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UNITED STATES OF AMERICA

Justice delayed *and* justice denied?

Trials under the Military Commissions Act

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The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

US Supreme Court, 1944

Summary

1. Overview: Trials set against a backdrop of unlawful practices 1

In the "war on terror", detainees in US custody have been treated as potential sources of information first and potential criminal defendants a distant second. Now, more than five years after detentions began, trials of a selected few detainees, plucked from years of secret or virtually incommunicado detention and interrogations, are looming.

These trials cannot be divorced from the context in which such proceedings would occur. This context is one of practices pursued in the absence of independent judicial oversight that have systematically violated international law. A thread through the "war on terror" has been the pursuit of unchecked executive power and efforts to keep detainees captured and held outside the USA away from the ordinary courts. Under the government's war paradigm, judicial consideration of *habeas corpus* petitions from "unlawful enemy combatants" is seen as unwarranted interference in military operations. In the absence of this basic safeguard against enforced disappearance, arbitrary detention and torture, such violations have occurred.

The government has also rejected the federal courts as the forum in which to bring any such detainees to trial. Instead, military commissions have been developed to fit the policy framework. Under the Military Commissions Act (MCA), signed into law on 17 October 2006, the government may introduce evidence while keeping secret the methods used to obtain it. The military judge can close the proceedings in order to prevent the disclosure of classified intelligence activities. The right to trial within a reasonable time, guaranteed in US federal courts and courts-martial, is denied to "unlawful enemy combatants". Indeed, a

previously secret 2003 Pentagon report on interrogations advised that not only the openness of military commission trials, but also the timing of the prosecutions themselves, would have to be weighed against "the need not to publicize interrogation techniques". When prosecutions are eventually brought, coerced evidence will be admissible.

At any such trials, the defendants will be individuals who have been subjected to years of indefinite detention, whose right to the presumption of innocence has been systematically undermined by a pattern of official commentary on their presumed guilt, including on the part of the President, who is given the power under the MCA to establish the commissions and act as final clemency authority. Among the defendants will be victims of enforced disappearance, secret detention, secret transfer (rendition), torture or other cruel, inhuman or degrading treatment. Their treatment has not only been arbitrary and unlawful, it has been highly coercive in terms of the interrogation methods and detention conditions employed.

The USA faces challenges in bringing to trial anyone whom there are grounds to believe has been involved in acts of transnational terrorism. However, a detainee's right to a fair trial – to be able to effectively challenge the state's evidence in a trial conducted within a reasonable time in a court that has jurisdiction over both defendant and crime – should not be prejudiced by any unlawful treatment to which the defendant or any other detainee has been subjected.

These military commissions will be convened following a trail of illegality, with those to be tried arbitrarily detained and ill-treated for years, and under the flawed provisions of the MCA and procedures in the Manual for Military Commissions (MMC). Given this context, Amnesty International does not believe that the trials will meet international standards of fairness. Indeed, at least in the cases of some detainees, perhaps a majority of the 24 identified at the time of writing as potential defendants (listed in Appendices 1 and 2), the organization questions whether the commissions will be competent – in the sense of having the jurisdiction under international law and standards – to conduct trials at all.

2. Fair trial standards do not evaporate in 'war'..... 12

The USA has used its global war paradigm to remove "alien unlawful enemy combatants" from the protections not only of the US Constitution, but international human rights law, including the fair trial standards enshrined in the International Covenant on Civil and Political Rights. It maintains that its activities outside the USA in the "war on terror" are exclusively regulated by the law of war, as it defines it. This contradicts the views of the International Court of Justice, the UN Human Rights Committee, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, and the International Committee of the Red Cross, among others.

Not only has the MCA in effect endorsed the war paradigm, it has backdated the "war" to before 11 September 2001 to allow the prosecution of individuals by military commission for crimes committed before that date. The US government has suggested that the setting up of military commissions will allow the prosecution of individuals for acts that did not violate US criminal laws at the time they were committed, in potential violation of a non-derogable provision of international law. Application of the war paradigm also raises questions of the inconsistent or arbitrary application of trial rights given the USA's intention to try individuals before military commissions for their alleged involvement in the same or similar crimes for which the US government has already tried others in federal court. These crimes include the bombing of the US embassies in Kenya and Tanzania in 1998, the bombing of the USS Cole in Yemen in 2000, as well as the attacks in the USA of 11 September 2001.

The US authorities have indicated that they may turn to civilian prosecutors in some instances in military commissions because the experience gained by the Justice Department "in some of the earlier terrorist cases would make it logical for them to be part of a prosecution team". Thus, when the government decides that it is favourable to its objectives, it may turn to components of the criminal justice system, while denying that the system itself can be the appropriate forum for prosecutions. The defendant, by contrast, is denied the opportunity to seek the protections of the criminal justice system. Instead he must rely on the military commission process with its rules both unfavourable to the fair administration of justice and generating concern that the process has been developed to "launder" human rights violations and to facilitate trials that would otherwise have been jeopardized by government misconduct.

The right to a trial before a competent tribunal requires that the tribunal has jurisdiction over both the individual and the offence in question. If a defendant is tried by a tribunal that does not have jurisdiction over them or the crime, the trial cannot be fair.

Under the MCA, both the category of individuals and the offences that fall under the jurisdiction of commissions are over-broadly defined. The offences could include any number of actions unrelated to international or non-international armed conflict. The individual need not have been engaged directly in armed hostilities, or to have been near a zone of international or non-international conflict.

The question of the competence of military commissions arises as a result of the USA's attempt to squeeze anyone it labels as "alien unlawful enemy combatant" into the jurisdictional remit of the commissions. Not only is this status unrecognized in international law, the detainees comprise individuals taken into custody in different locations and circumstances, governed by varying legal regimes under international law. They include people captured in international armed conflict who should have been presumed to be prisoners of war unless a promptly convened competent tribunal decided otherwise; civilians taken into custody outside of zones of armed conflict; and some who were detained when they were children.

It is now nearly five years since the international armed conflict in Afghanistan ended and became non-international. Amnesty International believes that the failure of the USA to provide those detained during the international conflict with prompt adjudication of their status by a competent tribunal -- including David Hicks and Salim Hamdan, now facing charges under the MCA -- rendered their detention arbitrary, in violation of international human rights law. In the absence of such determinations, their presumed status as prisoners of war would render their trials by commission unlawful under the Geneva Conventions.

Five of the 10 people designated for trial by military commission under the Military Order of November 2001, and likely to be the first charged under the MCA, were originally detained in Pakistan. There was no state of international or non-international armed conflict in or between Pakistan and the USA. The 14 individuals transferred in September 2006 from secret CIA custody to military custody and possible trial in Guantánamo are all believed to have been

captured outside zones of armed conflict, including Pakistan, Thailand and United Arab Emirates. Other detainees currently in Guantánamo were captured in countries that have included Pakistan, Bosnia-Herzegovina, Mauritania, Gambia and Egypt.

Amnesty International considers that, under international law, such individuals should always have been treated as criminal suspects, and therefore subject to international human rights law and principles of criminal law. The organization believes that they should not be tried in front of military tribunals of any kind. Having examined the jurisprudence of the UN Human Rights Committee and regional human rights bodies, the UN Special Rapporteur on the independence of judges and lawyers has maintained that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism runs counter to all international and regional standards and established case law.

In March 2007, Omar Khadr was facing charges under the MCA. This Canadian national is accused of offences committed in 2002 during the armed conflict in Afghanistan when he was 15 years old. The USA has ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Under its provisions, in the case of children held because they participated in the international or non-international armed conflict in Afghanistan, the USA has an obligation to provide them with "all appropriate assistance for their physical and psychological recovery and their social reintegration". Detaining children in indefinite military custody in Guantánamo Bay cannot meet this obligation. Neither can trying such individuals in front of a military commission.

4. The right to an independent and impartial tribunal 27

The independence and impartiality of the tribunal is essential to a fair trial, indeed is so basic as to be an absolute right that may suffer no exception. The fact that there is no civilian component to the military commissions raises concern as to whether they can meet the requirements of independence and impartiality.

The MCA provides for a military judge – a serving officer of the US armed forces on active duty – to preside over each military commission and to decide on questions of law, including the admissibility of evidence. The military judge must be certified as qualified to act as a judge, in accordance with the Uniform Code of Military Justice (UCMJ).

In promoting the military commissions, the US State Department has suggested that the judges in a military system are more independent and less political than federal judges. Nevertheless, in the USA, unlike the ordinary trial-level federal courts, military tribunals, whether courts-martial or military commissions, are part of the political branches, rather than the judicial branch of government (Article III of the Constitution). They are established under Article I of the Constitution (the legislative branch), and the decision-makers are under the command authority of the executive. Judges on Article III courts are appointed for life by the President with the "advice and consent" of the Senate. Military judges on Article 1 tribunals do not have the equivalent independence conferred by security and length of tenure. In 2001, an expert Commission pointed to a critical need to increase the independence of military judges by establishing fixed terms of office for them. Its recommendation was not adopted.

The other members of the military commission – at least five, but 12 if the case might result in the death penalty – would be members of the US armed forces on active duty. They would decide questions of fact. The Secretary of Defense's designee, the convening authority, is the person who appoints to military commissions members of the US armed forces on active duty.

Amnesty International is concerned that the convening authority's overarching role in the selection of commission members creates a condition of real or perceived lack of independence from the executive.

The executive continues to control the detention universe in which the detainees find themselves. It can decide when, if ever, to charge the detainees for trial by military commission. If the executive decides not to bring the detainee to trial or to drop the prosecution after the trial has started – whether for lack of evidence or for fear that the trial would reveal unlawful government policies – the commission has no say in the continuing detention. The detainee cannot bring a *habeas corpus* petition, either to the commission or to any other court. The absence of a framework of law upon which either the defendant or the commission can draw leaves the defendant's ability to prepare a defence in jeopardy and raises further questions about the independence of the commission.

The military commissions will be called upon to make many decisions which will test the institution's independence and impartiality and public perceptions of this crucial aspect of the trials. Amnesty International is concerned that the military commissions will lack the independence and impartiality necessary to subject to searching inquiry and reject the poisonous fruits of internationally unlawful activities that have been carried out under the 'war powers' of the Commander in Chief of the Armed Forces, the President.

Only non-US nationals will be tried by military commission. Indeed, promoting the MCA, the White House emphasized that "Americans cannot by tried by the military commissions the administration has proposed. Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."

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

As under the November 2001 Military Order, there are signs that the decision-making process determining whether and when people are to be charged for trial by military commission may be influenced by the position adopted by the detainee's home government. In a detention and military commission system already marked by arbitrariness, discrimination, and lack of independent judicial involvement, any such disparate treatment would suggest another dimension to such flaws. Whether a defendant is brought to trial and whether that trial is fair should not depend on the state of diplomatic relations between his government and the government that is detaining him. In full equality, regardless of national origin, all detainees facing criminal charges have the right to a fair trial within a reasonable time conducted in accordance with international law and standards.

Once again the backdrop against which these trials will occur cannot be ignored. Although the MCA provides that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt", the right of all those detained in Guantánamo and elsewhere to be presumed innocent, including the 14 men transferred from secret CIA custody to Guantánamo for the stated purpose of trial by commission, has already been systematically undermined by a persistent official commentary on their presumed guilt,

legal representation to the 14 on the grounds that they possess and could relate to counsel details of the secret CIA detention program, including interrogation techniques.

At the same time, the criminal cases against these 14 detainees are being developed by government lawyers. The authorities have said that it will take some time before the 14 cases come to trial because of their complexity. Similar complexity will be faced by the defence, and to deny legal representation even as the prosecution is developing the case is not only to deny the detainee's right to counsel but to jeopardize his right to adequate time and resources for the preparation of his defence. It constitutes a clear breach of the fundamental principle of "equality of arms", sometimes referred to as the most important criterion of a fair trial.

The right to a lawyer of choice for detainees charged for trial by military commission is restricted under the MCA. A defendant may retain a civilian lawyer, but would have to bear the cost unless that person offered their services *pro bono*. The civilian lawyer must be a US citizen and have passed stringent security clearance. A defendant is not able to choose as a lawyer a non-US national, for example, a lawyer from his own country. According to the wording of the MCA, even if the defendant retains a US civilian lawyer with the necessary security clearance, he will still be represented by a US military lawyer as associate counsel, even if that goes against the defendant's wishes.

The right to be defended by a lawyer of one's choice recognizes the importance of trust and confidence between the accused and their lawyer. This has been heightened in the case of detainees held in Guantánamo where the authorities have reportedly sought to undermine the relationships between detainees and their *habeas* counsel. One possible outcome of any breakdown in trust as a result of such occurrences might be expected to be that some defendants may choose to represent themselves. If this were the case, it would raise questions of whether such a choice was genuinely voluntary.

A defendant must be mentally competent to stand trial or to represent himself if he so chooses. Under the MCA, the military judge may order a mental examination if there are doubts about the detainee's competence. The matter would then be referred to a board consisting of one or more health professionals who will report on the mental capacity of the defendant. It is not clear who these individuals will be, and whether they will be attached to the military detaining authorities. Again questions of trust may arise. Medical personnel have been involved in the interrogation of detainees in Guantánamo and elsewhere. Amnesty International believes that any medical or mental health evaluation of defendants in the context of military commission trials should be culturally appropriate and conducted by independent health professionals.

International law requires that a criminal defendant must be allowed 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.

The location and the circumstances in which the detainees are held, as well as the length of time they have been detained, conspire against the capacity of a military commission defendant to locate and call witnesses who could testify in his defence. The record of the CSRT process also calls into question the willingness of the US military authorities to permit detainees to call witnesses on their behalf.

Some provisions of the MMC give rise to serious concern. For example, a witness whose identity or appearance is classified or otherwise protected from disclosure can be allowed by the military judge to be identified by a pseudonym and to testify from behind a protective screen. The witness would be out of the view of the defendant and his counsel, but within the view of the military judge and the commission members. Amnesty International is concerned that, in the context of military commissions, to the extent that it would be the government that would offer and be allowed to offer such an anonymous witness, the defence would be left considerably impaired in its capacity to assess or impeach the witness's credibility.

The use of hearsay evidence and classified evidence has particular potential to come into conflict with the fair trial right of any defendant to be able to challenge the evidence. In promoting the MCA, the administration explained that the need to resort to such evidence was why the administration favoured military commissions over courts-martial.

Hearsay evidence. The MCA provides for a more permissive use of hearsay than would be allowed in the US federal courts and in courts-martial. Under the MCA, evidence which the military judge determines has "probative value to a reasonable person" is admissible.

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

The MCA not only allows the use of hearsay evidence with lower safeguards, the rules in the MMC may actually encourage its use. For example, if there is particular evidence that is "of such central importance to an issue that it is essential to a fair trial", but it is destroyed, lost or otherwise unavailable, the military judge can stop the proceedings, but only after finding that the government was in possession of the evidence and it was lost or destroyed in bad faith. Especially if the judge takes a permissive approach to the loss of evidence, first-hand evidence may thus become second-hand hearsay. The same concern arises in relation to witness testimony. If a witness whose testimony "is of central importance to the resolution of an issue essential to a fair trial" is deemed unavailable, the judge can allow the trial to continue if the government is not responsible for the unavailability. This is a broader standard than exists in courts-martial under the UCMJ.

The administration has accused critics of ignoring the fact that international tribunals allow the use of hearsay evidence. This argument comes from a de-contextualized and selective postulation of international jurisprudence and ignores the fact that the use of hearsay evidence by any international tribunal is part of a whole structure, with its own built-in safeguards and working methods. Any particular procedure cannot simply be plucked from another system and effectively replicated in the military commission process if the structure and other procedures of that process are themselves flawed.

Moreover, in the international tribunals, the finders of fact and law are panels of judges, entirely independent of any government, and expert in international law. In any military commissions convened under the MCA, the finder of law would be a single US military judge whose independence is in doubt. The finders of fact would be US military officers, who may not have the necessary legal training, assigned to the case by the Secretary of Defense or his designee. In addition, unlike the military commissions under the MCA, the international tribunals never have the death penalty as a sentencing option.

Classified evidence. No-one should be convicted of a criminal offence on the basis of evidence that he or she has been unable to see or to challenge effectively. This does not mean that the state does not have legitimate interests in keeping certain information from the public realm, but under international standards, any closure of trial proceedings from the public must be "exceptional". Amnesty International further stresses that the purpose or effect of any closure of proceedings must not be the removal from public scrutiny of any human rights violations that may have occurred, including enforced disappearance and torture. Closure of proceedings in such circumstances would undermine the integrity of the entire process.

Under the MCA, the military judge may close all or part of the commission proceedings to the public, including upon making a finding that such closure is necessary to "protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities". This is a matter of potential concern. The CIA's interrogation techniques, for example, are classified at "top secret" level. On 6 March 2007, the Pentagon announced that CSRT hearings for the 14 detainees transferred from secret CIA detention would be held in closed session "due to the high likelihood that these detainees might divulge highly classified information". This presumably would be the same at a trial by military commission.

In the military commissions, any classified information "shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security". If classified information is disclosed to the defence, the military judge can issue a protective order to ensure that it is not made public. Where the classified information is not to be disclosed, the judge may authorize, but only "to the extent practicable", the deletion of classified parts of documents to be introduced as evidence or their substitution with a summary version or a "statement of relevant facts that the classified information would tend to prove".

The prosecution may also be permitted to introduce evidence while protecting from disclosure the sources, methods, or activities by which the government acquired it, if the military judge finds that the evidence is "reliable". An unclassified summary of the sources, methods, or activities may be provided to the defence, but again only "to the extent practicable and consistent with national security". These provisions also apply to any classified evidence that "reasonably tends to exculpate the accused". Thus, the defendant may be denied access to some or all government evidence that tends to prove his innocence, if that evidence is classified and it is deemed impracticable to give a summary version of it. The prosecution may object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take "suitable action to safeguard such classified information".

Amnesty International is concerned that defendants may face an insurmountable barrier in relation to certain classified evidence used against them. The defence may be denied the ability effectively to challenge classified information or the methods used to obtain it. If deletions, summaries or substitutions are considered impracticable, the defence may be denied the totality of the information deemed classified. Given that US detention and interrogation policies in the "war on terror" have violated international law, this is a matter for particular concern in the context of these military commissions.

10. Use of information obtained by unlawful methods 52

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt. Another is that no statement may be admitted as evidence in any

proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment. The MCA neither guarantees these rights nor requires the government to abide by its international legal obligations.

Whatever its origins, the admission of evidence that has been obtained by torture or other cruel, inhuman or degrading treatment is antithetical to the rule of law. When it comes to trials, prosecutors should see themselves as the first line of defence in protecting the integrity of the proceedings by preventing the use of evidence that has been obtained by torture, ill-treatment or other unlawful methods. Given that practices such as secret detention, secret rendition, and torture or other cruel, inhuman or degrading treatment have been cleared by government lawyers, Amnesty International is not confident that they will be opposed by government prosecutors in the context of military commissions, and is concerned that they may not be subject to the searching inquiries that allegations of such practices would more likely face if raised in criminal trials conducted in the federal courts.

The MCA states that "no person shall be required to testify against himself *at a proceeding of a military commission*". However, this does not expressly prohibit the admission as evidence of information earlier coerced from the defendant during his years in custody. Indeed, the MCA allows the Secretary of Defense to prescribe procedures under which a statement made by the accused "shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination". The MCA also expressly allows an oral confession or admission to be "proved by the testimony of anyone who heard the accused make it, even it was reduced to writing and the writing is not accounted for". No corroboration is required, unlike in trials by US courts-martial.

The MCA prohibits the admission of any statement obtained by the use of torture. However, the USA defines torture more narrowly than under international law. In addition, the MCA would allow the admission of evidence extracted under equally prohibited cruel, inhuman or degrading treatment. The MCA differentiates between statements obtained before 30 December 2005, when the Detainee Treatment Act (DTA) came into force, and statements obtained after that date. This betrays a position that ignores the international legal requirement that any statement obtained under cruel, inhuman or degrading treatment should not be admitted into evidence, regardless of when it was obtained.

Prior to the enactment of the DTA, there were more than four years of extraterritorial detention operations by the USA in the "war terror". Many thousands of interrogations of detainees took place during this period in Afghanistan, Guantánamo and elsewhere, by agents of the US and other countries. All 10 people charged for trial by military commission under the 2001 Military Order – and likely to be charged for trial by military commission under the MCA – had been detained for more than three years before the DTA came into force. Similarly all of the 14 men transferred from secret CIA custody to possible trial under the MCA in Guantánamo were taken into custody prior to the enactment of the DTA, most of them more than two years before.

The USA's reservations to international treaties mean that, even with the passage of the DTA, it only considers itself bound by the prohibition on cruel, inhuman or degrading treatment or punishment to the extent that it matches existing US law. Indeed, the Justice Department reportedly considers that constitutional law allows the courts in effect to consider a sliding scale of abuse depending on the context in which it occurs. The wording in the MMC appears to provide scope for the military judge at a commission trial to take this approach.

The military commission system under the MCA leaves the determination as to what constitutes torture and other ill-treatment and whether information extracted under it can be introduced at a trial to the military and the executive authorities. The possible ramification of this for defendants in this process is illustrated by cases in which the military have investigated allegations of torture and other ill-treatment, including under techniques authorized by the executive, and found that they had not been unlawful even when international law had clearly been breached.

Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill–treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere.

International standards prohibit the state from taking advantage of the situation of a detainee for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. As well as the many explicit allegations of torture or other ill-treatment made by detainees in US custody in Afghanistan, Guantánamo and elsewhere, Amnesty International considers that the conditions in which many of them have been held amount to cruel, inhuman or degrading treatment and are in themselves coercive.

11. The right to appeal and the right to remedy 61

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

Under the MCA, anyone convicted by a commission may have its findings and sentence reviewed by the convening authority. In addition, the Secretary of Defense "shall establish" a Court of Military Commission Review made up of panels of not less than three appellate military judges. The Secretary of Defense will appoint the judges, including the Chief Judge, to this Court, which would reside within the Office of the Secretary of Defense. Anyone convicted by a commission can appeal to this Court "in accordance with procedures prescribed under regulations of the Secretary of Defense". This review process would not fulfil the requirements that any appeal court be independent.

