amnesty.org/library/Index/ENGMDE140062005.

detained by US forces for several months in 2003 and 2004, during which time she was allegedly subjected to torture or ill-treatment.[306]

Other allegations of torture and ill-treatment committed by US forces throughout the "war on terror" continue to emerge.[307] Bisher al-Rawi, an Iraqi national and UK resident seized in Gambia in late 2002 and transferred to Guantánamo via Afghanistan, told his CSRT hearing in September 2004 that "we were taken from Gambia to Kabul and then to Bagram Airbase. In Bagram, I provided information only after I was subjected to sleep deprivation, and various threats were made against me."[308] Moazzam Begg, a UK national, has revealed that he saw Bisher al-Rawi in Bagram in late 2002 and that "his face had obviously the marks and bruises of what were the remnants of a beating".[309] Moazzam Begg has alleged that he himself was tortured and ill-treated in US custody in Afghanistan and "witnessed two people get beaten so badly that I believe it caused their deaths".[310] Richard Belmar, another UK national, has said that he sustained a fractured skull as a result of being struck on the head while hooded on his way to Bagram airbase. He has further claimed that this was not the worst thing that happened to him in US custody: "The worst thing that happened to me, I can't even explain because it's too horrific, I can't, you know, I can't handle it, to speak on it".[311] At his CSRT hearing in Guantánamo in 2004, he also said that at Bagram he had seen "a lot of things they [US personnel] did to people that they thought weren't telling the truth or were withholding information. That scared me." Richard Belmar and Moazzam Begg were transferred to the UK in January 2005, almost a year after British intelligence officers had visited the UK detainees and reported that their mental health was deteriorating. They also reported that Moazzam Begg "had complained about being held in solitary confinement for over a year, not seeing daylight for four months, being denied reading material and restriction of mail."[312]

Martin Mubanga, another of the four British detainees transferred to UK custody and released a little over 24 hours later has alleged that in June 2004 he was subjected to the following treatment while shackled and lying on the floor of an interrogation room in Guantánamo:

> "*I needed the toilet and I asked the interrogator to let me go. But he just said 'you'll go when I say so'. I told him he had five minutes to get me to the toilet or I was going to go on the floor. He left the room. Finally, I squirmed across the floor and did it in the corner, trying to minimize the mess. I suppose he was watching through a one-way mirror or the CCTV camera. He comes back with a mop and dips it in the pool of urine. Then he starts covering me with my own waste, like he's using a big paint-brush, working methodically, beginning with my feet and ankles, and working his way*

[306] Page 129, *USA: Human dignity denied*, *supra*, note 17

[307] Interview with Channel 4 News (UK), 24 February 2005. Although not the subject of this report, it is important to add that detainees held inside the USA in the "war on terror" are also alleged to have been subjected to torture or ill-treatment. For example, in a recent decision on the case of Benamar Benatta, an Algerian national held in untried detention in US custody since 12 September 2001, the UN Working Group on Arbitrary Detention found that his incarceration amounted to arbitrary detention. The Working Group also noted that the conditions in the early part of his detention – when he was kept in incommunicado detention in a cell illuminated for 24 hours a day and woken by a guard every 30 minutes – "could be described as torture". Opinion No.18/2004, addressed to the US government on 7 May 2004. UN Doc. E/CN.4/2005/6/Add.1, 19 November 2004.

[308] *El-Banna et al. v. Bush et al*. CSRT unclassified factual returns for Bisher al-Rawi.

[309] Interview with Zubeida Malik, *Today*, BBC Radio 4, 21 April 2005.

[310] Interview with Channel 4 News (UK), 24 February 2005.

[311] *Is torture a good idea?* Dispatches, Channel 4 TV, 28 February 2005.

[312] *The handling of detainees by UK intelligence personnel in Afghanistan*, Guantanamo Bay and Iraq. The UK Intelligence and Security Committee. March 2005, para. 67.

up my legs. All the while, he's racially abusing me, cussing me: 'Oh, the poor little negro, the poor little nigger.' He seemed to think it was funny".[313]

Martin Mubanga, arrested in Zambia, transferred to Guantánamo in May 2002, and affirmed as an "enemy combatant" by the CSRT in October 2004, also described the use of temperature manipulation during interrogations, as well as isolation, withdrawal of "comfort items", beatings and other physical abuse at the detention facility.

Since the *Rasul* decision in June 2004, some Guantánamo detainees have been visited by lawyers representing them for their *habeas corpus* appeals in US courts. Some of what the detainees have said has been declassified in recent weeks, providing the first chance for their accounts of what they have been through to be made public. Unclassified details of the alleged treatment of Bahraini detainee Jum'ah Mohammad Abdul Latif Al Dossari and others are given below, as provided to Amnesty International by the lawyers for the detainees:

"*Mr Al Dossari was arrested in Pakistan and held by Pakistani authorities for several weeks. Mr Al Dossari was transferred from Pakistan to Kandahar, Afghanistan via airplane by US authorities. On the plane, he was shackled by chains on his thighs, waist and shoulders, with his hands tied behind him. The chains were so tight around his shoulders that he was forced to lean forward at an extreme angle during the entire flight. This caused great pain to Mr Al Dossari's stomach, where he had had an operation some years before. When Mr Al Dossari complained about the pain, he was hit and kicked in the stomach, causing him to vomit blood.*

Upon arriving in Kandahar, Mr Al Dossari and other detainees were put on a row on the ground in a tent. US Marines urinated on the detainees and put cigarettes out on them (Mr Al Dossari has scars that are consistent with those that would be caused by cigarette burns). A US soldier pushed Mr Al Dossari's head into the ground violently and other soldiers walked on him…"

Mohammad Al Dossari has alleged, among other things, that he was forced to walk barefoot over barbed wire and that his head was pushed to the ground on broken glass. He has alleged that US soldiers subjected him to electric shocks, death threats, assault and humiliation. He has alleged that in Guantánamo Bay, he was subjected to a violent cell extraction, possibly on 27 or 28 April 2002, in which his head was repeatedly struck against the floor by a military guard until he lost consciousness. The government of Bahrain is reported to have requested an investigation into this incident. Mohammaded Al Dossari has alleged that during interrogations he has been wrapped in Israeli and US flags, shackled to the floor ("short-shackled") for some 16 hours, and been threatened that his family in Bahrain would be killed.

Fellow Bahraini detainee Abdullah Al Noaimi has alleged that he was physically assaulted by US soldiers in Kandahar air base in Afghanistan, stripped and sexually humiliated. He says that he witnessed detainees being bitten by dogs in Kandahar. In Guantánamo, he alleged that he has been threatened with rape, injected with an unknown substance during an interrogation, subjected to sexual taunting by female personnel, and hours of being shackled in a room made freezing by air conditioning.

A number of Yemeni detainees have alleged that they and others were subjected to torture and ill-treatment in Afghanistan before their transfer to Guantánamo, where they describe the regime as abusive, punitive, slow or failing to treat medical and dental problems, and prone to violent cell extractions and religious intolerance. The latter has allegedly included repeated disrespect for the Koran, including taking detainees' copies, insulting them, wrapping them in the Israeli flag, throwing them on the ground, and stamping on them.

[313] *How I entered the hellish world of Guantánamo Bay*. The Observer (UK), 6 February 2005.

- Mohammed Mohammed Hassen has alleged that an interrogator made him run 20 laps when he refused to talk, wounding his feet as he was still shackled. After further questioning, he alleges that he was made to run again, and subsequently put in isolation for 40 days.
- Several allege that interrogators have used the air conditioning to make detainees freezing cold. Yasin Qasem Muhammad Ismail says that he has been kept under the air conditioner running full blast for 18 hours. He has alleged that when held in Bagram air base in Afghanistan, US soldiers beat him, kicked him, and stood on his back and knees.
- Abd Al Malik Abd Al Wahab alleges that he has been forced to endure many hours of cold under air conditioners, and subjected to sleep deprivation. He states that he was threatened that unless he confessed he would be taken "underground" and would never see daylight. He has said that he had his thumb broken during beatings by US soldiers in the US air base in Kandahar in Afghanistan.

Turkish national and German resident Murat Kurnaz has alleged that when he was held in the US air base in Kandahar, interrogators repeatedly forced his head into a bucket of cold water for long periods of time, as well as subjecting him to an electric shock on his feet. He has alleged that he was held for days shackled and handcuffed with his arms secured above his head. On one occasion, he claims that a military officer loaded his gun and pointed it at Murat Kurnaz's head, screaming at him to admit to being an *al-Qa'ida* associate. Murat Kurnaz also claims to have witnessed other detainee beatings, in one case that he believes may have resulted in the detainee's death. In Guantánamo, he alleges, he has been subjected to sexual humiliation and taunting by young women who entered the interrogation room where he was shackled to the floor. When of them began to caress him from behind, he jerked his head back, hitting her head. He alleges that a response team of guards in riot gear entered the room beat him and sprayed him with pepper spray, and he was taken to isolation where he was left on the floor with his hands tied behind his back for 20 hours.

The handwritten notes of a US lawyer who met with Kuwaiti detainees in Guantánamo in January 2005 make for similarly disturbing reading:

> *All indicated that they had been horribly treated, particularly in Afghanistan and Pakistan where they were first held for many months after being taken into custody (in Kandahar, Kohat, Bagram). Although the words they used were different, the stories they told were remarkably similar – terrible beatings, hung from wrists and beaten, removal of clothes, hooding, exposure naked to extreme cold, naked in front of female guards, sexual taunting by both male and female guards/interrogators, some sexual abuse (rectal intrusion), terrible uncomfortable positions for hours. All confirmed that all this treatment was by Americans…*
>
> *Several said pictures were taken of some of this abuse...Some of the pictures still exist and are still used by the interrogators. Many knew that the Americans had killed several people during the interrogations at these places.*
>
> *Several also mentioned the use of electric shocks – like ping pong paddles put under arms – some had this done; many saw it done.*
>
> *Several said they just could not believe Americans could act this way.*
>
> *Tied so tightly that hands and feet swelled to much above normal size. Forced to move and assume uncomfortable positions while tied this way. Beaten with chains when would go to the bathroom. Forced to stay in positions and to urinate and defecate on self.*

Were not as specific about the abuses at Guantanamo. Several indicated that the physical abuses continued at GTMO, many confirmed the use of stress positions. But most said the abuse was more subtle (that also included beatings, though, but usually types of tactics 'that would not leave marks'). All seemed more concerned by religious persecution than physical abuse. From the outset, mocked for their religion...

As already noted in Section 4, Libyan national and UK resident Omar Deghayes has alleged that he was subjected to torture and ill-treatment in Pakistan following his arrest there. Following his transfer to US custody in Afghanistan, he has alleged that the following took place in Bagram air base where he was held for two months. According to his account recorded by a lawyer who visited him in Guantánamo in early 2005:

- "Omar went for 7-8 days without food in Bagram."
- "Omar was held in a dark room for days on end, without any access to light"
- "Omar and others were locked in boxes with no air and effectively suffocated for long periods".
- "Omar was chained to the wall, with his hands high up in the *Strappado* position. This caused extreme pain".
- "Omar was forced to live naked for long periods while he was in Bagram, as part of the humiliation process".

In Guantánamo, Omar Deghayes alleges that he was subjected to brutal extractions from his cell by the Extreme Reaction Force (ERF).[314] Among the alleged incidents related to the lawyer who visited him in Guantánamo were:

> "In March 2004, Omar was blinded in his right eye by the ERF team in Guantanamo Bay. He was being held in Oscar Isolation camp in Camp Delta. The MPs [military police] there were going to be sent to Iraq shortly afterwards and they were being trained up. They came around the cells with dogs for a search. They did a full body search on Omar. 'This is not a search, it is a sexual assault', Omar says, with disgust. 'They took us into the showers and put thei hand up my rectum'.
>
> People in the block were angry, and simply refused to have it done to them. Prisoners refused to come out of their cells. Lines of MPs came into the block, singing and laughing. The prisoners were maced, but they fought back this time. The officer standing behind the MPs kept urging them to spray more mace at Omar's eye. 'More, more!' he shouted.
>
> Then one of the MPs pushed his finger into Omar's eye. Again the officer shouted, 'More! More!' Omar was trying desperately not to scream, the pain – a mixture of mace and physical violence – was agony".

Omar Deghayes reported that this incident left him unable to see for two weeks, but that he gradually regained his sight in one eye. The other eye, which had been injured in his childhood, has remained blind and a source of continuing pain.

Omar Deghayes has alleged that during another "ERF-ing", he was punished for objecting to the authorities taking his Koran. He alleged that he was shackled and had his head put in the toilet which was then repeatedly flushed. In yet another incident he has alleged that he was shackled and subjected to high pressure water being hosed up his nose until he thought he would suffocate. He said that this was done with medical personnel present.

[314] Some detainees have called this the Immediate Reaction Force or the Internal Reaction Force (IRF).

By the time the lawyer was able to visit in January 2005, Omar Deghayes had been held in solitary confinement in Camp Five of Guantánamo's Camp Delta for eight months. This a concrete detention block, believed to be designed on "supermaximum security" prisons on the US mainland, regimes which the UN Committee against Torture has described as "excessively harsh".[315] In Camp Five, according to Omar Deghayes, the detainees are meant to remain in total silence at all times. They receive one shower per week. They are allowed no pens, paper, or communications with their families. There are reported to be some 70 to 80 detainees being held there. An Afghan national in Camp Five is reported to have been reduced to weeping much of the time.[316]

Allegations of torture and ill-treatment by US forces in the "war on terror" have not only come from detainees. In May 2005, for example, *Newsweek* cited army investigation sources had discoved that "interrogators, in an attempt to rattle suspects, flushed a *Qu'ran* down a toilet and led a detainee around with a collar and dog leash".[317] In January 2005, *Associated Press* (AP) reported that it had obtained a draft manuscript written by a translator employed at Guantánamo from December 2002 to June 2003.[318] In it, the translator alleged that female interrogators sexually humiliated male Muslim detainees in an effort to break them. AP wrote that it was not possible to independently verify his claims. However, they echo previous allegations made to Amnesty International and others by detainee and non-detainee sources.

In an interview in July 2004, for example, released Swedish detainee Mehdi Ghezali alleged to Amnesty International that women were used to "degrade us and our faith". He alleged:

> "*They used girls to tempt us to have sexual intercourse with them in order to degrade us and our faith. I don't know if these girls were prostitutes. The girl who was let into my interrogation room wore a military uniform. Other prisoners were subjected to very scantily clad girls. It only happened once that a woman came into my cell trying to seduce me. Other fellow prisoners told me about a girl who tried to have sexual intercourse with a prisoner, but he just spat on her. The guards beat the prisoner to the ground and knocked out his teeth. I also heard a story about a scantily clad girl who came into the interrogation room and smeared her menstrual blood all over him*."[319]

A non-detainee source told Amnesty International in September 2004 that during Ramadan in 2002, female military personnel had attempted to sexually arouse detainees. In one case, it is alleged, the detainee broke down in distress when he was returned to his cell and prayed for forgiveness for having had sexual feelings. In another case, it is alleged, a Yemeni detainee was subjected to sexual insults during interrogation, including repeated and

[315] Conclusions and recommendations of the Committee against Torture: United States of America. 15 May 2000. CAT/C/24/6.
[316] Unclassified information on Omar Deghayes. Dated 30 March 2005.
[317] *Gitmo: SouthCom showdown*. Newsweek, 9 May 2005.
[318] *Ex-G.I. writes about use of sex in Guantánamo interrogations*. AP, 28 January 2005 (the book was published in May 2005. At the time of writing, Amnesty International had not reviewed a copy).
[319] Amnesty International does not know if this is the same incident to which the authorities have admitted in which a female interrogator in early 2003 wiped red dye on a detainee's shirt and told him that it was blood. She received a verbal reprimand for this. There are alleged to have been various incidents in which female interrogators, using dye, pretended to smear menstrual blood on detainees. Detainees have alleged that they were smeared with blood. *Detainees accuse female interrogators*. Washington Post, 10 February 2005. A female interrogator who was reprimanded is reported to be now training soldiers in interrogations at the Army Intelligence School at For Huachuca in Arizona. *Interrogator disciplined over techniques now teaching soldiers*, New York Daily News, 16 March 2005.

graphic questions about whether his first sexual experience had been with a male relative.[320] Further allegations of religious abuses against Guantánamo detainees by their captors have emerged since then.[321] The executive summary of the Church report claims that there have been cases of only two female interrogators "who, on their own initiative, touched and spoke to detainees in a sexually suggestive manner in order to incur stress based on the detainees' religious beliefs." It did not mention that in December 2002 Secretary Rumsfeld authorized the interrogation technique of "inducing stress by use of detainee's fears", and that the use of female interrogators to "induce stress" had been used following this authorization.[322] According to *Newsweek*, female interrogators have told investigators that they were urged to be "creative" after Secretary Rumsfeld expressed frustration at the lack of actionable intelligence being extracted from the Guantánamo detainees.[323]

Allegations of abuse of detainees have also come from other governments' agencies. On 10 January 2002, for example, an officer with the UK Secret Intelligence Service (SIS) in Afghanistan reported back to London his concern at the treatment of a detainee in US custody that he had witnessed. What he saw has not been made public, but the response from London included the following instructions sent back to the SIS officer the next day and copied to all UK intelligence personnel in Afghanistan:

> "*It appears from your description that [the detainees in US custody] are not being treated in accordance with the appropriate standards. Given that they are not within our custody or control, the law does not require you to intervene to prevent this. That said [the UK government's] stated commitment to human rights makes it important that the Americans understand that we cannot be party to such ill treatment nor can we be seen to condone it… If circumstances allow, you should consider drawing this to the attention of a suitably senior US official locally. It is important that you do not engage in any activity yourself that involves inhumane or degrading treatment of prisoners… [Y]our actions incur criminal liability in the same way as if you were carrying out those acts in the UK*".[324]

In June 2002, the UK authorities raised with their US counterparts allegations of detainees in US custody in Afghanistan being hooded and subjected to sleep deprivation. A month later, a UK intelligence official raised with a US official in Afghanistan the inappropriateness of sleep deprivation, hooding and the use of stress positions against detainees, which the US official had said was being used to "get a detainee ready" for interrogation. The UK officer also raised with a US official in charge of a detention facility a detainee's allegations of ill-treatment, including "the use of constant bright lights".[325]

However, it seems that any such representations were unheeded by the USA. Indeed, when the "UK Government officially asked the US authorities in May 2004 if interrogation techniques such as hooding, sleep and food deprivation had been used in Guantánamo Bay and Iraq", the US administration was unapologetic in its response, confirming "that such techniques had been authorised for a limited period – in Guantanamo Bay between November

[320] See pages 33-34 of *USA: Human dignity denied*, *supra*, note 17.
[321] *Guantanamo detainees accuse guards of religious abuses*. Duluth News Tribune, 5 March 2005. In *USA*: *Human dignity denied,* note 17, *supra*, Amnesty International reported on these and other abusive interrogation techniques and detention conditions that appeared to be targetted at the religious sensitivities of the Muslim detainees held in US custody in Guantánamo, Afghanistan and Iraq.
[322] GTMO interrogation techniques. Undated.
[323] *Torture: Bush's nominee may be 'DOA'*. Newsweek, 21 March 2005.
[324] *The handling of detainees by UK intelligence personnel in Afghanistan, Guantanamo Bay and Iraq*. UK Intelligence and Security Committee. March 2005, para. 47.
[325] Ibid. paras 54 and 55.

2002 and January 2003, and in Iraq until May 2004."[326] According to the evidence still being revealed, torture and ill-treatment has been more widespread than that message would suggest.

Concerns about abusive interrogation techniques from within the USA's own agencies appear to have been ignored. In the wake of the Abu Ghraib scandal, and the emergence of the US administration's memorandums on how US agents could avoid criminal liability for torture and other cruel, inhuman or degrading treatment, concerns within the Federal Bureau of Investigation (FBI) about techniques employed by US interrogators have come to light.[327]

FBI documents are among heavily redacted information reluctantly released by the administration pursuant to a request filed by the American Civil Liberties Union (ACLU) and others in October 2003 under the Freedom of Information Act, and a follow-up lawsuit filed in June 2004 demanding government compliance with this request. An FBI email dated 13 May 2004, for example, suggested that Major General Geoffrey Miller, who was commander of Guantánamo detentions from November 2002 to March 2004 before being made Deputy Commander for Detainee Operations in Iraq, had in Iraq "continued to support interrogation strategies we not only advised against, but questioned in terms of effectiveness… [T]he battles fought in [Guantánamo] while [General Miller] was there are on the record."[328]

An FBI email dated 22 May 2004 refers to an instruction to FBI personnel in Iraq "not to participate in interrogations by military personnel which might include techniques authorized by Executive Order but beyond the bounds of standard FBI practice". The email said that some of FBI personnel, although not themselves participating in abuse, had been "in the general vicinity of interrogations in which such tactics were being used". The email goes on to seek clarification of an instruction from the Office of General Counsel (OGC) requiring FBI personnel to report any abuse that he or she comes across:

> "*This instruction begs the question of what constitutes 'abuse'. We assume this does not include lawful interrogation techniques authorized by Executive Order. We are aware that prior to a revision in policy last week, an Executive Order signed by President Bush authorized the following interrogation techniques among others: sleep 'management', use of MWDs (military working dogs), 'stress positions' such as half squats, 'environmental manipulation' such as use of loud music, sensory deprivation through the use of hoods, etc. We assume the OGC instruction does not include the reporting of these authorized interrogation techniques, and that the use of these techniques does not constitute 'abuse'.*"

An FBI document from December 2004, originally classified as secret for 25 years, included the following prior observations by FBI agents:

> <u>*Iraq*</u>
>
> *A detainee hooded and draped in a shower curtain, was cuffed to a waist high rail. An MP [military policeman] was apparently subjecting the detainee to sleep deprivation, as he was observed slapping the detainee lightly, as if to keep him from falling asleep;*

[326] *Ibid*. para 101.
[327] Following the Abu Ghraib revelations, the FBI sent a memorandum to all its divisions to remind all personnel deployed in Iraq, Afghanistan, Guantánamo, "or any other foreign location" of FBI interrogation policy. The memorandum, dated 19 May 2004, reminds its recipients that "it is the policy of the FBI that no interrogation of detainees, regardless of their status, shall be conducted using methods which could be interpreted as inherently coercive". *Treatment of prisoners and detainees*. From General Counsel, Federal Bureau of Investigation, 19 May 2004.
[328] For more on Major General Miller, see: *USA: Human dignity denied*, *supra*, note 17.

Guantanamo Bay

A detainee's mouth was duct taped for chanting from the Koran…military employee who applied the duct tape found it amusing;

A detainee being isolated for substantial periods of time;

Agents heard of detainees being subjected to considerable pain and very aggressive techniques during interrogations;

Agents aware of detainees being threatened…by dogs;

Agents have seen documentary evidence that a detainee was told that his family had been taken into custody and would be moved to Morocco for interrogation if he did not begin to talk.

Afghanistan

Agents are aware of detainees being subjected to interrogation techniques that would not be permitted in the United States (i.e. stress positions for extended periods of time and sleep deprivation) and to psychological techniques (i.e., loud music).

An FBI memorandum dated 14 July 2004 stated the following about the treatment of a Guantánamo detainee:

"*In 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.*"[329]

Another undated FBI email described the following which allegedly occurred in February 2004 against a detainee in Guantánamo:

"*[H]e was yelled at for 25 minutes. [He] was short-shackled, the room temperature was significantly lowered, strobe lights were used, and possibly loud music. There were two male interrogators, one stood behind him and the other in front. They yelled at him and told him he was never leaving here… After the initial 25 minutes of yelling, [he] was left alone in the room in this condition for approximately 12 hours… During the 12 hours, [he] was not permitted to eat, pray or use the bathroom*."

An FBI email from December 2003 referred to "torture techniques" being used by the Department of Defense (DoD) in Guantánamo, and noted the FBI's Military Liaison and Detainee Unit's "long standing and documented position against use of some of DoD's interrogation practices". The email expressed concern that DoD interrogators were impersonating FBI agents, and that "if this detainee is ever released or his story made public in any way, DoD interrogators will not be held accountable because these torture techniques were done [by] the 'FBI' interrogators". The email noted that "these tactics have produced no intelligence of a threat neutralization nature to date and…have destroyed any chance of prosecuting this detainee".[330]

[329] *Re: Suspected mistreatment of* [Guantánamo] *detainees*. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.
[330] Subject: Impersonating FBI at GTMO. 5 December 2003.

An FBI memorandum dated 10 May 2004 notes that law enforcement agencies at Guantánamo Bay "were of the opinion [that] results obtained from these interrogations were suspect at best". This memorandum recalls that the FBI had advised its agents who went to Guantánamo to "stay in line with Bureau policy and not deviate from that (as well as made them aware of some of the issues regarding DoD techniques"). The memorandum noted that the FBI and the Guantánamo military authorities had agreed to differ, and that "the Bureau has their way of doing business and DoD has their marching orders from the Sec Def [Secretary of Defense]". [331]

No one, including the Secretary of Defense, has yet been brought to account for the torture and ill-treatment FBI agents have said they witnessed in Guantánamo. The Department of Defense has provided details of the eight "minor infractions" found by Vice Admiral Church that led to disciplinary action against Guantánamo personnel. [332] None described abuses allegedly witnessed by FBI agents. The absence of a full independent inquiry and the failure of what has been a piecemeal approach to investigations – too often initiated only when media attention threatens to embarrass the authorities – was highlighted when an "internal" military investigation into the FBI allegations was announced in late December 2004. Even then, the investigating officer appointed was not high-ranking enough to be able to investigate Major General Geoffrey Miller's conduct when in charge of Guantánamo detentions during the period covered by the FBI documents. [333] It was not until two months later, and two days after media criticism that a whitewash was on the cards, that a more senior officer was appointed to take over.[334] The findings of the investigation had not been released at the time of writing, and it was not known how much would be made public and how much would remain classified.[335]

Despite the mounting evidence from multiple detainee and non-detainee sources that war crimes and other international crimes including torture, in some cases resulting in death, have been committed by US forces in the "war on terror", not a single US agent has been prosecuted for "torture" or for "war crimes" under the USA's Anti-Torture Act (18 U.S.C § 2340), War Crimes Act (18 U.S.C. § 2441), or Military Extraterritorial Jurisdiction Act (18 U.S.C. § 3261). A relatively small number of low-ranking soldiers have been court-martialled for offences under the Uniform Code of Military Justice (UCMJ).[336] As of 3 March 2005, the

[331] *Instructions to GTMO interrogators*. From: [Redacted], to: Harrington, T.J. (Div . 13)(FBI), http://www.senate.gov/~levin/newsroom/supporting/2005/DOJ.032105.pdf. This is the version released by Senator Carl Levin. In the version of this memorandum released to the ACLU, the words "were suspect at best", and "as well as made them aware of some of the issues regarding DoD techniques", had been redacted. It seems from this that the administration's reluctance to release materials may not be entirely based on national security concerns.

[332] The more recent Church Report summary of March 2005 has revised this to seven cases of substantiated "relatively minor" abuse, three of which were said to be interrogation-related. The USA's Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, lists "10 substantiated incidents of misconduct at Guantanamo", supra, note 16.

[333] "The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person". Army Regulation 15-6.

[334] *Ex-commander of Guantánamo Bay prison eludes abuse inquiry*. International Herald Tribune, 26 February 2005. A Southern Command spokesperson was quoted as responding that "at this point, a more senior investigating officer is not required". Two days later, Southern Command appointed a more senior officer to take over. *3-star general appointed to lead investigation*. United States Southern Command News Release, 28 February 2005.

[335] Early reports suggest that the investigation has confirmed abuses. See, for example, *Inquiry finds abuses at Guantánamo Bay*, New York Times, 1 May 2005.