The Court of Military Commission Review "may act only with respect to matters of law", that is, not of fact. The Court may only grant relief if "an error of law prejudiced a substantial trial right of the accused". The MCA reiterates that the limited right of appeal under the DTA would apply. Under this, the US Court of Appeals for the DC Circuit would only be able to act "with respect to matters of law", and the scope of its review is limited to consideration of whether the final decision was consistent with the standards and procedures specified by the MCA and, to the extent applicable, the Constitution and the laws of the United States. In addition, the MCA states that the US Supreme Court "may" review decisions of the DC Circuit Court of Appeals if it decides to do so. In the ordinary criminal justice system, the Supreme Court agrees to hear appeals in only a tiny percentage of cases that come before it.

The limitations in scope of appellate review provided under the MCA may fall foul of the requirement of international law. The UN Human Rights Committee has stressed that an appeal solely on questions of law, without the opportunity for the appellate court to conduct an evaluation of the evidence presented at trial is insufficient.

Except for this limited right of appeal, the MCA states that no other "court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,… relating

to the prosecution, trial, or judgment of a military commission…, including challenges to the lawfulness of the procedures of military commissions…". Given the abuses to which detainees have been subjected during their detentions, this curtailment of post-conviction remedies is a serious problem.

Under international law, a state must ensure that any person whose rights are violated has an effective remedy. This is non-derogable, even in times of emergency. The military commissions, including the appeals process, are part of the universe of irremediableness and discrimination in which the detainees find themselves. The fact that they only apply to foreign nationals, and the fact that the MCA curtails the right of judicial review of the lawfulness and conditions of detentions and the right to remedy for human rights violations, but only in the cases of non-US citizens, renders both the commission process and the law itself discriminatory, in violation of international law.

Despite world trends towards abolition of the death penalty, despite the fact that the international community has agreed that capital punishment is not an option even for the worst crimes tried by international criminal tribunals, and despite growing opposition in the USA to the death penalty in the face of evidence of its unreliability and unfairness even under a sophisticated judicial system, the MCA provides for the death penalty for a number of offences after trials of less rigorous standards.

Amnesty International calls on states not to provide information for use in judicial proceedings taking place abroad in any case where the death penalty is being sought or might be imposed, unless they obtain satisfactory guarantees that a death sentence will not be imposed. No such assurances should be accepted as sufficiently reliable in the case of the USA's military commission trials, given that they operate in a near legal vacuum, and have been preceded by a trail of unlawfulness. Moreover, because of the likelihood of the unfairness of trials under the MCA and the context in which such proceedings would occur, Amnesty International calls on states not to provide any information to assist the prosecution in military commission trials, even in cases where the death penalty is not sought.

UNITED STATES OF AMERICA
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Trials under the Military Commissions Act

1. Overview: A backdrop of unlawful practices

A brief government email dated 4 October 2002, entitled *Camp Delta Update*, speaks volumes. It said that the next "Air Flow" – military-speak for detainees being transferred by plane from Afghanistan to the US Naval Base in Guantánamo Bay, Cuba – was set to be carried out between 2 and 10 November 2002. It continued: "There will be between 20 and 34 new detainees on the flight. We strongly suggested total isolation for as long as possible for these individuals to keep them away from the 'veterans' until all available information is obtained from them."[1] A later Federal Bureau of Investigation (FBI) email, referring to the same time period, reveals that "extreme interrogation techniques were planned and implemented" against certain detainees held in Guantánamo.[2]

When Khalid Sheikh Mohammed, described by the US government as the "mastermind" behind the attacks of 11 September 2001 was arrested in Pakistan in March 2003, he was not brought to trial in US federal court (where he had previously been indicted)[3], but instead put into secret Central Intelligence Agency (CIA) detention for the next three and a half years. Three days after his arrest, the US Attorney General said that "Khalid Sheikh Mohammed's capture is first and foremost an intelligence opportunity".[4] The CIA's interrogation techniques remain classified "top secret", but among the methods reportedly used against this and other detainees has been "water-boarding", in effect mock execution by drowning.[5] Now in Guantánamo, his own allegations of torture have not been made public.[6]

In the "war on terror", detainees in US custody have been treated as potential sources of information first and potential criminal defendants a distant second. Now, more than five years after detentions began, trials of a selected few detainees are looming. Plucked from years of secret or virtually incommunicado detention and interrogations, these detainees will be tried not by the ordinary courts, but by military commissions tailored to fit this broader policy framework. The government may introduce evidence while keeping secret the methods used to obtain it. The military judge will be able to close the proceedings in order to prevent the disclosure of classified intelligence activities. The right to trial within a reasonable time, guaranteed in US federal courts and courts-martial, is denied to "alien unlawful enemy combatants". Indeed, a previously secret 2003 Pentagon report on interrogations advised that not only the openness of military commission trials, but also the timing of the prosecutions themselves, would have to be weighed against "the need not to publicize interrogation techniques".[7] When prosecutions are eventually brought, coerced evidence will be admissible.

It is clear that any examination of the fairness of these forthcoming trials cannot ignore the backdrop of international law-breaking practices against which they would occur. Even a far from exhaustive overview of this background is instructive.

Glossary

CAT – UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by the USA in 1992

Committee against Torture – the expert body established by the CAT to monitor its implementation

CIA – Central Intelligence Agency

Common Article 3 – Article 3 common to the four Geneva Conventions of 1949

Convening authority – The US Secretary of Defense or his designee; responsible for overseeing aspects of the military commission process, including reviewing and approving charges, appointing military commission members, and reviewing verdicts and sentences.

CSRT – Combatant Status Review Tribunal

DTA – Detainee Treatment Act of 2005

FBI – Federal Bureau of Investigation

ICCPR – International Covenant on Civil and Political Rights, ratified by the USA in 1994

Human Rights Committee – the expert body established by the ICCPR to monitor its implementation

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the USA in 1994.

ICRC – International Committee of the Red Cross

MCA – Military Commissions Act of 2006

MMC – Manual for Military Commissions

UCMJ – Uniform Code of Military Justice, the US military's criminal code

Five days after the attacks of 11 September 2001, the Director of the CIA sent a confidential memorandum to his staff headed "We're at war", stating that "All the rules have changed".[8] On the same day, Vice-President Dick Cheney said that in this "war", US forces would have to operate on "the dark side" – the means, he suggested, including working with human rights violators, would justify the ends.[9] The following day, 17 September 2001, President George W. Bush signed a newly confirmed but still-classified 14-page memorandum to the CIA Director relating to the agency's "authorization to detain terrorists", and containing information on the methods by which this covert activity would take place, including in collaboration with other governments.[10]

A week later, the Justice Department advised the White House that there were essentially no limits on the President's authority to respond to terrorist threats; the "method, timing, and nature of the response" was his to determine and did not have to be limited to "those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon".[11] On 13 November 2001, a week after the Justice Department had advised the White House on "the legality of the use of military commissions to try terrorists"[12], President Bush signed a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism. The Order not only provided for trials by military commission of foreign nationals, but also detention without trial and denial of *habeas corpus*. The Justice Department advised the Pentagon that holding "enemy aliens" at Guantánamo should keep their detentions from the scrutiny of the US federal courts.[13] The first detainees were transferred to the base two weeks later, on 10/11 January 2002, shackled, hooded, and tied down like cargo.

The White House Counsel drafted advice to the President that not applying the Geneva Conventions to *al-Qa'ida* and Taliban suspects would "preserve flexibility" in this "new kind of war", including the "ability to quickly obtain information from captured terrorists and their sponsors", and would also "substantially reduce" the risk that US personnel would later be prosecuted for war crimes under the USA's War Crimes Act.[14] The US Attorney General endorsed this approach as lawful.[15] A presidential memorandum, dated 7 February 2002, said that "humane treatment" was "a matter of policy" (not law) and suggested that there were detainees "who are not legally entitled to such treatment".[16] Later that month, the Justice Department advised the Pentagon that the constitutional protections against self-incrimination did not apply to trials by military commission; as "entirely creatures of the President's authority as Commander-in-Chief", such commissions were "not constrained by the strictures placed on 'criminal cases' by…the Bill of Rights".[17]

A leaked Justice Department memorandum from 1 August 2002 concluded that "under the current circumstances, necessity or self-defense may justify interrogation methods" amounting to torture under the USA's extraterritorial anti-torture law.[18] Meanwhile, a recently confirmed but still-classified Justice Department memorandum of the same date advised the CIA on the legality of "alternative interrogation methods by which the CIA seeks to collect critical foreign intelligence to disrupt terrorist attacks".[19] A leaked November 2002 memorandum from the General Counsel of the Pentagon suggested that interrogation techniques such as "the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family"; "exposure to cold weather or water"; and "use of a wet towel and dripping water to induce the misperception of suffocation" were "legally available".[20] An accompanying military document noted that such techniques were used by "other US government agencies", a term used to include the CIA.[21]

Four years and tens of thousands of detentions and interrogations later, on 17 October 2006, President Bush signed into law the Military Commissions Act (MCA). Drafted mainly by the administration before being approved by Congress, the Act was the legislative response to the US Supreme Court's ruling of 29 June 2006, *Hamdan v. Rumsfeld*. That case concerned Salim Ahmed Hamdan, a Yemeni national captured in November 2001 during the international armed conflict in Afghanistan and detained since June 2002 at the Guantánamo detention camp. He remains there with more than 350 other foreign nationals. In the words of a federal judge in December 2006, their "lengthy detention beyond American borders but within the jurisdictional authority of the United States is historically unique".[22] In the same month, another federal judge noted that the detainees had been "detained for many years in the terrible conditions at Guantánamo Bay". She continued: "It is often said that 'justice delayed is justice denied'. Nothing could be closer to the truth with reference to the Guantánamo Bay cases".[23]

Salim Hamdan was one of 10 Guantánamo detainees charged for trial by military commission under President Bush's November 2001 Military Order. The *Hamdan* ruling concluded that the military commissions were unlawful, as they had not been expressly authorized by Congress, and violated international law and US military law. By finding Article 3 common to the four Geneva Conventions of 1949 to be applicable, the Supreme

Court also reversed President Bush's determination that common Article 3 would not apply to *al-Qa'ida* or Taleban detainees taken into US custody. Common Article 3 – which reflects customary international law applicable to international and non-international armed conflicts (but does not apply where there is no such conflict) – guarantees minimum standards of humane treatment and fair trial.[24]

The 2003 Pentagon report on interrogations, classified as "secret" by the Secretary of Defense, noted that "the stated purpose of detainee interrogations is to obtain information of intelligence value", but added that "information obtained as a result of interrogations may later be used in criminal prosecutions".[25] Contradicting the government's later claim that military commissions are the only practicable forum for trials of "enemy combatants", it noted that the US could prosecute detainees in the federal civilian courts, courts-martial or military commission, and that "depending on the techniques employed, the admissibility of any information may depend on the forum considering the evidence". Trials in US federal courts or courts-martial, it noted, would be "conducted pursuant to statutory or constitutional standards and limitations". Under these protections, statements found to have been made involuntarily, including under torture or other cruel, inhuman or degrading treatment or punishment, would be inadmissible. In contrast, the report noted, the standard in military commissions was "simply whether the evidence has probative value to a reasonable person".

The USA prides itself on its constitutional protections. More than 60 years ago, two and a half years after the USA entered World War II, the US Supreme Court wrote:

> "The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government".[26]

In a major speech on 6 September 2006, President Bush responded to the Supreme Court's *Hamdan v. Rumsfeld* ruling. He confirmed what had long been reported – that the CIA had been operating a policy of secret detentions and "alternative" interrogation techniques.[27] These techniques, used against individuals denied the protections of the US Constitution and international law, are reported to have included methods that violate the prohibition on torture or other cruel, inhuman or degrading treatment.[28] They have been conducted against detainees in "secret, off-shore facilities… in order to help prevent terrorist attacks".[29] The fruits of these interrogations may yet be used in military commission trials.

In the charged climate of the fifth anniversary of the 9/11 attacks, President Bush said that the Supreme Court's *Hamdan* ruling had put the future of the secret CIA program in doubt, and legislation was needed to save it. He announced that he had that same day sent to Congress the "Military Commissions Act of 2006". President Bush, whose administration's policies have been the primary obstacle to trials and judicial review, said that "families of

those murdered that day have waited patiently for justice" and "should have to wait no longer". If Congress would authorize the military commissions bill, the President continued, the 14 "high-value" detainees (see Appendix 2) he revealed had just been transferred to Guantánamo from the secret custody in which they had been held for up to four and a half years – including "the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September 11, 2001" – could "face justice". With crucial mid-term congressional elections looming, Congress passed the Military Commissions Act. In its haste, it passed a bad law, provisions of which are incompatible with international law.[30]

Although secret detention is not expressly provided for in the MCA, President Bush emphasised – over and above the question of trials – that the legislation would allow the secret program to continue:

> "The Military Commissions Act of 2006 is one of the most important pieces of legislation in the war on terror. This bill will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders…When I proposed this legislation, I explained that I would have one test for the bill Congress introduced: Will it allow the CIA program to continue? This bill meets that test." [31]

Vice-President Cheney also said that by passing the MCA, Congress had voted on "our authority to continue the interrogation program", again emphasizing this over and above the question of trials. In the same interview, the Vice President appeared to endorse the interrogation technique of "water-boarding".[32] Only a matter of months earlier, the UN Committee against Torture and the UN Human Rights Committee had made clear to the US government that secret detention violates the USA's international obligations and called for any unlawful interrogation techniques to be terminated. Then, on 20 December 2006, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly. Among other things, this treaty serves to reinforce the international law prohibition against secret detention.[33] Fifty-seven countries signed the Convention when it opened for signature on 6 February 2007. The USA was not among them.

Signing the MCA into law, President Bush claimed that it "complies with both the spirit and the letter of our international obligations".[34] Yet this discriminatory legislation leaves the USA squarely on the wrong side of international law, both in its letter and according to the administration's interpretation of its provisions. At its heart is the denial of *habeas corpus* – a basic safeguard against detainee abuse – coupled with other measures facilitating a lack of official accountability for human rights violations committed in the "war on terror".[35] The other principal consequence of the MCA threatens to be the commencement of trials of "alien unlawful enemy combatants" by military commissions with the power to admit coerced evidence, to keep secret the methods used to obtain evidence, and to hand down death sentences. This report focuses on these proposed military trials.

In 1951, a US Supreme Court Justice wrote that "[t]he requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens…"[36] In a speech in London over half a century

later, the Director of Public Prosecutions, who is responsible for ensuring the independent review and prosecution of criminal proceedings initiated by police in England and Wales, said:

> "Terrorism is designed to put pressure on some of our most cherished beliefs and institutions. So it demands a proactive and comprehensive response on the part of law enforcement agencies. But this should be a response whose fundamental effect is to protect those beliefs and institutions. Not to undermine them… We wouldn't get far in promoting a civilizing culture of respect for rights amongst and between citizens if we set about undermining fair trials in the simple pursuit of greater numbers of inevitably less safe convictions. On the contrary, it is obvious that the process of winning convictions ought to be in keeping with a consensual rule of law and not detached from it. Otherwise we sacrifice fundamental values critical to the maintenance of the rule of law – upon which everything else depends."[37]

Government prosecutors – whether civilian or military lawyers, either of whom may be appointed to prosecutions under the MCA – are required by international standards to reject evidence they "know or believe on reasonable grounds was obtained through recourse to unlawful methods", including interrogation techniques or detention conditions that amounted to torture or other cruel, inhuman or degrading treatment or punishment.[38] The MCA, however, contains no such provision. Moreover, as already indicated, the record of senior US government lawyers in the "war on terror" does not inspire confidence that international standards will be respected at military commission trials. These lawyers have advised, among other things, that secret detention is lawful; that the President can authorize torture; that there are a wide array of acts that would "only" constitute cruel, inhuman or degrading treatment and therefore would not be criminalized by the USA's extraterritorial anti-torture statute; that the international ban on cruel, inhuman or degrading treatment did not apply to foreign nationals in US custody outside the USA; and that the Convention Against Torture's Article 3 ban on transferring detainees to countries where they would face torture did not apply to foreign detainees in US custody outside the USA.[39] Can we expect that prosecutors at the military commissions will take a different view in line with international law? If they, and the military judge, do not, it is highly unlikely that the trials will be fair.

At trials by military commission, the defendants will be individuals who have been subjected to years of indefinite and virtually incommunicado detention, whose right to the presumption of innocence has been systematically undermined by a pattern of prejudicial official commentary on their presumed guilt, including on the part of the President, who under the MCA is given the authority to establish the commissions and act as final clemency authority. Among the defendants will be victims of enforced disappearance, secret detention, secret transfer (rendition), torture or other cruel, inhuman or degrading treatment. Their treatment has not only been arbitrary and unlawful, it has been highly coercive in terms of the interrogation methods and detention conditions employed. Half a century ago, the US Supreme Court stated:

> "Coerced confessions are not more stained with illegality than other evidence obtained in violation of law. But reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent

> conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so."[40]

A leaked FBI email dated 5 December 2003 referred to "torture techniques" that had been employed by Department of Defense interrogators against a detainee at Guantánamo, and noted that the FBI's Criminal Investigation Task Force believed that the techniques had "destroyed any chance of prosecuting this detainee".[41] While this might be true in relation to the normal federal courts, the disturbing reality is that the less exacting standards of the MCA could yet allow military commissions to turn a blind eye to evidence of torture or other cruel, inhuman or degrading treatment. The April 2003 Pentagon report on interrogations discussed various interrogation techniques in relation to "unlawful combatants" held outside the USA, and noted the potential effect of the use of such techniques on future prosecutions. It noted, for example, that "environmental manipulation", isolation, sleep deprivation, "sleep adjustment", threatening a detainee with transfer to possible torture or death in a third country, forced prolonged standing, face or stomach slaps, and increasing "anxiety" through the "use of aversions", such as the presence of a dog, could affect or "significantly" affect the admissibility of statements. In each case, however, the report noted that this would be a "lesser issue for military commissions" than it would in the federal courts or courts-martial.[42]

The Pentagon report was written at a time when the military commissions envisaged were those established under the Military Order of November 2001. The MCA perpetuates this flaw, however. Under the MCA, a statement obtained by cruel, inhuman or degrading treatment before 30 December 2005, when the Detainee Treatment Act (DTA) was signed into law, is admissible if it is "reliable and possessing sufficient probative value", and "the interests of justice" would best be served by its admission.[43] While statements obtained under torture, or statements obtained after the passage of the DTA and deemed to have violated it, are inadmissible under the MCA, the USA's narrow definition of torture, together with the admissibility of hearsay evidence with limited safeguards and the fact that the government can keep secret the methods used to obtain evidence, limit even this partial protection.

At the same time, most of those held in US custody outside the United States in the "war on terror" will not face trial by the USA. This was never the administration's intention. Under its global "war" paradigm, under which international humanitarian law (the law of war) is only selectively applied and international human rights law disregarded, those detained as "unlawful enemy combatants" are held indefinitely in military detention for intelligence-gathering purposes and to prevent them returning to the global "battlefield".[44] The status of "unlawful enemy combatant", as a status with the legal consequences ascribed by the USA, is unknown in international law. Under the USA's conception, access to lawyers is perceived as detrimental to the interrogation process, external influences that break the "continuous" interrogation cycle.[45] Access to the courts is similarly seen as intruding on military operations. As the US Attorney General put it in January 2007, "the MCA's [*habeas corpus*] restrictions prevent terrorists captured on the battlefield from continuing to fight us in our courts."[46]

Instead of *habeas corpus*, detainees are given clearly inadequate and ineffective administrative review by Combatant Status Review Tribunals (CSRTs) which can rely on coerced and classified evidence against an unrepresented detainee presumed to be an "enemy combatant", broadly defined, unless he can prove otherwise. CSRT decisions are only narrowly reviewable by federal court. Indefinite detention may continue even after a CSRT determination that the detainee is "No Longer Enemy Combatant" (NLEC). Detainees have been held in Guantánamo for 20 months or more after an NLEC determination.[47] The government has argued that such delays are justifiable as part of "the Executive's necessary power to wind up wartime detentions in an orderly fashion".[48] The CSRT's determination of a detainee as an "unlawful enemy combatant" renders the detainee eligible for trial by military commission. Even those who are tried and acquitted by military commission can be returned to indefinite detention.[49] The military commissions are part of a universe absent of judicial remedy for detainees and their families.

At a press briefing on 18 January 2007, Brigadier General Thomas Hemingway, the legal adviser to the Office of Military Commissions, reiterated that of the thousands of detainees who have been held by the USA in the "war on terror", some 60 to 80 individuals might eventually be tried by military commission, although he suggested that even this might be an overestimate.[50] He indicated that Salim Ahmed Hamdan and the other nine Guantánamo detainees who had been charged for trial under the military commission system struck down by the *Hamdan* ruling would likely "be in the initial queue" for charging and prosecution under the MCA. This suggestion was partly borne out in February 2007 when three of the 10 – Salim Hamdan, Canadian national Omar Khadr, and David Hicks, who is Australian – became the first persons to face charges under the MCA. On 1 March 2007, David Hicks became the first of them to actually be charged for trial.

The cases of the 14 detainees sent to Guantánamo from secret CIA custody would take longer, Brigadier General Hemingway said, "because they are extraordinarily complex". Part of this complexity is that, while the administration was successful in exploiting these 14 cases to gain congressional approval for the MCA, the 14 also present the government with a problem. Its treatment of them over the years has transformed them from individuals with allegedly high intelligence value to detainees with information about possible government crimes, including enforced disappearance. The government has argued in court that what the 14 know about the CIA program – such as the location of secret detention facilities, conditions of confinement in them, or what interrogation techniques have been used – never sees the light of day. Its case is that such information is classified as top secret, and would cause "exceptionally grave damage" to national security if revealed.[51] This may leave these 14 particularly vulnerable to being returned to indefinite detention even if they were to be acquitted by military commission. If they were released, they would take knowledge of the CIA's secret program with them. In March 2007, the Pentagon announced that CSRT hearings for these 14 detainees would be held in closed session because the men "might divulge highly classified information".[52] This could be the same at their trials.

The government's resort to national security justifications in preventing revelations about detention and interrogation policies that violate international law has profound

implications for the fairness of military commission trials. Under the MCA, not only can coerced evidence be admitted, but any classified information "shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security". The prosecution may be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities by which the United States acquired the evidence". The prosecution may also object to any examination of a witness that could lead to the disclosure of classified information. It seems clear that the government will seek to prevent any disclosure of what has gone on in the secret detention program or may occur in the future.[53] This may be extended to what has gone on in US custody in Guantánamo and in Bagram and Kandahar airbases, forward operating bases and elsewhere in Afghanistan, where detainees have been interrogated incommunicado by various agencies amidst allegations of torture and ill-treatment and where the CIA has conducted interrogations in secret facilities. Not only may certain defendants thus face an insurmountable barrier in relation to certain classified evidence used against them, the MCA facilitates the admission of evidence that has been obtained by unlawful methods. This is antithetical to the rule of law.

The USA faces challenges in bringing to trial anyone whom there are grounds to believe has been involved in acts of transnational terrorism. However, a detainee's right to a fair trial – to be able to effectively challenge the state's evidence in a trial conducted within a reasonable time in a court that has jurisdiction over both defendant and crime – should not be prejudiced by any unlawful treatment to which the defendant or any other detainee has been subjected. Whether tried in civilian court, court-martial or military commission, anyone charged with a criminal offence, including war crimes, must be tried before an independent and impartial tribunal established by law in proceedings which meet international standards of fairness. These standards include:

- All persons must be equal before the courts and tribunals; there must be no discriminatory application of fair trial rights, including on the basis of nationality;
- Charges must be for internationally recognisable criminal offences;
- No one shall be held guilty of any criminal offence for an act that did not constitute a criminal offence under national or international law at the time it was committed;
- All persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;
- Trials must take place within a reasonable time;
- All persons must be presumed innocent until proven guilty; this also applies before criminal charges are filed;
- All persons must have full access to legal counsel of their own choosing, and have adequate time and facilities to prepare their defence;
- All persons must be informed promptly and in detail in a language which they understand of the nature and cause of the charge against them;
- All persons must be tried in their presence;

- All persons must be able to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;
- No persons must be compelled to testify against themselves or to confess guilt;
- Statements or any other material obtained by torture or by cruel, inhuman or degrading treatment or punishment must be excluded as evidence (except as evidence that such treatment took place);
- All persons convicted of a crime must have the right to have their conviction and sentence reviewed by a higher tribunal according to law. Reviews must be made by competent, independent and impartial tribunals, be genuine and go beyond formal verifications of procedural requirements.

On 18 January 2007, US Secretary of Defense Robert Gates released the Manual for Military Commissions (MMC), setting out rules for trials by military commission under the MCA, based on the rules for court-martial under the Uniform Code of Military Justice (UCMJ), the US military's criminal code.[54] It was also announced that the Secretary of Defense had designated Susan Crawford, a former judge on the US Court of Appeals for the Armed Forces, as the "convening authority" for military commissions.[55] The MMC asserts that the "Manual will have an historic impact for our military and our country".[56]

While military commissions convened under the MCA would be an improved version of their fundamentally flawed predecessors established under President Bush's November 2001 Military Order, in the words of the UK Attorney General "the changes made are too little and too late".[57] These military commissions will be convened following a trail of illegality, with those to be tried arbitrarily detained and ill-treated for years, and under the flawed provisions of the MCA and procedures in the MMC. Given this context, Amnesty International does not believe that the trials will meet international standards of fairness. Indeed, at least in the cases of some detainees, perhaps a majority of the 24 identified at the time of writing as potential defendants (see Appendices 1 and 2), the organization questions whether the commissions will be competent – in the sense of having the jurisdiction under international law and standards – to conduct trials at all.

Amnesty International considers the attacks of 11 September 2001 to constitute a crime against humanity. As a matter of principle across all countries, the organization takes the position that justice is best served by prosecuting all persons accused of war crimes, crimes against humanity, and other grave violations of international law, such as torture, enforced disappearance and unlawful killings, in independent and impartial civilian courts rather than in military tribunals. There is an emerging international consensus for this position.[58] As described below, the UN Human Rights Committee has consistently stated that the jurisdiction of military courts should be restricted to trial of military personnel accused of purely military or disciplinary offences, and it has raised particular concern about cases where military courts exercised jurisdiction over "terrorism" offences.

Civilians arrested outside of zones of international or non-international armed conflict should not be tried by military tribunals of any kind. In addition, criminal offences such as

terrorism or conspiracy to commit terrorism should not be categorized as war crimes or made subject to trial by military tribunal, if they did not occur in such an armed conflict. Simply labelling the context as a "war" does not justify bypassing civilian jurisdiction.

The right to trial before a competent, independent and impartial tribunal established by law requires that justice must not only be done, but must be seen to be done.[59] Amnesty International questions whether this can be achieved via military commission trials in the context of the US government's sweeping war paradigm in which international human rights law has been bypassed and international humanitarian law selectively applied by the USA, and in which the military and other government agencies have been tainted by abuses and a lack of independent investigations and accountability up the chain of command all the way to the Commander in Chief of the Armed Forces, the President.

On 14 February 2007, President Bush issued an executive order establishing military commissions under the MCA.[60] The order "supersedes any provision" of the November 2001 Military Order "that relates to trial by military commission" (the remainder of the Order on detention without trial remains in force).[61] Nevertheless, Amnesty International urges the USA to reflect upon the positive benefits that would be gained by turning to the ordinary civilian courts – even at this late stage – in the case of the relatively small number of detainees who are likely to face charges. Given that both before and since 11 September 2001, defendants, including foreign nationals, have been tried in the federal courts on charges relating to international terrorism, it would bring a consistency of approach.[62] Under the MMC, "unlawful enemy combatants may be delivered upon request to civilian authorities, foreign or domestic, for trial".[63] Such a "demilitarization" of the USA's prosecutorial response should herald a greater respect for human rights in the pursuit of security, a promise the US government has made throughout the "war on terror", but so far has failed to meet.

In December 2001, 700 US law professors and lawyers signed a letter protesting the military commissions under the Military Order. They asserted that "the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise", and suggested that "the United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society."[64]

Five years later, the US government is still showing, in effect, a lack of confidence in the ability of the federal judiciary to deal with this challenge. Instead it continues to advocate the use of untested institutions operating in a near legal vacuum. Trials under the MCA threaten to cut corners in the pursuit of a few convictions and to add to the injustice that the Guantánamo detention facility has come to symbolize.[65]

The right to a fair trial, which includes the right to equality before the courts, is a key element of human rights protection that serves to safeguard the rule of law. Amnesty International once again urges the US authorities to abandon trials by military commissions and to turn to the existing US courts to try detainees. Anyone who is not to be promptly charged and tried in full accordance with international standards should be released with full protections against further abuse (see Section 14 for full framework of recommendations).

2. Fair trial standards do not evaporate in 'war'

A war paradigm, the underpinnings of which the US Supreme Court has acknowledged are "broad and malleable"[66], has characterized the USA's response to the attacks of 11 September 2001. According to Vice-President Cheney, the administration "made a fundamental choice after 9/11 that we were going to go on the offence – that we had to treat this as a war, that 9/11 wasn't a criminal act or a law enforcement problem, it was a war."[67] The past five years have shown this war paradigm to be dangerous for human rights, as the government has extended it to cover areas more appropriately addressed by law enforcement measures, and even then claimed that existing laws of war do not cover this "new paradigm.[68]

International concern about the use of this war paradigm has grown. For example, in January 2007, the Director of Public Prosecutions (DPP) for England and Wales said that "London is not a battlefield." The people who were killed in the London bombings of 7 July 2005 "were not victims of war" and the perpetrators were not "soldiers" as they claimed. "We need to be very clear about this", the DPP continued, "On the streets of London, there is no such thing as a 'war on terror', just as there can be no such thing as a 'war on drugs'." He said: "Acts of unlawful violence are proscribed by the criminal law. They are criminal offences. We should hold it as an article of faith that crimes of terrorism are dealt with by criminal justice."[69] Meanwhile, the International Committee of the Red Cross (ICRC), the authoritative interpreter of the Geneva Conventions and other international humanitarian law (IHL), does "not believe that IHL is the overarching legal framework" applicable to the "war on terror".[70] US officials have begun to acknowledge international misgivings.[71]

Amnesty International fully acknowledges that there have been international and non-international armed conflicts in which the USA has been involved since launching the "war on terror". The US-led interventions in Afghanistan in October 2001 and Iraq in March 2003 were international armed conflicts and subsequently, after June 2002 and June 2004 respectively, became non-international armed conflicts (as noted below, not all those held by the USA in the "war on terror" were detained in the context of those armed conflicts). However, as the ICRC has said:

> "Whether or not an international or non-international armed conflict is part of the 'global war on terror' is not a legal, but a political question. The designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict";[72]
>
> and:
>
> "Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war."[73]

A February 2006 report by five UN experts stressed that the legal regime applied to the Guantánamo detainees "seriously undermines the rule of law and a number of fundamental universally recognized human rights, which are the essence of democratic societies". They noted that "the global struggle against international terrorism does not, as

such, constitute an armed conflict for the purposes of the applicability of international humanitarian law".[74]

The US administration, however, has used its war paradigm to remove "alien unlawful enemy combatants" from the protections not only of the US Constitution, but also of international human rights law. It has abused the already overbroad Authorization for the Use of Military Force passed by Congress on 14 September 2001.[75] It maintains that its activities outside the USA in the "war on terror" are exclusively regulated by the law of war, as it defines it, and that human rights law is inapplicable in this global armed conflict.[76] However, contrary to this assertion, it is widely agreed by international experts that "the two bodies of law, far from being mutually exclusive, are complementary."[77] The International Court of Justice (ICJ) has stated that:

> "The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[78]

More recently, the ICJ has reiterated that:

> "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation…"[79]

The USA has made no such derogation, and even if it had, a number of fundamental human rights provisions are explicitly non-derogable. Other international experts have also made clear that, whether or not there is a situation of armed conflict, international human rights law does apply. For example, The UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has said:

> "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".[80]

In January 2007, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated that acceptance of the USA's position "would have far reaching consequences". Indeed, he has said that it places "all actions taken in the so-called 'global war on terror' in a public accountability void, in which no international monitoring body would exercise public oversight. Creating such a vacuum would set back the development of the international human rights regime by several decades".[81]

One of the treaty monitoring bodies, the UN Human Rights Committee, has stated:

> "The [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive."[82]

The USA asserts that the ICCPR "is the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[83] These protections include fair trial standards, the right to equality before the law, and the right to challenge the lawfulness of one's detention in a court of law. In the "war on terror", however, those the USA detains outside its territory are deemed not deserving of such protections. The USA maintains that the ICCPR and at least Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) do not apply to individuals in US custody outside of the USA.[84] The UN expert bodies tasked with overseeing compliance with these two treaties have rejected the USA's position and called for change. In May 2006, the UN Committee Against Torture urged the USA to:

> "recognize and ensure that the Convention [against Torture] applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction".[85]

In July 2006, the UN Human Rights Committee called upon the USA to "review its approach and interpret the ICCPR in good faith" and in particular to:

> "acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as in times of war".[86]

Not only has the MCA in effect endorsed the administration's war paradigm, it has backdated this "war" to before 11 September 2001 to allow the prosecution of individuals by military commission for crimes committed before that date. Although the MCA states that it "does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission"[87], the State Department's legal advisor has suggested that the setting up of military commissions will allow the prosecution of individuals for acts that did not violate US criminal laws at the time they were committed, in possible violation of the prohibition against the retroactive application of criminal liability, a non-derogable provision of the ICCPR and a fundamental general principle of international law.[88]

The government has suggested, in addition to the fact that it is not holding most detainees with the intention of subjecting them to criminal prosecution, that one reason why military commissions are necessary for those who are tried is that "our criminal courts simply do not have extraterritorial jurisdiction" over the detainees it has in its custody; "These people had never set foot in the United States or planned specific criminal acts in violation of our federal criminal statutes".[89] This justification does not stand up to scrutiny. Signing the MCA into law, President Bush said that it would be used to try by military commission not only 9/11 conspirators, but also those believed responsible for the attack on the *USS Cole* in Yemen in October 2000 and "an operative" suspected of involvement in the bombings of the US embassies in Kenya and Tanzania in August 1998.[90] Yet individuals have already been indicted or tried in US federal court for their alleged involvement in these crimes.

On 19 March 2007, the Pentagon announced that Walid bin Attash had admitted at his CSRT hearing in Guantánamo a week earlier to having been involved in the bombing of the US embassy in Nairobi and of the *USS Cole*.[91] He was described in the 9/11 Commission Report in 2004 as "a senior al Qaeda operative connected to the US embassy bombings, the

USS Cole attack, and the 9/11 attacks", and 'Abd al-Rahim al-Nashiri as "the mastermind of the *Cole* bombing".[92] Walid bin Attash was arrested in April 2003 in Karachi and 'Abd al-Nashiri was arrested in the United Arab Emirates in November 2002. Rather than being brought to trial, they were hidden away in secret US detention. In September 2006, both men were transferred from secret CIA custody to possible trial by military commission in Guantánamo. In May 2003, *after* both these arrests, the USA charged two Yemeni nationals – who were not in US custody – in connection with the *USS Cole* bombing. Jamal Ahmed Mohammed Ali al-Badawi and Fahd al-Quso (aka Abu Hathayfah al-Adani) were indicted in US federal court in New York – not in a military commission in Guantánamo – with various offences, including conspiracy to murder and the murder of US nationals; conspiracy to use, using and attempting to use weapons of mass destruction; conspiracy to destroy, attempting to destroy and destroying US property and US defense facilities; using and carrying bombs and dangerous devices; and providing material support to a terrorist organization. In the indictment, 'Abd al-Nashiri and Walid bin Attash were named as "un-indicted co-conspirators".[93] The USA's secret detention of 'Abd al-Nashiri meant that he was tried *in absentia* in Yemen in 2004. He was sentenced to death (along with Jamal Mohammed al-Badawi, whose death sentence was reduced to 15 years in prison in 2005). In 2003, the Yemen authorities had indicated to Amnesty International that the reason the case had not come to trial earlier had been the strong objection at that time by the US authorities.[94]

Ahmed Khalfan Ghailani, a Tanzanian national arrested in Pakistan in July 2002, was also among the 14 detainees transferred to Guantánamo in early September 2006. He had spent two years in secret CIA custody. Ahmed Khalfan Ghailani was indicted in 1998 – not for trial in a military commission but in US federal court in New York – on numerous counts in relation to the embassy bombings in Kenya and Tanzania, including murder, attempted murder, conspiracy to murder, conspiracy to kill US nationals, conspiracy to use weapons of mass destruction, and conspiracy to destroy building and property of the United States.[95] The USA has already tried and convicted four men in relation to the embassy bombings. They were sentenced to life imprisonment after being convicted trials in US federal court in 2001. At that time, the Director of the Federal Bureau of Investigation (FBI) stated that "Through skill and perseverance, FBI personnel overcame major logistical challenges, which are inherent to crime scenes located in foreign countries, to conduct a thorough investigation that led to the verdict rendered today."[96] Presumably, neither the skill nor perseverance of the FBI has diminished; only the policy has changed, in turn raising questions of inconsistent or arbitrary application of trial rights.

In January 2003, UK citizen and alleged *al-Qa'ida* operative, Richard Reid, was sentenced to life in prison in a federal court in the USA for attempting to blow up a commercial airliner over the Atlantic. At his sentencing, Richard Reid said to the federal judge "I am at war with your country". Judge William Young said: "You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist."[97] Yet the US government is proposing to try other alleged non-US *al-Qa'ida* members, labeled as "alien unlawful enemy combatants", in military commissions.

The government waived its "right" to label John Walker Lindh as an "unlawful enemy combatant" as part of a plea arrangement in 2002.[98] This US national was captured in late 2001 during the international armed conflict in Afghanistan and charged in US federal court with, among other offences, conspiring with *al-Qa'ida* to murder US citizens and providing and conspiring to provide material support and resources to foreign terrorist organizations. Eventually, under a plea agreement, the government dismissed most of the charges and Lindh pled guilty to supplying services to the Taliban and carrying explosives while supplying such services. He was sentenced to 20 years in prison. US Attorney Paul J. McNulty, now US Deputy Attorney General, the second most senior law enforcement official in the country, said: "[T]his case proves that the criminal justice system can be an effective tool in combating terrorism".[99] The government is still intending to try foreign nationals, including those captured in Afghanistan around the same time, in similar circumstances, and accused of similar crimes as John Walker Lindh was originally charged with, in front of military commissions employing lower standards.

John Walker Lindh's plea agreement noted that if he wished to persist in his not guilty plea, he would "have the right to a speedy jury trial with the assistance of counsel… If a jury trial is conducted, the jury would be composed of twelve laypersons selected at random...The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty."[100] By contrast, foreign nationals selected for trial by military commission after years in detention without charge will face "juries" not of laypersons but of serving US soldiers who can convict a defendant by a two-thirds concurrence of those members of the commission present at the time the vote is taken.[101]

In May 2006, Zacarias Moussaoui was sentenced in federal court in Virginia to life imprisonment after pleading guilty to six charges relating to the conspiracy of 11 September 2001.[102] Yet when Khalid Sheikh Mohammed, described by the US government as the "mastermind" of the 9/11 attacks, was arrested in Pakistan in March 2003, he was put into secret CIA detention for the next three and a half years and subjected to "alternative" interrogation techniques. Khalid Sheikh Mohammed, who spent several years at school and college in the USA in the 1980s, was indicted in 1996 in US federal court for his alleged role in the Manila air (or "Bojinka") plot to blow up a dozen US airliners over the Pacific, and was the subject of a reported US plan at the time of the indictment for the FBI to arrest him in Qatar and transfer him to the USA for trial.[103] The government has said that it now intends to try Khalid Sheikh Mohammed before a military commission in Guantánamo.[104]

The US authorities have indicated that they may turn to civilian prosecutors in some instances in military commission trials because "the expertise may reside in the Department of Justice" and the experience gained "in some of the earlier terrorist cases would make it logical for them to be part of a prosecution team".[105] Thus, when the government decides that it is favourable to its objectives, it may turn to components of the criminal justice system, while denying that the system itself can be the appropriate forum for prosecutions. The defendant, by contrast, is denied the opportunity to seek the protections of the criminal justice system. Instead he must rely on the military commission process with its rules both unfavourable to the fair administration of justice and generating reasonable international

concern that the process has been developed to "launder" human rights violations and to facilitate trials that would otherwise have been jeopardized by unlawful government activities.

In his speech on 23 January 2007, the Director of Public Prosecutions in England and Wales said that the Guantánamo detainees were "in purgatory", denied the protections of either the Geneva Conventions or the US Constitution. He challenged the notion that it can be acceptable to compromise fundamental freedoms, including the right to a fair trial, in the struggle against terrorism:

> "One of the worst manifestations of this approach around the world has been the increasing resort to parallel jurisdictions… Here, quite deliberately, standard protections are no longer available. Suspects are removed from the protections of criminal justice and placed, instead, in quasi-judicial or even non-judicial fora deliberately hostile to due process."[106]

"It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested", noted the US Supreme Court in 2004.[107] Four decades earlier it had said that "implicit in the term 'national defence' is the notion of defending those values and ideals which set this Nation apart."[108] The US government has failed to uphold human rights in the "war on terror", and has trodden on due process in the name of a "war" for national security. Trials by military commission threaten to deepen the damage done. Discussing the military commissions in late 2006, the State Department Legal Advisor said: "Have we gotten this right? I can tell you with certainty that our international partners don't think we have."[109] He suggested, however, that "when our critics see how the recently signed Military Commissions Act works in practice, I believe they will realize that it offers an appropriate framework for these trials. The Act provides all of the fundamental guarantees of fairness and due process…"[110] Amnesty International strongly disagrees.

3. One size fits all? The right to a 'competent' tribunal

The primary institutional guarantee of a fair trial is that decisions will be made not by political institutions but by competent, independent and impartial tribunals established by law.

A tribunal by nature must be formally or functionally independent of the executive and legislative branches (see Section 4 below). The right to a trial before a *competent* tribunal requires that the tribunal has jurisdiction over both the individual and the offence in question. If a defendant is tried by a tribunal that does not have jurisdiction over them or the crime, the trial cannot be fair.

The MMC provides that the defendant and the offence must be subject to military commission jurisdiction, and states that "the judgment of a military commission without jurisdiction is void and is entitled to no legal effect".[111] However, under the MCA, both the category of individuals and the offences that fall under the jurisdiction of commissions are over-broadly defined. As already noted, the MCA in effect also backdates the "war on terror" to before 11 September 2001, and allows the prosecution of "alien unlawful enemy combatants" for offences committed "before, on, or after" that date.[112] The USA considers that any such detainees, if charged, can be tried by a one-size-fits-all military commission.

Regarding the crimes over which the military commissions are to be given jurisdiction, the MCA states in open-ended wording that the commissions have jurisdiction over "violations of the law of war and other offences triable by military commission".[113] Among the crimes that apparently fall into the latter category are the broadly-defined offences of "providing material support for terrorism" and offences such as "conspiracy" [to commit one or more substantive offences triable by military commission] and "obstruction of justice". These could include any number of actions unrelated to international or non-international armed conflict.

Amnesty International considers that offences that were not committed in an international or non-international armed conflict cannot, consistently with international standards, be tried by military tribunals of any kind. Moreover, the existence of an armed conflict, such as occurred in Afghanistan after the US-led invasion on 7 October 2001, cannot be used retroactively to designate as war crimes offences committed before that date. In the US Supreme Court's *Hamdan v. Rumsfeld* ruling, a plurality of the Justices affirmed that the military commissions formulated under the 2001 Military Order did not have the authority to try Salim Hamdan because the offence with which he was charged – conspiracy to violate the law of war – was not a recognized violation of the law of war. In February 2007, charges were sworn in the case of Salim Hamdan under the MCA, namely "conspiracy" and "providing material support for terrorism". Meanwhile, the MCA had stripped the courts of jurisdiction to hear *habeas corpus* appeals from "alien unlawful enemy combatants", the route taken by Hamdan in his successful challenge to commissions under the 2001 Military Order.

The US Attorney General has said that those who question "why terrorists should be tried as war criminals" rather than "in civilian courts just like any other individual who commits a crime" are ignoring the "existence and the practicalities of this armed conflict". In the "war on terrorism", he said, "members of al Qaeda are not merely common criminals…Their members continue to fight our Armed Forces on battlefields across the world, and they will continue to do so until we stop them. Their crimes are nothing less than war crimes."[114] Indeed, "we believe that as al Qaeda has scattered, the battlefield has widened."[115] Such a view, if accepted, would allow any government unilaterally to label anywhere as a "battlefield" and apply the laws of war as it saw fit.