[336] In the highest profile case – the Abu Ghraib torture scandal revealed by photos made public in late April 2004 – seven soldiers had been convicted of abusing detainees in Abu Ghraib at the time of

total number of investigations into allegations of abuse stood at 341, of which 226 had been closed or completed. In 70 per cent of these closed investigations (159 out of 226), the allegations were not substantiated. Of those cases where abuses were substantiated, 120 actions had been taken against 109 soldiers. Of these 120 actions, more than 70 per cent involved non-judicial or administrative sanctions:

- 27 per cent (32 actions) involved courts-martial
- 47 per cent (56 actions) involved non-judicial punishments
- 27 per cent (32 actions) involved administrative actions (e.g. reprimand).[337]

On 5 May 2005, the US Army revealed that about a quarter of "adverse punishments" to date had been applied against officers, of the following ranks:

- Brigadier General – one had been demoted to colonel (see below);
- Colonel – one non-judicial punishment;
- Lieutenant Colonel – four officers: two received letters of reprimand and two had received non-judicial punishments;
- Major – three officers: three letters of reprimand, two non-judicial punishment;
- Captain – 10 officers: three courts-martial, one "other than honourable discharge", five letters of reprimand, one non judicial punishment;
- 1st Lieutenant – four officers: two courts-martial, one letter of reprimand, one non-judicial punishment;
- 2nd Lieutenant – two officers: one "other than honourable discharge" and one letter of reprimand;
- Chief Warrant Officer – two officers: two courts-martial.[338]

In addition, the Army released details of investigations by the Department of the Army Inspector General into five senior officers who had been identified in various reviews and inquiries which had been initiated following the Abu Ghraib abuse scandal. Four of the five officers were cleared:

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writing. The highest ranking among them was a Staff Sergeant. Six had pleaded guilty – five were sentenced to prison terms ranging from eight and a half years to six months, while the sixth was discharged from the army without a prison sentence. At the time of writing, only one had gone to trial (by court-martial) – Charles Graner, who was sentenced to 10 years in prison in January 2005. Another, Sabrina Harman, was awaiting trial. On 4 May 2005, a military judge threw out Private Lynndie England's guilty plea in view of doubts about its reliability.

[337] Fact Sheet. US Army News Release, 3 March 2005. See also Annex 1 to USA's Second Periodic Report to the UN Committee against Torture, 6 May 2005, *supra*, note 16. According to the recent Church Report, by 30 September 2004, there had been 70 cases of substantiated detainee abuse, 38 involving "minor abuse", 26 involving "serious abuse" and six cases involving detainee deaths. These abuse cases involved 121 victims. Disciplinary action had been taken against 115 members of the US armed forces, "including numerous non-judicial punishments", 15 summary courts-martial (which deal with minor incidents), 12 special courts-martial (which can hand down a maximum sentence of six months' confinement) and nine general courts-martial (the most serious level of military court). Unclassified executive summary of review of Department of Defense interrogation operations, conducted by the Naval Inspector General, Vice Admiral Albert T. Church, III, 10 March 2005. http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf.

[338] *Army releases findings in detainee-abuse investigations*. US Army News Release, 5 May 2005.

- Lieutenant General Ricardo Sanchez, who was Commander of the Combined Joint Task Force 7 (CJTF7), the US armed forces in Iraq, was investigated for alleged dereliction in the performance of duties pertaining to detention and interrogations, and improperly communicating interrogation policies. The allegations were found to be unsubstantiated.
- Major General Walter Wojdakowski, who was Deputy Commander of CJTF7, was investigated for alleged dereliction in the performance of duties pertaining to detention and interrogation operations. The allegations were found to be unsubstantiated.
- Major General Barbara G. Fast, who was a senior intelligence officer with CJTF7, was investigated for alleged dereliction in the performance of her duties. The allegation was found to be unsubstantiated.
- Colonel Marc Warren, who was Staff Judge Advocate for CJTF7, was the subject of a "preliminary screening inquiry" on allegations of professional impropriety under lawyers' ethics rules and dereliction in the performance of his duties. The allegations were found to be unsubstantiated.
- Brigadier General Janis Karpinski, who was Commander of the 800th Military Police Brigade (whose personnel were among those implicated in the Abu Ghraib abuses), was investigated for alleged dereliction of duty; making a material misrepresentation to an investigating team; failure to obey a lawful order; and shoplifting (in Florida). The allegations of dereliction of duty and shoplifting were found to be substantiated. On 5 May 2005, President Bush approved a recommendation to demote Brigadier General Karpinski to the rank of colonel. The investigation found that "no action or lack of action on her part contributed specifically to the abuse of detainees at Abu Ghraib".[339]

On 12 May 2005, the *Washington Post* reported that Colonel Thomas M. Pappas, in charge of interrogations at Abu Ghraib from November 2003, would not be court-martialled on two counts of dereliction of duty (for failing to ensure that subordinates were adequately informed of, trained in, and supervised with regard to interrogation procedures, and for failing to obtain the approval of superior officers before allowing the presence of dogs during an interrogation). Instead, he would reportedly receive a letter of reprimand and a fine.[340]

As Amnesty International wrote in its October 2004 report, *USA: Human dignity denied – Torture and accountability in the 'war on terror'*, as a matter of principle and across all countries, the organization takes the position that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture, in independent and impartial civilian courts. In the report, Amnesty International raised its concern about the appearance of leniency in cases of human rights violations tried by military court-martial, including in cases where detainees have died in custody allegedly as a result of ill-treatment (see next section and Appendix 1). Signs of this continue. For example, in September 2004 a 1st Lieutenant in the US Army was referred to trial by court-martial on charges including conspiracy, aggravated assault, involuntary manslaughter and obstruction of justice under the UCMJ. The case involved incidents on 5 December 2003 in which an Iraqi detainee was forced into the Tigris River near Balad in Iraq, and on 3 January 2004 in which two Iraqi detainees were forced off a bridge into the Tigris near Samarra. One of the detainees, 19-year-old Zaidoun Hassoun, drowned in the latter incident. The Lieutenant

[339] *Ibid.*
[340] *Abu Ghraib officer gets reprimand*. Washington Post, 12 May 2005. See also pages 32 and 71, *USA: Human dignity denied*, *supra*, note 17.

was facing a maximum sentence of 29 years in prison. In the event, he was sentenced to 45 days confinement following a two-day court-martial in Fort Hood, Texas, on 14 and 15 March 2005. Based on a pre-trial agreement, the commanding authority did not pursue the manslaughter charge and the soldier pleaded guilty to assault charges instead.[341] Two days later, a US Army Captain was also sentenced to 45 days' confinement after seven military officers on a court-martial convicted him of assault in incidents involving the abuses of Iraqi detainees in mid-2003. He had faced a possible sentence of nine years in prison.[342]

In *Human dignity denied*, Amnesty International also detailed how the US government has so far failed in its obligation to ensure thorough and independent investigations into the allegations of human rights violations in the "war on terror", including arbitrary detentions, unlawful killings, "disappearances", secret detentions, torture and other cruel, inhuman and degrading treatment. One of the cases which the report raised was that of three Iraqi nationals working for *Reuters* news agency who alleged that they had been beaten and subjected to sleep deprivation, stress positions, hooding and sexual and religious humiliation in US military custody near Fallujah after their arrest in January 2004.[343] The military investigation into their allegations concluded that no misconduct had taken place. *Reuters* had called for the investigation to be reopened, describing it as "woefully inadequate". According to the news agency, the three detainees, Ahmad Muhammad Hussein al-Badrani, Salem Ureibi and Sattar Jabar al-Badrani, had not even been interviewed for the military investigation. In a letter dated 7 March 2005, *Reuters* was informed that the case would not be reopened.[344]

The USA's Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, insists that the USA "has taken and continues to take all allegations of abuse very seriously". It states, however, that none of the "extensive investigative reports" into abuses against detainees in US custody in the "war on terror" have found that "any governmental policy directed, encouraged or condoned these abuses".[345] The reports to which it refers have generally taken a "lessons-learned" approach rather than an approach that also clarifies where responsibility for abuse lies and facilitates prosecution or disciplinary sanctions as appropriate, as international standards require.[346]

The investigations and reviews initiated and conducted by the authorities since the Abu Ghraib prison scandal broke in April 2004 are far from enough, offering only snapshots of what has occurred. For example, most consist of the military investigating itself, with military investigations mandated to look down the chain of command rather than up, and none investigating the higher echelons of the administration, or the USA's involvement in secret transfers to and secret detentions in other countries. Some cases may amount to "disappearances", crimes under international law. The involvement of the Central Intelligence Agency (CIA) in such cases, and the alleged existence of executive orders authorizing human rights violations, remain shrouded in secrecy (see Section 14).

On 10 March 2005, the US authorities released the conclusions of the latest in a series of official reviews conducted since the Abu Ghraib scandal broke in late April 2004. This

[341] *Court-martial scheduled for Lieutenant*. Media advisory, 10 March 2005. *Court-martial verdict and sentence*. Press release, 16 March 2005. 7th Infantry Division and Fort Carson Public Affairs Office.
[342] Sentence announced in court-martial at Fort Carson. 17 March 2005. 7th Infantry Division and Fort Carson Public Affairs Office.
[343] *USA: Human dignity denied*, *supra*, note 17, page 143-144, and page 27.
[344] *US says won't reopen probe into Reuters staff abuse*. Reuters, 22 March 2005.
[345] Second Periodic Report to UN Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.
[346] UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted by General Assembly resolution 55/89, 4 December 2000. See *USA: Human dignity denied*, pages 142-152, *supra*, note 17.

review of Department of Defense interrogation operations worldwide (the Church Report), conducted by the Naval Inspector General, Vice Admiral Albert T. Church, had been ordered by Secretary of Defense Donald Rumsfeld on 25 May 2004. Vice Admiral Church had earlier that month been directed by Secretary Rumsfeld to review detention procedures at Guantánamo Bay and at the Naval Consolidated Brig in Charleston, South Carolina, where two US "enemy combatants" were being held (see Section 16, below). Of this earlier review, Vice Admiral Church stressed that what he was being asked to do was neither an inspection nor an investigation, but rather a review that he described as a "snapshot of current existing conditions".[347] Anyone who was hoping to see a more in-depth and critical analysis from the subsequent global review will have been disappointed. The 378-page Church Report remains classified. Only the executive summary has been released, and has strengthened the conclusion among some, including Amnesty International, that the response to the allegations of detainee abuse in the "war on terror" has amounted to a whitewash of senior official accountability.

The Church investigation interviewed personnel who had served in Afghanistan, Iraq and Guantánamo Bay, as well as "senior policy makers in Washington", and reviewed "voluminous documentary material". It found "no link between approved interrogation techniques and detainee abuse".[348] The US Government has emphasised this finding in its recent report to the UN Committee against Torture, stressing that "Vice Admiral Church's investigation is the most comprehensive to date" and by, in effect, exonerating senior administration officials, was "consistent with the findings of earlier investigations".[349] Vice Admiral Church himself said that there was "no policy that condoned or authorized either abuse or torture".[350] Yet it is known from documents now in the public domain that, for one, Secretary Rumsfeld authorized numerous interrogation techniques in December 2002 for use in Guantánamo that violated the international prohibition on torture and other cruel, inhuman or degrading treatment – techniques that numerous detainees have alleged were used against them, and non-detainee sources, including FBI agents have claimed to have witnessed. The Church investigation did not interview a single detainee or former detainee.[351] Neither did it interview Secretary Rumsfeld; Vice Admiral Church said that this was because "I just had no more questions… I really had no need to go any further."[352] In Amnesty International's view, therefore, it cannot be said to have been "thorough" and "exhaustive", as described by Vice Admiral Church.[353]

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[347] Media availability with Vice Admiral Church, Department of Defense Transcript, 12 May 2004.
[348] In the case of the deaths of two detainees in the US air base in Bagram in Afghanistan in December 2002, the Church Report noted that the abuses which led to the deaths "consisted of violent assaults, rather than any authorized techniques". Nevertheless, the report noted, "in response to the investigation" of the two deaths, in late February 2003, the Bagram commander had modified or eliminated five "interrogator tactics" in February 2003 "as a precaution, out a general concern for detainee treatment". Army investigators closed the investigation into the deaths in October 2004, recommending charges against 11 military police (MP) officers and four military intelligence (MI) officers in the death of Mullah Habibullah on 4 December 2002, and against 20 MPs and seven MI officers in the death of Dilawar on 10 December 2002 (some of those implicated are named in both cases). The Church Report also noted that "medical personnel may have attempted to misrepresent the circumstances of death, possibly in an effort to disguise detainee abuse".
[349] Second Periodic Report to the Committee against Torture, 6 May 2005, *supra*, note 16, Annex 1.
[350] *Ibid*.
[351] Department of Defence media office, 16 March 2005. The military spokesperson told Amnesty International that he was "not aware of any detainees being specifically interviewed" for the Church investigation, as its purpose was to review US "policies and procedures" on interrogation.
[352] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.
[353] *Ibid*.

An earlier military investigation, the Fay report, found that the sort of techniques authorized by Secretary Rumsfeld for use at Guantánamo were being used in Afghanistan where interrogators were "removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation". The regional director of the Afghan Independent Human Rights Commission in Gardez, Afghanistan, told Amnesty International on 23 March 2005 that his office has recorded some 80 complaints of abuse by US forces in the single province of Paktika over the past two years, ranging from destruction and confiscation of property to "inhuman" treatment of detainees.[354] He said that detainees taken to US-controlled facilities have alleged that they were subjected to sleep deprivation, food deprivation, strip searching and stripping, as well as to interrogations while blindfolded. The Church report said that such techniques had been "developed independently by interrogators in Afghanistan in the context of a broad reading of FM 34-52 [the US Army Field Manual on intelligence interrogation]". If by "broad reading", the Church review means a reading that tolerated techniques which violate international standards – including techniques reportedly described by the Navy's General Counsel as "unlawful and unworthy of the military services" – then it should have said so.[355] In which case it should also have said that Secretary Rumsfeld authorized abusive techniques for use at Guantánamo.

Instead, the Church investigation said that "issues of senior official accountability were addressed by the Independent Panel to Review DoD Detention Operations [the Schlesinger Panel]", also appointed by Secretary Rumsfeld.[356] In fact, the Schlesinger Panel had generally evaded this question. One of the panel members, former Secretary of Defense Harold Brown suggested that in the case of high-level administration officials, punishment of was not an option and that the matter of their accountability rested with the electorate at election time.[357] Presumably then, under his reasoning, the re-election of President Bush in late 2004, and the latter's retention of Donald Rumsfeld as Secretary of Defense, not to mention the promotion of White House Counsel Alberto Gonzales to the post of Attorney General, is enough to wipe the slate clean in terms of administration accountability.[358] Amnesty International is shocked that such a theory was again put forward on 29 April 2005 by an official Pentagon spokesperson when he said: "I suppose there's people that will always feel that more can be done. I will remind people – and the Secretary [of Defense] has spoken about this publicly; there's no reason to not repeat – that he offered to resign over the matter

[354] Nationwide in the past 18 months, the Commission is reported to have logged more than 800 allegations of abuses committed by US troops. '*One huge US jail*'. Guardian Weekend (UK), 19 March 2005.

[355] US Navy officials were reported to be outraged at the "abusive techniques" being used at Guantánamo in late 2002 that they threatened to withdraw navy interrogators from operations at the base. The Navy's General Counsel, Alberto Mora is reported to have described the techniques as "unlawful and unworthy of the military services".*Abuse outraged navy at Guantánamo Bay*. The Boston Globe, 17 March 2005. Senator Carl Levin was reported as saying that the events were recorded in the main classified Church report.

[356] See *USA: Human dignity denied*, note 17, *supra*.

[357] "To take the highest level, take the level of the Secretary of Defense, I don't think that you can punish somebody, demand resignation, on the basis of some action, an individual action, by somebody far down the chain. I think at that level, the decision has to be made on the basis of broad performance. And indeed at the very highest level, it's made at election time… The Secretary of Defense has to decide whether he's lost confidence in his under-secretaries or his assistant secretaries on the basis of their performance. And the electorate has to decide on the basis of its confidence at election time". Oral testimony to the Senate Armed Services Committee, 9 September 2004.

[358] See *USA: Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General*. AI Index: AMR 51/031/2005, 1 February 2005, http://web.amnesty.org/library/Index/ENGAMR510312005 .

[Abu Ghraib]. The President didn't accept that offer, and then subsequent to that, there was was an election. And the American people had the full weight of everything that happened in the last four years and decided to rehire the President for this job. That's not bad when it comes to whether or not somebody at the very top was accountable."[359]

Earlier comments attributed to John C. Yoo, one of the Deputy Assistant Attorneys General in the US Justice Department who drafted a number of the now infamous memorandums on detention and interrogation policies in 2001 and 2002, carried the same message. According to the *New Yorker* magazine, he said that President Bush's re-election, and Alberto Gonzales' confirmation as Attorney General, was "proof that the debate is over. The issue is dying out. The public has had its referendum".[360] "It's hard to know what is most outrageous about those comments", editorialized the *New York Times*, calling for a full independent commission of inquiry: "that Mr Yoo actually believes Americans voted for torturing prisoners or that an official at the heart of this appalling mess feels secure enough to say that."[361]

The Chairman of the Schlesinger Panel, James Schlesinger, suggested that the resignation of the Secretary of Defense "would be a boon to all of America's enemies" and that "his conduct with regard to [the issue of interrogation policy] has been exemplary".[362] Yet in December 2002 Secretary Rumsfeld authorized stripping, isolation, hooding, stress positions, sensory deprivation, and the use of dogs in interrogations. In similar vein, in September 2003, modelled on the Guantánamo policy, Lieutenant General Ricardo Sanchez, the commanding officer in Iraq, authorized as an interrogation technique "the presence of military working dogs" to exploit "Arab fear of dogs".[363] Yet on 26 April 2005, the Chairman of the Joint Chiefs of Staff, General Richard Myers, noted that the Army Inspector General had cleared Lieutenant General Sanchez of any wrongdoing in relation to the abuses of detainees in Iraq, and General Myers reiterated that Lt. Gen. Sanchez "did a terrific job…he's a very attractive officer."[364]

The use of dogs in interrogations, at least, is now seen as unacceptable by the armed forces.[365] According to reports, a revised version of the 1992 military interrogation field manual (FM 34-52), which was already in final draft form in June 2004, will expressly prohibit this and other practices such as stress positions, stripping and sleep deprivation. Although it would only govern interrogations by Department of Defense personnel, and not, for example, those conducted by the CIA, it will reportedly prohibit other government

[359] Principal Deputy Assistant Secretary of Defense for Public Affairs, Larry Di Rita, Defense Department Regular Briefing, 29 April 2005.
[360] *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.
[361] *Time for an accounting*. New York Times, 19 February 2005.
[362] Press conference with members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel). Department of Defense News Transcript, 24 August 2004. The other panel members, retired General Charles Horner and former member of Congress, Tillie Fowler, agreed. This was consistent with the position Tillie Fowler had taken in an interview before the panel had begun its work, in which she had made it clear that Secretary Rumsfeld was not to be the focus of their review. Referring to the Abu Ghraib revelations, she was quoted as saying: "The Secretary is an honest, decent, honourable man, who'd never condone this type of activity. This was not a tone set by the Secretary." *Wide gaps seen in US inquiries on prison abuse*. New York Times, 6 June 2004.
[363] CJTF-7 Interrogation and counter-resistance policy. Memorandum for Commander, US Central Command, 14 September 2003.
[364] Defense Department Briefing with Secretary Rumsfeld and General Myers, News Transcript, 26 April 2005.
[365] Army improving procedures for handling detainees. American Forces Information Service, 24 February 2005. See also Transcript of Detainee Operations Update, US Army, 24 February 2005.

agencies including the CIA from holding unregistered detainees (so-called "ghost detainees") at DoD-controlled facilities.[366] If such practices are to be considered abusive now, why have Secretary Rumsfeld and others not been called to account for authorizing them during the "war on terror"? In fact, even the 1992 version of FM 34-52 lists the use of stress positions – "forcing an individual to stand, sit, or kneel in abnormal positions for prolonged periods of time" – as an example of physical torture. It also lists "abnormal sleep deprivation" as an example of mental torture. No US personnel, civilian or military, have been brought to account either for authorizing or committing such techniques of torture or ill-treatment in the "war on terror".

Maintaining the official line that any abuses by US forces in the "war on terror" have been on the margins, Secretary Rumsfeld continues to insist that "not a single one of the investigations that have been conducted" have described abuses as "systemic or systematic".[367] Even this assertion is inaccurate. For example, previously secret documents of an army investigation of a US detention facility in Mosul, Iraq, concluded that the detainees there were being:

> "*systematically and intentionally mistreated (heavy metal music, bullhorn, hit with water bottles, forced to perform repetitive physical exercises until they could not stand, having cold water thrown on them, deprived of sleep, and roughly grabbed off the floor when they could no longer stand. The detainees had sand bags on their heads with "IED" [improvised explosive device] written on them, the infantry soldiers stated they felt this was done to make them angry at the detainees, and it had exactly this effect.*"

Like the Schlesinger Panel, with whom it "worked hand-in-glove"[368], the Church review was not critical of any interrogation techniques *per se*. Thus the Schlesinger Panel reported uncritically that "interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation." It seems that a tendency not to characterize such techniques as abusive runs deep. This is illustrated by recent information that has come to light from the ACLU Freedom of Information lawsuit. In documentation released in December 2004, for example, a US Navy officer described a process by which Iraqi detainees classified as prisoners of war would be taken to an empty swimming pool, handcuffed, shackled and hooded, and left kneeling for up to 24 hours. Despite providing this description, the officer stated that he "never saw any instances of physical abuse" of the detainees.[369]

The closest the Church Report summary came to concern about interrogation techniques was noting that interrogations of two "high-value" detainees using techniques approved by Secretary Rumsfeld in December 2002 "were sufficiently aggressive that they highlighted the difficult question of precisely defining the boundaries of humane treatment of

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[366] *Army, in manual, limiting tactics in interrogation*. New York Times, 28 April 2005. The new manual, being produced by the US Army Intelligence Center (USAIC), is reported to be titled "FM 2-22.3 Human Intelligence Collector Operations", and was reported to be in Final Draft form in June 2004. *USAIC fields two new intelligence manuals.* Military Intelligence Professional Bulletin, April-June 2004.

[367] Defense Department Briefing, 29 March 2005.

[368] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.

[369] *Navy Corpsman described pressure to "keep his mouth shut"*. ACLU news release. 14 December 2004.

detainees". In this regard, the Church investigation struck a similar tone to James Schlesinger, who had claimed that "in the conditions of today, aggressive interrogation would seem essential", and "what constitutes 'humane treatment' lies in the eye of the beholder".[370] The Church summary said that the "need for intelligence in the post-9/11 world, and our enemy's ability to resist interrogation, have caused our senior policy makers and military commanders to reevaluate traditional US interrogation methods and search for new and more effective interrogation techniques." The summary said that this search had been conducted "within the confines of our armed forces' obligation to treat detainees humanely." This flies in the face of what we now know was discussed within the administration on how US agents could avoid criminal responsibility for torture and ill-treatment.

Also like the Schlesinger Panel, the Church Report concluded that "the vast majority of detainees" had been treated humanely. "In those few instances where they weren't", said Vice-Admiral Church, "it's been investigated".[371] Such conclusions smack of complacency and suggest a lack of independence from the executive's position that disregards international law and standards and suggests that a few aberrant soldiers displaying "un-American values" have been responsible for abuses. Even without the scores of allegations of torture and ill-treatment by US forces made in the "war on terror", for example, the conditions of detention have been cruel, inhuman or degrading for hundreds if not thousands of detainees, held in virtually incommunicado indefinite detention without charge or trial or access to lawyers, relatives or the courts. The right to be treated with humanity and with respect for the inherent dignity for the human person has been systematically denied.

International concern continues, both over the lack of a comprehensive independent investigation and the fact that policies and practices that facilitate torture and ill-treatment remain in place. In a joint statement on 5 February 2005 on the USA's "war on terror" detentions, for example, six UN experts stressed "the need to objectively assess the allegations of torture, and other cruel, inhuman or degrading treatment or punishment, particularly in relation to methods of interrogation of detainees."[372]

A former UN Special Rapporteur on torture (2002-2004), Professor Theo van Boven, has stated on the question of the USA's involvement in torture and ill-treatment in the "war on terror" that "what we know is only the tip of an iceberg".[373] What we do know is that treaties, including the Geneva Conventions, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights (ICCPR), all of which have been ratified by the USA, have been selectively disregarded and systematically violated.

The ICCPR, for example, prohibits torture and other cruel, inhuman or degrading treatment or punishment (Article 7), as well as the arbitrary deprivation of life (Article 6), arbitrary detention (Article 9), and discrimination, including on the basis of nationality (Article 2). It also guarantees the right to judicial review of the lawfulness of one's detention (Article 9), fair trial (Article 14), and the right of any detainee to be treated with humanity and with respect for the inherent dignity of the human person (Article 10).

As noted, the Human Rights Committee has stressed that the rights enshrined in the ICCPR apply to everyone "within the power and effective control" of the State Party and that

[370] Written statement of James Schlesinger to the Senate Armed Services Committee, 9 September 2004.
[371] Department of Defense transcript of briefing on interrogation operations and interrogation techniques. 10 March 2005.
[372] *UN rights experts raise 'serious concerns' over detainees at US naval base*. UN News Centre, 4 February 2005.
[373] *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

the treaty is binding on all branches and all levels of government. There can be no excuses for failure to comply on such a scale. On the question of investigations into violations of rights enshrined in the ICCPR, the Human Rights Committee emphasised that either the failure by the State Party to investigate such allegations or its failure to bring perpetrators to justice could in and of itself give rise to a separate breach of the Covenant. The Committee continued:

> "*These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman or degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7, and 9 and, frequently 6)… Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility*."[374]

Clearly then, the three branches of US government – executive, legislature and judiciary – must work to ensure full investigation of, and accountability for, past abuses and to bring an end to any such abuses now and prevent any recurrence. The USA prides itself on having a tripartite system of "checks and balances" to ensure fair, lawful and transparent government. As one of the current US Supreme Court Justices has pointed out: "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."[375] Yet in the "war on terror", the executive has assumed, and so far mostly been allowed to assume, unfettered power in detentions.

The legislature

Since May 2004, Amnesty International has been calling for US Congress to set up a full independent commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices.[376] Such a commission, composed of credible experts with all the necessary powers to be able investigate all levels and agencies of government, must be independent, impartial and non-partisan and should apply all relevant international law and standards, and would benefit from expert international input.

So far, Congress has shown little collective cross-party inclination to ensure that there are full investigations into the range of human rights violations that have occurred. Amnesty International is concerned that party politics may be overriding human rights obligations.[377]

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[374] General Comment no. 31, *supra*, note 269.
[375] *Clinton v. City of New York*, US Supreme Court, 524 U.S. 417 (1998), Justice Kennedy, concurring.
[376] See *USA: Human dignity denied,* supra, note 17, and *USA: Amnesty International calls for a commission of inquiry into 'war on terror' detentions*, AI Index: AMR 51/087/2004, 19 May 2004, http://web.amnesty.org/library/Index/ENGAMR510872004.
[377] Following the March 2005 release of the Church Report on interrogations, congressional responses to it appeared to split down party lines. See, for example, *Democrats slam Abu Ghraib report that clears Pentagon*. Financial Times, 11 March 2005. *Official declines to pin blame for blunders on interrogations*, New York Times, 11 March 2005. In February 2005, the Republican Chairman of the Senate Select Committee on Intelligence confirmed that he was reviewing a proposal from the Committee's Democrat Vice-Chairman for a formal investigation into the "full facts" behind the CIA's role in the secret detentions outside the USA and secret transfers of detainees to other countries, and "all presidential and other authorities" for such activities. It was subsequently reported that the Chairman was opposing the proposal. *Senate may open inquiry into CIA's handling of suspects*. New York Times, 13 February 2005. *Senate Intelligence Chairman opposes CIA abuse inquiry*. New York Times, 1 March 2005. By mid-March, the Committee had still failed to agree on whether to open an investigation, with all seven of the Committee's Democrats supporting such a proposal (there are eight Republicans). The Vice-Chairman described a closed session of the Committee on 15 March 2005 as "probably the least constructive meeting of the Intelligence Committee that I have ever been to". He said that the Committee was "not facing its oversight responsibilities with sufficient seriousness". *Prisoner inquiry is up in the air*, Los Angeles Times, 16 March 2005.

This is one of the reasons why Amnesty International is not calling for a bipartisan commission of inquiry made up of congresspersons, favouring instead experts entirely independent of government.[378]

Again, Amnesty International stresses that, under international law, US legislators have, alongside the executive and the judiciary, an obligation to ensure that all allegations of human rights violations are fully investigated. The UN Human Rights Committee has made it clear that, for violations of the ICCPR, which the USA ratified with the "advice and consent" of the Senate in 1992 [US Constitution Article II (2)], failures to abide by the requirements of the treaty "cannot be justified by reference to political, social, cultural or economic considerations within the State".[379] Amnesty International urges Congress not to allow party politics to interfere with their obligation to ensure full accountability for past violations and to initiate all necessary legislative and oversight measures to ensure non-repetition. In its General Comment 31, the Human Rights Committee continued that state parties must "make reparation to individuals whose rights have been violated":

> "*Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy…is not discharged… [T]he Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations*".[380]

The judiciary

In his January 2005 ruling, Judge Leon took the view that the ICCPR does not confer privately enforceable rights on individuals. The Guantánamo detainees, he said, therefore could not rely upon the ICCPR (or the UN Convention against Torture) "as a viable legal basis to support the issuance of a writ of *habeas corpus*". He was apparently willing to leave to others the question of torture and other cruel, inhuman or degrading treatment. One of the cases before him was of David Hicks, which raises concerns under numerous provisions of the ICCPR. This Australian detainee was captured in Afghanistan in December 2001, transferred to Guantánamo Bay in January 2002, made subject to President Bush's Military order in July 2003 (and transferred that month to Camp Echo), and charged for trial by military commission in June 2004. David Hicks has signed an affidavit which includes the following allegations:

> "*I have been beaten before, after, and during interrogations.*
>
> *I have been menaced and threatened, directly and indirectly, with firearms and other weapons before and during interrogations.*
>
> *I have heard beatings of other detainees occurring during interrogation, and observed detainees' injuries that were received during interrogations.*
>
> *I have been beaten while blindfolded and handcuffed.*

[378] Another reason is the long-standing reluctance, within all branches of government, consistently and fully to apply international law and standards to the USA. The 9/11 Commission's report into the attacks of 11 September 2001 has been widely praised. However, concerns have been raised about whether the Commission was truly non-partisan, independent and impartial. For example, see David Ray Griffin, *The 9/11 Commission Report: Omissions and Distortions*. Arris Books, 2005.
[379] General Comment 31. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 14.
[380] *Ibid*.

I have been in the company of other detainees who were beaten while blindfolded and handcuffed. At one point, a group of detainees, including myself, were subjected to being randomly hit over an eight hour session while handcuffed and blindfolded.

I have been struck with hands, fists, and other objects (including rifle butts). I have also been kicked. I have been hit in the face, head, feet, and torso.

I have had my head rammed into asphalt several times (while blindfolded).

I have had handcuffs placed on me so tightly, and for so long (as much as 14-15 hours) that my hands were numb for a considerable period thereafter.

I have had medication – the identity of which was unknown to me, despite my requests for information – forced upon me against my will. I have been struck while under the influence of sedatives that were forced upon me by injection.

I have been forced to run in leg shackles that regularly ripped the skin off my ankles. Many other detainees experienced the same.

I have been deprived of sleep as a matter of policy.

I have witnessed the activities of the Internal Reaction Force (IRF), which consists of a squad of soldiers that enter a detainee's cell and brutalize him with the aid of an attack dog. The IRF invasions were so common that the term to be "IRF'ed" became part of the language of the detainees. I have seen detainee suffer serious injuries as a result of being IRF'ed. I have seen detainees IRF'ed while they were praying, or for refusing medication."[381]

Nevertheless, Judge Leon took the narrow view that alleged torture or ill-treatment, "though deplorable if true…does not render the *custody* itself unlawful". He seemed satisfied that "safeguards and mechanisms are in place to prevent such conduct and, if it occurred, to ensure it is punished." This is not good enough. The right to judicial review of the lawfulness of one's detention is itself a safeguard against torture and ill-treatment. To deny full judicial review is to allow torturers to operate unhindered. Besides, the confidence displayed by Judge Leon is misplaced. As already stated above, the investigations and reviews that have taken place so far into allegations of torture and ill-treatment have lacked scope, reach and independence. In some cases, whistleblowers have allegedly not been taken seriously or have been subjected to pressure to stay silent.[382] In other cases, evidence has been destroyed.[383]

[381] *Rasul et al. v. Bush et al.* Affidavit in support of amended complaint and applications for injunctive relief, US District Court for the District of Columbia, 5 August 2004. Declassified in November 2004.
[382] For example, see *Military lawyers objected to interrogation methods at Guantanamo*, sources say. New York Daily News, 13 February 2005. Also, ACLU news release, 4 March 2005, reporting on newly released documents revealing that a civilian interrogator claimed he had been transferred because "I refused to conduct my interrogations inhumanely". Also, *Whitewashing torture*? By David DeBatto. Salon.com, 8 December 2004. Thirty-six hours after telling his commanding officer that he had witnessed five incidents of torture and abuse of Iraqi detainees, US Sergeant Frank Ford, a counterintelligence officer stationed in Samarra, was strapped to a gurney and flown out of Iraq on a military plane on the grounds that he was suffering delusions as a result of combat stress. He was ordered to undergo a psychiatric evaluation in Germany, despite a military psychiatrist's initial conclusion that he was stable. The case has subsequently come light via the Freedom of Information Act lawsuit filed by the ACLU. See *Soldier who reported abuse was sent to psychiatrist*, Washington Post, 5 March 2005. See also, Navy Corpsman described pressure to "keep his mouth shut". ACLU news release, 14 December 2004.
[383] A DVD called "Ramadi Madness" including scenes of soldiers kicking a handcuffed detainee who later died; degrading a dead detainee's body; and joyriding while yelling profanities at Iraqi civilians, was destroyed after the case came under investigation, according to documents released to the ACLU.

In addition, safeguards are sapped of meaning in the face of a lack of political will to enforce them or a tolerance, if not endorsement, at the highest levels for treatment that violates the international prohibition on torture and other ill-treatment. The Church Report's executive summary of March 2005 concluded that "there was a failure to react to early warning signs of abuse". What it did not mention was that early and continued warnings came from non-governmental organizations, among others, but that they were ignored. Indeed, a lawsuit recently filed in US court against Secretary of Defense Donald Rumsfeld on behalf of four Iraqi and four Afghan nationals who claim they were tortured in US custody – including by "severe and repeated beatings, cutting with knives, sexual humiliation and assault, confinement in a wooden box, forcible sleep and sensory deprivation, mock executions, death threats, and restraint in contorted and excruciating positions" – notes such NGO warnings.[384] For example, it points out that Amnesty International wrote to Secretary Rumsfeld in January 2002 and again in a 61-page memorandum in April 2002, expressing its concern about the treatment of detainees in Afghanistan and Guantánamo Bay. The organization never received substantive replies to these or any other communications which have urged full investigations into cases of torture and ill-treatment and full adherence to international legal protections for detainees. Instead, Secretary Rumsfeld later authorized interrogation techniques for use at Guantánamo which violated the international prohibition on torture or other cruel, inhuman or degrading treatment. That blanket authorization of 2 December 2002 was rescinded on 15 January 2003, with the proviso that the techniques could be requested of Secretary Rumsfeld on a case-by-case basis. Also under a 16 April 2003 memorandum authorizing certain interrogation techniques recommended by the Pentagon Working Group on Detainee Interrogations in the Global War on Terrorism, Secretary Rumsfeld may also authorize unspecified – and potentially unlimited – "additional interrogation techniques" on a case-by-case basis.[385] The 16 April 2003 memorandum "remains in effect today", according to the March 2005 executive summary of the Church report.

In her 31 January 2005 ruling, Judge Joyce Hens Green did not turn a blind eye to the evidence of torture and ill-treatment, and put it into the context of the Combatant Status Review Tribunal (CSRT). She concluded that the CSRT "did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees". She raised the case of Australian detainee Mamdouh Habib who has alleged that he was tortured in Egypt prior to his transfer to Guantánamo.[386] Like many others, he chose not to attend the hearing. His "Personal Representative" told the CSRT that "all the information that he has given up prior to talking

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ACLU news release, 4 March 2005. Photographs and video images depicting abuses in Afghanistan were destroyed to avoid "another public outrage" following the Abu Ghraib scandal. *Afghan photos sparked inquiry*. Los Angeles Times, 18 February 2005. See also case of the death of Nagem Sadun Hatab, in which physical evidence was destroyed. Page 149, *USA: Human dignity denied*, *supra*, note 17.

[384] *Arkan Mohammad Ali, Thahe Mohammed Sabbar, Sherzad Kamal Khalid, Ali H., Mehboob Ahmad, Said Nabi Siddiqi, Mohammed Karim Shirullah and Haji Abdul Rahman v. Donald H. Rumsfeld*. Complaint for declaratory relief and damages. In the United States District Court for the Northern District of Illinois. March 2005.

[385] "If, in your [i.e. Commander, US Southern Command's] view, you require additional interrogation techniques for a particular detainee, you should provide me, via the Chairman of the Joint Chiefs of Staff, a written request describing the proposed technique, recommended safeguards, and the rationale for applying it with an identified detainee". Memorandum for Commander, US Southern Command: Counter-Resistance Techniques in the War on Terrorism. 16 April 2003, available at http://web.defenselink.mil/news/Jun2004/d20040622doc9.pdf.

[386] See, for example, *USA: Guantánamo – An icon of lawlessness*, AI Index: AMR 51/002/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510022005.

to me on 17 September 2004 was under duress". The Personal Representative also relayed that Mamdouh Habib considered that conditions in Camp 5 of Guantánamo Bay, "where the lights are on and the fans run constantly is a form of torture".[387] The CSRT determined on 22 September 2004 that he was an "enemy combatant". He was transferred to Australia four months later, on 28 January 2005, and released. Judge Green noted that "Mr Habib is not the only detainee before this Court to have alleged making confessions to interrogators as a result of torture" and that evidence had been introduced indicating that "abuse of detainees occurred during interrogations not only in foreign countries but also in Guantánamo itself". She highlighted recently revealed claims of such abuse made by an FBI agent:

> "*On a couple of occassions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defacated (sic) on themselves and had been left there for 18, 24 hours or more. On one occassion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on , I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occassion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion (sic), not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor."*[388]

The executive

If the executive has nothing to hide and nothing to fear from a full independent investigation into the USA's policies and practices on detentions and interrogations in the "war on terror", then it should support such an inquiry.

In addition, the US Department of Justice is the executive authority with the power to initiate procedures to enforce the War Crimes Act and the Anti-Torture Act, both passed in 1996. The Attorney General is the Justice Department's chief office-holder. So far no one has been charged under these acts. The only person so far prosecuted by the Justice Department for alleged "war on terror" abuses – a civilian contractor working with the CIA charged with assaulting an Afghan detainee who died in custody – was not charged under either act. The Justice Department failed to clarify to Amnesty International why not.[389]

Amnesty International is concerned by *prima facie* evidence that senior members of the US administration, including President Bush and Secretary of Defense Rumsfeld, have authorized human rights violations including "disappearances" and torture or other cruel, inhuman or degrading treatment. In addition, senior officials, including the current and previous Attorneys General, may have been involved in a conspiracy to give immunity to US agents, most specifically members of the CIA, from prosecution for torture or war crimes under US law.[390] For example, both former Attorney General John Ashcroft and current

[387] *Habib v. Bush*. CSRT unclassified factual returns, In the US District Court for the District of Columbia.
[388] http://www.aclu.org/torturefoia/released/FBI.121504.5053.pdf
[389] See pages 159-160, *USA: Human dignity denied*, note 17, *supra*.
[390] At the same time, the USA has an active campaign of opposing the International Criminal Court (ICC). The Bush administration has stated that it does not intend to ratify the Rome Statute of the ICC, and has been pressurizing governments around the world to enter into impunity agreements which commit them not to surrender to the ICC any US nationals accused of genocide, crimes against

Attorney General Alberto Gonzales advised President Bush that not applying Geneva Convention protections to detainees captured in Afghanistan would make future prosecutions for war crimes under US law more difficult. It is alleged also that Alberto Gonzales, in his role as White House Counsel, requested the now infamous 1 August 2002 Justice Department memorandum on torture following a request from the CIA for legal protections for its interrogators.[391] That memorandum, which Alberto Gonzales "accepted" as a "good-faith effort", represented the position of the executive branch until it was withdrawn in late June 2004.[392] If it were not for leaks, including of the Abu Ghraib torture photographs, it has to be considered likely that the memorandum would still be secret and still represent the position of the administration to this day. Instead, a replacement was issued on 30 December 2004, shortly before Alberto Gonzales was to come before the Senate Judiciary Committee to face questioning on his nomination to the post of US Attorney General.[393]

While the replacement memorandum is an undoubted improvement on its predecessor, many of the contents of the original memorandum live on in the Pentagon's Working Group Report on Detainee Interrogations in the Global War on Terrorism, dated 4 April 2003, which has not been withdrawn or replaced. In addition, the December 2004 memorandum does not address some of its predecessor's contents, such as the assertion that the President can authorize torture and that there can be various defences against criminal liability for torture. To address such questions, the new memorandum asserts, is "unnecessary", as the President has stated that the USA will not engage in torture. This omission is regrettable, as this is a time for closing all loopholes, not leaving open the possibility for future abuse. The only position consistent with the absolute prohibition in international law on torture and its status as an international crime, regardless of the rank or position of the perpetrator, would have been to state unequivocally that no one, the President included, has the right or the authority to torture detainees or to order their torture and that anyone, the President included, who does so will have committed a crime.

Instead, by relying solely on the President's words, the 2004 memorandum actually reinforces the position of its August 2002 predecessor that it is entirely up to the President to decide on these matters. The 2004 memorandum cites as an example of President Bush's opposition to torture his statement on the occasion of UN International Day in Support of Victims of Torture in June 2004, in which he stated that the USA "will not tolerate torture. We will investigate and prosecute all acts of torture." Firstly, the President made a similar statement a year earlier, at which time the August 2002 memorandum was still secret and in force. Secondly, the President apparently believes that there are people who "are not legally entitled to humane treatment", as he stated in a memorandum of 7 February 2002 which remains in force. Thirdly, as noted above, not a single person has been prosecuted for "torture" under the Anti-Torture Act, and the investigations into allegations of torture and other cruel, inhuman or degrading treatment have lacked independence, scope and reach. As

humanity or war crimes. The US Department of Defense's March 2005 National Defense Strategy stresses that "legal arrangements should…provide legal protections for our personnel through Status of Forces Agreements and protections against transfers of US personnel to the International Criminal Court."

[391] See *USA: Human dignity denied*, note 17, *supra*.

[392] "That memo represented the position of the executive branch at the time it was issued"; and: "It represented the administrative branch position". "I accepted the August 1, 2002, memo". Alberto Gonzales, White House Counsel, in response to oral questions from Senator Patrick Leahy and Senator Edward Kennedy and written questions from Senator Richard Durbin during the US Attorney General nomination hearings before the Senate Judiciary Committee, January 2005.

[393] Daniel Levin, Acting Assistant Attorney General, Memorandum for James B. Comey, Deputy Attorney General. Re: Legal standards applicable under 18 U.S.C. §§ 2340-2340A, 30 December 2004, http://www.usdoj.gov/olc/dagmemo.pdf.

also already noted, Alberto Gonzales affirmed in January 2005 that the Justice Department does not consider itself legally bound by the Convention against Torture's prohibition (Article 16.1) on cruel, inhuman or degrading treatment in the case of non-US nationals detained outside the USA. This presumably is the reason that the December 2004 memorandum did not address the question of cruel, inhuman or degrading treatment. The August 2002 memorandum claimed that under the Convention, cruel, inhuman or degrading treatment "establishes a category of acts that are not to be committed and that states must endeavor to prevent, but that states need not criminalize, leaving those acts without the stigma of criminal penalties". However, what the August 2002 memorandum failed to note, and its successor ignored entirely, is the fact that Article 16.2 of the Convention against Torture states that:

> "*The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion*".

As Amnesty International has pointed out elsewhere, all forms of torture and ill-treatment are strictly and equally prohibited in all circumstances. For example, the International Covenant on Civil and Political Rights prohibits torture and other cruel, inhuman or degrading treatment or punishment even "in times of public emergency which threatens the life of the nation".[394] The only position consistent with the absolute prohibition in international law on cruel, inhuman or degrading treatment or punishment and their status as international crimes would have been to state unequivocally that such acts are prohibited in all circumstances and their perpetrators would be prosecuted. Instead, the Justice Department's December 2004 memorandum ignored the issue altogether.

From such a starting point, it is difficult to see how Attorney General Alberto Gonzales will live up to his pledge on "war on terror" abuses, namely that "wherever there is reason to believe that crimes may have been committed that are within the authority of the Department of Justice…, the Department under my leadership [will] investigate and, where appropriate, prosecute such crimes".[395] The question is also raised, what would he define as "crimes"? Asked whether he would agree that he should "personally be disqualified from any investigation or inquiry into detainee abuses", given that he himself was implicated in the setting of policy and practices that "appear to have contributed to detainee abuses in Afghanistan, Guantanamo Bay, and Iraq", Alberto Gonzales only replied that he would "take extremely seriously my obligation to recuse myself from any matter whenever appropriate".[396] At the same time he said that he had "no reason to believe" that a comprehensive independent commission of inquiry into the USA's "war on terror" interrogation and detention policies and practices was "advisable".[397] In February 2005, a spokesman for the Attorney General, declining to address the question of an independent commission or the appointment of a Special Counsel, neverthless said that Attorney General Gonzales did not intend to recuse himself from investigations and that this "speaks for itself".[398]

Under federal regulations, the US Attorney General "will appoint a Special Counsel when he or she determines that criminal investigation of a person or matter is warranted" and:

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[394] *USA: Human dignity denied*, *supra*, note 17, pages 41-46.
[395] Written response to Senator Patrick Leahy from Alberto Gonzales, nominee Attorney General. January 2005.
[396] Written response to Senator Edward Kennedy from Alberto Gonzales, nominee Attorney General. January 2005.
[397] Written response to Senator Patrick Leahy from Alberto Gonzales, nominee Attorney General. January 2005.
[398] *ACLU urges investigation of detainee abuse*. Washington Post, 16 February 2005.

"(a) That investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department or other extraordinary circumstances; and

(b) That under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[399]

Amnesty International believes that these three criteria have been met. As the organization has detailed above and in its October 2004 report, *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, there is *prima facie* evidence against senior government officials supporting a determination that an investigation by an outside independent prosecutor is warranted. It is clear that the current Attorney General has a conflict of interest in this matter, and that there is a public interest in getting to the bottom of what has occurred.

The individual appointed "shall be a lawyer with a reputation for integrity and impartial decisionmaking, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly, and that investigative and prosecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies. The Special Counsel shall be selected from outside the United States Government."[400] Amnesty International, adding the proviso that the prosecutor must take proper and full account of international law and standards (Justice Department policies and advice in the "war on terror" have manifestly failed to do so), will continue to call for the appointment of a Special Counsel.[401]

Amnesty International will also continue to call for a full independent commission of inquiry, and for the facilitation of investigations by UN mechanisms such as the Special Rapporteur on Torture, and human rights organizations.

13. Deaths in custody – evidence of abuse continue to emerge

When we viewed Mowhosh's remains, he was black and blue, purple, indications that he had been beaten pretty severely
Curtis Ryan, US army criminal investigator, 2 December 2004[402]

On 28 April 2005, Sergeant Hasan Akbar of the US Army's 101st Airborne Division was sentenced to death by court-martial in Fort Bragg, North Carolina. This black Muslim soldier had been convicted of the premeditated murder of two fellow US soldiers in March 2003 in Kuwait in the first week of the Iraq invasion.[403] The prosecution depicted Sergeant Hasan as a

[399] Code of Federal Regulations 28 C.F.R. 600.1. There was previously a provision in US law for the prosecution of crimes in which the Attorney General or Justice Department had a perceived conflict of interest. This was the Independent Counsel Act, which would allow the appointment of an independent counsel by a special judicial panel. However, the Act expired in 1999, and has not been replaced.
[400] 28 C.F.R. 600.3.
[401] Under the UN Guidelines on the Role of Prosecutors, all prosecutors are to be made aware, *inter alia*, "human rights and fundamental freedoms recognized by national and international law" (Guideline 2.b). Also, "prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences" (Guideline 15).
[402] *United States v. CW2 Williams, SFC Sommer and SPC Loper*, 66th Military Intelligence Company, 3rd Squadron, 3rd Armored Cavalry Regiment. Fort Carson, Colorado. Unclassified transcript.
[403] The over-representation of ethnic and racial minorities on federal and military death row in the USA is particularly pronounced. At state level, studies have consistently shown that race is a contributory

religious fundamentalist bent on killing as many US soldiers as he could before they could kill Muslims in Iraq. The defence presented evidence that he was mentally ill. The jury of 15 US military personnel decided that he should be killed.

Sergeant Akbar's sentence is in marked contrast to those so far passed by other courts-martial for US soldiers convicted of killing Iraqis and can also be compared to cases involving deaths of Afghans or Iraqis in US custody which have not been taken to trial (see Appendix 1). For example, Private Edward Richmond was charged with the premeditated murder of Muhamad Husain Kadir, an Iraqi civilian, on 28 February 2004. The soldier allegedly shot the unarmed detainee, who was handcuffed, in the back of the head. It was alleged that Private Richmond had earlier said that he had wanted to kill an Iraqi. In August 2004, the court-martial reduced the charge to one of voluntary manslaughter and sentenced him to three years in prison, less 47 days for time served, even though that time had not been spent in confinement.[404] In turn this case contrasts to that of Sergeant Oscar Nelson, who in September 2003 was sentenced by a court-martial to seven years in prison for the involuntary manslaughter of a fellow US soldier in May 2003. Sergeant Nelson was accused of driving recklessly in a military vehicle when it overturned, killing Specialist Nathaniel Caldwell.[405]

Meanwhile, evidence of abuses and impunity continues to emerge in death-in-custody cases. In its October 2004 report, *USA: Human dignity denied – Torture and accountability in the 'war on terror'*, Amnesty International also raised the case of 'Abd Hamad Mawhoush, a major general in the Iraqi army under the former regime who died in a US detention facility in Al Qaim in northwest Baghdad on 26 November 2003, two weeks after he had handed himself in to the US military on 10 November.[406] He had died after being interrogated while allegedly being rolled back and forth with a sleeping bag over his head and body, and after one of his interrogators sat on his chest and placed his hands over his mouth. Several months later, in the wake of the Abu Ghraib scandal, four soldiers were charged with murder and dereliction of duty.[407] Evidence has since emerged that he was subjected to a brutal beating two days before his death by personnel from other agencies, including the CIA, none of whom had been charged at the time of writing. [408]

On the morning of 2 December 2004, shortly after a preliminary military hearing for three of the soldiers began in Fort Carson in Colorado, the Investigating Officer closed the entire proceedings from the public for reasons of national security.[409] However, the *Denver Post* brought a legal challenge to have the hearing opened, and proceedings were suspended on 3 December 2004 pending consideration of the issue by the US Army Court of Criminal Appeals. On 23 February 2005, the Court ruled that it had been unlawful to close the entire hearing, and that only those portions involving classified information should be closed. The

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factor in capital sentencing, particularly race of victim. Eighty per cent of the nearly 1,000 people executed in the USA since judicial killing resumed in 1977 were convicted of crimes involving white victims. Yet, African Americans and whites are the victims of murder in almost equal numbers in the USA. Such studies suggest that lives of white people are valued more highly by the system than the lives of minorities, particularly African Americans. As already pointed out above, the lives of US citizens appear to have been valued more highly by US authorities in the "war on terror" than the lives of Afghans, Iraqis and others.

[404] *USA: Human dignity denied*, *supra*, note 17, page 157.

[405] *Ibid*.

[406] Pages 148-149, *USA: Human dignity denied*, *supra*, note 17.

[407] Chief Warrant Officer Jefferson Williams, Sergeant First Class William Sommer and Specialist Jerry Loper, and Chief Warrant Officer Lewis Welshofer. A murder charge carries a maximum sentence of life imprisonment without the possibility of parole.

[408] *Iraqi General beaten two days before death*. The Denver Post, 5 April 2005.

[409] The hearing is known as an "Article 32" hearing and is conducted to determine whether those charged should be court-martialled.

appeals court ordered the army to open the remainder of the hearing as appropriate and to make public the unclassified parts of the transcript of the hearing already conducted. The hearing ended on 30 March 2005, and the transcript of the earlier part was released at that time. The unredacted parts of this transcript contain disturbing revelations.[410]

As alleged in other US detention facilities in the "war on terror", there is evidence that abusive interrogation techniques in the Al Qaim facility were routine and authorized, and that a lack of training and resources contributed to the abuses. For example, a US Army Sergeant who testified at the hearing said that "stress positions" were among the techniques approved "from higher".[411] Stress positions, he said, included "putting the detainees on their knees, making the detainee stand for the entire interrogation, holding different objects… out in front of you". The medical examiner who conducted the autopsy on General Mawhoush revealed that he had been told that "individuals would sit on his chest, abdomen, or back. And it was described to me as putting him in, quote, stress positions".[412] A military doctor who was assigned to the Al Qaim facility at the time that General Mawhoush died also testified. She revealed that in the 14 days that she was at the facility she had treated at least one other person who she was "quite sure had received some physical abuse". She recalled that that detainee "had bruising on the back of his hands. He had very severe bruising over his entire back. He complained of feet pain, and he had bruising on the bottoms of his feet. And he had bruising on the tops of his feet, as well, and some bruising on his anterior…"[413] An army investigator who testified at the hearing referred in passing to another case in which a detainee was being "roughed up".

As Amnesty International reported in *Human Dignity Denied*, the military news release which first announced 'Abd Hamad Mawhoush's death had been titled: "Iraqi General Dies of Natural Causes", claiming that he had died after complaining of not feeling well. However, at the December 2004 hearing, Curtis Ryan, an investigator with the Army's Criminal Investigation Division (CID), who testified that he had seen photos of the body sent to him by email a few hours after the death, revealed that the prisoner was covered in "bruising, pretty obvious bruising, dark purple, definitely indications to us that something had happened that required investigation". Investigator Ryan related how he and other investigators found the following marks of abuse on a subsequent examination of the body:

> "*Extensive bruising on the arms, legs, front and back of the torso… And there were some bruises that indicated that he perhaps had been struck with a long cylindrical object. And then there were some other bruises that looked like maybe they were caused by a rifle butt*."

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[410] *United States v. CW2 Williams, SFC Sommer and SPC Loper*, 66th Military Intelligence Company, 3rd Squadron, 3rd Armored Cavalry Regiment. Fort Carson, Colorado. Unclassified transcript. All quotes taken from this transcript unless otherwise noted. All references to names and agencies other than military, e.g. the CIA and OGA are redacted.

[411] As already noted, the current US military interrogation manual, FM 34-52, lists "forcing an individual to stand, sit or kneel in abnormal positions for prolonged periods of time" as an example of physical torture. Secretary Rumsfeld authorized the use of stress positions in Guantánamo in December 2002. The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "prolonged standing" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied*, *supra*, note 17.

[412] When more than one person is on the detainee, it is apparently called a "pig pile" or a "dog pile".

[413] It is not clear from the transcript if this is the same person as another that she was sure had been beaten: "he had worked a translator with me throughout the day and was removed, I believe for interrogation. I'm not even sure. And several hours later, I was called to see him. And he was fine when I saw him in the morning and was badly bruised when I saw him in the afternoon".