The USA's view of the world as the battlefield is reflected in the fact that detainees in Guantánamo have included people taken into custody in, for example, Bosnia, Mauritania, Thailand, Gambia, Zambia and Indonesia. It is also reflected in the broad definition that the MCA gives for who qualifies as an "unlawful enemy combatant". To earn such a label, an individual need not have been engaged directly in armed hostilities, or to have committed a terrorist act, or to have been near a zone of international or non-international conflict. The definition is:

> "(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense".[116]

The MCA's endorsement of the Combatant Status Review Tribunal (CSRT) means that it is the executive that determines who is an "unlawful enemy combatant" and therefore who is eligible for trial by military commission. The CSRTs were devised by the administration in response to the *Rasul v. Bush* and *Hamdi v. Rumsfeld* decisions of the US Supreme Court in June 2004. These tribunals consist of three military officers who can rely on secret evidence or evidence coerced under torture or other ill-treatment in making their determinations. The burden is on the detainee, without legal representation and generally denied the possibility of obtaining witnesses or evidence, to disprove his "enemy combatant" status.

Although the government is now describing the CSRTs as "Article 5-like" tribunals[117] (Article 5 of the Third Geneva Convention requires a prompt determination of whether a person is entitled to protected status by a "competent tribunal"), they do not, in function or objective, serve as such tribunals. Set up thousands of miles from Afghanistan, more than two years after detentions began, the CSRT does not have the power to determine prisoner of war (PoW) status. In early 2002, President Bush had determined categorically that no Taleban or *al-Qa'ida* detainee would qualify for PoW status (this followed advice drafted by the White House Counsel that such a determination would "eliminate any argument regarding the need for case-by-case determinations of PoW status").[118] Detainees appearing before the CSRTs were told that the tribunals did not have the authority to make such a determination.[119] The CSRT only determines whether or not a person is an "unlawful enemy combatant", a status unknown to article 5 and unrecognized under international humanitarian law generally. Under the DTA, the CSRT determination of status can be challenged in the US Court of Appeals for the District of Columbia (DC) Circuit, but only on seemingly narrow procedural grounds.[120] Indeed, in the words of one judge on that Court, the DTA "imposes a series of hurdles, while saddling each Guantánamo detainee with an assortment of handicaps that make the obstacles insurmountable", in a process that is "inimical to the nature of habeas review".[121]

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also raised his concern that under the MCA, the President has the power to determine who is an "unlawful enemy combatant", "resulting in these detainees being subject to the jurisdiction of a military commission composed of commissioned military officers. At the same time, the material scope of crimes to be tried by military commissions is much broader than war crimes in the meaning of the Geneva Conventions."[122]

Before any detainee can be brought to trial by military commission, the legal advisor to the convening authority must advise the latter as to whether a commission would have jurisdiction over the defendant and the crime alleged.[123] The convening authority is the Secretary of Defense or his designee. The legal advisor is appointed by the Secretary of Defense, and may be civilian or military.[124] Once the convening authority has referred the

charges on for prosecution, there appears to be little or no meaningful opportunity for defendant to challenge the jurisdiction of the commission to try them.

The MMC states that a case against a charged detainee can be dismissed upon a finding that the military commission "lacks jurisdiction to try the accused for the offence".[125] At the same time, the MCA "does not require that an individual receive a status determination by a CSRT or other competent tribunal before the beginning of a military commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss".[126] The government has indicated that all defendants will have had a CSRT determination by the time they come to trial.[127] At the same time, if a detainee set for trial by military commission has an appeal of the CSRT's finding that he is an "unlawful enemy combatant" pending in the DC Circuit Court of Appeals, this will not be considered a reason to delay the trial.[128] In other words, the trial of the defendant can proceed, even though judicial consideration, to the extent that it is provided for under the MCA, is still pending as to whether he is even lawfully before the commission.

Under the MCA, the detainee cannot challenge the jurisdiction of the military commissions in a *habeas corpus* petition to the US courts, as the courts are stripped of competency to consider *habeas corpus* petitions. The failure to provide for habeas corpus contravenes the fundamental right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"(ICCPR, article 9(4)). In addition, only the US Court of Appeals for the DC Circuit can consider challenges, but only after the military commission trial is finalized, and only then on the same narrow procedural grounds that apply to its review of CSRT determinations.[129]

In summary, the question of the competence of military commissions arises as a result of the USA's attempt under its global war paradigm to squeeze anyone it labels as "alien unlawful enemy combatant" into the jurisdictional remit of the commissions. Not only is this status unrecognized in international law, the detainees comprise individuals taken into custody in different locations and circumstances, governed by varying legal regimes under international law. They include people captured in international armed conflict who should have been presumed to be prisoners of war unless a promptly convened competent tribunal decided otherwise; civilians taken into custody outside of zones of armed conflict; and some who were detained when they were children.

3.1 Individuals detained in international armed conflict

Salim Ahmed Hamdan, the Yemeni national whose case was at the centre of the *Hamdan v. Rumsfeld* ruling, and who was one of the first three detainees to face charges under the MCA, was captured in Afghanistan in November 2001. His capture occurred during the international armed conflict that occurred in Afghanistan following the US-led intervention in October 2001 until the establishment of a Transitional Authority on 19 June 2002. He was handed over to the US military by his Afghan captors in return for a bounty of thousands of US dollars.

The US took custody in a similar manner in respect of dozens of cases of individuals picked up by Pakistan and Afghan forces.

Under the Third Geneva Convention, Salim Hamdan and all other persons detained in the context of the international armed conflict in Afghanistan – including David Hicks, Ali Hamza al Bahlul and Ibrahim Ahmed al Qosi, who were also charged under the 2001 Military Order and are likely to face trial under the MCA – should have been presumed to be prisoners of war and treated as such unless and until a "competent tribunal" determined otherwise (Article 5).[130] The burden is on the detaining authority to show that a detainee does not qualify for PoW status, on a case by case basis before a competent tribunal, not by presidential fiat. Prisoners of war must be released and repatriated without delay after the cessation of hostilities unless they are to be tried for war crimes or other criminal offences. [131] As combatants, PoWs cannot be prosecuted for simply taking part in hostilities.[132]

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

- Must be tried before the same courts and according to the same procedures as US personnel (Third Geneva Convention, article 102). They must be tried by military courts, unless members of the US armed forces could be tried for the same crimes in civilian courts (Third Geneva Convention, article 84). Although US soldiers are generally tried by military courts-martial, they can be tried in the civilian courts for offences not of a purely military nature.
- Cannot be subjected to punishments for criminal offences which do not apply to the military personnel of the state detaining them and must not receive more severe sentences (Third Geneva Convention, articles 82 and 102).[133]

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

Denial of the right to a "fair and regular trial" for a PoW who is charged with a crime or for a civilian protected person under the Fourth Geneva Convention can amount to a war crime.[134]

It is now nearly five years since the international armed conflict in Afghanistan ended. Amnesty International believes that the failure of the USA to provide Salim Hamdan and others prompt adjudication of their status by a competent tribunal during that conflict rendered their detention arbitrary, in violation of international human rights law. In the absence of such determinations, their presumed status as PoWs would render their trials by military commission unlawful under the Geneva Conventions.

3.2 Individuals detained in non-international armed conflict

An unknown number of people held in Guantánamo, and hundreds in US custody in Afghanistan (the ICRC reported on 31 December 2006 that there were approximately 630 detainees held in Bagram air base – all are held without charge or access to lawyers, the courts, or relatives)[135] were taken into custody during the non-international armed conflict in Afghanistan, ongoing since the transfer of power to the Transitional Authority on 19 June 2002. Common Article 3 of the 1949 Geneva Conventions, as well as the relevant rules of customary international humanitarian law, applies to this conflict. International human rights law is also applicable.

The ICRC has stated that if brought to trial for any crimes they may have committed, anyone detained in the non-international armed conflict in Afghanistan is "entitled to the fair trial guarantees of international humanitarian and human rights law".[136] The *Hamdan* ruling declared that common Article 3's requirement for fair trial must be interpreted as broadly as possible, and four of the Justices drew particular attention to the protections contained in Article 75 of Additional Protocol 1 as well as in Article 14 of the ICCPR. Welcoming the *Hamdan* decision, the UN Human Rights Committee noted that common Article 3 "reflects fundamental rights guaranteed by the [ICCPR], in any armed conflict."[137]

Violations of common Article 3, including the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable by civilized peoples", can amount to war crimes under international law.[138] Such a violation used to be prosecutable under the USA's War Crimes Act until the MCA narrowed the scope of that Act.

3.3 Civilians detained outside zones of armed conflict

An unknown number of detainees were taken into custody outside a zone of international or non-international conflict and subject to unlawful transfers to Afghanistan, Guantánamo and elsewhere (see Appendix 3). In such cases it is solely international human rights law that is applicable; international humanitarian law does not apply. The situation is one of criminal law enforcement, not war.

For example, Pakistan national Muhammad Saad Iqbal al-Madni has said that he was arrested in Jakarta, Indonesia, on 9 January 2002, taken to Egypt two days later and held there until 12 April 2002. Thereafter he was flown to Afghanistan where he was held in US custody between 13 April 2002 and 22 March 2003, when he was transferred to Guantánamo where he remains. In other words, he was in Afghanistan at a time of international and then non-international armed conflict *only* because he was taken and held there by the USA.

Many detainees subsequently transferred to Guantánamo were originally taken into custody in Pakistan. The US government has said that "the vast majority of the people who are being held in Guantánamo… were captured around the end of 2001 and the beginning of 2002, in or around Afghanistan and Pakistan."[139] Some of the detainees arrested in Pakistan were picked up on the Afghanistan/Pakistan border, having fled the conflict in Afghanistan. Even these individuals, however, were not necessarily combatants. For example, a group of

18 members of the Uighur community from China who ended up in Guantánamo had fled to Pakistan from Afghanistan after their camp was bombed by the USA. They were reportedly sold into US custody after being held in custody in Pakistan for about two weeks. The Uighur detainees have told their CSRTs that they had neither seen nor been involved in any combat in Afghanistan, and as far as Amnesty International is aware, the USA has produced no credible evidence to the contrary. As one of the Uighur detainees, Abdul Razak, told his CSRT hearing, "You accused me of being an enemy combatant. Did you get me from a combat zone or from another country, Pakistan?" To which the CSRT President responded: "It doesn't matter in our definition. Location of the capture is not part of our definition". Another of the Uighurs, Abu Bakker Qassim, told the CSRT: "In my knowledge, an enemy combatant is someone in a battle with a rifle in your hands captured from there; or a person retreating from his position. But I was captured in Pakistan without any weapons and arrested by local people".[140]

Other people detained in Afghanistan had not been in Afghanistan either during the conflict or at any other time, meaning that international humanitarian law is inapplicable to their cases. In CSRT hearings, several of these detainees have also said that they were handed over to the USA by Pakistan forces in exchange for payments. In his recent memoirs, President Musharraf wrote that the CIA had paid millions of dollars in "bounties" and "prize money" for 369 suspects handed over by Pakistan to the United States.

In seeking to explain their authority to hold individuals captured during the armed conflict in Afghanistan, including in Pakistan, the USA has said that "if a country is unwilling or unable to do something about the aggressors, another country has a right under international law to take action to defend itself…That is what our coalition forces were doing in Afghanistan. They were not there as policemen… There was a legal state of armed conflict in Afghanistan, where we were fighting the Taliban and Al Qaeda. As a result, we did have the legal right to pick these people up… Our soldiers picked them up in a time of war."[141] Yet, this was not the case with Pakistan. As shown above, Pakistan engaged in substantial cooperation with the USA.[142] There was no state of international or non-international armed conflict in or between Pakistan and the USA.

Five of the 10 people designated for trial by military commission under the Military Order of November 2001, and likely to be charged under the MCA, were originally detained in Pakistan, with only one of them apparently having recently crossed from Afghanistan. They include Binyam Muhammad, an Ethiopian national and British resident detained at Karachi airport and transferred to Morocco before being taken to Guantánamo.[143] The 14 individuals transferred in September 2006 from secret CIA custody to military custody and possible trial in Guantánamo are all believed to have been captured outside zones of armed conflict, including in Pakistan, Thailand and United Arab Emirates. Other detainees currently in Guantánamo were taken into custody in countries that have included Bosnia-Herzegovina, Pakistan, Mauritania, Gambia and Egypt.

Amnesty International considers that, under international law, such individuals should always have been treated as criminal suspects, and therefore subject to international human rights law and principles of criminal law, including the right to prompt judicial review of the

lawfulness of their detention and to release if that detention was deemed unlawful. The organization believes that they should not be tried before military tribunals of any kind.

The UN Human Rights Committee has consistently expressed concern at the broad jurisdiction of military courts, stating that the trials of non-military persons should be conducted in civilian courts before an independent and impartial judiciary, while the jurisdiction of military courts should be restricted to trial of military personnel accused of purely military or disciplinary offences.[144] The Committee has concluded that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice."[145] The Committee has raised particular concern about cases where military courts exercised jurisdiction over "terrorism" offences or offences against the security of the state, and has "deplored" the jurisdiction of military courts over civilians accused of treason.[146] The Committee against Torture has expressed similar concerns and made similar recommendations.[147] Such concerns directly implicate the USA's resort to military commissions in the "war on terror".

The evolving international standards on this issue are also reflected in the draft UN Principles governing the administration of justice through military tribunals, submitted in 2006 by the UN Special Rapporteur on this issue to the Sub-Commission on the Promotion and Protection of Human Rights. Principle 5 states that:

> "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts".
>
> Principle 8 states:
>
> "The jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status."
>
> And Principle 9 states:
>
> "In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes".[148]

The Inter-American Commission on Human Rights has stated that placing civilians under the jurisdiction of the military courts is contrary to article 8 of the Inter-American Convention on Human Rights (the right to a hearing by a competent, independent and impartial tribunal) and that military courts are special and purely functional courts designed to maintain discipline in the military and police and ought therefore to apply exclusively to those forces.[149] The Inter-American Court of Human Rights reasoned as follows:

> "Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously

established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts."[150]

The African Commission on Human and People's Rights has consistently maintained that the only purpose of military courts is to "determine offences of a purely military nature committed by military personnel" and that "military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts."[151]

Having examined the jurisprudence of the Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, the UN Special Rapporteur on the independence of judges and lawyers, Leandro Despuy, maintained that using military or emergency courts to try civilians in the name of national security, a state of emergency or counter-terrorism runs counter to all international and regional standards and established case law.[152]

3.4 No military trials for those detained as children

In February 2007, Omar Khadr became one of the first three detainees charged under the MCA. This Canadian national is accused of offences committed in 2002 during the armed conflict in Afghanistan when he was 15 years old.

In the "war on terror", the US authorities have detained a number of people who were under 18 years old at the time of being taken into custody. The Pentagon has said that "age is not a determining factor in detention."[153] There may have been at least 17 people held in Guantánamo who were under 18 years old at the time they were taken into custody. The ICRC has repeatedly said that it "does not consider Guantánamo an appropriate place to detain juveniles", and has expressed particular concern "about the possible psychological impact this experience could have at such an important stage in their development."[154] Like their adult counterparts, some were detained outside zones of armed conflict. For example, Chadian national Muhammad Hamid al Qarani was arrested in a mosque in Karachi in Pakistan in October 2001 at the reported age of 14 and held in prison for three weeks, where he was allegedly tortured. He was subsequently transferred to Peshawar, held there for 10 days, and then transferred to US custody in late November 2001. He has alleged that he was subjected to torture in US custody in the US air base at Kandahar in Afghanistan before being transferred to Guantánamo in early January 2002. Now 20 years old, he remains in Guantánamo, where he could yet face trial by military commission.

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

the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action." Under Article 40, if the child is alleged to have violated the law, they should be "treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society". The USA has signed the CRC and is therefore obliged under international law not to do anything that would undermine the object and purpose of the treaty pending its decision on whether to ratify it.[155]

The USA has ratified the Optional Protocol to the CRC on the involvement of children in armed conflict. Under Article 6(3), in the case of children held because they participated in the international or non-international armed conflict in Afghanistan, the USA has an obligation to provide them with "all appropriate assistance for their physical and psychological recovery and their social reintegration". Detaining children in indefinite military custody in Guantánamo Bay cannot meet this obligation. Neither can trying such individuals in front of a military commission.

Article 4.1 of the Optional Protocol prohibits non-state armed groups from recruiting or using in hostilities anyone under the age of 18 years. Article 4.2 requires state parties to "take all feasible measures to prevent such recruitment". While the USA was not in a position to prevent the recruitment or use of children either by the Taliban or *al-Qa'ida*, its subsequent treatment of Omar Khadr and other children alleged to have been used as combatants in the conflict in Afghanistan contravenes the spirit of Article 4 of the Optional Protocol.

Principle 7 of the draft UN Principles governing the administration of justice through military tribunals states that:

> "Strict respect for the guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) should govern the prosecution and punishment of minors, who fall within the category of vulnerable persons. In no case, therefore, should minors be placed under the jurisdiction of military courts". [156]

In November 2005, Guantánamo detainee Omar Khadr was charged for trial by military commission under the 2001 Military Order. The charges were laid more than three years after he was detained in Afghanistan at the age of 15. He has now been charged under the MCA with murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying. The charge of murder relates to the allegation that on or around 27 July 2002 (during the non-international armed conflict in Afghanistan), he threw a grenade which killed a US soldier, Sergeant Christopher Speer. The charge of attempted murder alleges that between June and July 2002, he converted land mines into improvised explosive devices for use against US forces.

Omar Khadr is no longer a child – after five years in military detention he is 20 years old – but the principle should still stand (otherwise governments could simply hold children in

custody until they became adults in order to treat them as adults). Neither he nor anyone else who was a child when taken into detention should be tried by military commission.

4. The right to an independent and impartial tribunal

The independence and impartiality of the tribunal is essential to a fair trial, as provided in article 14 of the ICCPR and other international standards. The UN Human Rights Committee has clarified that the right to trial by an independent and impartial tribunal is so basic as to be "an absolute right that may suffer no exception".[157]

The UN Basic Principles on the Independence of the Judiciary provide that "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". In addition, the Human Rights Committee has expressed concern that "quite often the reason for the establishment of [special] courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".[158]

The requirement of independence means that decision-makers administering justice must be free to decide matters before them impartially on the basis of the facts and in accordance with the law, without any interference, pressures or improper influence from any government officials in any branch or elsewhere and for any reason.[159] It also means that the people appointed as judges are selected on the basis of objective criteria, including their legal expertise and integrity.[160]

The principle of impartiality demands that each of the decision-makers, whether judge or juror, be unbiased. Actual impartiality and the appearance of impartiality are both indispensable for the effective administration of justice and ensuring the right to a fair trial.

The Human Rights Committee has emphasised that the competence, independence and impartiality of the courts must be "established by law and guaranteed in practice". The Committee placed particular emphasis on "the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office".[161] The UN Basic Principles on the Independence of the Judiciary, which sets out the minimum conditions necessary to ensure judicial independence, requires that "judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists". Principle 13 of the 2006 draft UN Principles on the administration of justice through military tribunals emphasizes that "the organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial." It also states that "military judges should have a status guaranteeing their independence and impartiality, in particular vis-à-vis the military hierarchy".[162]

Amnesty International again emphasises the overall context in which the MCA military commission trials will occur, and underscores the pressing need for strict adherence to international standards and transparency if justice is to be done and seen to be done. In respect of military judges, they are subject to command discipline and so may lack certain

protections that would insulate ordinary judges from undue influence, such as length and security of tenure.

The commentary that accompanies Principle 13 of the draft UN Principles notes the large body of case law that "has spelled out the subjective as well as the objective content of independence and impartiality". Bearing in mind the adage "justice should not only be done but should be seen to be done", the Special Rapporteur on the administration of justice through military tribunals notes that the concept of impartiality becomes more complex in relation to military tribunals "as the parties have good reason to view the military judge as an officer who is capable of being 'judge in his own cause' in any case involving the armed forces as an institution, rather than a specialist judge on the same footing as any other". The presence of civilian judges within military tribunals, therefore, at a minimum could only reinforce the appearance of impartiality of such tribunals.[163]

A notable improvement from the trials envisaged under the 2001 Military Order is that a military judge, rather than no judge, will preside over military commissions under the MCA. The Act provides for a military judge – a serving officer of the US armed forces on active duty – to preside over each military commission and to decide on questions of law, including the admissibility of evidence.[164] The military judge must be certified as qualified to act as a judge, in accordance with Article 26 of the Uniform Code of Military Justice.[165] The judge must have at least two years' experience as a military judge after having been so certified.[166] The MCA provides that the Secretary of Defense "shall prescribe regulations providing for the manner in which military judges are detailed to such commissions".[167] The Manual for Military Commissions submitted by the Secretary of Defense in January 2007 describes these procedures. As under the UCMJ, the responsibility for assigning judges to specific commissions will reside in judicial channels.[168] According to the MMC, a pool of military judges for military commissions is nominated by the Judge Advocates General of the US Army, Navy and Air Force. From this pool, the convening authority (the Secretary of Defense or his designee) selects an individual with "extensive experience as a military judge" to serve as the Chief Judge of the Military Commissions Trial Judiciary (Chief Trial Judge).[169] The Chief Trial Judge will assign military judges to each military commission.

In promoting the military commissions, the US State Department has suggested that "the judges in a military system are more independent and less political than federal judges. Federal judges are selected by a partisan President, while judges on military courts are individuals who have had ten, twenty, thirty years of training in military law and are, in essence, independent military lawyers."[170] Nevertheless, in the USA, unlike the ordinary trial-level federal courts (District Courts), military tribunals, whether courts-martial or military commissions, are part of the political branches, rather than the judicial branch of government (Article III of the Constitution). They are established under Article I of the Constitution (the legislative branch), and the decision-makers are under the command authority of the executive. Judges on Article III courts are appointed for life by the President with the "advice and consent" of the Senate. Military judges on Article 1 tribunals do not have the equivalent independence conferred by security and length of tenure.