Investigator Ryan testified at the preliminary hearing that the CID investigation had found evidence that General Mawhoush had been subjected to a brutal assault on 24 November, two days prior to his death. It is reported that the CIA and other personnel in the facility at the time became involved in the Mawhoush interrogation because the soldiers were "having a hard time; they weren't getting any information out of him."[414] A "collective decision" was reached on how to proceed:

> "*… the other thing that they were going to try to do was put a bunch of people in the room, a tactic that Mr [blank] called 'fear up', I guess as a means of intimidation…*[415] *[T]hey started doing what… several other people called the 'good cop/bad cop'…*[416] *When [Mowhosh] didn't answer or provided an answer that they didn't like, at first [redacted] would slap Mowhosh*[417]*, and then after a few slaps, it turned into punches. And then from punches, it turned into [redacted] using a piece of hose… [F]rom the best we can tell, a piece of black insulation that you'd use to insulate water pipes in a house to keep them from freezing, about 3 feet long or a meter long, and he was hitting Mowhosh with that when he provided answers that they didn't like… But at some point, somebody outside of that first group of Mowhosh and [redacted] came forward, yelled something at Mowhosh. Mowhosh kicked at that person, and then a scuffle ensued, and then basically it was a free-for-all. The room collapsed on Mowhosh. Sergeant [redacted], for example, said he took out some frustrations by punching Mowhosh six or seven times. Mr [redacted] said he punched Mowhosh a couple of times and probably hit with his heel of a hand a couple of times. And that lasted for 1 or 2 minutes. Nobody can really say for sure. And then Mowhosh was let out of the room… Specialist Loper told me that he had to carry Mowhosh with the help of Sergeant Sommer and two or three other soldiers*."

Major Michael Smith, a forensic psychologist with the US Armed Forces who conducted an autopsy on 'Abd Hamad Mawhoush at Baghdad International Airport Mortuary on 2 December 2003, was also questioned at the hearing. He revealed that the cause of death was asphyxia due to smothering and chest compression.[418] He confirmed that the bruising on the body was "a marker of significant physical violence", but that "bruises themselves did not cause death." Major Smith also revealed that General Mawhoush had suffered five broken ribs, which were "consistent with blunt force trauma, that is, either punching, kicking, or

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[414] *Iraqi General beaten two days before death*. The Denver Post, 5 April 2005. Quote from military hearing transcript.

[415] "Fear Up Harsh" and "Fear Up Mild" are interrogation techniques contained in the 1992 US interrogation manual FM 34-52. The April 2003 Pentagon Working Group report recommends that they be among the techniques approved for general use against "unlawful combatants outside the United States".

[416] This is also known as "Mutt and Jeff". The April 2003 Pentagon Working Group report recommends that they be among the techniques approved for general use against "unlawful combatants outside the United States". In a still-operational memorandum, dated 16 April 2003, Secretary Rumsfeld authorized its use at Guantánamo Bay, as long as the interrogating authorities "specifically determine that military necessity requires its use" and he, Secretary Rumsfeld is notified in advance.

[417] The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "face or stomach slap" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied*, *supra*, note 17.

[418] The autopsy notes that the "details surrounding the circumstances at the time of death remain classified". The autopsy report has recently been released under the ACLU's freedom of information lawsuit. Dated 18 December 2003, it concludes: "Significant findings of the autopsy included rib fractures and numerous contusions (bruises), some of which were patterned due to impacts of blunt object(s)… [These] support a traumatic cause of death and therefore the manner of death is best classified as homicide".

striking with an object or being thrown into an object". It has also been alleged that one of the four soldiers charged threw a heavy box at the detainee. Major Smith acknowleged that such an object "if it was thrown with significant force, if could possibly cause rib fractures". At the hearing it was also suggested that General Mawhoush had been made to do "physical training" prior to interrogation, where he was forced to carry large rocks.[419] He had reportedly fallen a number of times on the rocks.

Investigator Ryan also revealed what had been learned about the interrogation on the day of the detainee's death, when the "sleeping bag technique" was used:

> "*…they had laid Mowhosh on the floor to ask him questions and… they had rolled him from his back to his stomach and back to his back… Mowhosh was not really answering any questions. He wasn't providing any information. And then the decision was made to put Mowhosh in the sleeping bag… [A]t the guidance of Chief Warrant Officer Welshofer, Loper assisted in placing a green Army sleeping bag… over Mowhosh's head, actually the feet area over the head so that the face was covered. And then to hold the bag tight, they wrapped a length of electrical wire; not like an extension cord, but like white wire that was used to actually run the wiring in the building over there. Maybe about 20 feet long. And then they laid Mowhosh on the floor, and Specialist Loper assisted with that. And then at that point with Mowhosh on his back, he told me that Welshofer straddled Mowhosh, one foot on either side and then kind of squatted or said on Mowhosh's upper body whie he was on the floor in the sleeping bag. He said as the interrogation continued, at one point Welshofer covered Mowhosh's face with his hand, held it there for a few seconds, and then released.*[420] *He stated that he and Williams were where Mowhosh's feet were on his legs, standing on the bag so that Mowhosh wouldn't be able to kick Mr Welshofer and knock him off…*
>
> *[Specialist Loper] said at one point while the general was on the floor in the sleeping bag he was on his back, he was being questioned, he still wasn't providing information. Mr Welshofer stood up, and he said everybody kind of paused for a minute, and they were looking at the general, and it looked like the general wasn't breathing. Then he said after a few seconds, the general took a long, deep breath, and then that he shook or spasmed for a couple of seconds. He said that Mr Welshofer made the statement, 'Thank God. I thought he had stopped breathing.' And then at that point they rolled Mowhosh over onto his stomach, and then Mr Welshofer sat on him again, this time on his back, and continued the interrogation*."

Another witness, a US army interrogator, was questioned about the "sleeping bag technique" and whether she thought such a technique "can be appropriate". She replied: "Yeah, and a sleeping bag is not inherently a weapon. It's to take somebody out of their comfort zone. And I don't feel it was an inappropriate use… The sleeping bag was just placed over a detainee's head and probably to about waist level, just to make it dark and, like I said, to take them out of their comfort zone". According to this witness, the detainee could be prone, kneeling, sitting or, standing. From this and other witness testimony at the hearing, it is clear that the purpose of the sleeping bag technique is to play on detainees' claustrophobia.

[419] The still operational Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism recommends the use of "physical training" in "strategic interrogation facilities" against detainees who have "critical intelligence" and have been cleared by medical personnel for such an interrogation technique. See page 66, *USA: Human dignity denied*, *supra*, note 17.

[420] This technique is apparently known as "burking", a stifling technique named after William Burke who was hanged in the UK in 1829 for murdering people whose bodies he sold for medical dissection. Major Smith testified that "burking" may leave no visible signs of trauma, and that the Mawhoush case "has elements of burking involved in his death".

For example, another soldier confirmed that he had heard of the technique being used because the "detainee said that he was scared of the dark". At the reopened preliminary hearing on 30 March 2005, another interrogator alleged that he had witnessed one of the charged soldiers subject another detainee to the sleeping bag technique, and again had sat on the detainee, slapping him, yelling at him and putting his hands over the detainee's mouth. The interrogator said that the soldier had picked up the detainee in the sleeping bag, thrown him on the concrete floor and fell with his body weight on top. The interrogator claimed that he had reported such brutality to his superiors, but had stopped doing so when nothing changed and after being accused of being "too close to the Iraqis".[421]

Other methods of using detainees' claustrophobia against them reportedly included forcing them into wall lockers and banging on the lockers with pipes.[422] At the reopened hearing on 30 March 2005, another Chief Warrant Officer who had been deployed to the Al Qaim facility reportedly stated that such methods were regularly used, and would not state that it was abusive to sit on a detainee's chest or to cover his mouth to block his breathing, saying it was a "grey" area. He reportedly testified that the interrogation of Mawhoush would have been acceptable if it had not caused "extreme distress".[423]

US Army Colonel David Teeples, whose deployment to Iraq included command over the Al Qaim facility and the four men charged, was called as one of the witnesses.[424] During his testimony, Colonel Teeples stated the following when asked to explain his earlier answer that he would not be surprised to learn that the "sleeping bag technique" used on 'Abd Hamad Mawhoush was an "authorized technique":

> "*I don't know what the approved techniques are or were. I do know that I saw people that were detainees that were kept standing for hours, just to fatigue them. And I know that, you know, sleep deprivation was a technique, and I believe that the first time I heard about the claustrophobic effect was in Chief Welshofer's rebuttal to the letter of reprimand. And, so, I could understand why the sleeping bag technique could be used as a claustrophobic technique, not intending to harm someone, not intending to kill someone, but intending to put some sort of fear into their mind. Now, I mean, the – and so – you know, and the way I answered that one question about sitting on somebody, certainly I wouldn't condone sitting on somebody until they stopped breathing. Now, just sitting on somebody – you know, may you got – make somebody afraid. That – you know, and I don't know that that's wrong.*"

When asked whether he would countenance interrogation techniques that cause "physical pain in a subject", he stated that he would not. However, he continued: "But how do you know – I mean, there's some things that we did – for instance, keep them from sleeping. And I'm assuming that that was an approved technique. But some people could say, 'Well, that caused physical pain, if you can't sleep'… I don't know what you mean exactly by 'physical pain', you know. We could sit here and argue all day about that". In reference to the "sleeping bag technique", Colonel Teeples testified that "there are some techniques of

[421] *Grim testimony at Carson hearings*. Rocky Mountain News, 31 March 2005.
[422] *Good guys? Military logic tortured*. The Denver Post, 1 April 2005.
[423] *Grim testimony at Carson hearings*. Rocky Mountain News, 31 March 2005; *Good guys? Military logic tortured*. The Denver Post, 1 April 2005; *Soldiers used proper interrogation techniques, lawyer says*. Associated Press, 1 April 2005.
[424] Colonel Teeples explained that his forces had not been given any professional interrogators and so "that's why we installed having our own interrogation team… I mean, it's like me as military governor of Alanbar. I've never been a governor any place, especially in a foreign country. So, I pick a couple of linguists and then just do the best I can." He said that during one 10-day period, they had 350 detainees in the Al Qaim detention facility, which was dubbed "Hotel Blacksmith".

interrogation that either cause a claustrophobic condition, some kind of fear. But it's not physical harm."

Colonel Teeples testified that "My thought was that the death of Mowhosh was brought about by [redacted] and then it was "unfortunate and accidental, what had happened under an interrogation by our people". He said that even if it was proved to him that the death had been caused entirely by the interrogation of the four soldiers charged with murder, "I'm not sure I would change my mind. I mean, a lot of it has to do with intent, I think. If you take away what the [redacted] did, then I think you have to look at the intent of the interrogation".

The three defendants who were the subject of the preliminary hearing have all denied wrongdoing, claiming that their actions had been sanctioned by commanders, a claim that has been repeated in other cases.[425] The fourth defendant has also issued a statement saying that he had only been using what he believed were "approved techniques", and that the information gleaned under such interrogations had "prevented further insurgent attacks, thereby saving American soldiers' lives". [426] Major Jessica Voss, head of the military intelligence unit to which the soldiers belonged has also said that she believed that the "sleeping bag" technique was authorized. Indeed, according to the hearing transcript, Major General Charles H. Swannick, a senior commander of US forces in Iraq, included the following observation with letters of reprimand to soldiers involved in the Mawhoush case: "Death was from asyphxiation. I expect better adherence to standards in the future". This surely suggests that the sleeping bag technique was not, *per se*, considered abusive among the higher ranks.

At the time of writing, the decision as to whether the cases of the four charged soldiers would go to court-martial had not been taken. The investigating officer who held the preliminary hearing will make a recommendation to the soldiers' commander at Fort Carson who takes the final decision.

Commanders – who take the decision whether to prosecute a soldier under their command – have recently decided not to take up army investigators' recommendations to prosecute 11 US soldiers for offences including negligent manslaughter and assault in the death of an Iraqi detainee who died in US custody on 9 January 2004 from "blunt force injuries and asphyxia". This is believed to be the case of Abdul Jaleel who died in the Forward Operating Rifles Base in Al Asad, five days after being taken into custody. In the initial part of his detention he had allegedly been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door, and he was gagged. He died in this position.[427] However, commanders rejected the recommendation to prosecute, determining that the death had been the "result of a series of lawful applications of force in response to repeated aggression and misconduct by the detainee". [428]

The investigation into the death in custody in Iraq of Abdul Kareem Abdul Rutha, also known as Abu Malik Kenami, on 9 December 2003 has also left questions unanswered. Abu Malik Kenami was detained on 5 December 2003 and brought to the US detention facility at "AO [area of opeation] Glory" in Mosul. He was interrogated for the first and last time on that day. However, for the next four days, he was kept hooded with a plastic sandbag

[425] *Beating of Iraqi General alleged in army hearing*. Washington Post, 3 April 2005.
[426] *Good guys? Military logic tortured*. The Denver Post, 1 April 2005.
[427] *Brutal interrogation in Iraq.* The Denver Post, 19 May 2004.
[428] *Army criminal investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom*. United States Army Criminal Investigation Command, 25 March 2005.

and his hands were handcuffed in front of him with plastic zip ties. The rule in the facility at that time was that the detainee must not attempt to lift the hood or talk. As punishment for disobeying these rules, Abu Malik Kenami was repeatedly subjected to "ups and downs", whereby the detainee is forced to stand up and sit down rapidly, in constant motion for up to 20 minutes at a time.[429] On some occasions, he would have his hands handcuffed behind his back while forced to do this. On the morning of 9 December, he was found dead. His body was put in a refrigerated van for the next six days. No family members claimed the body and it was arranged for a local mortician to pick it up. No autopsy was conducted.

An army investigator assigned to the case said that in the absence of an autopsy, "the cause of Abu Malik Kenami's death will never be known", and that he could only "speculate" on the cause of death. He concluded that the detainee had died of a heart attack, including because "he was performing ups and downs for ten to twenty minutes several times over a two to three hour period". [430] Neither this, nor permanent hooding and handcuffing, was seen as abusive, however. A previously secret army memorandum recording the death states: "At no time was [Abu Malik Kenami] physically abused or put under any physical duress, other than regular exercise and corrective training."[431] Another of the sworn statements to the investigator states that "the detainee did have a bag over his head the entire time he was at the [detention facility]. He was also subjected to [physical training], that is: standing up and sitting down rapidly for hours on end". The statement concludes that, while the guards "do yell at the detainees to ensure they behave while in custody, [they] do not abuse them".

14. Secrecy – the executive's weapon of mass distraction

How can our State Department denounce countries for engaging in torture while the CIA secretly transfers detainees to the very same countries for interrogation? The President says he does not condone torture, but transferring detainees to other countries where they will be tortured does not absolve our government of responsibility. By outsourcing torture to these countries, we diminish our own values as a nation and lose our credibility as an advocate of human rights around the world.

US Senator Patrick Leahy, 17 March 2005[432]

In June 2002, an Amnesty International observer was due to attend a hearing in a US District Court in Virginia in the case of John Walker Lindh, a US citizen captured in the armed conflict in Afghanistan. The organization was particularly concerned at allegations that he was tortured and ill-treated in US military custody into making a "confession". The abuse to which he was allegedly subjected – stripping, blindfolding, threats, the cruel use of restraints, humiliating photography, and denial of access to legal counsel or relatives – echoed what would emerge two years later in Iraq.[433] At his court hearing, a federal judge was to consider whether his "confession" should be admitted as evidence.

[429] Additionally, "all detainees conduct a short [physical training] session daily to keep them warm….and promote a health lifestyle". At the time of the death, the facility was holding more than 60 detainees, and was described as overcrowded.

[430] One of the medical personnel involved also suggested the possibility of hypothermia, given the low temperatures in the holding facility at that time, and the lack of action from the authorities on a request for heating made a few weeks earlier.

[431] Memorandum for Record: Death of detainee. Department of the Army, Bravo Company, 311th MI BN (2BCT), Mosul, Iraq. 9 December 2003.

[432] Statement of Senator Patrick Leahy on the Convention Against Torture Implementation Act, 17 March 2005.

[433] Amnesty International had raised the case of John Walker Lindh in its *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, AI Index: AMR 51/053/2002, April 2002.

In the event, the hearing was cancelled after Lindh agreed to plead guilty to much reduced charges carrying a lesser sentence. As part of the deal, he dropped his allegations of torture and ill-treatment, signing a statement that he was "not intentionally mistreated by the US military".[434] Any breach of the plea agreement by Lindh would open him up for prosecution "to the full extent of the law" and a heavier sentence. The Justice Department reportedly insisted that the deal was only possible if John Walker Lindh agreed to it before the suppression hearing. A former attorney at the Justice Department who raised legal and ethical objections to Lindh's interrogation in Afghanistan subsequently lost her job.[435] In contrast, the Assistant Attorney General in charge of the Justice Department division which oversaw the case was in early 2005 nominated by President Bush to the position of Secretary of Homeland Security.[436]

Under international law, the US government was obliged to ensure a prompt and impartial investigation into John Walker Lindh's allegations of torture and ill-treatment.[437] Likewise any prosecutors involved in the case were under obligation not to use any evidence against the defendant which they had reasonable grounds to believe had been coerced by torture or ill-treatment and to ensure that anyone responsible for any such treatment was brought to justice.[438] Instead, the allegations of torture and ill-treatment received no more official attention. Given what we know now about the secret memorandums that were being written in 2002 within the administration about torture and ill-treatment in the "war on terror", and the widespread allegations of abuse that have emerged since, there has to be concern that Lindh's alleged ill-treatment and the pressure for a plea arrangement were, respectively, part of a wider policy and cover-up. Secrecy breeds abuse and secrecy can be used to leave abuse unpunished and unchecked.

Secrecy, or to put it another way, the denial of independent external or judicial scrutiny, has formed a central part of the USA's "war on terror" detentions. The CIA is the agency most frequently cited in this regard. For example, Vice Admiral Albert Church noted, when issuing the executive summary of his review into Department of Defense interrogation operations, that "the CIA has independent operations in Afghanistan".[439] One reported CIA detention facility was known as the Pit or the Salt Pit, an abandoned brick factory north of Kabul. In November 2002, an Afghan detainee was allegedly stripped, chained to the floor, assaulted, and left in a cell overnight without blankets, on the orders of a CIA agent. He died, with hypothermia being given as the cause of death. According to reports, he was buried by Afghan guards in an unmarked grave, his family never notified. The *Washington Post* quoted one US government officials as stating that "he just disappeared off the face of the earth".[440]

Even before the US Supreme Court's *Rasul* ruling in June 2004 punctured a central assumption of the administration's Guantánamo detention policy – namely that the "federal

[434] See pages 91-92, *USA: Human dignity denied*, *supra*, note 17.
[435] The lawyer was Jesselyn Radack. See, *Lost in the Jihad, Why did the government's case against John Walker Lindh collapse*? The New Yorker, 10 March 2003. *The trials of Jesselyn Radack*. The American Lawyer, 14 July 2003.
[436] The Senate confirmed the nomination of Michael Chertoff. See *Chertoff and torture*, by Dave Lindorff. The Nation, 14 February 2005.
[437] For example, Articles 12 and 16, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
[438] Guideline 16, UN Guidelines on the Role of Prosecutors.
[439] Department of Defense briefing on detention operations and interrogation techniques. 10 March 2005.
[440] *CIA avoids scrutiny of detainee treatment*, Washington Post, 3 March 2005. The Salt Pit has since reportedly been torn down, with the CIA using another facility. The death in custody was referred to the Justice Department for possible prosecution in 2004, but no one has yet been charged. The CIA officer in charge of the case was reportedly promoted.

courts lack jurisdiction over habeas petitions filed by alien detainees held outside the sovereign territory of the United States"[441] – the US authorities had not put all their eggs in the Guantánamo basket. The month after Guantánamo started receiving detainees, Deputy Secretary of Defense Paul Wolfowitz said of the administration's detainee policy, "either we detain them ourselves or we turn them over to a court in the United States, or we turn them over to another country".[442] Indeed, "only" approximately 750 people have been held in Guantánamo, of whom about 520 remained in the base by 26 April 2005. In August 2004, the UN's Independent Expert on Human Rights in Afghanistan, Professor Cherif Bassiouni, called on Coalition forces in Afghanistan to grant the national human rights commission and him access to "the main detention sites, where an estimated 300-400 persons are detained". He stressed that "the lack of transparency raises serious concerns about the legality and condition of their detention".[443] In March 2005, he called on coalition forces to provide access to all facilities to the national and international monitors, including the ICRC, UN special rapporteurs, and the Afghan government.[444] Following another visit to Afghanistan in early 2005, the UN expert issued a statement in which he expressed his grave concern "at allegations of arrest, detention and mistreatment committed by foreign forces in Afghanistan. The Independent Expert is particularly concerned at allegations of possible torture having been committed in this context".[445] As already noted above, in April 2005, the UN Independent Expert's mandate was not renewed as a result, he believes, of US pressure.

Kamal Sadat, a reporter with the BBC World Service in Afghanistan, has said that he was detained by US forces in Khost in September 2004. He says he was hooded and flown to a US base, whose location he did not know, and where there were detainees of different nationalities. He was released without explanation three days later. He has recalled:

> "*Every time I was moved within the base, I was hooded again. Every prisoner has to maintain absolute silence… Prisoners were arriving and leaving all the time. There were also cells beneath me, under the ground. It was only later I learned that I had been held in Bagram. If the BBC had not intervened, I fear I would not have got out*."[446]

There are reported to be some 400 detainees held in Pakistan at the behest of the USA. Mohammed, a former detainee allegedly held in a facility jointly run by the Pakistan intelligence services and the CIA has said:

> "*I was questioned for four weeks in a windowless room by plain-clothed US agents. I didn't know if it was day or night. They said they could make me disappear*."[447]

In addition, so-called "high-value detainees" – perhaps several dozen – are allegedly being held in CIA custody in secret locations in Afghanistan and elsewhere. Not even the ICRC has access to such detainees, whose fate and whereabouts remain unknown, leaving them outside the protection of the law and placing them squarely within the scope of the UN

[441] *Re: Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, 28 December 2001.
[442] Deputy Secretary Wolfowitz interview with Fox News Sunday, 17 February 2005. Department of Defense News Transcript.
[443] *Independent human rights expert ends visit to Afghanistan*. United Nations press release, 23 August 2004.
[444] Report of the independent expert on the situation of human rights in Afghanistan, M. Cherif Bassiouni. UN Doc. E/CN.4/2005/122, 11 March 2005, para. 89.
[445] *UN Expert on Human Rights in Afghanistan ends country visit*. UN press release, 10 February 2005.
[446] *'One huge US jail'*. The Guardian Weekend magazine (UK), 19 March 2005.
[447] *Ibid*.

Declaration on the Protection of All Persons from Enforced Disappearance. As noted above, "disappearances" are a crime under international law. Yet no one has been brought to account for these "disappearances", known in US military parlance as "ghost detainees", at least one of whom in Iraq died in custody.[448]

Tanzanian national and alleged *al-Qa'ida* operative Ahmed Khalfan Ghailani is a recent case of an individual who may have "disappeared" in US custody. He is reported to have been arrested in July 2004 in Gujrat, Pakistan, in a joint US/Pakistan operation. After his arrest, he was held at an undisclosed location and would be interrogated "to our satisfaction before handing him over to the US for the trial", according to a quote attributed to Pakistan's Interior Minister. US agents were said to be participating in the interrogation.[449] In January 2005, a Pakistani security official was quoted as saying that Ahmed Khalfan Ghailani "was turned over to our American friends months ago." Asked where the detainee had been taken, the official replied "We have no idea, and as a matter of fact we don't ask such questions."[450] Ghailani's whereabouts remain unknown.

Another recent case of someone who is alleged to have "disappeared", possibly in US custody, is that of Mohammad Naeem Noor Khan, a Pakistan national who was arrested in July 2004 in Lahore, Pakistan. He was taken into custody by the Pakistan authorities on behalf of the USA. His interrogation reportedly provided the CIA with a "rich lode of information".[451] Naeem Noor Khan's current whereabouts are unknown. Similarly, Libyan national and alleged senior *al-Qa'ida* operative Abu Faraj al Libbi, was detained in Pakistan on or around 2 May 2005 by Pakistan forces aided by US intelligence. He was reportedly being interrogated by US and Pakistan agents at an undisclosed location at the time of writing.[452] He was feared to be at risk of torture and other ill-treatment and transfer to and "disappearance" in US custody.[453]

The whereabouts of some other individuals taken into US custody, or detained with US involvement, have remained unknown for more than three years.[454] In its recent report to the UN Commission on Human Rights, the UN Working Group on Enforced or Involuntary Disappearances stated that it was "deeply concerned" by the reports of the USA's use of secret detentions.[455] It reminded the US government that secret detention facilities are "typically associated with the phenomenon of disappearance". Article 10 of the UN Declaration on the Protection of All Persons from Enforced Disappearance which states:

> "*Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention…Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been*

[448] Manadel al-Jamadi, see page 148 of *USA: Human dignity denied*, *supra*, note 17.
[449] *Pakistan Holds Top Al Qaeda Suspect*, Washington Post, 30 July 2004.
[450] *Al-Qaida suspect said in US custody*. Associated Press, 25 January 2005.
[451] *'One huge US jail'*. The Guardian Weekend magazine (UK), 19 March 2005.
[452] *US agents attend grilling of bin Laden lieutenant*. Reuters, 6 May 2005.
[453] Amnesty International Urgent Action, http://web.amnesty.org/library/Index/ENGASA330072005.
[454] See pages 111-114, *USA: Human dignity denied*, *supra*, note 17. See also, for example: *Syria: "Disappearance" of Muhammad Haydar Zammar*, AI Index: MDE 24/016/2005, 6 April 2005, http://web.amnesty.org/library/Index/ENGMDE240162005.
[455] UN Doc. E/CN.4/2005/65. Question of enforced or involuntary disappearances. Report of the Working Group on Enforced or Involuntary Disappearances, 23 December 2004, para. 364.

manifested by the persons concerned… An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention…"[456]

The Church Report summary of March 2005 concludes that "to the best of our knowledge, there were approximately 30 'ghost detainees', as compared to a total of over 50,000 detainees in the course of the Global War on Terror", as if this relatively small percentage of "ghost detainees" together with the claim that "the practice of DoD [Department of Defense] holding 'ghost detainees' has now ceased", should assuage concern.[457] It does not. Firstly, even a single case of "disappearance" is a gross violation of international law and standards. Secondly, not only are the whereabouts of numerous detainees still unknown, no one has been brought to account for past cases. For example, there has been no reason given as to why Secretary Rumseld's admitted authorization for hiding at least one such detainee in Iraq should not be considered to have been a "disappearance" or an otherwise illegal secret detention and should not lead to a criminal investigation. Yet as already stated, the Church investigation did not even question Secretary Rumsfeld and the Schlesinger Panel chair considers Secretary Rumsfeld's conduct to have been "exemplary".

Mohamedou Ould Slahi, a Mauritanian national arrested in Mauritania in December 2001, is alleged to have been secretly transferred to Jordan for interrogation before being eventually brought to Guantánamo, where he remains.[458] Jamal Mar'i, a Yemeni national, was arrested in Pakistan in late 2001. While held in Pakistan, he was allegedly interrogated several times by US intelligence agents. He was subsequently taken by plane to Jordan and held in an intelligence facility there. He has said that he was hidden from the ICRC for about a month – thus "disappearing" in custody for that period. He alleged that when the ICRC visited, he was taken down to the basement, but one time the detaining authorities forgot to take him down. The ICRC delegates were surprised to find him in the facility. His family then received a message from him via the ICRC. Jamal Mar'i was subsequently sent to Guantánamo Bay.[459] In September 2004, at his CSRT hearing in Guantánamo three years after his detention, he said:

"[T]hey apprehended me on September 23rd 2001. They didn't capture me, but some people simply kidnapped me while I was asleep. I was captured with a Pakistani cook. There was nobody else with us. An American interrogator interrogated me, then we were given to Pakistan… They did not release me. They turned me over to the United States. They took me from Pakistan to Jordan… The United States is the one who took me to Jordan… I am not an enemy combatant, I am a sleeping combatant because I was sleeping in my home…How can you call a person an enemy combatant when you're sleeping in your own home and somebody comes to your home and takes you somewhere and you don't know where that is?"

Another Yemeni national, Mohammed Mohammed Hassen, was arrested with about 10 other people in a house in Faisalabad, Pakistan, near the Salafia University where he was studying. He was taken to Lahore, where he was allegedly interrogated by US agents over a period of two to three days. He was then moved to Islamabad, where he was held for two months and interrogated once by US agents. He was subsequently taken to the airport by

[456] Declaration on the Protection of All Persons from Enforced Disappearances, adopted by UN General Assembly resolution 47/133 of 18 December 1992.
[457] General Paul Kern, who oversaw the earlier Fay investigation told the Senate Armed Services Committee on 9 September 2004 that the there might have been as many as 100 "ghost detainees" in Iraq.
[458] Omar Deghayes, unclassified information, 30 March 2005. Also, see page 34, *USA: The threat of a bad example*, http://web.amnesty.org/library/Index/ENGAMR511142003.
[459] See also, *USA: Human dignity denied*, *supra*, note 17.

Pakistani agents and handed over to their US counterparts. Handcuffed and hooded, he was put on a plane and flown to Afghanistan, where he was held in Bagram and Kandahar air bases before being transferred to Guantánamo. The others with whom he was originally detained were also allegedly on the same plane to Cuba.

Reports that the CIA has operated a secret facility in Guantánamo, coupled with the Pentagon's refusal to release identities or to give anything but approximate totals for the numbers of people held in the base, raise fears of secret transfers to and from it and the possibility that there have been people held for interrogation there who would fall into the category of "disappeared" under international standards.[460] It is not known exactly how many detainees have been held in Guantánamo who were not in the custody of the Department of Defense. On 29 March 2005, the US Secretary of the Navy Gordon England announced that Combatant Status Review Tribunals had been completed "for all of the DoD detainees at Guantánamo", and was unable to give an absolute assurance that this was all the detainees held at the base.[461]

Amnesty International raised concern in November 2001 that, in the context of the "war on terror", the USA might expand its existing practice of "renditions" or secret detainee transfers.[462] In April 2002, the organization urged the US administration not to "undermine the rule of law by promoting or participating in 'renditions' of suspects" following evidence that such secret transfers had occurred.[463] In August 2003, the organization raised more cases of renditions.[464] In October 2004 it did so yet again, noting evidence that on 17 September 2001 President Bush had signed a Memorandum of Notification granting "exceptional authorities" to the CIA in the "war on terror", and also that he authorized the CIA to set up

[460] On 26 April 2005, the Pentagon announced that the transfer of two detainees to Belgium left "approximately 520" detainees in Guantánamo. This is the same figure it gave on 19 April 2005, when it announced the transfer of 18 detainees out of the base to Afghanistan and Turkey. Prior to that, on 12 March 2005, the Pentagon said that the transfer of three detainees to Afghanistan, Maldives and Pakistan left "approximately 540 detainees" in Guantánamo. This is exactly what it said five days earlier on 7 March, when announcing the transfer of three detainees to France. Prior to that, the last figure it gave was "approximately 545" when it announced on 28 January 2005 that the transfer of Mamdouh Habib to Australia left "approximately 545" detainees in the base. This was the same figure it gave a few days earlier after four British detainees were returned to the UK on 25 January. The imprecision of the Pentagon's figures, and the failure to give the identities of the detainees, allows the possibility that individual detainees could be transferred to and from the base without being reflected in the figures. See *Human Dignity Denied*, pages 101-102, *supra*, note 17.

[461] Defense Department Special Briefing on Combatant Status Review Tribunals, US Department of Defense News Transcript, 29 March 2005. Asked whether the CIA's practice of holding "ghost detainees" in Guantánamo had ended and whether the approximately 540 people officially reported as held at the base were all those currently held, the Navy Secretary said: "As far as I know, that's all the people in Guantánamo. I mean, I have no other data. As far as I know, that's the total number". The CIA's practice of holding "ghost detainees" has been so secretive that other parts of government have been kept in the dark. In Iraq, for example, the detention of three Saudi nationals as "ghost detainees" was apparently unknown even to the State Department, the US Embassy in Saudi Arabia, and Ambassador Paul Bremer, who headed the Coalition Provisional Authority at the time. See page 103, *USA: Human dignity denied*, *supra*, note 17.

[462] *USA: No return to execution – The US death penalty as a barrier to extradition*, AI Index: AMR 51/171/2001, November 2001, pp. 16-24, http://web.amnesty.org/library/Index/ENGAMR511712001.

[463] *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay*, http://web.amnesty.org/library/Index/ENGAMR510532002.

[464] See pages 29-32, *USA: The threat of a bad example - Undermining international standards as "war on terror" detentions continue*, AI Index: AMR 51/114/2003, August 2003, http://web.amnesty.org/library/Index/ENGAMR511142003.

secret detention facilities outside the USA and to use harsh interrogation techniques.[465] Amnesty International has never had a reply from the US authorities to its concerns. For example, it has yet to receive a response to the letter it sent to the CIA, President Bush, Secretary Powell, and Secretary Rumsfeld in August 2004 on the case of Khaled El-Masri, a German national allegedly transferred from Macedonia to incommunicado detention and ill-treatment in Afghanistan in early 2004. Amnesty International raised with the authorities what Khaled El-Masri had said happened to him after he had been taken off a coach on 31 December 2003 as he was travelling into Macedonia and held there for the next three weeks.

> "*On 23 January, he was told that he would be taken to the airport to fly back to Germany. Blindfolded and handcuffed, he states that he was taken to a car and driven to a location where he heard aeroplanes. He alleges that he was taken to a room, beaten and stripped of his clothes by having them cut from his body. When he refused to take off his underwear, he says he was beaten again at which point he undressed completely. He says he heard the sound of a camera taking pictures of him naked. At this point his blindfold was taken off and he says he saw six masked men dressed in black.*
>
> *Khaled El Masri states that he was given a diaper and blue track suit to wear, that his hands and feet were tied and that he was taken to a plane. In the plane, he alleges that he was thrown to the ground and tied to chains fixed at the sides of the aircraft. He states that he was blindfolded, hooded and made to wear earplugs and headphones. He claims to have been given an injection in each shoulder. He states that the plane took off at around 9pm on the evening of 23 January 2004. He says that he was given no reason for his arrest and detention at any time.*"[466]

It has since been reported by NBC News that Khaled El Masri was kept in secret detention in the "Salt Pit" in Kabul, even after the CIA realized it had the wrong man in a case of mistaken identity.[467]

Khaled El Masri's allegations mirror what has happened to others, for example, Australian national Mamdouh Habib, who was allegedly transferred from Pakistan with US involvement to Egypt where he was allegedly subjected to severe torture.[468] Similarly, in a handwritten letter to the Combatant Status Review Tribunal, dated 8 December 2004, Pakistan national Saifullah Paracha wrote of his abduction by US agents in Thailand and his transportation to Afghanistan where he was held for more than a year before being transferred to Guantánamo where he remains:

> "*I reached Bangkok International Airport on July 06, 2003 and at the airport I was illegally and immorally arrested – back hand/leg cuffed, black big mask on my head up to neck, was thrown on floor of station wagon facing down. I am heart patient / diabetic / high blood pressure / skin disorder, gout; it could have been fatal, there was no human consideration at all. From airport I was taken to unknown place for few days and kept eyes covered, ears cover, handcuffed, leg cuffed. After few day I*

[465] The President's central policy memorandum of 7 February 2002 noting that the USA's values "call for us to treat detainees humanely, including those who are not legally entitled to such treatment" (however inadequate the protection it provided), did not apply to the CIA or other non-military personnel. See pages 107-116 of *USA: Human dignity denied*, *supra*, note 17..

[466] Letter to the CIA and members of the US administration from Amnesty International Secretary General Irene Khan, 20 August 2004. Letters were also sent to the authorities in Afghanistan and Macedonia.

[467] *CIA accused of detaining innocent man*. MSNBC.com, 21 April 2005.

[468] See *USA: Guantánamo – an icon of lawlessness*, AI Index: AMR 51/002/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510022005.

was transported by plane to Afghanistan, under extremely severe bad conditions. I was kept in isolation from July 2003 – September 20, 2004 and since September 20, 2004 – I am in isolation cell in Guantanamo Bay Island… Am I being considered human being or animal, or is USA my God?"[469]

At his hearing in front of the Combatant Status Review Tribunal in Guantánamo on 9 October 2004, Jordanian national and UK resident Jamil El Banna recalled his transfer from Gambia to Afghanistan in what he described as a "kidnapping" by US agents:

"*When they came and arrested and handcuffed me, they were wearing all black. They even covered their heads black… They took me, covered me, put me in a vehicle and sent me somewhere. I don't know where. It was at night. Then from there to the airport right away… We were in a room like this with about eight men. All with covered up faces… They cut off my clothes. They were pulling on my hands and my legs…They put me in an airplane and they made me wear the handcuffs that go around your body so I would not do anything on the airplane… This is all kidnapping. Yes. They took me underground in the dark. I did not see light for two weeks… Bagram, Afghanistan. Right there in the dark. They put me in the dark. I was surprised. I did not know what I did wrong or what I did. They starved me; they handcuffed me, there was no food… I was under their control. They are the ones who took me and put me there. They know what they have done. I was surprised that the Americans would do such a thing. It shocked me*."[470]

Such descriptions also echo the recent findings of the Parliamentary Ombudsman in Sweden, Mats Melin, in another case. He investigated Swedish/US cooperation in the secret deportation of two Egyptian asylum-seekers, Ahmed Hussein Mustafa Kami 'Agiza (A) and Muhammad Muhammad Suleiman Ibrahim El-Zari (Z) from Sweden to Egypt in December 2001. They were allegedly subjected to torture in Egypt, including by electric shocks.[471] A summary of the Ombudsman Melin's findings include the following:

"A few days before December 18, 2001, the Swedish Security Police received an offer from its American counter-part, the CIA, to make use of an American airplane for the expulsion procedure. This airplane could depart in the evening of December 18 and was said to have direct access through Europe for a flight to Egypt. The Security Police, apparently after having informed the Minister of Foreign Affairs, accepted the offer.

On December 18, at lunch-time, the Security Police was informed that American security personnel would be on board the American airplane and that they wished to perform what they called a security check of A and Z. It was arranged for the check to be conducted in a police station at Bromma airport in Stockholm.

Immediately after the Government's decision in the afternoon of December 18, A and Z were apprehended by Swedish police and subsequently transported to Bromma airport. The American airplane landed shortly before 9.00 p.m. A number of American security personnel, wearing masks, conducted the security check, which consisted of at least the following elements. A and Z had their clothes cut up and removed with a pair of scissors, their bodies were searched, their hands and feet were

[469] *Paracha v. Bush*. Unclassified factual returns from CSRT process. In the US District Court for the District of Columbia.
[470] *El Banna v. Bush*. Factual returns from CSRT process. In the US District Court for the District of Columbia.
[471] *Renditions*. File on 4. BBC Radio 4, 8 February 2005. See also, *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.

> fettered, they were dressed in overalls and their heads were covered with loosely fitted hoods. Finally, they were taken, with bare feet, to the airplane where they were strapped to mattresses. They were kept in this position during the entire flight to Egypt. It has been alleged that A and Z also were given a sedative per rectum. This allegation has not been possible to substantiate during the investigation…
>
> [T]he investigation shows that the Swedish Security Police lost control of the situation at the airport and during the transport to Egypt. The American security personnel took charge and were allowed to perform the security check on their own. Such total surrender of power to exercise public authority on Swedish territory is clearly contrary to Swedish law…
>
> [A]t least some of the coercive measures taken during the security check were not in conformity with Swedish law. Moreover, the treatment of A and Z, taken as a whole, must be considered to have been inhuman and thus unacceptable..."[472]

Canadian citizen Maher Arar has said that he was flown out of the USA on a jet by a team that called themselves the "Special Removal Unit".[473] It has recently been reported that federal aviation records support his contention that he was transferred on 8 October 2002 aboard a Gulfstream jet, and that he was flown via New Jersey, Washington DC, Maine, and Rome to Jordan, from where he was driven to Syria. The Gulfstream III jet's registration number is reported to have been N829MG, records for which show that it also went to Guantánamo Bay in December 2003.[474] Evidence of three other aircraft allegedly used to carry out secret transfers has also come to light, using civil aviation records and sightings by "planespotters":

- Between June 2002 and January 2005, a Gulfstream IV jet, registration number N227SV (previously N85VM), reportedly flew to Afghanistan, Morocco, Dubai, Jordan, Italy, Japan, Switzerland and the Czech Republic, as well as stops in US air bases in Maryland and Germany, 82 stops at Dulles International Airport outside Washington DC, and 51 visits to the US Naval Base in Guantánamo Bay. On 18 February 2003, the jet was in Cairo, Egypt. That was the day after Egyptian national Osama Nasr Mostafa Hassan was abducted on a street in Milan and allegedly driven to the US air base in Aviano, Italy, interrogated, drugged and flown to Egypt, where he was allegedly tortured, including with electric shocks. He is reported to have been released in mid-2004, but rearrested shortly afterwards after he made a phone call to his wife. He is believed to remain in custody.[475]

  This Gulfstream jet has also flown to Azerbaijan. Amnesty International has been unable to establish if this was the plane used to transport Yemeni national 'Abd al-Salam al-Hiyla. As Amnesty International reported in June 2004, his family lost contact with him after he travelled to Egypt on a 15-day business trip from 9 September 2002. His family said that the Egyptian embassy in Sana'a, Yemen, told them that he had left Egypt on "a special American plane that took him to Baku,

[472] *Expulsion to Egypt – a review of the execution by the Security Police of a Government decision to expel two Egyptian citizens*. The Parliamentary Ombudsman, 22 March 2005, http://www.jo.se/Page.aspx?Language=en&ObjectClass=DynamX_Document&Id=1625.
[473] *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.
[474] *Suit by detainee on transfer to Syria finds support in jet's log*. New York Times, 30 March 2005. The plane in question has since changed ownership and is now reported to have the registration number N259SK.
[475] *Jet's travels cloaked in mystery*. Chicago Tribune, 20 March 2005. See also *Italian prosecutor probing CIA's role in militant's disappearance.* Chicago Tribune, 24 February 2005.

Azerbaijan". [476] 'Abd al-Salam al-Hiyla is currently believed to be held in Guantánamo Bay, having been taken there via custody in Bagram air base in Afghanistan.

- Another Gulfstream jet, registration N379P (later changed to N8068V), was used to deport Egyptian nationals Ahmed Hussein Mustafa Kami 'Agiza and Muhammad Muhammad Suleiman Ibrahim El-Zari from Bromma airport in Sweden to Egypt in 2001 (above). The jet N379P has also been spotted in Pakistan and Gambia during other renditions, and in Luton and Glasgow airports in the UK, as well as military bases in the UK.[477] It is also reported to be the plane which transported Mohammed Hayda Zammar from Morocco in late 2001 to alleged torture in Syria, and Muhammad Saa Iqbal Madni from Indonesia to Egypt where he is reported to have died during interrogation.[478] This jet also allegedly flew Yemeni national Jamil Qasim Saeed Mohammed out of Karachi international airport on 26 October 2001. [479] Amnesty International is concerned that he has "disappeared" in US-controlled custody, possibly in Jordan. The organization first raised this case with the US authorities in November 2001 and in a letter and memorandum to President Bush and other senior adminitration officials in April 2002. The organization has never received a reply.[480]
- A Boeing 737, registration N313P and seats for 32 passengers, is reported to have made 600 flights to 40 countries since 11 September 2001, including 30 trips to Jordan, 19 to Afghanistan and 17 to Morocco. It is also reported to have landed at Guantánamo. Recent information appears to support Khaled El-Masri's allegations (above), that he was seized in Macedonia and flown to Afghanistan in January 2004. According to information published by *Newsweek*, the Boeing 737 landed in Skopje on 23 January 2004, the date Khaled El-Masri told Amnesty International in mid-2004 was the day he was flown out of Skopje.[481] The Boeing 737 has also reportedly flown to Uzbekistan.[482]

By March 2005, the *New York Times* was reporting that "one of the biggest non-secrets in Washington these days is the Central Intelligence Agency's top-secret program for sending terrorism suspects to countries where concern for human rights and the rule of law don't pose obstacles to torturing prisoners. For months, the Bush administration has refused to comment on these operations, which make the United States the partner of some of the world's most repressive regimes." [483] Based on interviews with current and former government officials, the *New York Times* reported that President Bush's directive signed in the days after the attacks of 11 September 2001 and giving the CIA expansive authority to conduct renditions without case-by-case approval from the White House, State Department, or Justice Department, remained classified. An official was quoted as saying that the "CIA

[476] *Human rights fall victim to the "War on Terror"*, AI Index: MDE 04/002/2004, June 2004, http://web.amnesty.org/library/Index/ENGMDE040022004.
[477] *Torture: The dirty business*. Dispatches, Channel 4 TV (UK), 1 March 2005.
[478] See 'One huge US jail', Guardian Weekend (UK), 19 March 2005, and page 184 *USA: Human dignity denied*, *supra*, note 17.
[479] *US accused of 'torture flights'*. The Sunday Times (UK), 14 November 2004.
[480] *Memorandum to the US Attorney General – Amnesty International's concerns relating to the post 11 September investigations,* AI Index: AMR 51/170/2001, November 2001, http://web.amnesty.org/library/Index/ENGAMR511702001; *Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay,* AMR 51/053/2002, http://web.amnesty.org/library/Index/ENGAMR510532002, and accompanying letter.
[481] *Aboard Air CIA*, Newsweek, 28 February 2005.
[482] *60 Minutes*. CBS Television, 6 March 2005.
[483] *Torture by proxy*, New York Times, 8 March 2005.

has existing authorities to lawfully conduct these operations". The official claimed that since 11 September 2001, the CIA had flown 100 to 150 "war on terror" suspects to various countries, including Egypt, Jordan, Pakistan, Saudi Arabia and Syria.[484] In a later report, the *Washington Post* cited evidence from current and former intelligence officers and lawyers that the system of oral assurances that the CIA relies upon from the receiving country that the detainee will not be tortured has been ineffective and impossible to monitor. One CIA officer was quoted as saying that the system of assurances was a "farce". Another official said: "It's beyond that. It's widely understood that interrogation practices that would be illegal in the US are being used." CIA Director Porter Goss said that "once [the detainees are] out of our control, there's only so much we can do". Attorney General Alberto Gonzales said "we can't fully control what [the receiving] country might do…If you're asking me, 'Does a country always comply?', I don't have an answer to that".[485]

Clearly such a system of assurances is inadequate and fails to meet the USA's international obligations. The UN Human Rights Committee, for example, has pointed out that the obligation of all countries, like the USA, that have ratified the International Covenant on Civil and Political Rights includes

> "*an obligation not to extradite, deport, expel or otherwise remove a person from their territory* [including all persons under their control], *where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant* [the rights to life and freedom from torture or other cruel, inhuman or degrading treatment or punishment], *either in the county to which removal is to be effected or in any country to which the person may subsequently be removed.*"[486]

The Committee added that "the relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters".

In its Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, the US government states that "The United States is aware of allegations that it has transferred individuals to third countries where they have been tortured. The United States does not transfer persons to countries where the United States believes it is 'more likely than not' that they will be tortured [a higher burden on the individual than under the CAT[487]]. This policy applies to all components of the United States government. The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred".[488]

In view of the absolute nature, under international law and standards, of states' obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment, Amnesty International opposes the circumvention of this absolute obligation by reliance upon diplomatic assurances in any circumstances. The organization considers diplomatic assurances to be unacceptable as evidence that no risk of torture or ill-treatment exists in the receiving state. Such "assurances" are both evasive of and erosive of the absolute legal prohibition on torture and ill-treatment in general and on *refoulement* (transferring persons to where they risk torture/ill-treatment) in particular, in

[484] *Rule change lets CIA freely send suspects abroad to jails*. New York Times, 6 March 2005.
[485] *CIA's assurances on transferred suspects doubted*. Washington Post, 17 March 2005.
[486] General Comment 31, para 8. UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[487] See page 182, *USA: Human dignity denied*, *supra*, note 17.
[488] US Second Periodic Report to the Committee against Torture, 6 May 205, *supra*, note 16, para. 27.

addition to being inherently unreliable, morally questionable and in practice ineffective – as several of the above cases have illustrated.

As Amnesty International reported in its October 2004 report, the CIA's activities remain shrouded in secrecy.[489] The Schlesinger Panel report noted that it "did not have full access to information involving the role of the Central Intelligence Agency in detention operations; this is an area the Panel believes needs further investigation and review". However the CIA is not being investigated outside the office of the CIA Inspector General. In his responses to US Senators questioning him prior to his confirmation as US Attorney General, Alberto Gonzales refused to give information about the CIA saying that information about "standards for interrogation by the CIA would be classified, as would be information about any particular methods of questioning approved for use by the CIA". The Church report noted that it was beyond the scope of its investigation to look into the question of "the existence, location or policies governing detention facilities that may be exclusively operated by OGA's [other government agencies, e.g. the CIA)". It said that the CIA had cooperated with its investigation "but provided information only on activities in Iraq".[490]

There have been allegations of torture and ill-treatment by the CIA. Indeed, senior officials at the FBI were reportedly so concerned about the severity of interrogation techniques used by the CIA in the "war on terror", that they warned their operatives to stay out of interrogations of high-level detainees interrogated by the CIA.[491] The Schlesinger Panel report on Department of Defence Detention Operations, dated August 2004, noted that the "CIA was allowed to operate under different rules" from the military.[492]

The current director of the CIA, Porter J. Goss, nominated by President Bush in August 2004 and sworn in to office the following month, recently told the US Senate Armed Services Committee that the US government "does not engage in or condone torture". His written statement did not mention cruel, inhuman or degrading treatment, equally prohibited under international law.

Porter Goss told the Committee that although all current interrogation methods being used by the CIA were legal and none constituted torture, he could not vouch for techniques employed by the agency earlier in the "war on terror". The CIA public affairs office quickly put out a statement to correct the "false impression that US intelligence may have had a policy in the past of using torture against terrorists captured in the war on terror". The statement continued:

> "*All approved interrogation techniques, both past and present, are lawful and do not constitute torture. The truth is exactly what Director Goss said it was: 'We don't do torture'. CIA policies on interrogation have always followed legal guidance from the Department of Justice. If an individual violates the policy, then he or she will be held accountable. Lawful interrogation of captured terrorists is a vital tool in saving American lives. It works – and it is done with Congressional oversight, in keeping with American law.*"[493]

This is hardly reassuring, given that for almost two years, "legal guidance from the Department of Justice" explicitly considered torture a legitimate – and legal – tool, to be used at the President's discretion, in the "war on terror". Questions that also arise include what

[489] See *Human dignity denied*, *supra*, note 17, pages 100-116 and pages 181-190.
[490] Likewise, the Schlesinger panel had not had full access to information about the CIA's detention operations or full cooperation from the agency.
[491] *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004.
[492] Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004.
[493] Statement by CIA Director of Public Affairs, Jennifer Millerwise, 18 March 2005.

interrogation techniques or detention conditions does the administration consider to constitute torture, what does it consider to amount to cruel, inhuman or degrading treatment (equally and absolutely prohibited under international law), and what has been the legal guidance offered to the CIA by the Justice Department? On the first question, for example, it was shocking that in their Senate confirmation hearings to the posts of US Attorney General and US Secretary of State respectively, neither Alberto Gonzales nor Condoleezza Rice were willing to describe "water-boarding" as torture. This has been described as an interrogation technique by which a detainee's head is forced under water to the point where he believes he will drown. The Church Report describes it as a technique in which water is poured on a detainee's towelled face to induce the misperception of suffocation. Either way, it would amount to torture. Yet Porter Goss told the Senate Armed Services Committee that the technique fell under "an area of what I will call professional interrogation techniques".[494] The General Counsel of the Department of Defense had earlier indicated that this technique was "legally available", even if a blanket approval was not warranted for use by the military at Guantánamo Bay.[495]

A US military medical report released in April 2005 under the ACLU's freedom of information act lawsuit reveals the following allegations given to a doctor at the US facility, Camp Bucca, in Iraq in June 2004. The detainee said that he was held in Abu Ghraib in May 2004, during which time he alleged, according to the doctor:

> "*He was beaten for 5 days. States he recalls the names [redacted]. Interpreter from Egypt. Two black soldiers. An Iraqi. Started beating him with sticks on the back. Placed in a small room underground. Placed in handcuffs – very tight – injuries to both wrists. Had his head kept under water – did it several times to point of passing out. Then he was placed in water and wires placed on him as if to shock him – said he was shocked 3 times*."

On the second question, the administration still does not consider itself legally bound by the absolute international prohibition on cruel, inhuman or degrading treatment. Alberto Gonzales said in his written responses to the Senate that the US Justice Department "has concluded that under Article 16 [of the Convention against Torture (CAT)] there is no legal prohibition under the CAT on cruel, inhuman or degrading treatment with respect to aliens overseas". Linked to this is the third question – namely what legal guidance the Justice Department has offered to the CIA. Previously secret documents appear to point to an attempt within the executive to immunize the CIA from prosecution for torture and war crimes. In one memorandum, written in response to a CIA request for legal protections, the Justice Department argued that the President can override national and international prohibitions on torture, offered legal defences for anyone accused of torture, narrowed to almost vanishing point the definition of torture, and suggested that there was a "significant range of acts that though they might constitute cruel, inhuman or degrading treatment or punishment fail to rise to the level of torture" and could therefore not lead to prosecutions under the Anti-Torture Act.[496] This represented the administration's position for some two years until the memorandum emerged into the public domain following the Abu Ghraib scandal. The December 2004 memorandum, rather than explicitly rejecting this position and stating, in

[494] *Questions are left by CIA chief on the use of torture*. New York Times, 18 March 2005.
[495] Action memo. For Secretary of Defense, from William J. Haynes, General Counsel. *Counter-Resistance Techniques*. 27 November 2002. Approved 2 December 2002. http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf.
[496] 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. http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

accordance with international law, that no one has the authority to order torture, chose to evade the issue, and to this day the US administration's position remains unclear.

In another memorandum, the White House Counsel advised the President that not applying the Geneva Conventions to detainees captured in the Afghanistan conflict would make future prosecutions of US agents under the War Crimes Act less likely. Another leaked memorandum on legal discussions in the government in early 2002 stated that administration lawyers agreed that "the CIA enjoys the same high level of protection from liability under the War Crimes Act as the US military. It added that to the extent that Geneva Convention protections were not applied as a matter of law but were applied as a matter of policy, "it is desirable to circumscribe that policy so as to limit its application to the CIA".[497] No-one in the CIA has yet been prosecuted.[498]

There is reported to be concern within the CIA that withdrawal of the August 2002 memorandum has withdrawn the legal protections that it purportedly provided to the agency's interrogators, opening them up to prosecution.[499] Under international law, however, there 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.