In 1994, the US Supreme Court upheld the constitutionality of the method by which military judges are appointed under the UCMJ. The Court looked to history and tradition rather than to settled or evolving international standards. It noted that "although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition". It noted that, although Congress had made changes to the US military justice system to make it "more like the American system of civilian justice", it had rejected tenure for military judges.[171] The Court nonetheless concluded that the lack of a fixed term of office for military judges did not violate the due process clause of the US Constitution's Fifth Amendment, and that under the UCMJ, military judges were sufficiently insulated from the effects of command influence to preserve judicial impartiality.

In 2001, the Report of the expert Commission on the 50th Anniversary of the Uniform Code of Military Justice noted that since its creation in 1951 the UCMJ had "failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world". While acknowledging that the UCMJ had been significantly revised in 1968 and 1983, the Commission emphasized that in recent years, "countries around the world have modernized their military justice systems, moving well beyond the framework created by the UCMJ fifty years ago." The Commission identified areas "in need of immediate attention". One recommendation, not implemented, was to increase the independence of military judges by establishing fixed terms of office for them. The Commission concluded that while many military judges now possessed "at least some modicum of judicial independence", measures to increase this independence were "critical", given the "central role of judges in upholding the standards of due process, preserving public confidence in the fairness of courts-martial, and bringing United States military justice closer to the standards being set by other military criminal justice systems around the world".[172]

In past human rights reports, the US State Department has criticized the lack of independence of military tribunals in other countries.[173] In contrast, the US government has asserted that the military commissions under the MCA will be "sufficiently independent".[174] Certainly, the rules contained in the MMC, mirroring the rules for courts-martial, prohibit anyone, including the convening authority, from applying inappropriate pressure on any military judge, commission member, or prosecuting or defence counsel involved in the commissions. Nevertheless, the fact that there is no civilian component to the commissions themselves raises concern as to whether they can meet the requirements of independence and impartiality.

The military judge will be called upon to make many decisions during military commissions which will test the institution's independence and impartiality and public perceptions of this crucial aspect of the trials. These decisions include areas that could implicate the executive in violations of international law, including on questions relating to enforced disappearance, secret detention, torture or cruel, inhuman or degrading treatment and arbitrary detention. In addition, the military judge will have to make decisions on questions relating to classified information in a context in which the administration has been widely criticized for its over-use of classification, including in circumstances where classification is, by design or effect, concealing human rights violations. Amnesty International is concerned

that the military commissions would lack the independence and impartiality necessary to subject to searching inquiry and reject the poisonous fruits of internationally unlawful activities that have been carried out under the 'war powers' of the Commander in Chief of the Armed Forces, the President.

The other members of the commission – at least five members, but 12 (or no fewer than nine if 12 individuals are not available) if the case in one in which the death penalty might be applied – would be members of the US armed forces on active duty. They would decide questions of fact. The Secretary of Defense or his designee, the convening authority, is the person who appoints to military commissions members of the US armed forces on active duty, who "in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament".[175] As in courts-martial, commission members may be challenged for cause by either defense or prosecution, and each party may have one peremptory challenge (removal of commission member without giving a reason)

Under the UCMJ, the convening authority is a military commander, whereas under the MCA it is the Secretary of Defense or his designee. The Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, concluded that the "far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces." The Commission recommended that one measure that should be taken immediately was to prohibit convening authorities from selecting the members of the court-martial. This recommendation was not implemented. It added that "there is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection". In the case of military commissions convened under the MCA, Amnesty International is concerned that the convening authority's overarching role in the selection of commission members creates a condition of real or perceived lack of independence from the executive.

By endorsing the CSRT process, the MCA also calls into question both the independence and competence of the military commissions. Under the MCA, it will be the executive, through its flawed CSRT process, which will retain the power to determine who will be subjected to trial by commission. If the military commissions accept without testing the findings of the CSRTs – which the government argues are "entitled to a strong presumption of regularity"[176] – they will effectively be approving torture and other ill-treatment, raising further doubts about the independence of these tribunals if they can provide no remedial action. A federal judge has said that the CSRTs "did not sufficiently consider whether the evidence upon which the tribunal relied in making its 'enemy combatant' determinations was coerced from the detainees". She noted evidence that "abuse of detainees occurred during interrogations not only in foreign countries but also in Guantánamo itself."[177] Six retired federal judges, in a brief submitted before the US Court of Appeals for the District of Columbia, have also emphasized that, according to the publicly available record:

> "The CSRT panels did little to evaluate the probity of allegedly coerced evidence, even when evidence such as medical records was readily available. Some CSRTs

> found the torture allegations credible enough to warrant investigation by other military authorities, but the panels nevertheless found the detainees to be enemy combatants without awaiting the outcome of the investigation… A number of CSRTs simply ignored testimony that the detainee's prior statements to interrogators were the result of torture… On occasion, CSRTs probed the torture allegations, but to demonstrate that US forces did not participate in the torture, not to determine whether the 'confession' was reliable or the product of coercion."[178]

The six judges said that they were not aware of a single CSRT that permitted the detainee "to develop an evidentiary record regarding statements allegedly obtained by torture". The government takes the view that under the MCA, the US Court of Appeals for the District of Columbia Circuit cannot consider facts outside the CSRT record when considering challenges to CSRT determinations, leaving the CSRT's comprehensive neglect in relation to the torture issue without remedy for the detainee.

The executive continues to fully control the detention universe in which the detainees find themselves. It can decide when, if ever, to charge the detainees for trial by military commission. If the executive decides not to bring the detainee to trial or to drop the prosecution after the trial has started – whether for lack of evidence or for fear that the trial would reveal unlawful government policies – the commission has no say in the continuing detention. The detainee cannot bring a *habeas corpus* petition, either to the commission or to any other court. Under the MCA, apart from a limited right of appeal (see below) no "court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,… relating to the prosecution, trial, or judgment of a military commission…, including challenges to the lawfulness of the procedures of military commissions…".[179]

The US Attorney General has said that "what is extraordinary is how much – not how little – our law protects enemy combatants."[180] However, although the military commissions are "established by law" through the passage of the MCA, they will nevertheless operate in something approaching a legal vacuum. Trials will be held outside US territory and only non-US nationals will be subject to them. The US government will continue to take the position that neither the ICCPR, nor the US Constitution will apply to these detainees. Neither can any defendant turn to the Geneva Conventions; under the MCA any "alien unlawful enemy combatant subject to trial by military commission" is prohibited from "invok[ing] the Geneva Conventions as a source of rights."[181] Although, the rules for military commission are based upon the procedures for trial by courts martial under the UCMJ, neither the UCMJ nor its precedents are binding on trials by military commission.[182] The absence of a framework of law upon which either the defendant or the commission can draw leaves the defendant's ability to prepare a defence in jeopardy and raises further questions about the independence of the commission.

5. Discriminatory application of fair trial rights

Under the MCA, only foreign nationals designated as "unlawful enemy combatants" can be subjected to trial by military commission. In promoting the Act, the White House stressed that "Americans cannot by tried by the military commissions the administration has proposed.

Americans accused of war crimes and terrorism-related offences will continue to be tried through our [civilian] courts or courts-martial."[183]

Extraordinary courts may not be created to try groups of people for criminal offences on the basis of a distinction of any kind, including their national origin. Such courts would contravene the principle of equality before the courts and the principle of non-discrimination, a fundamental principle of international law, and one which runs through all human rights law.[184]

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

Under the ICCPR, all persons are equal before the law, entitled without any discrimination to the equal protection of the law (Article 26), and "shall be equal before the courts and tribunals" (Article 14). Each state party to the ICCPR undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights enshrined in the treaty, without distinction of any kind, including on the basis of national origin (Article 2). The Human Rights Committee has stated the general rule that "each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens."[185]

Similarly under ICERD, everyone has the right to "equal treatment before the tribunals and all other organs administering justice" (Article 5). The Committee on Elimination of Racial Discrimination has called on parties to ICERD, of which the USA is one, to ensure in the administration of justice "that non-citizens enjoy equal protection and recognition before the law" and any "non-citizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law".[186] The Committee has stressed that although Article 1.2 provides for the possibility of differentiating between citizens and non-citizens, that article should not be interpreted to undermine the "basic prohibition on discrimination" or to "detract in any way from the rights and freedoms enshrined in international human rights law, including the ICCPR.[187]

In 2002, after John Walker Lindh, a US national captured during the armed conflict in Afghanistan was charged in federal court while foreign detainees were left in legal limbo in Guantánamo, a Pentagon spokesperson said that "as we've shown with John Walker, the US citizenship does make it a different case and a different kind of treatment".[188] Although President Bush has repeatedly stated that "equal justice" is one of the "non-negotiable demands of human dignity", the USA is still intending to try foreign nationals, including those detained around the same time, in similar circumstances, and accused of similar crimes as John Walker Lindh originally was, in front of military commissions employing lower standards than apply either in the civilian courts or courts-martial.

As part of his plea agreement, John Walker Lindh agreed to testify at future trials, including military tribunals. The government agreed to forego "any right it has to treat the defendant as an unlawful enemy combatant based on the conduct alleged in the [original]

indictment". [189] The government recommended that Lindh be given credit for the approximately seven weeks he had been in the custody of the US military before being handed over to civilian jurisdiction. In contrast, military commission defendants could be returned to indefinite executive detention after acquittal or after having served a sentence after conviction. There is no express provision in the MCA to credit time spent in untried detention.

Under the November 2001 Military Order, the decision-making process determining whether and when people were to be charged for trial by military commission appeared to be influenced by the position adopted by the detainees' home governments. British nationals Feroz Abbasi and Moazzam Begg, for example, were made eligible for trial by military commission in July 2003, but were transferred to the UK and released without charge after the UK government strongly opposed the proposed commissions as unfair. In contrast, the Australian government supported the USA's intention to try David Hicks by military commission under the Military Order and he remained charged for trial until the *Hamdan* ruling struck the process down. Although the Australian authorities have continued to remain generally supportive of the US government's revised military commission system under the MCA, in the face of domestic public concern they have begun to express disquiet about the length of time that Hicks has been held without trial. Prime Minister John Howard, who has said that "five years is far too long" for someone to be detained untried, indicated on 20 February 2007 that in a telephone call that day, President Bush had given a "very direct assurance" that Hicks' prosecution would be expedited. Amnesty International is not aware of any other government having been given such assurances. On 1 March 2007, the Pentagon announced that David Hicks was the first detainee to be charged under the MCA, and his arraignment was subsequently set for 26 March 2007.[190] On 2 March, the Australian Minister for Foreign Affairs, Alexander Downer, asserted:

> "It's a tribute to the degree of influence that the Australian Government has in Washington, and the strength of the relationship that, of all the people held in Guantánamo Bay, the one Australian there is the first person to be tried…I can't believe that an Australian Government which was anti-American would have any hope of achieving that. Our Government has got Hicks to be the first person to be tried… We've got an Australian citizen here… [of] the 300 to 400 people I believe [are] in Guantánamo Bay, there's one Australian. And we've got this Australian to the head of the queue in terms of trial. And that's a good achievement."[191]

In a detention and military commission system already marked by arbitrariness, discrimination, and lack of independent judicial involvement, the disparate treatment among detainees as described above suggests another dimension to such flaws. Amnesty International reiterates that whether a defendant is brought to trial and whether that trial is fair should not depend on the state of diplomatic relations between his government and the government that is detaining him. In full equality, regardless of national origin, all detainees facing criminal charges have the right to a fair trial within a reasonable time conducted in accordance with international law and standards. The detaining authority has the primary responsibility to safeguard this guarantee, but the detainee's home government should do all it can to ensure a fair trial for or release of the detainee in question.

6. Damage done: Right to presumption of innocence

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet internationally prescribed requirements of fairness.[192] The Human Rights Committee has identified this fundamental principle of fair trial as a peremptory norm of international law from which states may never deviate, even in an emergency situation.[193] The presumption of innocence attaches to an accused even before he or she is criminally charged and lasts until the charge against the defendant is proved beyond a reasonable doubt.[194]

The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also governs the conduct of all other public officials. Public authorities, particularly prosecutors and police, may not make statements about the guilt or innocence of an accused before the outcome of the trial.[195] It also means that the authorities have a duty to seek to prevent the news media or other powerful social groups from influencing the outcome of a case by pronouncing on its merits.

The MCA provides that "the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt". The real litmus test, however, is how this right is guaranteed in the course of pre-trial and trial proceedings.

The CSRT process presumes the "guilt" of the detainees as "enemy combatants" unless the detainee can prove otherwise. In the words of Yemeni detainee Sharaf Ahmad Muhammad Masud to his CSRT proceeding: "All the rules in the United States and in the world, the person is innocent until you prove he is guilty not innocent. But, here with the Americans, the detainees are guilty until proven innocent". Affirmation of "enemy combatant" status renders the detainee eligible for trial by military commission.

As well as labelling Guantánamo detainees as loosely-defined "enemy combatants" in a broadly-defined global "war", the US administration, including the President in his role as the Commander in Chief of the Armed Forces, has repeatedly labeled the detainees as "killers", "terrorists", and "bad people", in violation of the presumption of innocence. President Bush has continued the prejudicial labelling of Guantánamo detainees. He said of them in June 2006: "They're cold-blooded killers. They will murder somebody if they're let out on the street."[196] Again in September 2006, he referred to those held in Guantánamo as "terrorists" who were being held in the base "so they cannot murder our people".[197] Other senior officials have echoed this sentiment throughout the "war on terror". For example, Vice-President Cheney said in 2005 of the 520 detainees then held of Guantánamo:

> "[H]ard-core terrorists is the only way to describe them. They're unlawful combatants. They're out to kill Americans. And if you put them back on the streets, that's exactly what they'll do… [W]e absolutely need to have a facility like that to house some very violent and evil people."[198]

Given that even the USA's National Security Strategy cites President Bush's stated aim of the "war on terror" as being "to rid the world of evil", and given the President's repeated references to the "war on terror" as being a struggle between "good and evil", and

one in which "either you are with us, or you are with the terrorists", it is clear that such Manichean labels fall into a disturbing and broad pattern of commentary on the presumed guilt of the detainees. This labelling violates the presumption of innocence and damages the prospect of a fair trial, particularly in view of doubts about the independence from the administration of the military commissions set to conduct such trials.

The government has characterized the recent transfer of 14 detainees from secret custody to Guantánamo as the outcome of President Bush's "determination to bring the CIA detainees to trial".[199] Yet even as he revealed the transfers, President Bush undermined the right of these detainees to the presumption of innocence. In his address, although he said that defendants in military commission trials would be presumed innocent, at the same time he referred to the 14 as "dangerous men" and "terrorists". A number of these 14, and other individuals currently held in Guantánamo, were also in effect presumed guilty in the congressional 9/11 Commission Report. Sections of this report "relied heavily on information captured from al Qaeda members" in identifying alleged conspirators in the attacks of 11 September 2001. In other words, echoing the subsequent CSRT process, coerced information was used against the detainees to prejudge their guilt outside of any judicial proceeding. The 9/11 report acknowledged that "assessing the truth of statements by these witnesses" was "challenging", noting that the 9/11 Commission had had access neither to the detainees nor their interrogators. It failed at the same time to denounce either the secret detention or the interrogation techniques used to extract the information from such detainees. Amnesty International fears the same failure will be a feature of military commissions.

The prejudicial official commentary contrasts with official comments following evidence of war crimes and human rights violations committed by US troops. For example, questioned in 2004 after the revelations about the torture and ill-treatment of detainees by US personnel in Abu Ghraib prison in Iraq, President Bush stressed that there were investigations underway, "some of them related to any criminal charges that may be filed". He continued: "in our system of law, it's essential that those criminal charges go forward without prejudice. In other words, people need to be – are treated innocent until proven guilty".[200]

Amnesty International is deeply concerned by the failure of the President, the Commander-in-Chief of the Armed Forces, to ensure respect for the presumption of innocence equally in the case of all those potentially facing criminal trials.

7. A fiction: The right to trial within a reasonable time

Under the ICCPR and other international instruments, persons who are detained pending trial on criminal charges must be tried within a reasonable time or released pending trial.[201] Furthermore, international law requires that proceedings in criminal cases be completed without undue delay.[202] This extends not just to the trial itself, but also to periods of pre-trial detention.

This right is recognized in the Sixth Amendment to the US Constitution which states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". According to the US Supreme Court,

> "In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial… [O]bviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual."[203]

The right to a speedy trial under the Uniform Code of Military Justice stems from the Sixth Amendment right, and is similarly seen as essential to protecting the "command and societal interest in the prompt administration of justice".[204] If the accused is denied his or her constitutional right to a speedy trial, "the only possible remedy" is dismissal of the indictment and release of the detainee.[205]

According to the US government, however, neither the US Constitution, nor the UCMJ, nor the ICCPR, applies to foreign nationals held as "enemy combatants" in Guantánamo or elsewhere outside the USA. Although President Bush used the right to justice of the families of the victims of 9/11 in urging Congress to pass the MCA, his administration has apparently taken the view for five years that society has no interest in the prompt administration of justice in the case of detainees held in the "war on terror".[206] The detainees have been left to the whim of the executive, with some held, for example, for more than four years in secret custody. A 2003 Pentagon report on interrogations advised that the timing of prosecutions by military commission would have to be considered against the need to keep interrogation methods secret.[207] In the case of the 10 detainees charged for trial by military commission under the November 2001 Military Order, part of the reason why their right to a prompt trial was not met was because the administration established and defended to the end a patently unlawful military commission process, as was pointed out by many organizations, jurists and other individuals – including 700 US law professors and lawyers – well before the US Supreme Court struck the commissions down in June 2006.[208]

The question arises as to how the right to a trial within a reasonable time fits into the detention regime developed by the US government. After all, the question of trials has been made a peripheral issue by this regime, demoted by the priority given to intelligence-gathering and protection of national security as the stated purposes of detention. As already noted, the vast majority of those held as "enemy combatants" will never face trials by the USA. Instead they are held in indefinite detention without charge, their plight in the hands of the executive, presumed and found "guilty" of being "enemy combatants" by CSRTs relying on secret and coerced evidence, collectively labelled as "terrorists" and "killers", and kept from being able to challenge the lawfulness or conditions of detention via *habeas corpus* petitions. Their detention is, in Amnesty International's opinion, arbitrary and unlawful, violating international human rights law. For these detainees, many of whom have been held for more than five years, the question of trials within a reasonable time has been rendered wholly inoperative to their plight.

Admiral John D. Hutson, a former Judge Advocate General of the US Navy, told the Senate Armed Services Committee on 13 July 2006 that if the military commissions being envisioned for a selected few "war on terror" detainees were to be based on the UCMJ, some "modification" would have to be made in relation to the right to a speedy trial. He added that

"somebody who's been in a dark, dank hole for, you know, four years, you're going to run into speedy trial issues, I suppose so that would have to be addressed". Since the passage of the MCA, the State Department Legal Advisor said that "even following as many of the court martial rules as we can, we simply cannot have speedy trials."[209]

Under Rule 707 of the Manual for Courts-Martial, a court-martial must occur within 120 days of arrest or summons. This period was selected "as a reasonable outside limit given the wide variety of locations and conditions in which courts-martial occur". US courts have ruled that when a defendant has been held in pre-trial detention for more than 90 days, there is a presumption that speedy trial rights have been violated and the government must demonstrate due diligence in bringing the case to trial.[210] More than 1,300 days have passed, for example, since Salim Ahmed Hamdan was pronounced eligible for trial by military commission under the 2001 Military Order, and more than 900 days have passed since the government announced that he had been charged.

The MCA makes no provision guaranteeing the right to trial within a reasonable time. Indeed, the Act expressly states that "any rule of courts-martial relating to speedy trial" under the UCMJ "shall not apply to trial by military commission". Nevertheless, there are some guidelines for timing in the MMC, not enshrined in law, given the wording of the MCA.

Once the convening authority has issued the order that charges against a detainee will be tried by a specified military commission, the prosecutor assigned to the case has the responsibility to ensure that a copy of the charges is provided to the accused and to the military defence lawyer assigned to the case. This service of charges must be made "sufficiently in advance of the trial to prepare a defense".[211] Within 30 days of the service of charges, "the accused shall be brought to trial."[212] This means that the accused will be brought to a military commission session where the charges will be read and the detainee will be asked to plead.

Within 120 days of the service of charges, "the military judge shall announce the assembly of the military commission".[213] This does not necessarily mean that the trial begins, only that beyond this point the members of the commission may not be changed without "good cause".[214] Under the military commission rules, "as soon as practicable after the service of charges", the military judge sets "an appropriate" schedule for discovery (the pre-trial disclosure of information to the opposing party).[215] The military judge can delay military commission proceedings "only upon finding that the interests of justice served by taking such an action outweigh the best interests of both the public and the accused in a prompt trial of the accused".[216]

If the speedy trial provisions under the MCA, such as they are, are violated, the military judge has the power to dismiss the charges against the detainee with or without prejudice to the government's right to reinstitute military commission proceedings at a later date.[217] However, even if the judge were to dismiss the charges with prejudice to the government, the remedy that would be available to someone charged with a criminal offence in the USA – release from custody – is unavailable to the "alien unlawful enemy combatant". In his case, the government could simply return him to indefinite detention.

Even if a detainee is tried by a military commission and acquitted, he may be returned to indefinite detention as an "enemy combatant".[218] Clearly, the right to a trial within a reasonable time in such a case would have little meaning to the individual in question, and have done nothing to meet society's interest in the prompt and fair administration of justice.

8. The right to counsel before, at and after trial

Everyone arrested or detained – whether or not on a criminal charge – and everyone facing a criminal charge – whether or not detained – has the right to the assistance of legal counsel.[219] The right to a lawyer generally means that a person has the right to legal counsel of their choice.[220] Everyone charged with a criminal offence has the right to defend him or herself in person or through a lawyer.[221]

The US Supreme Court has said that "even without employing brutality, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals".[222] The practice of incommunicado detention, it said, "is at odds with one of our Nation's most cherished principles – that the individual may not be compelled to incriminate himself."[223] In early 2002, the Justice Department advised the Pentagon that this constitutional protection would not be applicable to defendants facing trial by military commission: "US military tribunals convened abroad are not required to grant aliens rights under Self-Incrimination Clause" [of the Fifth Amendment to the US Constitution].[224] In the "war on terror", detainees have been repeatedly interrogated in incommunicado or secret detention, without access to a lawyer, over a period of years. Some of them now face trial by military commission.

Detainees held in Guantánamo have been interrogated prior to their transfer to the base, including in Afghanistan or other countries, and by US agents and agents of other countries. Interrogations began in Guantánamo in January 2002. On 27 February 2002 – five years ago – the Secretary of Defense said that the USA was beginning the process of interrogating with a view to possible prosecution.[225] An April 2003 Pentagon report on interrogations noted that "one of the Department of Defense's stated objectives is to use the detainees' statements in support of ongoing and future prosecutions".[226] The following month, a classified FBI memorandum stated that "FBI agents and DOD [Department of Defense] investigators at Guantánamo conduct interviews on a daily basis in response to a steady number of criminal and intelligence-related leads. Some of the information gathered from these interviews is likely to be used in military tribunals and, possibly, in federal court." The same document notes that members of the Defense Intelligence Agency's Defense HUMINT Service were "being encouraged at times to use aggressive interrogation tactics" in Guantánamo. It continued:

> "Not only are these tactics at odds with legally permissible interviewing techniques used by US law enforcement agencies in the United States, but they are being employed by personnel in GTMO who appear to have little, if any, experience eliciting information for judicial purposes. The continued use of these techniques has the potential of negatively impacting future interviews by FBI agents as they attempt to gather intelligence and prepare cases for prosecution".[227]

Despite the use of aggressive interrogations for possible prosecutorial purposes, no detainee was provided legal representation. Although detainees were given access to lawyers for the purpose of filing *habeas corpus* petitions following the *Rasul v. Bush* ruling by the US Supreme Court in June 2004, detainees continued to be subjected to interrogation in the absence of counsel. Agents of other governments, including China, Egypt and Libya, are also reported to have participated in interrogations of unrepresented detainees held in Guantánamo, amidst allegations of ill-treatment.[228]

By March 2007, the 14 detainees who were transferred in September 2006 from secret CIA custody for the stated purpose of trial by military commission still had no access to legal counsel, even as the administration continued to undermine their right to be presumed innocent. For example, the US Attorney General, the country's chief law enforcement officer, said in November 2006, "Architects of the September 11th attacks have been captured and interrogated … and we have learned vital information from them which has enabled us to prevent further attacks. Khalid Sheikh Mohammed, Abu Zubaydah, and Ramzi bin al Shibh today await justice before a military commission at Guantánamo Bay."[229] Abu Zubaydah, for example, has been held since March 2002 without access to counsel. He had been shot several times during his arrest, and it is alleged that painkillers were used "selectively" to obtain his cooperation during interrogation.[230] Not only would this qualify as torture, any statements obtained as a result of such treatment should be inadmissible as evidence in any legal proceedings, except against those responsible for the torture. Thirty years ago, the US Supreme Court said that "due process of law" requires that statements extracted under "virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness…cannot be used in any way against a defendant at his trial".[231] Interrogating a man being treated for serious gunshot wounds in this way has been said by a US Supreme Court Justice to be "the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods" constituting "an immediate deprivation" of the inmate's rights.[232]

President Bush has stated that "we knew that Zubaydah had more information that could save innocent lives, but he stopped talking."[233] As a result, the CIA designed and implemented a new interrogation program which allegedly proved to be "highly effective" on Abu Zubaydah held incommunicado in secret detention without a lawyer.[234] More than four years later, Abu Zubaydah is still being denied access to legal representation on the grounds that because of his "involvement in the high-value terrorist detainee program, it is highly likely he will possess, and may be able to transmit to counsel, information that would be classified at the TOP SECRET//SCI [Sensitive Compartmented Information] level".[235] Abu Zubaydah was the victim of an enforced disappearance. The information that he possesses includes details of interrogation techniques, detention conditions and facilities in the CIA's secret program. Amnesty International is concerned that Abu Zubaydah and the other 13 recent transferees are being denied legal representation on the grounds that they might relay to counsel allegations of serious governmental government conduct.

Once any individual has been identified as a suspect in a crime, that person has the right to be informed that he is a suspect, to be informed of his rights – including the right to

remain silent without such silence being a consideration in the determination of guilt or innocence, to have counsel of his own choice and to have free legal assistance if unable to pay for it, and not to be questioned in the absence of counsel. As the Rules of Procedure and Evidence of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court make clear, these rights apply even to persons suspected of the most serious crimes: genocide, crimes against humanity and war crimes.[236] Abu Zubaydah, for one, has variously been described by the US authorities since his arrest as "a key terrorist recruiter, an operational planner, and a member of Usama bin Laden's inner circle", and as a "dedicated terrorist".

The criminal cases against the 14 detainees transferred to Guantánamo from secret CIA custody in September 2006 are already being developed by government lawyers.[237] As already noted, the authorities have said that it will take some time before the cases of the 14 come to trial "because they are extraordinarily complex". Similar complexity will undoubtedly be faced by the defence, and to deny legal representation even as the prosecution is developing the case is not only to deny the detainee's right to counsel but to jeopardize his right to adequate time and resources for the preparation of his defence. It constitutes a clear breach of the fundamental principle of "equality of arms", sometimes referred to as the most important criterion of a fair trial.[238]

As to legal representation once a detainee is charged with a crime, the rules of military commission under the MCA constitute an improvement over the rules under the pre-*Hamdan* commission system. For example, under the MCA the defendant will be able to represent himself if he so chooses, as long as "his deportment and the conduct of the defense [conforms] to the rules of evidence, procedure, and decorum applicable to trials by military commission". If he fails in this regard, the military judge may wholly or partially revoke the defendant's right to self-representation.[239]

Nevertheless, the right to a lawyer of one's choice is still restricted under the MCA. A defendant charged for trial by military commission may retain a civilian lawyer, but would have to bear the cost unless that person offered his or her services *pro bono*. The civilian lawyer must be a US citizen and have passed stringent security clearance.[240] A defendant is not able to choose as a lawyer a non-US national, for example, a lawyer from his own country. Yemeni national Ali Hamza al-Bahlul, for example, charged for trial by military commission under the 2001 Military Order, had wanted to represent himself. This was not provided for under the Military Order. According to his military lawyer during pre-trial proceedings in 2004, al-Bahlul's second preference was to be represented exclusively by a Yemeni lawyer. His last preference was to be represented by a US military lawyer with a Yemeni lawyer acting as co-counsel.

According to the wording of the MCA, even if the defendant retains a US civilian lawyer with the necessary security clearance, he will still be represented by a US military lawyer as associate counsel, even if that goes against the defendant's wishes.[241] Although defence counsel can be excused, according to the MMC, "with the express consent of the accused", this appears to apply only to a case of a detainee who wishes to dismiss all counsel and represent himself.[242]

Essentially, the same rules apply to the question of appellate counsel. The Secretary of Defense establishes procedures for the appointment of appellate counsel, both for the appellant and the government.

The right to be defended by a lawyer of one's choice recognizes the importance of trust and confidence between the accused and their lawyer. This has been heightened in the case of detainees held in Guantánamo where the authorities have reportedly sought to undermine the relationships between detainees and their *habeas* counsel, in contravention of the UN Basic Principles on the Role of Lawyers which require governments to ensure that lawyers are able to perform all of their professional functions without hindrance or improper interference (Principle 16). For example, a lawyer representing Kuwaiti detainees alleged that 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 told him that interrogators have told them not to trust their lawyers, including "because they are Jewish". A Yemeni detainee has reported that another detainee had a "lawyer" who made him multiple visits. The "lawyer" subsequently turned up in military uniform.[243] One possible outcome of any breakdown in trust as a result of such occurrences might be expected to be that some defendants may choose to represent themselves. If this were the case, it would raise questions of whether such a choice was genuinely voluntary.

A defendant must be mentally competent to stand trial or to represent himself if he so chooses. In US criminal trials, the test for both is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as a factual understanding of the proceedings against him."[244] Under the MCA, a defendant will not be brought to trial if it is established by a preponderance of the evidence that he is incompetent to the extent that he "is unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense of the case".[245] The convening authority (before or after the detainee is charged), or the military judge (after the detainee is charged) may order a mental examination. If he or she does so, the matter will be referred to a board consisting of one or more physicians, psychiatrists or clinical psychologists, who will report on the mental capacity of the defendant. It is not clear who these individuals will be, and whether they will be attached to the military detaining authorities.

Again questions of trust may arise. Medical personnel have been involved in the interrogation of detainees in Guantánamo and elsewhere and interrogators have had access to detainee medical records, causing the ICRC to protest.[246] Amnesty International has recently again been told, for example, that Guantánamo detainee Mohamed al-Qahtani (see box in Section 10 below) remains afraid to seek medical attention because of the involvement of medical personnel in his torture and ill-treatment.[247] Amnesty International believes that any medical or mental health evaluation of defendants in the context of military commission trials should be culturally appropriate and conducted by independent health professionals.

The nature of the detention regime has implications for the mental health of detainees, and their possible fitness to stand trial. It is now more than three years since the ICRC revealed its concern that the indefinite nature of the Guantánamo detentions was having a

serious impact on the psychological health of a large number of the detainees held there. In June 2006, three detainees died in the base, after apparently hanging themselves in their cells. There have been numerous other suicide attempts.

9. The right to call and examine witnesses

Article 14.3(e) of the ICCPR provides that any criminal defendant must be allowed, "in full equality", to be able "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This provision is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution.[248]

The location and the circumstances in which the detainees are held, as well as the length of time they have been detained, conspire against the capacity of a military commission defendant to locate and call witnesses who could testify in his defence. In a *habeas corpus* petition in US federal court in December 2005, for example, lawyers for Yemeni national Ali Hamza al-Bahlul, charged in February 2004 for trial by military commission, raised the possibility that the government was planning to use as evidence against him statements obtained from other Guantánamo detainees who had since been released, and might therefore be unavailable for cross-examination.

The record of the CSRT process – under which a detainee's confirmed status as an "enemy combatant" makes him eligible for trial by military commission – calls into question the willingness of the US military authorities to permit detainees to call witnesses on their behalf. A study of the CSRT records has found that in more than half of the cases where a detainee asked to call a witness for his CSRT hearing, the witness sought was an individual who was not a fellow detainee held at Guantánamo. *All* such requests for a witness from outside the base were denied by the US authorities.[249] With this in mind, the following amendment to a Department of Defense fact sheet on military commissions may herald an area of particular concern in relation to forthcoming trials. A version of the fact sheet dated 16 October 2006 states that any defendant tried by military commission has "the *right* to call and cross examine witnesses". A revised version, dated 8 February 2007, states that "current legislation and commission rules provide…an *opportunity* to present evidence and call witnesses" (emphasis added).[250]

The MCA provides that "the accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing, as provided for by this chapter".[251] The test of whether this guarantee is meaningful will be how the rules and procedures prescribed under the Act are implemented. However, some provisions of the MMC give rise to concern. For example, a witness "whose identity or name and appearance is classified, privileged, or otherwise protected from disclosure" can be allowed by the military judge "to be identified by a pseudonym during all commissions sessions, and to testify from behind a protective screen". The witness would be out of the view of the defendant and his counsel, but within the view of the military judge and the

commission members. The anonymous witness could also testify from a remote location by closed-circuit television, still hidden from the view of the defendant and his counsel.[252] Amnesty International is concerned that, in the context of military commissions, to the extent that it would be the government that would offer and be allowed to offer such an anonymous witness, the defence would be left considerably impaired in its capacity to assess or impeach the witness's credibility.

The use of hearsay evidence and classified evidence has particular potential to come into conflict with the fair trial right of any defendant to be able to challenge the evidence against him or her.[253] In promoting the MCA, the administration explained that the need to resort to classified and hearsay evidence were among the reasons why the administration favoured military commissions over courts-martial.[254]

The consequences of admitting unreliable hearsay evidence are even direr in cases involving the potential application of the death penalty. International standards require that any trial that may end in the death penalty give "all possible safeguards to ensure a fair trial", and evidence must be "clear and convincing leaving no room for an alternative explanation of the facts".[255] The reliance upon classified and hearsay evidence without clear and reliable corroborating evidence threatens to undermine this safeguard.

9.1 Hearsay evidence

The right to confront one's accusers "is a concept that dates back to Roman times".[256] This right is protected in the US Constitution. The Sixth Amendment's confrontation clause provides that "in all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him".

A primary reason that hearsay evidence is normally disallowed in ordinary criminal proceedings is that the party against whom the statement is introduced is unable to effectively challenge the statement as the person who made the statement is typically not present in court or subject to cross-examination. In the 1969 version of the Manual for Courts Martial under the UCMJ, for example, hearsay was considered incompetent evidence and was inadmissible. In 2004, the US Supreme Court ruled that "testimonial" statements (such as statements made during custodial interrogations or previous judicial proceedings) of witnesses who are absent from a criminal trial because of their unavailability can only be admitted "where the defendant has had a prior opportunity to cross-examine". The Court added that "dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty". It warned that "reliability is an amorphous, if not entirely subjective, concept" and that "vague standards" relating to the right to confrontation are "manipulable". This would be of particular concern in "politically charged cases", where "the impartiality of even those at the highest levels of the judiciary might not be so clear."[257]

The MCA provides for a more permissive use of hearsay than would be allowed under the Federal Rules of Evidence used in the US federal courts, rules mirrored in the UCMJ for use in courts-martial. Indeed, the US Attorney General has said that "military commissions are necessary because in many cases, the use of civilian courts would simply be

unavailable or impractical…For example, our civilian courts in the United States strictly limit the introduction of hearsay statements."[258]

The likelihood that the government will turn to hearsay evidence in trials by military commissions was suggested in the administration's version of the MCA sent to Congress on 6 September 2006. This sought to have Congress adopt the "finding" that "hearsay evidence often will be the best and most reliable evidence that the accused has committed a war crime". An expanded rationale for this approach may be gleaned from the earlier leaked version of the Act which stated that "hearsay statements from, for example, fellow terrorists are often the only evidence available in this conflict". In such circumstances, it is clear that such statements must be treated with extreme caution. For example, the "fellow terrorist" may be a person who has been in indefinite detention without charge for several years, possibly incommunicado and in a secret location. That individual may have made the statement as a result of torture or other cruel, inhuman or degrading treatment, thus making it inadmissible under international law. As the person making the statement is unavailable to be examined in court, its veracity cannot be subjected to the necessary searching inquiry. Indeed, in some instances, the "sources, methods, or activities by which the United States acquired" the information will remain classified. The "fellow terrorist" may equally be a person who has a grudge against the defendant, or who is unwittingly mistaken in the information he provides or who has been made promises in return for his testimony.

Under the MCA, "evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person".[259] Hearsay evidence that would not be admissible in courts-martial or ordinary US courts under the Federal Rules of Evidence may be admitted in trial by military commission unless the party opposing its use, having been given a "fair opportunity" to challenge the evidence, "demonstrates that the evidence is unreliable or lacking in probative value".[260] In addition, the military judge "shall exclude any evidence the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the commission", or if the introduction of the evidence is unnecessary or a waste of time.[261]

The MCA not only allows the use of hearsay evidence with lower safeguards, the rules in the MMC may actually encourage its use. For example, if there is particular evidence that is "of such central importance to an issue that it is essential to a fair trial", but it is destroyed, lost or otherwise unavailable, the military commission judge can stop the proceedings, but "only upon a finding that the United States was in possession of the evidence and the evidence was lost in bad faith or destroyed in bad faith".[262] In such circumstances, especially if the military judge takes a permissive approach to the loss of evidence, first-hand evidence may become second-hand hearsay. The same concern arises in relation to witness testimony. If a witness whose testimony "is of central importance to the resolution of an issue essential to a fair trial" is deemed unavailable, the military judge can allow the trial to continue if the government is not responsible for the unavailability. This is a broader standard than exists in courts-martial under the UCMJ (under which the judge may stop the proceedings regardless of whether the government is to blame for the witness unavailability).

The MMC states that the court martial rule would be "particularly impracticable for military commissions" because "witnesses located in foreign countries may by unavailable for many reasons outside the control of the United States, and Congress provided for the broad admissibility of hearsay precisely to allow for the introduction of evidence where the witnesses are not subject to the jurisdiction of the military commission or are otherwise unavailable".[263] The Manual also states that the MCA "recognizes that hearsay evidence shall be admitted on the same terms as other evidence because many witnesses in a military commission prosecution are likely to be foreign nationals who are not amenable to process, and other witnesses may be unavailable because of military necessity, incarceration, injury, or death."[264] The rules of hearsay under the UCMJ stress that the expression "military necessity" is "not intended to be a general escape clause". There is no such instruction under the MCA. This is a cause for concern given that in the "war on terror", the US government has taken a disturbingly broad view of "military necessity", for example, to justify holding detainees in prolonged incommunicado detention, during which time they have been subjected to torture or other ill-treatment.[265]

The MMC states that evidence that would not be admissible in courts-martial under the UCMJ's rules on hearsay may be admitted in trials by military commission if "the particulars of the evidence (including information on the general circumstances under which the evidence was obtained, the name of the declarant, and, where available, the declarant's address)" is made known.[266] However, this protection may be undermined by the rules governing the use of classified information – the government could seek to keep the identity of the witness and the methods used to obtain the evidence secret if such details are classified (see below).

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

In promoting the MCA, the administration accused critics of ignoring the fact that international tribunals allow the use of hearsay evidence.[267] This argument comes from a de-contextualized and selective postulation of international jurisprudence and ignores the fact that the use of hearsay evidence by any international tribunal is part of a whole structure, with its own built-in safeguards and working methods. Any particular procedure cannot simply be plucked from another system and effectively replicated in the military commission process if the structure and other procedures of that process are themselves flawed.

Furthermore, it should be noted that in the case of the international criminal tribunals, the finders of fact and law are panels of judges, entirely independent of any government, and expert in international law. In any military commissions convened under the MCA, the finder of law would be a single US military judge assigned to the case under regulations prescribed by the Secretary of Defense. The finders of fact would be US military officers, who may not have the necessary legal training, assigned to the case by the Secretary of Defense's designee. In addition, unlike the military commissions under the MCA, the international tribunals never have the death penalty as a sentencing option.[268]

9.2 Classified evidence

No-one should be convicted of a criminal offence on the basis of evidence that he or she has been unable to see or to challenge effectively. In addition, the government's legitimate need to protect national security must not curtail the defendant's rights under Article 14 of the ICCPR, including the right to be able effectively to challenge the evidence against him or her, and to be present at all times.

This does not mean that the state does not have legitimate interests in keeping certain information from the public realm. Article 14.1 of the ICCPR, for example, holds that there are limits to the right to an open public trial:

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

Under international standards, any closure of trial proceedings from the public must be "exceptional".[269] Amnesty International further stresses that the purpose or effect of any closure of proceedings (or the use of witnesses whose identity is kept from the defence) must not be the removal from public scrutiny of any human rights violations that may have occurred, including enforced disappearance, secret detention, torture or other cruel, inhuman or degrading treatment. Closure of proceedings in such circumstances would undermine the integrity of the entire process.

Under the MCA, the military judge may close all or part of the commission proceedings to the public, including upon making a finding that such closure is necessary to "protect information the disclosure of which could reasonably be expected to cause damage to national security, including intelligence or law enforcement sources, methods, or activities".[270] This is a matter of potential concern. The CIA's interrogation techniques, for example, are classified at "top secret" level, and according to the administration, will remain so in the future.[271] On 6 March 2007, the Pentagon announced the commencement of CSRT hearings for the 14 detainees transferred to Guantánamo from secret CIA detention, and at the same time revealed that they would be held in closed sessions "due to the high likelihood that these detainees might divulge highly classified information".[272] This could be the same at a military commission trial. A previously secret 2003 Pentagon report on interrogations advised that the "military commission will be faced with balancing the stated objective of open proceedings with the need not to publicize interrogation techniques."[273]

Classified information can be admitted in evidence in criminal prosecution in the civilian courts and courts-martial, as well as in immigration proceedings, in the USA. In 1980, Congress passed the Classified Information Procedures Act (CIPA) in order to deal with the problem of "graymail", the situation where a criminal defendant threatens to disclose classified information during the course of a trial in the hope that the government would forego prosecution rather than have the information disclosed.[274]

Under CIPA, the government is allowed to substitute an unclassified summary of classified documents for the documents themselves or to submit a statement admitting as evidence facts that the documents would tend to prove. Courts will generally employ a two-part test, to establish if the information is relevant and material (i.e. beneficial to the defendant's case). Once the court "determines that an item of classified information is relevant and material, that item must be admitted unless the government provides an adequate substitution. If no adequate substitution can be found, the government must decide whether it will prohibit the disclosure of the classified information; if it does so, the district court must impose a sanction, which is presumptively dismissal of the indictment… CIPA thus enjoins district courts to seek a solution that neither disadvantages the defendant nor penalizes the government (and the public) for protecting classified information that may be vital to national security." [275]

The availability of protections to government already provided under CIPA erodes the justification for military commissions. While CIPA applies to cases in the federal civilian courts, Military Rule of Evidence 505 is directly based on it for use in courts-martial. However, no such provisions apply in respect of military commissions. The MCA states that although the procedures for military commissions are "based upon the procedures for trial by general courts-martial" under the UCMJ, those procedures only apply to trials by military commission "as specifically provided" under the Act. No such explicit provision is made in relation to the use of classified evidence in military commission trials.