Dan Coleman, a former FBI agent believes that torture "has become bureaucratized" under the Bush administration. He considers that since 11 September 2001, the CIA has operated under the presumption that "it has extralegal abilities outside the US…Whatever they do is all right. It all takes place overseas".[500] The CIA may be operating under more than a presumption. It may be acting under presidential authorization. If reports to this effect are accurate, ultimate responsibility for any resulting "disappearances", torture or other cruel, inhuman or degrading treatment would lie squarely at the President's door. To this day, the White House is reported to be maintaining extraordinary levels of secrecy about the CIA's detentions, placing unprecedented restrictions on congressional oversight of this issue.[501]

Michael Scheuer, a former CIA officer in the agency for 22 years, said recently in an interview about the CIA's alleged involvement in secret transfers and torture of detainees:

> "*The thing you have to remember, especially about the US clandestine service, is that it is peculiarly the tool of the executive branch and of the President. There is no operation in which the CIA has been involved, for example, against either al Qa'ida or other Sunni terrorists that has not been approved by the legal authorities… Human rights is a very flexible concept. It kind of depends on how hypocritical you want to be on a particular day*".[502]

Hypocrisy remains a part of the USA's "war on terror". The US government recently wrote the following: "[I]n recent years, government officials have inflicted severe prisoner abuse and torture in a series of 'unofficial' secret prisons and detention centers outside the

[497] Status of legal discussions re application of Geneva Conventions to Taliban and al Qaeda.
[498] One civilian contractor working with the CIA is being prosecuted for assault in the case of an Afghan detainee who died in custody in 2003.
[499] *CIA is seen as seeking new role on detainees*. New York Times, 16 February 2005. *Within CIA, worry of prosecution for conduct*. New York Times, 27 February 2005.
[500] *Outsourcing torture*. By Jane Mayer. The New Yorker, 14 February 2005.
[501] *White House has tightly restricted oversight of CIA detentions*. New York Times, 6 April 2005.
[502] Michael Scheuer, interviewed for "Rendition" – File on 4, BBC Radio 4, 8 February 2005.

national prison system". It was writing about Iran.[503] If the US government were to be honest, could it say the same thing about itself?

The government is resisting answering this question. Maher Arar, who was secretly transferred in October 2002 from the USA via Jordan to alleged torture in Syria, is suing the USA and US officials, including former Attorney General John Ashcroft, in the US courts. A legal brief filed on his behalf in opposition to those officials' motion to dismiss the lawsuit, states that "the fundamental question underlying this case" is:

> "*Why would United States officials intercept a Canadian citizen on his way home to Canada, detain him a JFK [airport], international obstruct his access to a lawyer, order him removed, and then place him not on a connecting flight to his home in Canada, but on a federally chartered jet to Syria where he would be detained without charges, interrogated and tortured for nearly one year?*"

The government responded that this "fundamental question" cannot be litigated because doing so would jeopardize national security interests.[504]

15. Transfers from Guantánamo and a return from Saudi Arabia

Security forces continued to abuse detainees and prisoners, arbitrarily arrest, and hold persons in incommunicado detention.
US State Department, on human rights in Saudi Arabia, 2004[505]

On 18 September 2004, the Pentagon announced the transfer of 29 Pakistan nationals from Guantánamo to the "control of Pakistan for continued detention".[506] More than six months later they were indeed still detained in Pakistan without charge or trial, their years of being in a legal vacuum in US custody now stretching into an indefinite future at the hands of their own government. In March 2005, the men staged a peaceful protest at Adiala jail near Islamabad, seeking an end to their legal limbo.[507]

While the US administration continues to resist efforts to have the Guantánamo detentions subjected to full judicial review, it seems that in the wake of the *Rasul* ruling, the subsequent decisions by Judges Robertson and Green, and the prospect of further losses in the courts, the Pentagon may be intending to transfer scores of detainees out of Guantánamo. Some of them may be transferred to detention in other countries, including Afghanistan, Saudi Arabia and Yemen.[508] Lawyers who have been filing *habeas corpus* petitions for the detainees have responded by seeking temporary restraining orders and injunctions in the US courts preventing the transfers of detainees where there is concern that they may face torture or other ill-treatment. Incommunicado or secret detention can *per se* amount to such ill-treatment.

On 29 March 2005, Judge Henry H. Kennedy on the DC District Court granted such a request and ordered the government to provide the lawyers for 13 Yemeni detainees and the court "with 30 days' notice prior to transporting or removing" any of them from Guantánamo

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[503] "Iran" in Country Reports on Human Rights Practices - 2004. US State Department. Released by the Bureau of Democracy, Human Rights, and Labor, 28 February 2005. http://www.state.gov/g/drl/rls/hrrpt/2004/41721.htm.
[504] *Arar v. Ashcroft*, et al. In the United States District Court for the Eastern District of New York. Declaration of James B. Comey, Deputy Attorney General, US Department of Justice.
[505] "Saudi Arabia" in Country Reports on Human Rights Practices - 2004. US Department of State. 28 February 2005, http://www.state.gov/g/drl/rls/hrrpt/2004/41731.htm.
[506] *Transfer of detainees completed*. Department of Defense news release, 18 September 2004.
[507] *Gitmo-freed Pakistanis jailed at home*. Associated Press, 29 March 2005.
[508] *Pentagon seeks to transfer more detainees from base in Cuba*. New York Times, 11 March 2005. See also Amnesty International Urgent Action

Bay."[509] The government had asserted that the claims of detainees facing transfer that they may be subjected to torture or ill-treatment or indefinite detention without due process in other countries were based upon "hollow speculation" and "largely anonymous sources and innuendo". However, Judge Kennedy, appointed to the Court in 1997, ruled that the government's "declarations concerning general policy and practice do not entirely refute Petitioners' claims or render them frivolous". He noted the numerous reports from multiple sources which suggested that such transfers had indeed taken place. In any event, Judge Kennedy agreed that even if they were not facing torture, transfer out of Guantánamo would extinguish the detainees' *habeas corpus* claims by executive fiat, an irreparable harm. The government had also argued that granting an injunction against the government would "illegitimately encroach upon the foreign relations and national security prerogatives of the Executive Branch" and harm the executive in a "myriad" of ways. Judge Kennedy rejected such "vague premonitions", noting that there was no indication that notifying the detainees' lawyers 30 days ahead of any planned transfer would "intrude upon executive authority".[510] Amnesty International welcomes Judge Kennedy's assertion of judicial oversight, which was followed by other similar orders. However, the organization is concerned by rulings from two other judges on the same court on 14 and 21 April 2005.

US District Judge Reggie B. Walton, appointed to the Court by President George W. Bush in 2001, was faced with a similar petition filed on behalf of six Bahraini detainees seeking that they would not be transferred without 30 days notice being given to the court and to the lawyers, including notice of the intended transfer destination. Again the government opposed the detainees' motion on the grounds that the detainees' fears that they would be transferred to situations where they risked torture, death or continued detention without trial were "based on rumors, myths, and hype". Judge Walton took a position that was in marked contrast to that of Judge Kennedy two weeks earlier:

> "*It is clear that the underlying basis for the claims advanced by the petitioners is their basic distrust of the Executive Branch. And, the predicate for their distrust is based on nothing more than speculation, innuendo and second hand media reports. This is not the stuff that should cause the court to disregard declarations of senior Executive Branch officials…In the context of the situation now before the Court, requiring the respondents to provide notice as requested prior to carrying out the transfer of the detainees from Guantánamo Bay on the record before it, would be tantamount to an unconstitutional encroachment on the authority of the Executive Branch to determine when it should continue to detain an individual it has no further interest in detaining. This Court simply does not have authority to require the Executive Branch to provide thirty day notices prior to effecting the transfer of the petitioners…. [I]t is a fundamental principle under our Constitution that deference to the Executive Branch must be afforded in matters concerning the military and national security matters*".[511]

The administration had argued to the court that granting such an injunction would "undermine the United States' ability to reduce the number of individuals under [its] control and [its] effectiveness in eliciting the cooperation of other governments in the war on terrorism". Ignoring this suggestion that the US administration views the fundamental human rights of detainees as negotiable in the context of building alliances in the "war on terror", Judge Walton ruled that these were "weighty and sensitive governmental interests that surely

[509] *Abdah et al. v. Bush et al. Order*. US District Court for the District of Columbia, 29 March 2005.
[510] *Abdah el al. v. Bush et al*. Memorandum Opinion. US District Court for the District of Columbia, 29 March 2005.
[511] *Almurbati et al. v. Bush et al*. Memorandum Opinion, US District Court for the District of Columbia, 14 April 2005.

trump the petitioners' interests concerning why they should not be transferred without advanced notice". He issued an order that the government inform the court, after the event, that any transfer was not made as a means to outsource detention or to extinguish the jurisdiction of the District Court over the detainees.

A week after Judge Walton's ruling, a similar one was handed down by Judge John Bates, also appointed to the Court in 2001 by President Bush. It concerned another six detainees in Guantánamo, including one individual who was a minor at the time he was taken to the base. Judge Bates noted in his decision of 21 April 2005, that, apart from Judge Walton, "generally, other judges have ordered some form of the requested 30-days' notice".[512] Indeed, by 4 May 2005, 14 rulings had been in favour of notice being given on transfers and only two decisions, those of Judge Bates and Judge Walton, against, with 11 more decisions pending. Judge Bates echoed Judge Walton when he said that the petitioners' pursuit of such notice was "founded on fear and mistrust". He added that "it may be understandable for petitioners and their counsel to mistrust the Executive, but this Court cannot rule based on petitioners's speculation, innuendo, and mistrust". Judge Bates ruled that "there is a strong public interest against the judiciary needlessly intruding upon the foreign policy and war powers of the Executive" on such a basis.[513]

Amnesty International, too, understands such mistrust, but unlike Judge Bates believes that it is based on more than mere speculation. There is now compelling evidence that the US administration has said one thing in the "war on terror" – that it is committed to the rule of law and human dignity – and done another.

At the same time as the issue of possible large numbers of transfers of detainees from Guantánamo has come to the fore, it has been reported that the CIA may be seeking to reduce its role in "war on terror" detentions. Following the administration's replacement of the August 2002 memorandum which had reportedly been produced following a request from the CIA for legal protections for its interrogators, there is said to be growing concern within the agency about the prospect of prosecutions for human rights violations. At the same time, long-term secret detentions consume agency resources for ever-diminishing "intelligence" returns. If no other US agency were to step in to assume some of this interrogation and detention role, it is possible that the CIA could decide to turn over some detainees in its custody to other countries.[514]

Amnesty International will continue to press the US authorities to charge or release all the detainees in its custody and to ensure that none will be sent to a country or situation where he or she would face human rights violations, including torture or ill-treatment, arbitrary detention, "disappearance", unfair trial or execution. The USA should not practice torture, ill-treatment or indefinite, incommunicado or secret detention, conduct unfair trial or resort to the death penalty, but neither may it "outsource" such practices to other states.

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[512] "either by granting the motion for preliminary injunction, see *Abdah v. Bush,* No. 04-CV-1254 (HHK) (March 29, 2005 Order)*; Al-Joudi v. Bush*, No. 05-CV-0301 (GK) (April 4, 2005 Order), by including the 30-days' notice as a condition of granting respondents' motion to stay the case, see *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (March 16, 2005 Order), or by requiring the 30-days' notice pursuant to the All Writs Act, see *Ameziane v. Bush,* No. 05-CV-0392 (ESH) (April 12, 2005 Order)."

[513] *Al-Anazi et al. v. Bush et al*. Memorandum Opinion. Civil Action No. 05-0345. US District Court for the District of Columbia, 21 April 2005. http://www.dcd.uscourts.gov/opinions/2005/Bates/2005-CV-345~6:58:55~4-22-2005-a.pdf.

[514] *CIA is seen as seeking new role on detainees*. New York Times, 16 February 2005. *Within CIA, worry of prosecution for conduct*. New York Times, 27 February 2005.

A case that comes to mind in this regard is that of Ahmed Omar Abu Ali, a dual US/Jordanian national who was held for nearly two years in incommunicado detention in Saudi Arabia, allegedly at the behest of the US government.

Ahmed Abu Ali, born in Texas to Jordanian immigrants, was arrested by Saudi police on 11 June 2003 as he was taking his final exams in the Islamic University of Medina, Saudi Arabia. Three other US nationals were arrested in Saudi Arabia around the same time, extradited to the USA, and charged along with eight other men from Virginia with conspiracy to commit terrorism. Ahmed Abu Ali was not extradited. Instead, he was detained in Saudi Arabia without charge or access to legal counsel for the next 20 months.[515]

According to Ahmed Abu Ali's parents, he was detained incommunicado for at least the first month, while their requests for assistance from the US State Department were unsuccessful. The parents said that the State Department later claimed that the Saudi authorities would not allow them access in the first month. However, on 15 June 2003, four days after Ahmed Abu Ali's arrest, FBI agents had visited the prison in Riyadh where he was detained and watched as he was interrogated by Saudi officials.[516] In July 2003, a Saudi government spokesman was reported as saying that the FBI had had "full and complete and direct access" to Ahmed Abu Ali since his arrest.

Over a period of four days in mid-September 2003, Ahmed Abu Ali was interrogated by two FBI agents. He asked for a lawyer, but was told by the FBI that "because he was in Saudi custody, he was not entitled to an attorney because they [the Saudi authorities] would not allow it". The FBI interrogations went ahead nevertheless. According to one of the interrogators in 2005, the interrogations lasted up to eight hours and "would start late at night and go into the early hours" over each of the four consecutive days. The first night, this FBI interrogator said, Saudi security officials were present at the interrogation at which Ahmed Abu Ali said that "he didn't want to talk". According to this agent, on the second day, "to get him to talk… after he had indicated that he didn't want to talk to us and he wanted an attorney", he told Ahmed Abu Ali that he faced three possibilities: designation as an "enemy combatant" and transfer to US military custody; prosecution and imprisonment in Saudi Arabia; or prosecution and imprisonment in Saudi Arabia followed by prosecution in the USA.[517]

After each FBI interrogation session, the Saudi authorities then "took custody of him again". The above FBI agent claimed in March 2005 that he and the other US interrogator had "no knowledge" of what, if any, "encouragement" the Saudi authorities gave Ahmed Abu Ali to talk to the US interrogators the following day. He also responded that he had "no knowledge" of the allegation that Ahmd Abu Ali was "handcuffed to something overhead" during the time between interrogation sessions. The FBI agent claimed to "have no specific knowledge" of the use of torture and beatings in Saudi prisons, although upon further questioning admitted to having "heard that prisoners are mistreated in Saudi jails", and that he was "aware of a newspaper article whereby a Saudi official was quoted as saying [Ahmed Abu Ali] was mistreated".[518]

[515] The details of the case are taken from the Memorandum Opinion issued by the US District Court for the District of Columbia on 16 December 2004, *Omar Abu Ali, et al. , v. John Ashcroft el al*., unless otherwise stated.
[516] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005. Testimony of FBI Special Agent Barry Cole.
[517] *Ibid*.
[518] *Ibid*.

As Ahmed Abu Ali's family continued to seek his release, they claimed that the Saudi authorities had described the arrest and detention as an "American case" over which the US, not the Saudi, authorities had ultimate control. His parents filed a petition for a writ of *habeas corpus* in the US District Court for the District of Columbia, arguing that Ahmed Abu Ali was being held in Saudi Arabia at the behest of the USA, and that the administration wanted to keep him there in order that he could be detained and interrogated free from constitutional constraints. Judge John Bates, who noted that there was "at least some circumstantial evidence that Abu Ali has been tortured during interrogations with the knowledge of the United States", issued his ruling on 16 December 2004. His analysis of the case began with the following:

> "*There is no principle more sacred to the jurisprudence of our country or more essential to the liberty of its citizens that the right to be free from arbitrary and indefinite detention at the whim of the executive… This right draws its force from – and would be meaningless without – the ability of the citizen to challenge his detention through a petition for a writ of habeas corpus… Consistent with its high purpose, courts have given the writ an exceptionally broad reach… [H]owever, the United States argues that the habeas petition for Abu Ali should be dismissed as a matter of law, no matter how extensive a role the United States might have played and continues to play in his detention, for the sole reason that he is presently in a foreign prison…*
>
> "*This position is as striking as it is sweeping. The full contours of this position would permit the United States, at its discretion and without judicial review, to arrest a citizen of the United States and transfer her to the custody of allies overseas in order to avoid constitutional scrutiny; to arrest a citizen of the United States through the intermediary of a foreign ally and ask the ally to hold the citizen at a foreign location indefinitely at the direction of the United States; or even to deliver American citizens to foreign governments to obtain information through the use of torture. In short, the United States is in effect arguing for nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him.*
>
> "*This Court simply cannot agree that under our constitutional system of government the executive retains such power free from judicial scrutiny when the fundamental rights of citizens have allegedly been violated*".[519]

The US executive cited not the President's war powers as its authority for what it argued should be a judicially unreviewable detention, but its broad authority to conduct foreign affairs free from judicial scrutiny. Judge Bates, who said that "a citizen cannot be so easily separated from his constitutional rights", rejected the government's motion to dismiss the case. He said that he would tread cautiously given the sensitivity of the foreign relations questions involved. He refused to accept or reject that the court had jurisdiction over the case, instead ordering further "jurisdictional discovery". In other words, the government would have to present evidence to confirm or refute the allegations made by the petitioners, which he described as "considerable" and almost entirely unrebutted by the government. Judge Bates ordered that the two parties submit a proposal of how they would go forward by 10 January 2005.

The case moved swiftly following Judge Bates' order. Rather than respond to the discovery order, after more than a year-and-a-half of detention without charge or trial, the

[519] *Abu Ali et al. v. Ashcroft et al.*, Civil Action No. 04-1258 (JDB), Memorandum Opinion, 16 December 2004, US District Court for the District of Columbia, http://www.dcd/uscourts.gov/04-1258.pdf.

authorities transferred 23-year-old Ahmed Abu Ali back to the USA. He arrived back in the United States on 21 February 2005 to face charges of providing material support for *al-Qa'ida* in a plot to establish an *al-Qa'ida* cell in the USA and to assassinate President Bush.[520] Perhaps he would still be in detention without charge or trial in Saudi Arabia if it had not been for the *habeas corpus* petition brought by his parents.

At a bail hearing on 1 March 2005, it became clear that the charges against Ahmed Abu Ali were based extensively on "admissions" he and alleged co-conspirators gave in detention in Saudi Arabia (one of the alleged co-conspirators has since been killed in a shoot-out with Saudi police in September 2003). Since his return, Ahmed Abu Ali has alleged that he was subjected to torture and ill-treatment in Saudi custody. The US administration has denied the allegation, insisting that "he has simply tried to divert the focus from his own criminal conduct by claiming that he was mistreated while he was in Saudi custody".[521]

The US authorities' conduct has, at best, been highly questionable throughout this case. At the bail hearing, the FBI agent above stated that when he and the other US interrogator had "interviewed" Ahmed Abu Ali over the four days in September 2003, they were only doing so for intelligence-gathering purposes and not for criminal prosecution purposes and had proceeded with this questioning despite the fact that Abu Ali had asked for an attorney because "we felt that the information was so vital to national security, we needed the information." This, of course, conflicts with the FBI agents own admission that he had told Abu Ali on the second day of interrogation that he faced possible prosecution in the USA and/or Saudi Arabia.[522] This has now come to pass with the charges based largely on "admissions" made by the defendant or his alleged co-conspirators when interrogated without access to legal counsel in incommunicado detention in Saudi Arabia.

Ahmed Abu Ali has pleaded not guilty to the charges, which carry a possible 80-year prison sentence.[523] It is notable that the Justice Department chose not to bring these charges until February 2005, despite having the evidence on which they are based by September 2003. For example, during the period between his arrest and late July 2003, Ahmed Abu Ali allegedly gave a written "confession" that he had joined an *al-Qa'ida* cell in Saudi Arabia. During this time, he was also videotaped reading out a "confession".[524] Yet, until Judge Bates ordered jurisdictional discovery in late 2004, the administration had resisted all attempts to have Ahmed Abu Ali brought back to the USA and before a court. Only when that order was issued was he returned and charged. It certainly appears that the USA had control over his fate as Ahmed Abu Ali has alleged the Saudi authorities repeatedly told him.[525]

On 12 May 2004, the Assistant Director of the Washington DC Field Office of the FBI had written in an e-mail that "this office has no further interest in Mr Ali's detention." At the bail hearing on 1 March 2005, Magistrate Judge Liam O'Grady described this e-mail evidence as "disturbing" and questioned the Justice Department official about it, given that

[520] Department of Justice news release, 22 February 2005.
[521] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005.
[522] *Ibid*.
[523] At the time of writing, the trial was scheduled to begin on 22 August 2005.
[524] *USA v Abu Ali*, Cr. No. 05-53. Transcript of detention hearing before Liam O'Grady, Magistrate Judge, US District Court, Eastern District of Virginia, Alexandria Division, 1 March 2005.
[525] *Ibid*. At the bail hearing, Ahmed Abu Ali's lawyer said: "The government's evidence is that my client is interrogated and admits in Saudi Arabia to being a member of Al Qaeda. And I think the Court can take judicial notice that Saudi Arabia is not on good terms with Al Qaeda at the current time. Yet they have never charged him with any offense. And they have consistently told him at all times that as soon as our [US] government either said, let him go or send him to us, he was going to either be freed or turned over to the United States".

the government was now contesting bail on the grounds that "this defendant presents an extraordinarily grave danger to this community and to this nation". The Justice Department responded to Judge O'Grady's concern with an attempt to distance the government from the e-mail: "we cannot account for every statement made by individuals who are US Government employees".[526] Judge O'Grady denied bail although he repeated that he was "very disturbed by the information" in the e-mail and said that he might reconsider denial of bail if further evidence emerges to undermine the strength of the government's case.

16. Unchecked power at home – "enemy combatants" in the USA

You have to recognize that in situations where there is a war – where the Government is on a war footing, that you have to trust the executive...
US Deputy Solicitor General, to US Supreme Court, 28 April 2004 [527]

While the US administration has not (yet) labelled Ahmed Abu Ali as an "enemy combatant" – two other US citizens, Yaser Esam Hamdi and José Padilla, have been so classified by executive order during the "war on terror". A third person in the USA, Qatari national Ali Saleh Kahlah al-Marri, has also been so designated and held in untried military custody.

Yaser Esam Hamdi was detained in the context of the international armed conflict in Afghanistan in late 2001. He was flown to Guantánamo in January 2002 before the discovery of his US citizenship three months later caused the authorities to transfer him to military custody in Virginia. In July 2003, he was transferred to a naval brig in South Carolina.

Legal efforts challenging his detention eventually reached the US Supreme Court, which on 28 June 2004, ruled that Yaser Hamdi was entitled to a "meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker". [528] The case was remanded back to the lower courts for further proceedings. On 27 August 2004, a federal judge ordered the government to explain why Yaser Hamdi was being held in indefinite solitary confinement, as he had been held for more than two years. The judge ruled that such treatment "without question", raised issues under the US constitutional ban on "cruel and unusual punishment". In a further order of 5 October 2004, the same judge noted that three months since the Supreme Court's *Hamdi* ruling, the detainee had not been provided "with a hearing of any kind by this Court, the military, or any other tribunal." It further noted that no charges had been levelled against Yaser Hamdi, and that he remained in solitary confinement. With Yaser Hamdi so held, an agreement for his release was reached between his lawyers and the government. He was released from US custody later in October 2004 and transferred to Saudi Arabia. The conditions attached to his release included renouncing his US citizenship and undertaking not to leave Saudi Arabia for five years and never to travel to Afghanistan, Iraq, Israel, Pakistan or Syria.

The USA had continued to hold Yaser Hamdi for almost two years after the UN Working Group on Arbitrary Detention had found that his detention was "arbitrary" in violation of the International Covenant on Civil and Political Rights. It levelled the same criticism about the detention of José Padilla.[529] He remains in military detention without charge or trial almost three years after his arrest.

José Padilla was arrested at Chicago Airport in May 2002 on the suspicion of plotting to detonate a radioactive "dirty" bomb against a US target. On the basis of an executive order

[526] *Ibid*.
[527] *Rumsfeld v. Padilla*, 03-1027, oral argument in the US Supreme Court, 28 April 2004.
[528] *Hamdi v. Rumsfeld*, 03-6696, decided 28 June 2004.
[529] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2003.8, 16 December 2002, para. 64. The two are referred to as "Mr X and Mr Y".

signed by President Bush on 9 June 2002, he was transferred from civilian to military custody two days before there was to be a court hearing on his case and without his lawyer being informed. From then he was held without charge or trial in a military brig in South Carolina.

In late 2003, the US Court of Appeals for the Second Circuit in New York ruled that the Padilla's detention was unlawful. "The President's inherent constitutional powers", the court ruled, "do not extend to the detention as an enemy combatant of an American citizen seized within the country away from a zone of combat". It noted: "As this Court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum… Under any scenario, Padilla will be entitled to the constitutional protections extended to other citizens."[530] The Court ruled that the government should release José Padilla from military custody within 30 days, and if it wished, transfer him to Justice Department custody which could bring charges against him. The government was willing to do no such thing, however, and appealed to the US Supreme Court.

The Supreme Court did not address the question of whether the President had the authority to detain Padilla in military custody as an "enemy combatant". Instead, on 28 June 2004, the same day as the *Rasul* and *Hamdi* decisions, it ruled the case should not have been filed in federal court in New York, but in South Carolina. Four of the nine Justices dissented, saying not only that it had been filed in the appropriate jurisdiction, but making their opinion clear about unfettered executive power:

> "*At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.*[531] *Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.*
>
> *Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny*."[532]

The Padilla Case was re-filed in the US District Court for the District of South Carolina as the Supreme Court majority had ordered. The government persisted in its contention that the President has the constitutional authority to detain José Padilla without charge or trial as an "enemy combatant", and that the place of his arrest was of no consequence. However, District Judge Henry Floyd found that President Bush's decision to remove Padilla from the ordinary criminal justice system and place him in military custody

[530] *Padilla v. Rumsfeld*, US Court of Appeals for the Second Circuit, 18 December 2003.
[531] The Star Chamber was an English court created in 1487 by King Henry VII. The Star Chamber, comprising 20-30 judges, became notorious under Charles I's reign for handing down judgments favourable to the king and to Archbishop William Laud, who supported the persecution of the Puritans. It was abolished in 1641.
[532] *Rumsfeld v. Padilla*, 03-1027, decided 28 June 2004 (Justice Stevens, dissenting).

was "neither necessary nor appropriate". Judge Floyd described the administration's view of the extent of the President's Commander-in-Chief powers in this case was "deeply troubling" and must be rejected. He continued that:

> "*To do otherwise would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties… [T]he Court finds that the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner as an enemy combatant*".[533]

Judge Floyd ordered that José Padilla be released within 45 days. However, the Justice Department immediately decided to appeal the ruling to the US Court of Appeals for the Fourth Circuit, thus ensuring that the detainee is kept in indefinite military custody. On 7 April 2005, lawyers for Padilla petitioned the US Supreme Court to take the case prior to the appeal to the Fourth Circuit:

> "*As things stand – and as they will continue to stand for some time in the absence [of US Supreme Court intervention] – no one knows the extent of the President's military power over American citizens at home during the 'War on Terror'. The continuing uncertainty about an issue of such imperative public importance does not serve the American people or its government…Neither security nor freedom is served by the continuing shroud of uncertainty that hands over the question whether the President may seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge*".[534]

The appeal brief added that the uncertainty was having a corrosive effect on wider criminal justice: "Since Padilla's military seizure from the civilian prison in which he was held, federal terrorism prosecutions have occurred under explicit or implicit Executive threats to declare criminal suspects enemy combatants and detain them in military prisons without criminal trial… The threat of an enemy combatant designation has loomed over many domestic terrorism cases".[535] At the time of writing, the US Supreme Court had not announced whether it would intervene in the case at this stage.

On 23 June 2003, less than a month before Qatar national Ali Saleh Kahlah al-Marri was due to go to trial in the USA on charges of credit card fraud and making false statements to the FBI, President Bush designated him as an "enemy combatant" by executive order. Al-Marri was transferred from the control of the Department of Justice to incommunicado solitary confinement in the Naval Consolidated Brig in Charleston, South Carolina. Almost two years later, he remains in untried military custody in South Carolina.

Ali al-Marri was held incommunicado from June 2003 to August 2004. In August 2004, he had a visit from the ICRC. It is not known how many other times he has been visited by the ICRC. He was allowed visits from his lawyer in October 2004 and January 2005. Otherwise he has been held incommunicado. He receives limited recreation time, which is considered by the authorities to be a "privilege" not a right. To date, Ali al-Marri has been detained for almost three and a half years, all in solitary confinement. There are concerns for his psychological state based on correspondence to his lawyers.