In 2006, the US Deputy Attorney General noted that the USA had prosecuted terrorism suspects in the federal courts since the 9/11 attacks:

> "Foremost, we have faced and overcome unprecedented challenges – both legally and operationally – in shepherding our cases through our criminal justice system. Let me focus specifically on our effective use of classified information in certain prosecutions... In our prosecutions involving the use of classified information, we undertake an important and essential balance. We must balance our obligation to hold defendants accountable for criminal conduct and the defendants' right to a fair trial, while, at the same time, not compromising our national security. The balance is delicate and difficult, and it ultimately takes place within the protocols Congress provided in the Classified Information Procedures Act. Article III federal judges administer these Congressionally-provided protocols and procedures in order to balance the Government's need to protect classified information with a defendant's right to a fair trial."[276]

In the case of military commissions convened under the MCA, any classified information "shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security".[277] This rule applies to "all stages of the proceedings of military commissions, including the discovery phase".[278] If classified information is disclosed to the defence, the military judge can issue a protective order to ensure that it is not made public. Alternatively, where the classified information is not to be disclosed, the military judge may authorize, but only "to the extent practicable", the deletion of classified parts of

documents to be introduced as evidence or their substitution with a summary version or a "statement of relevant facts that the classified information would tend to prove".[279]

The prosecution may also be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities by which the United States acquired the evidence", if the military judge finds that the evidence is "reliable" and the sources, methods or activities classified. An unclassified summary of the "sources, methods, or activities" may be provided to the defence, but again only "to the extent practicable and consistent with national security".[280] Of overriding concern is the applicability of these provisions even to any classified evidence that "reasonably tends to exculpate the accused".[281] Thus, the defendant may well be denied access to some or all government evidence that would serve to prove his innocence, if that evidence is classified and the government with the assent of the military judge considers it "impracticable" to provide a summary version. The prosecution may also object to any examination of a witness or motion to admit evidence by the defence that could lead to the disclosure of classified information, and following such an objection the military judge would take "suitable action to safeguard such classified information".[282]

The government may at any time request an *in camera* presentation if it wishes to invoke the national security privilege or use any classified information. In order to obtain such a hearing, the government can submit an affidavit to the military judge showing that disclosure of the information could reasonably be expected to damage national security. This affidavit would be examined by the military judge only, and would not be provided to the defence. If the judge agrees with the affidavit, an *in camera* presentation is held from which, if the prosecution so requests, the defendant would be excluded. At the presentation, the judge would hear arguments from the defence lawyer and the prosecution, before determining whether the information could be disclosed at the commission proceeding.[283] The effectiveness of any such arguments by the defence must be called into question in respect of any presentation from which the defendant is excluded.

Amnesty International is concerned that defendants may face a possibly insurmountable, barrier in relation to testing certain classified evidence used against them. The defence may be denied the ability effectively to challenge classified information or the "sources, methods, or activities" by which it was acquired by the US authorities. If deletions, summaries or substitutions are considered "impracticable", the defence may even be denied the totality of the information deemed classified. The US has already engaged systematically in practices of unlawful detention and interrogation in the "war on terror", in contravention of international standards. These practices have included some justified under the concept of "military necessity". This principle, lifted from the normal situation in the law of armed conflict for application to criminal justice, is used to justify the use of military commissions and the rule under which they will be conducted.[284] Furthermore, given that such policies have been cleared by government lawyers responding to the administration's war paradigm, the likelihood of a military commission judge or prosecutor rejecting such policies may be remote.

Amnesty International considers that the admission of evidence that has been or might have been obtained by unlawful methods is antithetical to the rule of law and would

seriously damage the integrity of proceedings. The "national security privilege" as it is described in the MCA, often known in the USA as the "state secrets privilege", should be used neither to cover-up nor encourage government abuse.[285]

The use of substitutions, such as in the form of unclassified summaries or statements of facts, in any judicial proceeding raises serious concern, even more so in trials before military commissions employing lesser safeguards and in the context of a "war" in which the executive has relied upon secrecy and claims of "military necessity" to facilitate unlawful activities. As one leading commentator has noted:

> "Substitutions are also powerful weapons for the prosecution with a high potential for abuse. They are used where the defendant's right to a fair trial most directly conflicts with the government's need to protect national security information. Substitutions change admissible evidence into a different form, without consent of the defendant, for reasons unrelated to criminal justice concerns."[286]

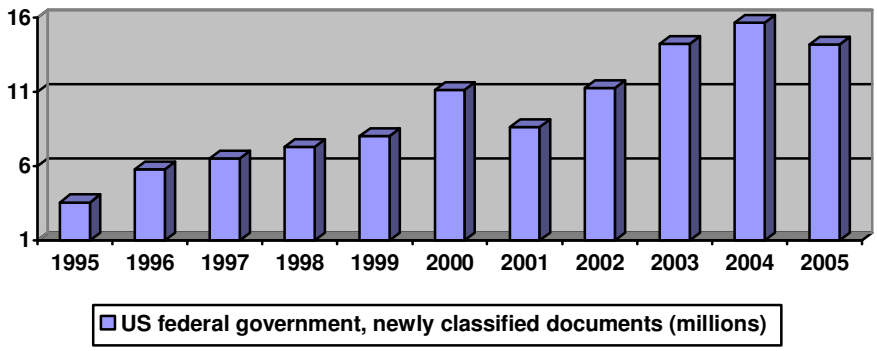
A substitution can be seen as "hearsay within hearsay – a written statement drafted out of court, summarizing other out-of-court assertions, offered to prove the truth of the matter asserted".[287] Hearsay within hearsay is admissible under the MCA, but again with less stringent safeguards than apply under the UCMJ.[288]

At the very least, if substitutions are used, rigorous and independent judicial scrutiny is required to ensure that the prosecution does not abuse them to avoid disclosing evidence that might benefit the defence. The Secretary of Defense may also prescribe additional regulations at any time.[289] This could be a cause for concern given that the Office of the Secretary of Defense has been implicated in, but not held to account for, human rights violations committed by the USA in the "war on terror". There may be a conflict between the administration's obligation to ensure fair trials and a temptation to prevent the disclosure of information about such human rights violations.

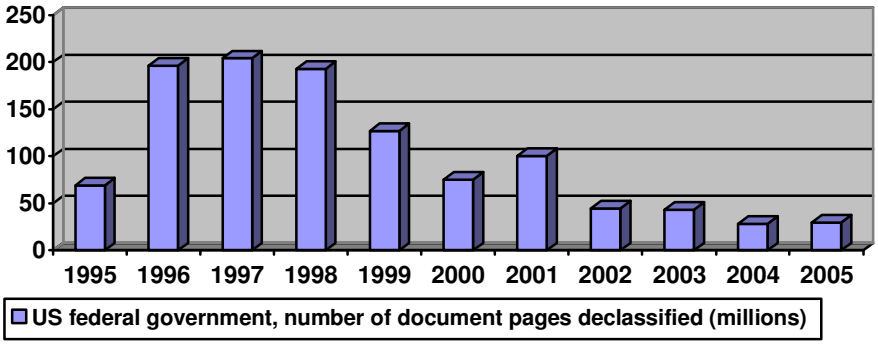
It should be noted that "over-classification is a constant pitfall and that executive branch officials tend to exaggerate the need to keep information secret".[290] According to a former US Solicitor-General, it is apparent "to any person who has considerable experience with classified material that there is massive over-classification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another". [291] In 2005, in a case involving CIA detentions, a US District Court Judge noted "an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already know, or that which is more embarrassing than revelatory of intelligence sources or methods".[292]

The current US administration is one which has resorted to secrecy more than its predecessors.[293] Certainly in the context of the "war on terror", the US administration has resorted to a level of secrecy that has been widely criticized, including by the UN Committee against Torture, the UN Human Rights Committee and Amnesty International.[294] Possible unlawful fruits of this secrecy could have a direct impact on detainees in Guantánamo or elsewhere who may face trial. Classified documents authorizing interrogation techniques that violated the international prohibition of torture or other cruel, inhuman or degrading treatment

have only came to light because of leaks following the Abu Ghraib scandal and litigation pursued under the USA's Freedom of Information Act. Much remains classified in the face of government resistance to declassification.



Charts included as indicators only. Source: Information Security Oversight Office, compiled by OpenTheGovernment.org. *Secrecy Report Card 2006: Indicators of Secrecy in the Federal Government* (Does not include data from the CIA because the agency has classified that information).



In the CIA detentions case in 2005 (referred to above), the US District Court judge suggested that: "historians will evaluate, and legislators debate, how wise it is for a society to give such regard to secrecy. The practice of secrecy, to compartmentalize knowledge to those having a clear need to know, makes it difficult to hold executives accountable and compromises the basics of a free and open democratic society". [295]

Whatever future historians might conclude about the wisdom of such executive secrecy, no defendant should be put in the position of being rendered unable effectively to challenge evidence against him or to reveal human rights violations that may impact his case. Trials by military commissions under the MCA threaten to achieve precisely this result.

Secrecy and human rights violations – implications for trial by military commission

Prior to President Bush's confirmation of the CIA secret detention program on 6 September 2006, the government had argued in District Court that the agency must not be compelled either to confirm or deny the existence of a presidential directive authorizing the CIA to establish detention facilities outside the USA and a Justice Department memorandum on CIA interrogations. Even to acknowledge the existence or non-existence of these documents, the CIA argued, would reveal that the CIA was involved in detentions and could cause serious damage to national security.[296] Although there was already much evidence in the public domain about CIA detentions and associated human rights violations, in September 2005 the District Court judge ruled that he had "small scope for judicial evaluation in this area" and accepted the CIA's position.[297]

While an appeal of this decision was pending, President Bush confirmed the secret program while seeking congressional approval for the Military Commissions Act. Clearly, his speech made the government's justification for not confirming or denying the existence of the documents untenable. It backtracked to suggest that the President's "determination to bring the CIA detainees to trial" (a determination hitherto not acted upon) had led the authorities to determine that the public interest in disclosing limited information about the secret detention program outweighed the need to protect "certain limited classified information relating to the existence of the program".[298]

The case was sent back to the District Court, where the government confirmed the existence of two documents "responsive" to the two raised in litigation. One is an 18-page Justice Department memorandum dated 1 August 2002 containing legal advice to the CIA regarding potential interrogation methods, including in response to the CIA raising particular methods. The other is a 14-page memorandum from President Bush to the CIA Director dated 17 September 2001 and "pertaining to the CIA's authorization to detain terrorists". The latter contains "specific details" of the CIA's secret detention program that President Bush declined to disclose in his address of 6 September 2006.[299] The details upon which the President had expressly declined to elaborate included location of secret facilities, the conditions of confinement and the interrogation techniques used. [300]

In January 2007, the government declared that it was withholding the two documents in their entirety as they contained information, including on interrogation methods, classified "top secret", the disclosure of which could cause "exceptionally grave damage" to national security and undermine "the cooperative relationships that the United States has developed with its critical partners in the global war on terrorism". The effect, if not the purpose, of its decision is to conceal human rights violations.

The government has asserted that no information in the two documents had been classified in order to "conceal violations of law". Yet secret detention, in and of itself, violates the USA's treaty obligations, as the UN Committee against Torture and the Human Rights Committee told the US government in 2006. The CIA program was cleared by government lawyers. The government's interpretation of the law, and by extension its assertions that no classification is concealing violations of the law, must be treated with extreme caution.

In trials by military commission under the MCA, the prosecution may be permitted to introduce evidence while protecting from disclosure "the sources, methods, or activities" by which the USA acquired it, if the military judge finds that the evidence is "reliable" and the sources, methods or activities classified. Amnesty International fears that the military commissions will lack the independence and impartiality to proceed with the necessary skepticism and to conduct the necessary searching inquiries into alleged government misconduct. As such, the commissions would be a forum in which human rights violations are whitewashed and trials unfair.

10. Use of information obtained by unlawful methods

A fundamental minimum fair trial standard is the right not to be compelled to testify against oneself or to confess guilt.[301] Another is that no statement may be admitted as evidence in any proceedings where there is knowledge or belief that the statement has been obtained as a result of torture or other cruel, inhuman or degrading treatment or punishment.[302] The UN Human Rights Committee has stated that "the law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable."[303] The MCA fails in this regard. It neither guarantees these detainee rights nor requires the government to abide generally by its international legal obligations.

The US Supreme Court wrote, in the case of a prisoner held for *four days* incommunicado and coerced into confessing, that "when interrogation of a prisoner is so long continued, with such a purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling admission of guilt, due process precludes the use of the confession thus obtained".[304] In the "war on terror", many detainees have been interrogated over a prolonged period, sometimes in excess of years, in incommunicado and secret detention, for the purpose of obtaining information, some of which may yet be used in trials by military commission.

Article 15 of the Convention against Torture prohibits statements obtained as a result of torture being used as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. Other coercive techniques – cruel, inhuman or degrading interrogation methods or detention conditions – are similarly prohibited under international law and statements extracted as a result of them must be inadmissible in any court.[305] In May 2006, the UN Committee against Torture communicated to the USA that "detaining persons indefinitely without charge constitutes *per se* a violation of the Convention [against Torture]". This coercive regime has been compounded by the fact that none of the detainees has been given access to lawyers during interrogations.

In its authoritative interpretation of article 7 of the ICCPR (prohibition on torture or other cruel, inhuman or degrading treatment or punishment), the UN Human Rights Committee has stated: "It is important for the discouragement of violations under article 7 that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment".[306] In its July 2006 conclusions on the USA's compliance with its obligations under the ICCPR, the Human Rights Committee called on the USA to "refrain from relying in any proceedings on evidence obtained by treatment incompatible with article 7".

International humanitarian law also prohibits coercion. The Third Geneva Convention provides: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever" (Article 17). The Fourth Geneva Convention provides: "No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties" (Article 31). Common Article 3 to the four Geneva Conventions prohibits torture, cruelty, and "outrages upon personal dignity, in particular, humiliating and degrading treatment", and at

the same time prohibits trials by anything other than "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

The exclusionary rule is an inseparable part of the general prohibition on torture and other cruel inhuman and degrading treatment, and must include any information, not only statements, obtained as a result of torture or other ill-treatment. The exclusion is not limited to the torture or ill-treatment perpetrated by agents of the prosecuting state. If the latter obtains evidence that has been obtained by the unlawful actions of another government, that too must be inadmissible, except as evidence against the perpetrator of the illegality.[307] Whatever its origins, the admission of evidence that has been obtained by torture or other cruel, inhuman or degrading treatment is antithetical to the rule of law and would seriously damage the integrity of proceedings. In 1952, the US Supreme Court stated:

> "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause [of the Constitution's 14th Amendment] even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct that naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."[308]

> And a dozen years later, the Court wrote:

> "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will, and because of the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."[309]

Earlier, the Supreme Court held that a trial is a "mere pretence" where the authorities "have contrived a conviction resting solely upon confessions obtained by violence".[310] Even if a confession is shown to have been coerced, its impact on the jury may still linger. Confessions have a "profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so."[311] Even where a coerced confession constitutes only one part of the evidence that supports a conviction, "no one can say what credit and weight the jury gave to the confession", and its admission "vitiates the judgment" because it violated due process.[312]

Due process requires that "state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions".[313] Thus, when it comes to trials, prosecutors should see themselves as the first line of defence in protecting the integrity of the proceedings by

preventing the use of evidence that has been obtained by torture, ill-treatment or other unlawful methods. The UN Guidelines on the Role of Prosecutors require that such officials be fully cognizant of "human rights and fundamental freedoms recognized by national and international law". The Guidelines continue that:

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

Under the MCA, the procedures governing the appointment of military or civilian prosecutors to military commissions are prescribed by the Secretary of Defense, raising concern about their independence, including in relation to human rights violations that have been authorized or condoned by, among others, the Office of the Secretary of Defense. Recourse to methods that violate international law has been systematic in the USA's "war on terror". They include enforced disappearance, secret detention, prolonged incommunicado detention, prolonged indefinite detention without charge or trial, interrogation methods and detention conditions that amount to torture or other cruel, inhuman or degrading treatment or punishment, denial of *habeas corpus*, and denial of legal representation. All of these practices have been authorized or used in a detention regime established expressly to obtain information from detainees so held, some of whom will face prosecution.[314] Given that such policies and practices have been cleared by certain government lawyers, Amnesty International is not confident that they will be opposed by government prosecutors in the context of military commissions, and is concerned that they may not be subject to the searching inquiries that allegations of such practices would more likely face if raised in criminal trials conducted in the federal District Courts.

While intelligence-gathering is a legitimate and necessary exercise in the pursuit of protecting human security, the methods must comply with the law, including international law on the treatment of detainees. Coercing confessions and then using them at trial has, as the US Supreme Court said in 1936, been "the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions".[315] The question here is whether trials by military commissions under the MCA will prove to be more than a 21st century cousin of the Star Chamber.[316]

In 1961, the Supreme Court ruled that while judicial determination of whether a confession was coerced can turn on the facts of the particular case, cases involving "physical brutality, threats of physical brutality, and such convincingly terror-arousing…incidents of interrogation as the removal of prisoners from jail to jail, at distances from their homes, for questioning in secluded places, the keeping of prisoners unclothed and standing on their feet for long periods during questioning [and] deprivation of sleep…used to sap the prisoner's sleep", did not fall into any such ambiguous category.[317] This list is relevant to the array of detention conditions and interrogation techniques that detainees in US secret and incommunicado custody have suffered during the "war on terror".[318] The names of the

techniques may have changed – for instance, extremes of temperature become "environmental manipulation", sleep deprivation by moving detainees from cell to cell during the night becomes the "frequent flyer program", and threatening detainees with dogs becomes an example of "increasing anxiety by use of aversions". Generally, in the "war on terror", acts that constitute torture or other cruel, inhuman or degrading treatment have been euphemized by the USA into "stress and duress" techniques. But as the Supreme Court has recognized, "there is torture of mind as well as body; the will is as much affected by fear as by force."[319] The Court has also emphasized that, "coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition…[T]he efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion'."[320] The conduct of interrogators requiring exclusion of a statement obtained by them has therefore "evolved from acts of clear physical brutality to more refined and subtle methods of overcoming a defendant's will".[321] Recent research involving survivors of torture is instructive in this regard, concluding that:

> "[A]ggressive interrogation techniques or detention procedures involving deprivation of basic needs, exposure to aversive environmental conditions, forced stress positions, hooding or blindfolding, isolation, restriction of movement, forced nudity, threats, humiliating treatment, and other psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects. Such stressors satisfy the criterion of 'severe mental suffering', which is central to the definition of torture in international conventions".[322]

Before examining the specific provisions of the MCA on the issue of coercion, it should again be noted that the trials would be conducted in a near legal vacuum. According to the government, a foreign national subjected to trial by military commission in Guantánamo or elsewhere outside the USA, can turn neither to the US Constitution for protection, nor to the Uniform Code of Military Justice, nor to international human rights law, nor to the Geneva Conventions. For more than four years of detentions, prior to the passage of the Detainee Treatment Act in December 2005, the administration took the position that the prohibition on cruel, inhuman or degrading treatment in Article 16 of the Convention against Torture did not apply to foreign detainees captured and held outside the USA.[323] Until the *Hamdan* ruling in June 2006, the administration considered that common Article 3 to the Geneva Conventions, which prohibits "outrages upon personal dignity, in particular humiliating or degrading treatment", did not apply to these detainees either.

Under the MCA, only the rules and procedures of the military commissions as provided by the MCA apply. These leave the defendant exposed to the use of evidence coerced from him or other detainees.

Article 14(3)(g) of the ICCPR requires that "in the determination of any criminal charge against him", everyone has the right, in full equality, "not to be compelled to testify against himself or to confess guilt". Under the Fifth Amendment to the US Constitution, no one "shall be compelled in any criminal case to be a witness against himself". The

Amendment "has its roots in the Framers' belief that a system of justice in which the focus is on the extraction of proof of guilt from the criminal defendant himself is often an adjunct to tyranny and may lead to the conviction of innocent persons."[324] The protection of the Self-Incrimination Clause of the Fifth Amendment is not limited to statements compelled during a court proceeding, but extends to prior statements subsequently introduced into evidence at such a proceeding.[325]

Under the MCA, however, the protection is more limited. Although the MCA states that "no person shall be required to testify against himself *at a proceeding of a military commission*" (emphasis added), this does not expressly prohibit the admission as evidence of information earlier coerced from the defendant during his years in custody. On the contrary, the Act allows the Secretary of Defense to prescribe procedures under which a statement made by the accused "shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination" so long as its admission would not conflict with other provisions of the Act.[326] Other provisions of the Act incorporate a less than absolute prohibition on the use of evidence extracted under torture or cruel, inhuman or degrading treatment, as defined under international law and standards. The MCA also expressly allows an oral confession or admission to be "proved by the testimony of anyone who heard the accused make it, even it was reduced to writing and the writing is not accounted for".[327] No corroboration is required, unlike in trials by US courts-martial.

The MCA states that the provisions of Article 31(a), (b) and (d) of the UCMJ, which prohibit compulsory self-incrimination, "shall not apply to trial by military commission".[328] Under these provisions at a US court-martial, the protection is greater than under the MCA, and prohibits the use in evidence against a defendant of any statement obtained through "coercion, unlawful influence, or unlawful inducement".[329] In other words, a lower standard will be applied to individuals facing trial before military commissions, who are exclusively foreign nationals, than would be applied to individuals facing trial by court-martial. The Manual for Military Commissions reinforces this deficiency. It states that "alien unlawful enemy combatants have a statutory privilege against self-incrimination under [§948r of the MCA]. Other witnesses, such as United States citizens, may invoke privileges under the US Constitution or Article 31 of the UCMJ to the extent that they apply".[330] As discussed above, the availability of this protection solely to US citizens reveals the discriminatory nature of the MCA and the military commissions.

The MMC states that, subject to the rules concerning classified information, "prior to arraignment, the prosecution shall disclose to the defense the contents of all relevant statements, oral, written, or recorded, made or adopted by the accused, that are within the possession, custody or control of the Government", and which are "material to the preparation of the defense… or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial." However, if by the time of the trial, the prosecution intends to use statements made by the defendant that were not disclosed prior to arraignment, the defence can object and the military judge may use his or her discretion "in the interests of justice".[331] Depending on the inclination of the judge, this opens the door to the possibility that a

defendant may be confronted by statements he may have made under coercion during his years of detention.

The MCA prohibits the admission of any statement obtained by the use of torture (except as evidence against the person accused of torture).[332] However, the USA defines torture more narrowly than under international law. Thus, the MMC defines torture as:

> "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions) upon another person within the actor's custody or physical control. 'Severe mental pain or suffering' is defined as the prolonged mental harm caused by or resulting from:
>
> (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
>
> (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>
> (C) the threat of imminent death; or
>
> (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality."[333]

The Committee against Torture has expressed concern at this narrow definition. In May 2006, it called on the USA to "ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the [US] understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or duration".[334]

In addition, the MCA would not prohibit the admission of evidence extracted under equally prohibited cruel, inhuman or degrading treatment (as defined under international law); or under treatment that violated the state's obligation to treat anyone deprived of their liberty "with humanity and with respect for the inherent dignity of the human person" (ICCPR, article 10.1); or under treatment that amounted to "outrages upon personal dignity, in particular degrading and humiliating treatment" under Article 3 common to the four Geneva Conventions of 1949. At a hearing before the Senate Armed Services Committee on 13 July 2006, the witnesses – six former or current members of the Judge Advocate General Corps of the US Army, Navy and Air Force – all agreed that some of the interrogation techniques authorized in the "war on terror" had violated common Article 3. However, the MCA prohibits any "alien unlawful enemy combatant subject to trial by military commission" from invoking the Geneva Conventions "as a source of rights".[335]

The MCA differentiates between statements obtained before 30 December 2005, when the Detainee Treatment Act (DTA) came into force, and statements obtained after that date. The MMC notes that the MCA "requires military judges in military commissions to treat allegedly coerced statements differently, depending on whether the statement was made

before or after December 30, 2005".[336] This statement alone betrays a position that ignores the international legal requirement that any statement obtained under cruel, inhuman or degrading treatment should not be admitted into evidence, regardless of when it was obtained.