[533] *Padilla v. Hanft*, Civil Action No. 2:04-2221-26AJ, memorandum opinion and order, District Court for the District of South Carolina, Charleston Division, 28 February 2005.
[534] *Padilla v. Hanft*, Brief of petitioner for writ of certiorari before judgment. In the Supreme Court of the United States, 7 April 2005.
[535] *Ibid*.

The question of whether President Bush has the authority to detain Ali al-Marri as an "enemy combatant" without charge or due process was pending before Judge Floyd in the US District Court in South Carolina at the time of writing. It is likely that whatever his decision it would be appealed.

17. Guantánamo and beyond: The lawlessness must end

I regret the perception – however wrong it may be – that this Administration may not be committed to the rule of law and to basic fundamental American values….Given the novelty and complex nature of the issues that the Administration has faced since the attacks of September 11, 2001, however, I can certainly understand how well-intentioned individuals could disagree with some of the decisions that we have made.
US Attorney General Alberto Gonzales, January 2005[536]

The Guantánamo Bay detention camp has become a symbol of the US administration's refusal to put human rights and the rule of law at the heart of its response to the atrocities of 11 September 2001. It has become synonymous with the US executive's pursuit of unfettered power, and has become firmly associated with the systematic denial of human dignity and resort to cruel, inhuman or degrading treatment that has marked the USA's detentions and interrogations in the "war on terror".

Guantánamo was specifically selected as a location to hold "war on terror" detainees based on legal advice from the Justice Department that the US federal courts did not have jurisdiction to consider appeals from "enemy aliens" captured abroad and detained there. The *Rasul* ruling by the US Supreme Court in June 2004 showed that this advice was wrong. However, while the administration has withdrawn the 1 August 2002 Justice Department memorandum on torture in the face of widespread outrage (although the withdrawal, as shown, has only been partial), it has not repudiated the Guantánamo advice. Instead, it is seeking to drain the *Rasul* ruling of any meaning and to have the executive entirely control the detainees' fate.

A number of judicial decisions have given some hope of a reassertion of judicial power, but the administration continues to fight such decisions as hard as it can. It is not forced to appeal in this regressive manner. It could, and should, of its own accord, bring its conduct fully into line with international law and standards for the treatment of detainees.

It has been more than three years since detention operations began at Guantánamo. Any doubt that the detention regime at Guantánamo has been an exercise in testing the limits of executive power rather than one in which security concerns have been addressed while respecting the USA's international human rights and humanitarian law obligations, has surely long since dissipated. The administration's disdain for international humanitarian and human rights law has been clear. It has ignored calls from the UN, Amnesty International and others to replace the legal vacuum it has sought to create in Guantánamo with full judicial review, full and fair trials for anyone suspected of internationally recognizable criminal offences, and the repatriation and release, with full human rights protections, for those against whom there is no evidence of wrongdoing.

Guantánamo is just the tip of an iceberg, however. Around the world, there are believed to be thousands of detainees held in secret, incommunicado or indefinite detention without trial in the "war on terror". Many of these detainees are in direct US custody – in Iraq, Afghanistan and in secret locations. In Iraq alone, for example, in early May 2005 there were more than 11,350 detainees held in US custody in Abu Ghraib, Camp Bucca, Camp Cropper

[536] Responses of Alberto R. Gonzales, nominee to be Attorney General, to the written questions of Senator Herb Kohl.

and in holding centres elsewhere.[537] They are held in incommunicado or virtual incommunicado detention. At least 500 detainees are believed to be held in the US air bases in Bagram and Kandahar in Afghanistan.[538] An unknown number are held in other US holding facilities elsewhere in the country. Several dozen "high-value" detainees are believed to be held in secret CIA facilities in these countries or elsewhere. In addition, there are hundreds if not thousands of "war on terror" detainees held by other countries, allegedly at the behest of the USA, or with its knowledge and access for its agents. In Yemen, for example, there are believed to be some 200 detainees so held, in Pakistan some 400, and hundreds in Saudi Arabia.

As the most visible part of this iceberg (although still operated behind a veil of secrecy), Guantánamo is also serving as a diversion. Its continued existence is distracting public attention and diverting legal resources from the greater mass of detentions elsewhere. Perhaps this fits the US administration's ends for those other detentions, which it wishes also to keep unscrutinized. Indeed, just as the courts are beginning to reassert a degree of scrutiny over the Guantánamo detainees, the executive may be looking to transfer large numbers of detainees to other locations for continued detention there. The US government must not be allowed to outsource its unlawful detention practices to other governments or to other agencies in order to bypass judicial scrutiny in its own courts. The rule of law must be reestablished.

All secret and incommunicado US detentions must end. Access to lawyers, relatives, the ICRC and national and international human rights monitors should be granted and maintained. All detainees must be treated humanely in the real sense of the term, namely in full accordance with international law and standards. All past violations must be fully and independently investigated and revealed, and those responsible for them held accountable. Anyone in US custody suspected of a criminal offence should be charged and brought to trial in full accordance with international standards of fairness. Anyone else should be released. No one should be returned from US custody to a country or situation where he or she would face execution or torture or other cruel, inhuman or degrading treatment or punishment, or to unfair trial, or indefinite incommunicado or secret detention without charge or trial.

The USA and other countries face serious security threats, including those posed by groups determined to pursue their fight by abusing fundamental human rights without restraint. Governments have a duty to protect people's rights from such threats. In so doing, however, governments must not lose sight of other human rights and of their obligation to respect them. As the US administration itself purports to recognize, respect for human rights is the route to security not an obstacle to it. Confronting crime, including "terrorism", with unlawful means undermines the very principles which States claim to be seeking to protect.

Amnesty International has made more than 60 recommendations to the US government structured around the organization's 12 Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State (see Appendix 4). It continues to appeal for implementation of these recommendations, central to which is Amnesty International's call for the establishment of a full independent

[537] There were reported to be 6,370 detainees in Camp Bucca; 3,538 in Abu Ghraib; 114 in Camp Cropper; and 1,331 in other US facilities. *US to expand prison facilities in Iraq.* Washington Post, 9 May 2005. In its Second Periodic Report to the Committee against Torture on 6 May 2005, the USA acknowledged that was detaining "approximately 10,000 persons in Iraq". *Supra*, note 16, Annex 1.

[538] According to the ICRC, as of October 2004, there were around 300 detainees being held at Bagram, and it was visiting on a regular basis to around 250 detainees in Kandahar. *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC.* ICRC operational update, 29 March 2005. In its Second Periodic Report to the Committee against Torture on 6 May 2005, the USA acknowledged that it had "slightly more than 500 detainees in Afghanistan". *Supra*, note 16, Annex 1.

commission of inquiry into all aspects of the USA's detention and interrogation policies and practices in the "war on terror".[539] In addition to this, Amnesty International is calling for the appointment of a Special Counsel to conduct a criminal investigation into any members of the US administration against whom there is evidence of involvement in crimes in the "war on terror", with the proviso that the Special Counsel take full account of international law and standards. Amnesty International will also continue to call for the facilitation of investigations by UN mechanisms such as the Special Rapporteur on Torture, and human rights organizations.

Amnesty International urges the US government to make a fundamental change in direction, and to embrace the rules and principles of international human rights and humanitarian law, many of which were historically laid down with the USA's active participation and support. The USA must bring the Guantánamo Bay detention camp and any other facilities it is operating outside the USA into full compliance with international law and standards. The only alternative is to close them down.

[539] Pages 192-200, *USA: Human dignity denied*, supra, note 17.

Appendix 1: Some deaths in US custody in Afghanistan and Iraq

Detainee	Date of death	Location	Notes[540]
Mohammad Sayari	28 August 2002	Near Lwara, Afghanistan	The detainee was shot repeatedly by soldiers when, they alleged, he lunged towards a weapon. However, army investigators found that there was probable cause to believe that five soldiers had been involved in a murder, and recommended their prosecution for conspiracy, murder, dereliction of duty and obstruction of justice. Commanders decided to take no action, however, on the grounds of insufficient evidence. A soldier received a letter of reprimand.
Name unknown	November 2002	Kabul, Afghanistan	An unidentified Afghan detainee died, reportedly of hypothermia, in a secret CIA facility, after being stripped, assaulted and left in cell overnight without blankets. The case is reported to be under investigation by CIA Inspector General. No charges yet filed.
Mullah Habibullah	4 December 2002	Bagram, Afghanistan	The autopsy revealed that the detainee had suffered blunt force trauma. Army investigators closed the investigation into the death in October 2004, recommending prosecution of 11 military police (MP) officers and four military intelligence (MI) officers for assault (see also case of Dilawar, below).
Dilawar	10 December 2002	Bagram, Afghanistan	The autopsy revealed that the detainee had suffered blunt force trauma. Army investigators closed the investigation into the death in October 2004, recommending prosecution of 20 MPs and seven MI officers, including on charges of assault, cruelty and maltreatment. In this and the above case, the Church review noted that medical personnel may have attempted to cover-up the abuse. By the end of March 2005, in this and the above case, charges had been laid against two military personnel.
Name unknown	January 2003	Wazi village, Afghanistan	During military operations in Wazi village, three detained Afghans were being questioned, when one of them attempted to stand up, reportedly because he did not understand the questions, and a US soldier shot him. Army investigators recommended prosecution of the soldier for murder and another for dereliction of duty for not reporting the incident. Case under review at the time of writing.
Jamal Naseer	March 2003	Gardez, Afghanistan	Arrested along with seven other Afghan detainees, and during 17 days of detention allegedly subjected to abuse, including electric shocks, beatings, and immersion in water. No autopsy. Army investigation, not initiated until late 2004, ongoing.

[540] This list is illustrative only. Sources: USA's Second Periodic Report to the Committee against Torture, submitted 6 May 2005, *supra*, note 16. *Marine involved in Mosque shooting will not face court martial*. US Marine Corps press release, 4 May 2005. *Prosecution hits snags at hearing on Iraqi killings*. New York Times, 28 April 2005. *Interrogator says US approved handling of detainee who died*. Washington Post, 13 April 2005. *Iraqi general beaten 2 days before death*. The Denver Post, 5 April 2005. *Army Criminal Investigators outline 27 confirmed or suspected detainee homicides for Operation Iraqi Freedom, Operation Enduring Freedom*. United States Army Criminal Investigation Command. 25 March 2005. Unclassified executive summary of review of Department of Defense interrogation operations, conducted by the Naval Inspector General, Vice Admiral Albert T. Church, III, 10 March 2005. *Prisoner deaths in custody*, Associated Press, 16 March 2005. *CIA avoids scrutiny of detainee treatment*. Washington Post, 3 March 2005. Various autopsy reports. Amnesty International, *USA: Human dignity denied*, *supra*, note 17, Pages 146-152.

Nagem Sadun Hatab	6 June 2003	Nasiriya, Iraq	This 52-year-old died on 6 June 2003, three days after his arrest, as a result of "asphyxia due to strangulation". Additional findings at the autopsy included "blunt force injuries, predominantly recent contusions (bruises), on the torso and lower extremeties". It also found that he had suffered six fractured ribs and a broken hyoid bone. Army investigators found that he had been hit and kicked in the chest by soldiers on 4 June. On 5 June, he was reported to be lethargic, not eating and drinking very little, and possibly having difficulty breathing. He had diarrhoea and was covered in faeces. The jail commander ordered that he be stripped and taken outside the cellblock. According to the military investigation, he was left "naked outside in the sun and heat for the rest of the day and into the night." In September 2004, a Marine reservist was convicted of assault and dereliction of duty and sentenced to 60 days' hard labour and was reduced in rank. The camp commander was sentenced to be dismissed from the army, after being convicted of dereliction of duty and maltreatment. Charges against six other marines and the commander of the detention facility were dismissed by their commanding authorities.
Dilar Dababa	13 June 2003	Baghdad, Iraq	Detainee died of head injuries in a US interrogation facility. He died of "closed head injury with a cortical brain contusion and subdural hematoma." While in custody he "was subjected to both physical and psychological stress". He was handcuffed to a chair and the chair secured to a pipe in the room because he was allegedly combative and an escape risk.
Abdul Wali	21 June 2003	Asadabad, Afghanistan	Abdul Wali died in US military custody in Asadabad Fire Base. In June 2004, Justice Department charged a civilian contractor working with the CIA with assault, rather than murder. The indictment stated that the contractor beat Abdul Wali, "using his hands and feet, and a large flashlight". In court proceedings in 2005, the defendant claimed that the interrogation methods had been indirectly authorized by the US administration via its deliberations over torture and ill-treatment as subsequently revealed in various administration memorandums.
Obeed Hethere Radad	11 September 2003	Nasiriya, Iraq	Detainee died in the Forward Operating Base Packho facility. Soldier shot detainee who was standing close to the perimeter wire. He was charged with murder. However, the commander determined that the soldier had been ill-informed about rules of engagement when a detainee approached the perimeter wire, the charge was dropped and the soldier administratively discharged.
Manadel al-Jamadi	4 November 2003	Abu Ghraib, Iraq	Manadel al-Jamadi died in Abu Ghraib prison. The autopsy report concluded that his "external injuries are consistent with injuries sustained during apprehension. Ligature injuries are present on the wrists and ankles. Fractures of the ribs and a contusion of the left lung imply significant blunt force injuries of the thorax and likely resulted in impaired respiration. According to investigative agents, interviews taken from individuals present at the prison during the interrogation indicate that a hood made of synthetic material was placed over the head and neck of the detainee. This likely resulted in further compromise of effective respiration…. The cause of death is blunt force injuries of the torso complicated by compromised respiration. The manner of death is homicide." He was a "ghost detainee" brought into the prison by the CIA and left unregistered and untreated for injuries sustained on arrest. Seven Navy Seals confessed to assaulting the detainee. The army investigation was closed and referred to the Naval Criminal Investigation Service. Several Navy personnel have been charged.

Abdul Wahid	6 November 2003	Gereshk, Afghanistan	Died from "multiple blunt force injuries" in a cell in US Forward Operating Base, Gereshk, 48 hours after being handed over to US by Afghan militia. Army investigation concluded that no US personnel were implicated in his death, and that it had been caused by injuries sustained in Afghan militia custody.
'Abd Hamad Mawhoush	26 November 2003	Al Qaim, Baghdad, Iraq	56-year-old Major General 'Abd Hamad Mawhoush died in US custody, after two soldiers slid a sleeping bag over his body, except for his feet, and began questioning him as they rolled him repeatedly from his back to his stomach. Then one of the soldiers, an interrogator, sat on Mawhoush's chest and placed his hands over the prisoner's mouth. It was during this interrogation that the prisoner "became non-responsive". Four soldiers were charged with the death in October 2004. At a preliminary military hearing for three of them in December 2004, evidence emerged that the detainee had been beaten two days earlier by CIA and special forces soldiers, none of whom had been charged at the time of writing. The detainee was allegedly slapped, punched and beaten with a hose. He had several broken ribs and severe bruising. The decision as to whether to try the four charged soldiers by court-martial had not been taken at the time of writing.
Abu Malik Kenami	9 December 2003	Mosul, Iraq	Abdul Kareem Abdul Rutha, also known as Abu Malik Kenami was detained on 5 December 2003 and brought to the US detention facility at "AO [area of opeation] Glory" in Mosul. He was interrogated for the first and last time on that day. However, for the next four days, he was kept hooded with a plastic sandbag and his hands were handcuffed in front of him with plastic zip ties. The rule in the facility at that time was that the detainee must not attempt to lift the hood or talk. As punishment for disobeying these rules, Abu Malik Kenami was repeatedly subjected to "ups and downs", whereby the detainee is forced to stand up and sit down rapidly, in constant motion for up to 20 minutes at a time. On some occasions, he would have his hands handcuffed behind his back while forced to do this. On the morning of 9 December, he was found dead. His body was put in a refrigerated van for the next six days. No autopsy was conducted. An army investigator assigned to the case said that in the absence of an autopsy, "the cause of Abu Malik Kenami's death will never be known", and that he could only "speculate" on the cause of death. He concluded that the detainee had died of a heart attack, including because "he was performing ups and downs for ten to twenty minutes several times over a two to three hour period".
Zaidoun Hassoun	3 January 2004	Samarra, Iraq	19-year-old detainee drowned after US soldiers allegedly forced him off a bridge in Samarra. Army investigation recommended prosecution of four soldiers for manslaughter. In the event, one soldier was sentenced to 45 days' confinement for assault, obstruction of justice and dereliction of duty, and one to six months' confinement for assault and obstruction of justice. Two other soldiers received non-judicial punishments.
Abdul Jaleel	9 January 2004	Al Asad, Iraq	47-year-old detainee died at Forward Operating Base Rifles. Autopsy concluded that the cause of death was multiple blunt force injuries and asphyxia. It found "deep contusions of the chest wall, numerous displaced rib fractures, lung contusions" and internal bleeding. He also had "fractures of the thyroid cartilage and hyoid bone". In the initial part of his detention he had been put in isolation and shackled to a pipe that ran along the ceiling. During questioning he was allegedly beaten and kicked in the stomach and ribs. Later, because he was allegedly uncooperative and disruptive, his hands were shackled to the top of his cell door,

			and he was gagged. He died in this position. The autopsy concluded that "the severe blunt force injuries, the hanging position, and the obstruction of the oral cavity with a gag contributed to this individual's death. The manner of death is homicide". Army investigations recommended prosecution of two soldiers for negligent homicide and nine others for various offences including assault. However, the commanding officers determined that no charges would be referred, concluding that the detainee died as a result of a series of lawful applications of force in response to aggression and misconduct by the detainee.
Naser Ismail	January 2004	Balad, Iraq	A preliminary military hearing was held in January 2005 into the case of a Staff Sergeant with the 4th Infantry Division charged with murder and obstruction of justice in the case of an Iraqi detainee killed in an incident in January 2004. The hearing was to determine if there was enough evidence to take the case to court-martial. The result was not known at the time of writing.
Mohammed Munim al-Izmerly	31 January 2004	Baghdad, Iraq	On 25 April 2003, this prominent Iraqi scientist was taken, handcuffed and hooded, to an unknown location. He was held for the next nine months, possibly at the "high value detainees" section at Baghdad International Airport. On 17 February 2004, the family received the news from the ICRC that 65-year-old Mohammed al-Izmerly was dead. He had died over two weeks earlier on 31 January 2004. The family commissioned their own autopsy which concluded that he had died from blunt force injury to the back of the head.
Muhamad Husain Kadir	28 February 2004	Near Taal Al Jal, Iraq	Iraqi detainee shot by a soldier near Taal Al Jal, Kirkuk, when he allegedly lunged towards the arresting officer. This was found to be a lie. At a court-martial in August 2004, the soldier was found not guilty of murder but guilty of voluntary manslaughter. Sentenced to three years' confinement and given a dishonourable discharge.
Name unknown	April 2004	Mosul, Iraq	Autopsy indicated blunt force trauma and positional asphyxia. Cause of death undetermined. The army investigation has been closed, and the case referred to Navy whose personnel are implicated.
Hamaady Kareem and Tahah Ahmead Hanjil	15 April 2004	Mahmudiyah, Iraq	The two Iraqi men were allegedly shot in the back after being detained. It was alleged that a soldier shot them in anger after learning that military intelligence officers had decided not to detain them. A Second Lieutenant in the US Marines faced a preliminary military hearing in late April 2005 to determine whether he would face court-martial for the killings, which he maintained were committed in self-defence.
Karim Hassan Abed Ali al-Haleji	21 May 2004	An-Najaf, Iraq	Two wounded Iraqis were captured in An-Najaf. One, Karim Hassan, was shot and killed by a US army captain who was charged with assault with intent to commit murder. He claimed it was a "mercy killing". In March 2005, he was convicted by court-martial of assault with intent to commit voluntary manslaughter, which carried a possible 10-year prison sentence. On 1 April 2005, he was sentenced to dismissal from the army, but received no prison sentence.
Qasim Hassan	18 August 2004	Sadr City, Iraq	16-year-old killed in a purported "mercy killing". In December 2004, one soldier sentenced to three years' imprisonment, and another to one year.
Name	18 August	Abu Ghraib	US guards used lethal force to subdue an "unruly group of

unknown	2004	prison, Iraq	prisoners", according to the autopsy. The detainee was shot in the head.
Thaher Khaleefa Ahmed	25 October 2004	Balad, Iraq	During a house search, a man was shot by a US soldier. Army investigators established that the soldier lied, that the man was handcuffed when he allegedly lunged towards the soldier. The soldier has been charged with premeditated murder, maltreatment and assault. Trial by court-martial due in May 2005.
Name unknown	11 November 2004	Mosul, Iraq	A wounded Iraqi was captured. When the US soldiers came under attack, they decided to withdraw and leave the detainee behind. As the US unit was withdrawing, a sergeant allegedly shot the detainee twice. The sergeant was charged with attempted murder.
Name unknown	13 November 2004	Fallujah, Iraq	A Marine corporal was videotaped shooting an apparently injured and unarmed Iraqi man in a mosque in Fallujah. He subsequently admitted that he had shot three alleged members of the "Anti-Iraqi Forces" in the mosque, and ballistics evidence confirmed this. According to the military investigation, all three died of multiple gunshot wounds. The commanding officer decided that the corporal should not face a court-martial, finding that the killings were "consistent with the established rules of engagement, the law of armed conflict and the Marine's inherent right of self-defense".

Appendix 2: Some additional extracts of CSRT testimony

Detainee	Selected extracts of detainee testimony at Combatant Status Review Tribunals, as per records filed in US District Court
Mohammed Necle Algerian national Detained in Bosnia and Herzegovina On 19 October 2004, CSRT confirmed him as an "enemy combatant"	We were surprised that we were handed over to the American forces that are present in Bosnia. We were bound by our hands and our feet, and we were treated the worst treatment. For 36 hours without food, sleep, water or anything and we were treated the worst treatment. We came to this place so they could interrogate us. Now I have been here for three years… I thought the case was about an [alleged plan to bomb the] American embassy and until now no one has directed one question to me regarding this case. Believe me, I came to this place as a mistake and I think that I was wronged. It was unfair to me… I have a clear conscience that I am not part of these terrorist organizations. I am not afraid of anything because I am not a terrorist. If you interrogated me for 20 years you would find that I am Mohammed Nechle. I used to think that America had respect for human rights when it came to prison. In the beginning [in Guantánamo] they didn't [medically] treat me. I asked them to treat me and they left me for a long time without treatment. I had a haemorrhage, that's what I had and talked to them about that. I used to tell them there was blood; I was bleeding. I used to tell them about it time after time and [they] just left it. In the end the way that this happened, the way I was brought here and the accusations that brought against me, I feel that my future has been destroyed. A person does not even know what to say to their kids now. That's a really big thing.
Omar Rajab Amin Kuwaiti national Detained on Pakistan/Afghanistan border On 1 November 2004, CSRT confirmed him as an "enemy combatant"	I hope this Tribunal is a fair one. I've already been classified as an enemy combatant but from what I know of the American justice system is that a person is innocent until they are proven guilty. Right now, I'm guilty trying to prove my innocence. This is something I haven't heard of in a justice system. The fact that the Americans would not apply the Geneva Conventions to us; that they would capture us and bring us here, never did I expect this to happen.
Bisher al-Rawi Iraqi national, UK resident Detained in Gambia, transferred to Guantánamo via Afghanistan On 25 September 2004, confirmed as "enemy combatant" by CSRT	The way things happened in Gambia was similar to the way a criminal gang would operate (from what I have seen on television)… In Gambia, the Americans were running the show. As I have stated before, the US was there [Gambia] and in charge from day one. They were not very respectful to the Gambians… [Bisher al-Rawi's hearing in front of the CSRT took place over two separate sessions]. After my last Tribunal, I was taken to Camp Echo. In Camp Echo, I was isolated from all detainees. I am participating in this Tribunal in an effort to clear my name. My interrogations will reveal that my story hasn't changed. If I were lying, I wouldn't remember what I told you and my story would change. As you know, we were taken from Gambia to Kabul and then to Bagram Airbase. In Bagram, I provided information only after I was subjected to sleep deprivation, and various threats were made against me… I don't understand why I am shackled in here.

Yasin Qasem Muhammad Ismail Yemeni national On 28 September 2004, CSRT confirmed him as an "enemy combatant"	From there they [the Afghans] sold me to the Americans. I was afraid in the beginning, because whenever we spoke to the interrogators we were punished. We were hit and tortured. Not only did I get hit and punched, they broke my nose. The Americans did this to me. When I arrived in Cuba, I got hit in the place where we eat. I got hit on the shoulder and it was very painful, it was dislocated or something. They threatened to break it monthly, even when I got to Cuba they told me I would be here for a long time… Q. When you got here in Cuba from Afghanistan, you stated you were tortured here? A. Yes, I still use the medication for my shoulder. Q. You were hit on the shoulder one time? A. More than that. When they brought me here they tied my foot to my back and they threw me on my face. I feel there is something torn in my shoulder from the way I was lying on the floor. Q Did you receive medical treatment here? A. I got treatment for the first two weeks I was here. Q. But since that incident there has been no other torture? A. I haven't, but I have seen other people in the camp mistreated and tortured and that affects me psychologically. I was afraid for my life. When the interrogators asked me if I was al-Qa'ida, I would say yes to avoid torture… I have nothing [more] to say. I have no witnesses and this Tribunal is not a legal proceeding, it is a military proceeding. It doesn't matter what I say, it's military and there are no judges.
Jamal Mar'i Yemeni national On 30 September 2004, CSRT confirmed him as an "enemy combatant"	[T]hey apprehended me on September 23rd 2001. They didn't capture me, but some people simply kidnapped me while I was asleep. I was captured with a Pakistani cook. There was nobody else with us. An American interrogator interrogated me, then we were given to Pakistan… They did not release me. They turned me over to the United States. They took me from Pakistan to Jordan… The United States is the one who took me to Jordan… I am not an enemy combatant, I am a sleeping combatant because I was sleeping in my home…How can you call a person an enemy combatant when you're sleeping in your own home and somebody comes to your home and takes you somewhere and you don't know where that is?
Fahmi Abdullah Ahmed Yemeni national On 1 October 2004, CSRT confirmed him as an "enemy combatant"	When the Pakistani authorities captured us, there were two civilian Americans with them…When the Pakistani authorities captured us, they delivered us to Lahore [Pakistan]. In Lahore, some civilian Americans interrogated us. I had only one interrogation with them and it was the same with the other detainees. After that we were delivered to Islamabad… We stayed there for two months… After the two months, we were delivered to the Islamabad airport. The airplane took us to Bagram. The American government received us from the Islamabad airport. It was an American military airplane and the soldiers were Americans. We arrived at the military base in Bagram and stayed there for two or three months. I was interrogated about four or six times. Then they took us to Kandahar and it was the same thing; American airplanes with American soldiers. Again, we were received by Americans. We stayed in a small camp with wires, at the Kandahar airport. After two or three weeks, we walked from the camp to a plane and they took us to Cuba. Just know that I have been here for three years and have [not] been in touch with my family. I don't think this is just and it's not right for the American legal system to not allow people to talk to their families. It is a very small right that is allowed to all detainees around the world. I have a mother, brothers and sisters and I am the man of the house because my father is now out of our house.

Jamil El Banna Jordanian national, long-term UK resident On 9 October 2004, CSRT confirmed him as an "enemy combatant"	Q. You said you were kidnapped in Gambia. Who kidnapped you? A. The Americans. Q. Were they American soldiers or American civilians? A. Civilians from the embassy. That is what I was told… When they came and arrested and handcuffed me, they were wearing all black. They even covered their heads black… They took me, covered me, put me in a vehicle and sent me somewhere. I don't know where. It was at night. Then from there to the airport right away… We were in a room like this with about eight men. All with covered up faces… They cut off my clothes. They were pulling on my hands and my legs…They put me in an airplane and they made me wear the handcuffs that go around your body so I would not do anything on the airplane… This is all kidnapping. Yes. They took me underground in the dark. I did not see light for two weeks… Bagram, Afghanistan. Right there in the dark. They put me in the dark. I was surprised. I did not know what I did wrong or what I did. They starved me; they handcuffed me, there was no food… I was under their control. They are the ones who took me and put me there. They know what they have done. I was surprised that the Americans would do such a thing. It shocked me.
Abd Al Aziz Sayer Uwain Al Shammeri Kuwaiti national On 29 September 2004, CSRT confirmed him as an "enemy combatant"	Also, if I had wanted to fight against the Americans, the matter did not require me travelling to Afghanistan. The Americans are present in Kuwait. So, if I wanted to fight with them, I would have fought them in Kuwait. You saw how people are bombing Americans in Saudi Arabia. If I had any hatred on my part, I would have done that to the Americans in Kuwait. There was no need for me to travel. If you're saying that the American is my enemy, these Americans are there in front of me. The mind does not say to leave my enemy when he is in front of me and go to another country to fight him. When that did not happen, it is proof that there is no hatred on my part towards the Americans… I hope that you really are fair in this Tribunal and that you do not punish me for things that other people have done. If I made a mistake, and you want to punish me for that, I don't have a problem with that because it was something that I did. Don't place other people's mistakes on me.
Abd al Malik Abd Al Wahab Yemeni national On 6 October 2004, CSRT confirmed him as an "enemy combatant"	We were tortured in Kandahar by beatings. Since we arrived in Cuba we have been mentally persuaded. We have been here for three years. We have nothing here, no rights, no trials, nothing. I have never taken part in any act of hostility against America. I am not an enemy combatant, are you trying to force me to be an enemy combatant? That's all I can say and I swear it is the truth. I just hope this hearing is useful. It is a step forward to solve the situation on this island. If you have any evidence against me that shows I am an enemy of the United States or that I fought against the United States, I am willing to face that trial.
Mohammed Mohammed Hassen Yemeni national On 12 October 2004, CSRT confirmed him as an "enemy combatant"	Q. Have you ever been to Afghanistan? A. I had never gone there until I was taken to the prison by the Americans… Q. Were you ever a member of Al Qaida? A. No. Never. I only heard of Al Qaida here in Guantanamo.
Boudella Al Haji Algerian national Seized in Bosnia and Herzegovina	I've never heard of [al-Qa'ida] until the 9/11 incident. I heard about it through the media. How can you associate me with an organization I've never heard of? As I said before, I'm against terrorist attacks… I'm asking you. You are just people, if I did a crime in the United States, would you take me to the courts in the United States? Of course. You are not going to deliver me to another country. If you find me innocent you'd let me go free, if not, you'd take me to jail. If I was innocent, it is impossible that you would give me to

On 18 October 2004, CSRT confirmed him as an "enemy combatant"	another nation. Even though we were innocent, we were delivered to another nation and we don't even know why… The only thing I know is we were taken by the Bosnians, delivered to the Americans and the next thing we knew, we were here. We spent four days with our eyes closed, with bandages on our eyes, tape on our mouths, with shackled hands and feet. Tuesday through Sunday…
Mustafa Ait Idir Algerian national Seized in Bosnia and Herzegovina On 20 October 2004, CSRT confirmed him as an "enemy combatant"	Now I would like to talk about the three days when we were being moved. During those three days we were being transferred here, animals would never have been treated the way we were. In Bosnia, the temperature was -20 degrees and there was ice and snow. It was very cold. They took off all my clothes and they gave me very thin clothes - like that tablecloth [detainee points to the white sheet covering the Tribunal table]. They placed me in a room that was very cold. As they moved me from country to country, my ears, mouth and eyes were covered. I could not even talk or breath. A mask with a metal piece was place over my mouth and nose. Why am I saying this? …I was given a letter from the American Ambassador in Bosnia that lied and said I was moved in a humane manner, when I got to Cuba, the first four or five months I could not feel my left leg. From my thigh to my back, I could not feel anything at all… Regarding my treatment here in prison, I am a person that lived very good life. I never had any problems with people whatsoever. Within my family itself, I had no problems. I never had any problems with my neighbours. The team I trained with consisted of Muslims, Catholics and Orthodox; many different people. My neighbours, were the same way. I made very good wages from my jobs. I never had any problems with money, people, anything. My life has changed completely. It has turned 360 degrees to this, where I am now. There are times when a soldier, who maybe never even went to school and barely knew how to hold a weapon, comes to you and swears at you; he says things to you that you have never ever heard of in your life. As an example, a soldier broke my finger. Can you see? I cannot bring this finger close to my other fingers. I cannot close this gap. On the middle finger, my knuckle has been broken. You probably cannot see that. But my finger, you can see that clearly. Q: Let me ask you a question? Are you saying a soldier in Guantanamo Bay, Cuba, broke your fingers? A: Yes. Soldiers took me and placed me on the ground in the rocks outside. My hands and my feet were bound. The soldiers put my face on the ground. You can see maybe my eye - a small little hole near my eyes. One soldier put my head on the ground, and then another soldier came and put his knee on my face. The soldier hit me on the other side of my face that was not touching the ground. If my head was turned a little bit more, the rocks would have gone into my eye. Next to my eye there is a little hole. There are a lot of things regarding the soldiers, but I won't talk about all of them. I just want to say a small thing. I hope that this is real. I am not berating you with these words, but this is something I don't want to keep inside. I hope this Tribunal is really real. I hope that a person who has made a mistake would admit to making a mistake. No matter who this person is. Even if he is the closest person to you. What I mean by this is, if America made a mistake by bringing me here to Cuba, not just because it is hard for them to admit a mistake was made, but to prevent me from leaving here, then bring all these accusations against me. I will tell you something else, if you have evidence, big or small, that I have any relationship with terrorism or if I helped any terrorists, I am prepared for any kind of punishment in any country. I am saying this to you now, and if you wish for me to, I will sign a piece of paper saying these same words.
Saifullah Paracha Pakistan national seized in Thailand	Tribunal President: Let me clarify that; you do understand this is an administration hearing, and this is not a legal proceeding. I do know you had some questions about the legality of your detention. That would be referred to other organizations of the government, but you will be receiving more specific instructions shortly of how to bring your question to US courts.

On 8 December 2004, CSRT confirmed him as an "enemy combatant"	Detainee: Your honor, I have been here over 17 months; would that be before I expire? Tribunal President: I would certainly hope so…. [T]his is a US government executive decision in regards to the detention of enemy combatants… Detainee: Your honor, my question is that is your Executive Order applicable around the earth? Tribunal President: It is a global war on terrorism. Detainee: I know sir, but you are not the master of the earth, sir.
Saber Lahmar Algerian national Seized in Bosnia and Herzegovina On 8 October 2004, CSRT confirmed him as an "enemy combatant"	I hope this hearing looks at the truth and represents true justice. This country has been a symbol of justice for more than two hundred years. I hope these hearings are not just one movie from many movies that have passed by us. I also hope I will be judged by the law and not by politics… I would like to point out something important. My detention from Sarajevo to Cuba was not legal. There is no current law in the world that allows for my detention from my country to another country. If I am accused of something in a country I was in, I should have been detained in that country. That country is recognized worldwide and therefore it has laws and courts. The court from the country should have tried me. Let's assume I was guilty of something and received punishment for it. The punishment should have been in that country. I have nothing to do with Cuba. The intimidation from the Americans is what caused my illegal detention from one country to another country. The Combatant Status Review Tribunal states I am an enemy combatant. Those words in my view are ridiculous and have no meaning. A sane person or a small child would never say anything like. The words 'enemy combatant' means a prisoner that has been arrested on the frontlines of the battlefield holding a weapon. In my case, I was kidnapped from my home by Americans. Therefore, the words enemy combatant doesn't apply to me.
Adil Kamil Abdullah Al Wadi Bahraini national On 26 September 2004, CSRT confirmed him as an "enemy combatant"	Q: Adil, do you have any other evidence to present to this Tribunal? A: I don't have any other proof or evidence. All what I have is my biography. Everybody knows me in Bahrain. I am a very correct person. I have never had any problems with the government or anything. Q: Anything else? A: I have no proof. I have been here for two years. I don't have anything.
Fouzi Khalid Abdullah Al Awda Kuwaiti national On 11 September 2004, CSRT confirmed him as an "enemy combatant"	I do not know what is the nature of the classified evidence [against me]… After a Government is liberated by another Government – my country was liberated by the United States, so it is impossible after that happening, and after my being surrounded by and living with Americans in my country, and visiting the United States, after all that, it is impossible for me to be an enemy combatant against the United States. In my whole life, I have never been an enemy against anyone. I wish for that to be taken into consideration. Maybe the United States Government knows my father's military history during the time of the occupation of Kuwait. My father was in the military and helped the United States during that time of the occupation. That is all I have.

Appendix 3: Alleged detention and interrogation practices

The following are some of the detention or interrogation practices that are alleged to have been authorized or used by the USA during the "war on terror". Some appear to have been tailored to specific cultural or religious sensitivities of the detainees, thereby introducing a discriminatory element to the abuse. Techniques are often used in combination. Neither gender nor age has offered protection. Children, the elderly, women and men are reported to have been among the subjects of torture or ill-treatment. This list does not claim to be exhaustive.

- Abduction
- Barbed wire, forced to walk barefoot on
- Blindfolding
- "Burking" – hand over detainee's mouth/nose to prevent breathing
- Cell extraction, brutal/punitive use of
- Chemical/pepper spray, misuse of
- Cigarette burns
- Claustrophia-inducing techniques, e.g. tied headfirst in sleeping bag, shut in lockers
- Death threats
- Dietary manipulation
- Dogs used to threaten and intimidate
- Dousing in cold water
- Electric shocks, threats of electric shocks
- Exposure to weather and temperature extremes, especially via air-conditioning
- Flags, wrapped in Israeli or US flags during or prior to interrogation
- Food and water deprivation
- Forced shaving, ie of head, body or facial hair
- Forcible injections, including with unidentified substances
- Ground, forced to lie on bare ground while agents stand on back or back of legs
- Hooding
- Hostage-taking, i.e. individuals detained to force surrender of relatives
- Humiliation, eg forced crawling, forced to make animal noises, being urinated upon.
- Immersion in water to induce perception of drowning
- Incommunicado detention
- Induced perception of suffocation or asyphxiation
- Light deprivation
- Loud music, noise, yelling

- Mock execution
- Photography and videoing as humiliation
- Physical assault, eg punching, kicking, beatings with hands, hose, batons, guns, etc
- Physical exercise to the point of exhaustion, e.g. "ups and downs", carrying rocks
- Piling, i.e. detainee is sat on or jumped on by one or more people ("dog/pig pile")
- Prolonged interrogations, eg 20 hours
- Racial and religious taunts, humiliation
- Relatives, denial of access to, excessive censorship of communications with
- Religious intolerance, eg disrespect for Koran, religious rituals
- Secret detention
- Secret transfer
- Sensory deprivation
- Sexual humiliation
- Sexual assault
- Shackles and handcuffs, excessive and cruel use of. Includes "short shackling"
- Sleep adjustment
- Sleep deprivation
- Solitary confinement for prolonged periods, eg months or more than a year
- Stress positions, eg prolonged forced kneeling and standing
- Stripping, nudity, excessive or humiliating use of
- Strip searches, excessive or humiliating use of
- Strobe lighting
- Suspension, with use of handcuffs/shackles
- Threat of rape
- Threats of reprisals against relatives
- Threat of transfer to third country to inspire fear of torture or death
- Threat of transfer to Guantánamo
- Threats of torture or ill-treatment
- Twenty-four hour bright lighting
- Withdrawal of "comfort items", including religious items
- Withholding of information, e.g. not telling detainee where he is
- Withholding of medication
- Withholding of toilet facilities, leading to defecation and urination in clothing

Appendix 4: Recommendations: Preventing torture & ill-treatment

Amnesty International's recommendations to the US authorities based on the organization's 12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State

1. Condemn torture and other ill-treatment

The highest authorities of every country should demonstrate their total opposition to torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment). They should condemn these practices unreservedly whenever it occurs. They should make clear to all members of the police, military and other security forces that torture and other ill-treatment will never be tolerated.

The US authorities should:

- Provide a genuine, unequivocal and continuing public commitment to oppose torture *and* other cruel, inhuman or degrading treatment under any circumstances, regardless of where it takes place, and take every possible measure to ensure that all agencies of government and US allies fully comply with this prohibition;
- Review all government policies and procedures relating to detention and interrogation to ensure that they adhere strictly to international human rights and humanitarian law and standards, and publicly disown those which do not;
- Make clear to all members of the military and all other government agencies, as well as US allies, that torture or other ill-treatment will not be tolerated under any circumstances;
- Commit to a program of public education on the international prohibition of torture and ill-treatment, including challenging any public discourse that seeks to promote tolerance of torture or cruel, inhuman or degrading treatment.

2. Ensure access to prisoners

Torture and other ill-treatment often take place while prisoners are held incommunicado — unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

The US authorities should:

- End the practice of incommunicado detention;
- Grant the International Committee of the Red Cross full access to all detainees according to the organization's mandate;
- Grant all detainees access to legal counsel, relatives, independent doctors, and to consular representatives, without delay and regularly thereafter;
- In battlefield situations, ensure where possible that interrogations are observed by at least one military lawyer with full knowledge of international law and standards as they pertain to the treatment of detainees;
- Grant all detainees access to the courts to be able to challenge the lawfulness of their detention. Presume detainees captured on the battlefield during international conflicts to be prisoners of war unless and until a competent tribunal determines otherwise;

- Reject any measures that narrow or curtail the effect or scope of the *Rasul v. Bush* ruling on the right to judicial review of detainees held in Guantánamo or elsewhere, and facilitate detainees' access to legal counsel for the purpose of judicial review.

3. No secret detention

In some countries torture and other ill-treatment take place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers the courts, and others with a legitimate interest, such as the International Committee of the Red Cross (ICRC). Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority and to ensure the prisoner's safety.

The US authorities should:

- Clarify the fate and whereabouts of those detainees reported to be or to have been in US custody or under US interrogation in the custody of other countries, to whom no outside body including the International Committee of the Red Cross are known to have access, and provide assurances of their well-being. These detainees include but are not limited to those named in the 9/11 Commission Report and in this Amnesty International report as having been in custody at some time in undisclosed locations;
- End immediately the practice of secret detention wherever it is occurring, and under whichever agency. Hold detainees only in officially recognized places of detention;
- Not collude with other governments in the practice of "disappearances" or secret detentions, and expose such abuses where the USA becomes aware of them;
- Maintain an accurate and detailed register of all detainees at every detention facility operated by the US**,** in accordance with international law and standards. This register should be updated on a daily basis, and made available for inspection by, at a minimum, the ICRC, and the detainees' relatives and lawyers or other persons of confidence;
- Make public and regularly update the precise numbers of detainees in US custody specifying the agency under which each person is held, their identity, their nationality and arrest date, and place of detention;
- Either charge and bring to trial, in full accordance with international law and standards and without recourse to the death penalty, all detainees held in US custody in undisclosed locations, or else release them;
- Comply without delay with Freedom of Information Act requests, and related court orders, aimed at clarifying the fate and whereabouts of such detainees;
- Make public and revoke any measures or directives that have been authorized by the President or any other official that could be interpreted as authorizing "disappearances", torture or cruel, inhuman or degrading treatment, or extrajudicial executions.

4. Provide safeguards during detention and interrogation

All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture and other ill-treatment and order release if the detention is unlawful. A lawyer should be present during interrogations.

Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

The US authorities should:

- Immediately inform anyone taken into US custody of his or her rights, including the right not to be subjected to any form of torture or other ill-treatmentt; their right to challenge the lawfulness of their detention in a court of law; their right to access to relatives and legal counsel, and their consular rights if a foreign national;
- Ensure at all times a clear delineation between powers of detention and interrogation;
- Keep under systematic review interrogation rules, instructions, methods and practices, as well as arrangements for the custody and treatment of anyone in US custody, with a view to preventing any cases of torture or other ill-treatment;
- Ensure that conditions of detention strictly comply with international law and standards;
- Prohibit the use of isolation, hooding, stripping, dogs, stress positions, sensory deprivation, feigned suffocation, death threats, use of cold water or weather, sleep deprivation and any other forms of torture or ill-treatment as interrogation techniques;
- Bring to trial in accordance with international fair trial standards all detainees held in Guantánamo, or release them;
- Ensure compliance with all aspects of international law and standards relating to child detainees;
- Ensure compliance with all international law and standards relating to women detainees;
- Invite all relevant human rights monitoring mechanisms, especially the UN Special Rapporteur on Torture, the Working Group on Enforced or Involuntary Disappearances (1980) and the Working Group on Arbitrary detention to visit all places of detention, and grant them unlimited access to these places and to detainees;
- Grant access to national and international human rights organizations, including Amnesty International, to all places of detention and all detainees, regardless of where they are held.

5. Prohibit torture and other ill-treatment in law

Governments should adopt laws for the prohibition and prevention of torture and other ill-treatment incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and other ill-treatment and the essential safeguards for its prevention must not be suspended under any circumstances, including states of war or other public emergency.

The US authorities should:

- Enact a federal crime of torture, as called for by the Committee against Torture, that also defines the infliction of cruel, inhuman or degrading treatment as a crime, wherever it occurs;

- Amend the Uniform Code of Military Justice to criminalize expressly the crime of torture, as well as a crime of infliction of cruel, inhuman or degrading treatment or punishment, wherever it occurs, in line with the Convention against Torture and other international standards;
- Ensure that all legislation criminalizing torture defines torture at least as broadly as the UN Convention against Torture;
- Ensure that legislation criminalizing torture and the infliction of cruel, inhuman or degrading treatment covers all persons, regardless of official status or nationality, wherever this conduct occurred, and that it does not allow any exceptional circumstances whatsoever to be invoked as justification for such conduct, or allow the authorization of torture or ill-treatment by any superior officer or public official, including the President.

6. Investigate

All complaints and reports of torture or other ill-treatment should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The methods and findings of such investigations should be made public. Officials suspected of committing torture or other ill-treatment should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

US Congress should:

- Establish an independent, impartial and non-partisan commission of inquiry into all aspects of the USA's "war on terror" detention and interrogation policies and practices. 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 whether classified or unclassified.

The US Attorney General should:

- 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 the "war on terror".

The US authorities should:

- Ensure that all allegations of torture and other ill-treatment involving US personnel, whether members of the armed forces, other government agencies, medical personnel, private contractors or interpreters, are subject to prompt, thorough, independent and impartial civilian investigation in strict conformity with international law and standards concerning investigations of human rights violations;
- Ensure that such investigations include cases in which the USA previously had custody of the detainee, but transferred him or her to the custody of another country, or to other forces within the same country, subsequent to which allegations of torture or ill-treatment were made;
- Ensure that the investigative approach at a minimum complies with the UN Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Ensure that the investigation of deaths in custody at a minimum comply with the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, including the provision for adequate autopsies in all such cases;

- In view of evidence that certain persons held in US custody have been subjected to "disappearance", the US authorities should initiate prompt, thorough and impartial investigations into the allegations by a competent and independent state authority, as provided under Article 13 of the UN Declaration on the Protection of All Persons from Enforced Disappearance.

7. Prosecute

Those responsible for torture or other ill-treatment must be brought to justice. This principle should apply wherever alleged torturers happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments should exercise universal jurisdiction over those suspected of these crimes, extradite them, or surrender them to an international criminal court, and cooperate in such criminal proceedings. Trials should be fair. An order from a superior officer should never be accepted as a justification for torture or ill-treatment.

The US authorities should:

- Publicly reject all arguments, including those contained in classified or unclassified government documents, promoting impunity for anyone suspected of torture and cruel, inhuman or degrading treatment, including the ordering of such acts;
- Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other ill-treatment;
- Any person alleged to have perpetrated an act of "disappearance" should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance;
- Ensure that all trials for alleged perpetrators comply with international fair trial standards, and do not result in imposition of the death penalty.

8. No use of statements extracted under torture or other ill-treatment

Governments should ensure that statements and other evidence obtained through torture or other ill-treatment may not be invoked in any proceedings, except against a person accused of torture or other ill-treatment.

The US authorities should:

- Ensure that no statement coerced as a result of torture or other ill-treatment, including long-term indefinite detention without charge or trial, or any other information or evidence obtained directly or indirectly as the result of torture or ill-treatment, regardless of who was responsible for such acts, is admitted as evidence against any defendant, except the perpetrator of the human rights violation in question;
- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, and abandon trials by military commission;
- Expose and reject any use of coerced evidence obtained by other governments from people held in their own or US custody;
- Refrain from transferring any coerced evidence for the use of other governments.

9. Provide effective training

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture and other ill-treatment are criminal acts. Officials should be instructed that they have the right and duty to refuse to obey any order to torture or to carry out other ill-treatment.

The US authorities should:

- Ensure that all personnel involved in detention and interrogation, including all members of the armed forces or other government agencies, private contractors, medical personnel and interpreters, receive full training, with input from international experts, on the international prohibition of torture and other ill-treatment, and their obligation to expose it;
- Ensure that all members of the armed forces and members of other government agencies, including the CIA, private contractors, medical personnel and interpreters, receive full training in the scope and meaning of the Geneva Conventions and their Additional Protocols, as well as international human rights law and standards, with input from international experts;
- Ensure that full training be similarly provided on international human rights law and standards regarding the treatment of persons deprived of their liberty, including the prohibition on "disappearances", with input from international experts;
- Ensure that all military and other agency personnel, as well as medical personnel and private contractors, receive cultural awareness training appropriate to whatever theatre of operation they may be deployed into.

10. Provide reparation

Victims of torture or other ill-treatment and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

The US authorities should:

- Ensure that anyone who has suffered torture or ill-treatment while in US custody has access to, and the means to obtain, full reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, wherever they may reside;
- Ensure that all those who have been subject to unlawful arrest by the USA receive full compensation.

11. Ratify international treaties

All governments should ratify without reservations international treaties containing safeguards against torture and other ill-treatment, including the International Covenant on Civil and Political Rights and its first Optional Protocol; and the UN Convention against Torture, with declarations providing for individual and inter-state complaints. Governments should comply with the recommendations of international bodies and experts on the prevention of torture and other ill-treatment.

The US authorities should:

- Make a public commitment to fully adhere to international human rights and humanitarian law and standards – treaties, other instruments, and customary law – and respect the decisions and recommendations of international and regional human rights bodies;

- Make a public commitment to fully adhere to the Geneva Conventions, and to respecting the advice and recommendations of the International Committee of the Red Cross;
- Ratify Additional Protocols I and II to the Geneva Conventions;
- Withdraw all conditions attached to the USA's ratification of the UN Convention against Torture;
- Withdraw all limiting conditions attached to the USA's ratification of the International Covenant on Civil and Political Rights;
- Provide the USA's overdue reports to the Human Rights Committee;[541]
- Ratify the Optional Protocol to the UN Convention against Torture;
- Ratify the UN Convention on the Rights of the Child;
- Ratify the American Convention on Human Rights;
- Ratify the Inter-American Convention on Forced Disappearance of Persons without any reservations and implement it by making enforced disappearances a crime under US law over which US courts have jurisdiction wherever committed by anyone.
- Ratify the Rome Statute of the International Criminal Court.

12. Exercise international responsibility

Governments should use all available channels to intercede with the governments of countries where torture or other ill-treatment are reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture or other ill-treatment. Governments must not forcibly return a person to a country where he or she would be at risk of torture or other ill-treatment.

The US authorities should:

- Withdraw the USA's understanding to Article 3 of the UN Convention against Torture, and publicly state the USA's commitment to the principle of *non-refoulement,* and ensure that no legislation undermines this protection in any way*;*
- Cease the practice of "renditions" that bypass human rights protections; ensure that all transfers of detainees between the USA and other countries fully comply with international human rights law;
- Not rely on diplomatic assurances as evidence that no risk of torture or ill-treatment exists in the receiving state.

[541] The Human Rights Committee has requested a special report from the US government on its detention practices. The Committee expectd to have the report ahead of its July 2005 session. *Press Briefing by Human Rights Committee Chair*, 1 April 2005.

Appendix 5: Selected AI documents on "war on terror" detentions

Pakistan/USA: Incommunicado detention / Fear of "disappearance" / Fear of torture or ill-treatment / Fear of forcible transfer, AI Index: ASA 33/007/2005, 6 May 2005, http://web.amnesty.org/library/Index/ENGASA330072005

USA: Response to the proposed "Interrogations Procedures Act", AI Index: AMR 51/039/2005, 16 February 2005, http://web.amnesty.org/library/Index/ENGAMR510392005

USA: Open letter to US Senators as they prepare to vote on the nomination of Alberto Gonzales for Attorney General, AI Index: AMR 51/031/2005, 1 February 2005, http://web.amnesty.org/library/Index/ENGAMR510312005

USA: Guantánamo: Trusting the executive, prolonging the injustice, AI Index: AMR 51/030/2005, 26 January 2005, http://web.amnesty.org/library/Index/ENGAMR510302005

USA: Human rights not hollow words. An appeal to President George W. Bush on the occasion of his reinaguration, AI Index: AMR 51/012/2005, 19 January 2005, http://web.amnesty.org/library/Index/ENGAMR510122005

USA: Guantánamo - an icon of lawlessness, AI Index: AMR 51/002/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510022005

USA: Guantánamo: The struggle for our children… Reports of chronic abuse bring more anguish – but new reason to hope as well, AI Index: AMR 51/001/2005, 6 January 2005, http://web.amnesty.org/library/Index/ENGAMR510012005

USA: Proclamations are not enough, double standards must end. More than words needed this Human Rights Day, AI Index: AMR 51/171/2004, 2 December 2004, http://web.amnesty.org/library/Index/ENGAMR511712004

UK: Briefing for the Committee against Torture, AI Index: EUR 45/029/2004, 26 November 2004 http://web.amnesty.org/library/Index/ENGEUR450292004

USA: Guantánamo: Military commissions – Amnesty International observer's notes, No.3 – Proceedings suspended following order by US federal judge, AI Index: AMR 51/157/2004, 9 November 2004, http://web.amnesty.org/library/Index/ENGAMR511572004

USA: Human dignity denied: Torture and accountability in the 'war on terror', AMR 51/145/2004, 27 October 2004, http://web.amnesty.org/library/Index/ENGAMR511452004

USA: A deepening stain on US justice, AI Index: AMR 51/130/2004, 19 August 2004, http://web.amnesty.org/library/Index/ENGAMR511302004

USA: Administration continues to show contempt for Guantánamo detainees' rights, AI Index: AMR 51/113/2004, 8 July 2004, http://web.amnesty.org/library/Index/ENGAMR511132004

USA: The US Supreme Court takes a step towards restoring the rule of law to Guantánamo, AI Index: AMR 51/110/2004, 28 June 2004, http://web.amnesty.org/library/Index/ENGAMR511102004

USA: The Gulf and the Arabian Peninsula: Human rights fall victim to the "War on Terror", AI Index: MDE 04/002/2004, 22 June 2004, http://web.amnesty.org/library/Index/ENGMDE040022004

USA: Iraq: Clarification needed on status of prisoners after 30 June. Open letter to the Permanent Representative of the United States of America to the United Nations, AI Index: MDE 14/031/2004, 18 June 2004, http://web.amnesty.org/library/Index/ENGMDE140312004

USA: Restoring the rule of law. The right of Guantánamo detainees to judicial review of the lawfulness of their detention, AI Index: AMR 51/093/2004, 16 June 2004, http://web.amnesty.org/library/Index/ENGAMR510932004

USA: Amnesty International calls for a commission of inquiry into 'war on terror' detentions, AI Index: AMR 51/087/2004, 19 May 2004, http://web.amnesty.org/library/Index/ENGAMR510872004

USA: Interrogation techniques amount to torture, AI Index: AMR 51/081/2004, 13 May 2004, http://web.amnesty.org/library/Index/ENGAMR510812004

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