Under the MCA, in both pre- and post-DTA cases, statements "in which the degree of coercion is disputed" may only be admitted if the military judge finds that the statement is "reliable" and possesses "sufficient probative value" and if "the interests of justice would best be served by admission of the statement into evidence". In the case of statements obtained after 30 December 2005, the military judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman or degrading treatment as defined and prohibited under the DTA.

Prior to the enactment of the DTA, there were more than four years of extraterritorial detention operations by the USA in the "war terror". Many thousands of interrogations of detainees took place during this period in Afghanistan, Guantánamo and elsewhere, by agents of the US and other countries. All 10 people charged for trial by military commission under the November 2001 Military Order – and likely to be charged for trial by military commission under the MCA – had been detained for more than three years before the DTA came into force. Similarly all of the 14 men transferred from secret CIA custody to possible trial under the MCA in Guantánamo were taken into custody prior to the enactment of the DTA, most of them more than two years before. They were subject to "alternative" interrogation techniques which, although cleared by administration lawyers, are widely reported to have included methods that violate the prohibition on torture and ill-treatment.

The USA's reservations to the CAT and the ICCPR mean that, even with the passage of the DTA, it only considers itself bound by the prohibition on cruel, inhuman or degrading treatment or punishment to the extent that it matches existing US law. At a Senate Judiciary Committee hearing on 11 July 2006, to discuss the replacement to the military commissions struck down by the *Hamdan* ruling, acting US Assistant Attorney General Steve Bradbury said that "there are gradations of coercion much lower than torture… So I think there's room for discussion on that point." The Justice Department reportedly considers that constitutional law allows the courts in effect to consider a sliding scale of abuse depending on the context in which it occurs.[337] Under US Supreme Court jurisprudence, conduct is banned that "shocks the conscience", but conduct "that shocks in one environment may not be so patently egregious in another", thereby requiring an "exact analysis of circumstances before any abuse of power is condemned as conscience-shocking".[338] The wording in the MMC appears to provide scope for the military judge at a commission trial to take this approach:

> "In evaluating whether the statement is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement." [339]

As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced confessions is not just their unreliability. They should be inadmissible even if

"statements contained in them may be independently established as true", because of the fundamental offence the coercive treatment of detainees causes to the notion of due process and its corrosive effect on the rule of law.[340] In November 2006, six retired federal judges wrote: "We do firmly contend that Article III (federal) courts have a duty to inquire whether, in fact, evidence has been gained by torture or other cruel, inhuman or degrading treatment, and to reject that evidence if so obtained".[341] They noted that in the CSRT process, no such inquiry has taken place and those administrative military tribunals have relied on evidence alleged obtained under torture in affirming the "unlawful enemy combatant" status of detainees held in Guantánamo. Now some of these detainees are to face trial, by a military commission of questionable independence, in which there is again likely to be a less "exact analysis" of any coerced evidence than should be conducted in federal court.

The military commission system under the MCA leaves the determination as to what constitutes torture and other ill-treatment and whether information extracted under it can be introduced at a trial to the military and the executive authorities. The possible ramification of this for defendants in this process is illustrated by cases in which the military have investigated allegations of torture and other ill-treatment, including under techniques authorized by the executive, and found that they had not been unlawful even when international law had clearly been breached. These include the case of alleged "high-value" detainees Mohammed al-Qahtani and Mohamedou Ould Slahi (see box below).

Apart from statements by the individual appearing as a defendant before the military commission, evidence obtained through torture or other ill-treatment could be introduced through hearsay or statements from other detainees held in the coercive detention regime at Guantánamo or elsewhere. For example, the Pentagon has alleged that during his interrogation, Mohammed al-Qahtani "provided detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantánamo".[342] If any of those 30 persons were to be charged for trial by military commission, the question arises as to whether they would be able to challenge that information (Osama bin Laden's alleged chauffeur, Salim Ahmed Hamdan was one of the 10 charged for trial under the previous military commissions). The defence may not be in a position to question how the statement was obtained, its credibility or the condition of the person by whom it was made. This is because access to information which might enable the defence to challenge such a statement may be foreclosed if, as is likely in some instances, it has been classified. As noted above, under the MCA, the prosecution may introduce evidence "while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence". [343] Much of the detail about Mohammed al-Qahtani's and Mohamedou Slahi's interrogations, for example, remains classified as do other interrogation logs.

Government memorandums, still classified, reportedly advise that US authorities could benefit with impunity from information extracted under torture in other countries if it could be shown that the detainees in question were not formally in US custody.[344] Many detainees have been interrogated by other governments, with the USA reportedly having access to the interrogation process or its fruits. For example, Muhammad Haydar Zammar, a German national of Syrian descent, was reportedly "rendered" by CIA jet from Morocco to

Syria in December 2001. US officials said that they did not have direct access to Muhammad Zammar in Syria, but reportedly provided written questions to his Syrian interrogators.

Military findings on torture and other ill-treatment: implication for trials under MCA

Saudi national Mohammed al-Qahtani was held in isolation in Guantánamo for three months in late 2002 and early 2003. He was interrogated for 18 to 20 hours per day for 48 out of 54 consecutive days. He was subjected to sexual and other humiliation, stripping, hooding, loud music, white noise, and to extremes of heat and cold through manipulation of air conditioning. From July to October 2003, another Guantánamo detainee, Mauritanian national Mohamedou Ould Slahi – held incommunicado and kept from the ICRC on grounds of "military necessity" – was subjected to extremes of temperature via the air-conditioning. He was threatened with death and enforced disappearance by US interrogators. He was told that his family, including his mother, was in US custody and in danger, and that he should cooperate in order to help them. [345] Both detainees remain in Guantánamo.

The US Supreme Court has in the past ruled as "inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed."[346] In that case the detainee was held for 16 hours incommunicado. In the above cases, the detainees were held incommunicado for months. In Mohamedou Slahi's case, his detention in Guantánamo followed eight months in incommunicado detention in Jordan to where he had been transferred by the USA and allegedly subjected to torture. During his subsequent interrogation in Guantánamo, Mohamedou Slahi was taken off in a boat in circumstances "where he thought this is where he goes away" (i.e. to be killed or "disappeared"). In similar vein, Mohammed al-Qahtani was allegedly subjected to a fake rendition during his interrogation period, during which he was injected with tranquilizers, made to wear blackened goggles, and taken out of Guantánamo in a plane. [347]

A military investigation concluded that Mohamed al-Qahtani's treatment "did not rise to the level of prohibited inhumane treatment." The Pentagon has described his interrogation as being guided by the "strict" and "unequivocal" standard of "humane treatment for all detainees" in military custody.[348] Similarly, a military investigation concluded that the threats against Mohamedou Slahi did "not rise to the level of torture as defined under US law". The investigators concluded that no disciplinary action was required on the question of the use of extremes of temperature as "environmental manipulation" was an interrogation technique that had been approved by the Secretary of Defense.

Both men have since recanted statements they say were coerced out of them. The question arises, however, as to the likely result should either of these detainees – or others subjected to torture or other ill-treatment – be brought to trial by military commission. In the first instance, their treatment would not be classified as torture by the US authorities (which would rule statements extracted under it inadmissible under the MCA). In addition, while it might be classified as cruel, inhuman or degrading treatment under the DTA, these interrogations, as with thousands of others, took place before passage of that legislation. Finally, the incommunicado detention to which these two detainees were subjected – and the secret detention of the 14 detainees transferred to Guantánamo in September 2006 – has been justified by the authorities under the notion of "necessity" in the "war on terror".[349] Will a *military* commission apply the requisite critical scrutiny to such executive justification? The question of the commission's independence from the executive (particularly the Office of the Secretary of Defense) may be further implicated. If the military judge were to rule such statements inadmissible on the grounds that they were obtained under torture, the question of accountability, and in particular why no official has been brought to account, would necessarily have to be addressed. In this regard, it should be noted that former Secretary of Defense Rumsfeld authorized the "special interrogation plans" formulated for use against both of these detainees.

International standards prohibit the state from taking "advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person".[350] As well as the many explicit allegations of torture or other ill-treatment made by detainees in US custody in Afghanistan, Guantánamo and elsewhere, Amnesty International considers that the conditions in which many of them have been held amount to cruel, inhuman or degrading treatment and are in themselves coercive. The length of detention must also be considered an element in the coercive nature of the regime. Mohammed Abdullah Tahamuttan, a Palestinian arrested in Pakistan by Pakistan and US agents and transferred to Guantánamo, wrote in late 2005 in a plea for his release that "if I have said anything incriminating, it is because of the stressful psychological conditions I have endured in this prison". Ameur Maammar, an Algerian national arrested in July 2002 by Pakistan and US agents at his home in Pakistan where he had refugee status, was transferred to Bagram and later to Guantánamo where he remains more than four years later. He told his CSRT hearing in 2004 that, while he could not deny that he had been well-treated by interrogators and guards, he had by then been detained for "two and a half years for no reason", and that "all that has happened to me and my family is real torture and psychological agony".

In order to abide by their international obligations, all prosecutors and judges at the military commissions should reject any evidence obtained from a detainee held in secret detention, in prolonged incommunicado detention, in indefinite detention without access to legal counsel, and otherwise subject to torture or other cruel, inhuman or degrading treatment or punishment.

11. The right to appeal and the right to remedy

Everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal according to law.[351] This ensures that there will be at least two levels of judicial scrutiny of a case, the second of which is by a higher tribunal than the first. The UN Human Rights Committee has stated that the "provisions of article 14 [of the International Covenant on Civil and Political Rights] 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 itself be a competent, independent and impartial tribunal established by law", and there must be no discrimination of appeal rights, including on the basis of nationality.

Under President Bush's November 2001 Military Order, there was no right of appeal to a higher court from decisions handed down by military commissions. However, the Detainee Treatment Act (DTA) passed in December 2005, formulated a limited right of appeal. Under this provision, the US Court of Appeals for the District of Columbia (DC) Circuit could review the military commission's decision, but only to the extent that it was "consistent with the standards and procedures" set out in the commission rules established by the Department of Defense and, "to the extent that the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States".[352]

Under the MCA, anyone convicted by a military commission may have the commission's findings and sentence reviewed by the convening authority.[353] In addition, the Secretary of Defense "shall establish" a Court of Military Commission Review made up of panels of not less than three appellate military judges.[354] The Secretary of Defense will appoint the judges, including the Chief Judge, to this Court, which would reside within the Office of the Secretary of Defense.[355] Anyone convicted under a military commission will be able to appeal to this Court "in accordance with procedures prescribed under regulations of the Secretary of Defense". Up to this point, then, the review process, for similar reasons given above in the discussion of the military commissions themselves, would not fulfil the requirements that the appeal court be an independent tribunal. Like the military commissions, the contemplated Court of Military Commission Review is not a strictly judicial body.

This Court "may act only with respect to matters of law", and not questions of fact.[356] The Court may only grant relief if "an error of law prejudiced a substantial trial right of the accused".[357] The MCA reiterates that the DTA's (limited) right of appeal would apply, adding that the DC Circuit Court of Appeals may not review the final judgment until the review by the convening authority and the Court of Military Commission Review has been exhausted or waived.[358] The Court of Appeals would only be able to act "with respect to matters of law", and the scope of its review is limited to consideration of whether the final decision was consistent with the standards and procedures specified by the MCA and, to the extent applicable, the Constitution and the laws of the United States.[359] In addition, the MCA states that the US Supreme Court "may" review decisions of the DC Circuit Court of Appeals if it decides to do so.[360] In the ordinary criminal justice system, the Supreme Court agrees to hear appeals in only a very small percentage of cases that come before it.

The limitations in scope of appellate review provided under the MCA may fall foul of the requirement of article 14(5) of the ICCPR. The UN Human Rights Committee has stressed that an appeal solely on questions of law, without the opportunity for the appellate court to conduct an evaluation of the evidence presented at trial is insufficient.[361]

The short time permitted for initiating appeal procedures under the MCA also raises concerns. The convicted person has 20 days (or a maximum of 40 days if an extension is requested and granted) to submit "matters for consideration" to the convening authority.[362] The legislation does not specify a timeline for review by the Court of Military Commission Review, but procedures for that Court will be prescribed by the Secretary of Defense. After the accused or his legal counsel has received notice of that court's final decision, a petition for review must be filed with the DC Court of Appeals within 20 days.[363]

Except for this limited right of appeal, the MCA states that no other "court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,… relating to the prosecution, trial, or judgment of a military commission…, including challenges to the lawfulness of the procedures of military commissions…".[364] Given the abuses to which detainees have been subjected during their detentions, including enforced disappearance, secret detention and rendition, prolonged incommunicado detention, torture or other cruel, inhuman or degrading treatment, and lack of access to the courts and lawyers, this curtailment of post-conviction remedies is a serious problem.

Under Article 2.3 of the ICCPR, a state must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In an authoritative interpretation, the UN Human Rights Committee has said:

> "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." [365]

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus by the UN General Assembly in December 2005, spell out the obligations of remedy in some detail.[366] States are obliged, among other things, to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law (Principle 3(b)). They are also required to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice…" and to "provide effective remedies to victims, including reparation" (Principle 3(c and d)). These reparations should take the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" (Principle 18). The Basic Principles and Guidelines must be applied an interpreted "without any discrimination of any kind or on any ground, without exception" (Principle 25).

As a state party to ICERD, the USA must "assure to everyone within [its] jurisdiction effective protection and remedies" against discrimination, including on the basis of national origin, as well as the right to seek "adequate reparation or satisfaction for any damage suffered as a result of such discrimination" (Article 6). The MCA is discriminatory in relation to the right to judicial review and to remedy for violations. Article 2.1 of the ICCPR requires the state party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind" including on the basis of national origin. Two of the rights recognized in the ICCPR are the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court and the right to an effective remedy for violations of rights under the treaty. The UN Human Rights Committee has underlined that these two key rights are among those which cannot be curtailed even in times of public emergency that threatens the life of the nation.

On 18 October 2006, Attorney General Alberto Gonzales was asked: "If you, Mr Gonzales, were arrested and classified as an unlawful enemy combatant and you were an innocent person, what course of action would you take?" The Attorney General replied:

> "I want to emphasize that the Military Commissions Act does not apply to American citizens. Thus, if I or any other American citizen were detained, we would have access to the full panoply of rights that we enjoyed before the law."[367]

The military commissions, including the appeals process, are part of a universe of irremediableness and discrimination. The fact that they only apply to foreign nationals, and the fact that the MCA curtails the right of judicial review of the lawfulness and conditions of detentions and the right to remedy for human rights violations, but only in the cases of non-US citizens, renders both the commission process and the law itself discriminatory, in violation of international law.

12. The death penalty is not justice

The USA is showing signs of stemming its recourse to the death penalty – in the face of ever mounting evidence of the cruelty, arbitrariness, discrimination and error which marks the US capital justice system. [368] Yet at the same time, the MCA threatens to allow the US government to execute foreign nationals after military trials violating international standards of fairness. Such an outcome would mark another ugly chapter in the USA's "war on terror".

The MCA expressly includes the death penalty as a sentencing option for a variety of offences if they lead to the death of one or more people. (If no deaths occur, the maximum sentence is life imprisonment). These offences are:

- murder of protected persons (as defined under the Geneva Conventions);
- attacking civilians;
- taking hostages;
- employing poison or similar weapons;
- using protected persons as a shield;
- torture;
- cruel or inhuman treatment;
- intentionally causing serious bodily injury;
- mutilating or maiming;
- murder in violation of the law of war;
- using treachery or perfidy;
- hijacking or hazarding a vessel or aircraft;
- terrorism;
- conspiracy to commit one or more of the offences triable by military commission.

In addition, the offence of spying is punishable by the death penalty, whether or not any death can be attributed to it. The MCA does not specify whether certain categories of defendant would be exempted from the death penalty, as required under international law and standards, including those who were under 18 at the time of the crime or those with serious mental disabilities.

Amnesty International opposes the death penalty under all circumstances and has repeatedly called on the USA to join the clear majority of countries which have abolished capital punishment in law or practice. Today, 128 countries are abolitionist in law or practice, and the international community has ruled out the death penalty as a sentencing option in international tribunals for even the worst crimes – genocide, war crimes and crimes against humanity. International human rights law is abolitionist in outlook, and in the case of retentionist countries, international standards require that any trial that may end in the death penalty meet all possible safeguards to ensure a fair trial, "at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights".[369] This standard is applicable even in a state of emergency because the protections on the right to life are non-derogable, applying even when the life of the nation is threatened.[370] As has been shown in this report, far from ensuring "all possible safeguards", the MCA curtails fair trial rights. An execution after such a trial would contravene international human rights law.

Common Article 3 to the Geneva Conventions – to the extent it applies to any of the detainees who might face trial – prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". Violations of common Article 3 can amount to war crimes under international law.

One of the reasons why the USA appears gradually to be turning against the death penalty in the domestic context is that a large numbers of wrongful convictions have been uncovered.[371] Many such cases of innocence have been discovered only after the prisoner spent years on death row. Of particular relevance to trials by military commissions, given the admissibility of hearsay and coerced evidence while possibly keeping secret the methods used to obtain the evidence, these domestic wrongful convictions include cases of people who were convicted on unreliable witness testimony or who were coerced into "confessing" to crimes that they did not commit. For example, four African American death row inmates were pardoned by the Illinois governor in 2003 on the basis that their confessions had been tortured out of them by the police.[372] Each had spent more than 15 years on death row. Under the rules for military commissions, the cut-off point for a convicted prisoner to petition the convening authority for a new trial on the basis of newly discovered evidence is two years. Tellingly, given that executions could occur within that time frame, the rules state that "a petition may not be submitted after the death of the accused".[373]

In an increasingly abolitionist world, resort to the death penalty by any country threatens to undermine international law enforcement cooperation. Many states will not extradite a suspect to a country which retains the death penalty as long at the death penalty remains an option in the case.[374] Amnesty International continues to campaign both for worldwide abolition and for guarantees that no one facing trial will be returned to a country

where he or she would face the death penalty. In November 2001, Amnesty International warned that in the context of the "war on terror", US agents and others cooperating with them might be tempted to pursue so-called "rendition" in attempting to bypass judicial protections.[375] Regrettably, the USA did not heed the organization's appeal for it not to resort to rendition, and future defendants on trial for their life in Guantánamo may include people who were subjected to transfers that bypassed judicial scrutiny.

Amnesty International calls on states not to provide information for use in judicial proceedings taking place abroad in any case where the death penalty is being sought or might be imposed, unless they obtain satisfactory guarantees that a death sentence will not be imposed. No such assurances should be accepted as sufficiently reliable in the case of the USA's military commission trials, given that they operate in a near legal vacuum, and have been preceded by a trail of unlawfulness. Moreover, because of the likelihood of the unfairness of trials under the MCA and the context in which such proceedings would occur, Amnesty International calls on states not to provide any information to assist the prosecution in military commission trials, even in cases where the death penalty is not sought.

The final decision on whether to execute a person sentenced to death by military commission would be taken by the President. The clemency record of the current President is cause for deep concern in this regard.[376]

Soon after the capture of Saddam Hussein in December 2003 in Iraq, President Bush described him as "a disgusting tyrant" who "ought to receive the ultimate penalty"[377]. Three years later, and 40 minutes after his transfer from US custody, Saddam Hussein was hanged. After secret film of the execution was broadcast on the internet, laying bare the fine line between vengeance and retribution, President Bush said: "I wish, obviously, that the proceedings had been done in a more dignified way. But, nevertheless, he was given justice".[378] The promotion of the idea of the death penalty as justice, like the idea of the death penalty as compatible with human dignity, is a habit that dies hard.

According to some reports, the execution in Iraq of Saddam Hussein managed to turn a dictator into a martyr for many.[379] In the context of the "war on terror", Amnesty International reiterates the following from its 1989 global report on the death penalty:

> "*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…*"[380]

A former member of the US National Security Council wrote in 2001:

> "*Other countries with far more experience in counterterrorism have concluded that imprisoning terrorists is the better option in the long run… Terrorism's greatest weapon is popular support... Our most powerful weapon against terrorists is our commitment to the rule of law. We must use the courts to make clear that terrorism is*

a criminal act, not jihad, not heroism, not holy war. And then, we must not make martyrs out of murderers."[381]

Amnesty International urges the USA to drop the use of the death penalty at trials by military commission or any other trials.

Memorandum on discrimination and the death penalty

Application of the death penalty in the USA has consistently been shown to be discriminatory, with race a factor in who is sentenced to death. The US military death penalty is also marked by racial disparities with seven of the nine current condemned inmates being non-white, and a majority convicted of killing white victims.

One of the six black men currently on military death row is Sergeant Hasan Akbar of the US Army's 101st Airborne Division. On 20 November 2006, the commander of Fort Bragg US Army Base in North Carolina affirmed his death sentence that had been passed on 28 April 2005. As far as Amnesty International is aware, Sergeant Akbar is the only member of the US armed forces or other agencies to be sentenced to death for an offence committed in Iraq, Afghanistan or elsewhere during the "war on terror". This Muslim soldier was convicted by court-martial of the premeditated murder of two fellow US soldiers in March 2003 in Kuwait in the first week of the Iraq invasion. The prosecution depicted Sergeant Hasan as a 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.

The degree of leniency generally shown to US agents for human rights violations committed against foreign nationals in Iraq, Afghanistan and elsewhere in the "war on terror" has drawn the concern, among others, of the UN Human Rights Committee. Sergeant Akbar's sentence, for example, is in marked contrast to others passed by 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. 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.

In early 2007, a military investigation into the death in US Special Forces custody of Jamal Naseer in Gardez, Afghanistan, found probable cause that two US soldiers committed assault. Jamal Naseer and seven other Afghan soldiers had been arrested and allegedly subjected to 17 days of torture and ill-treatment, including beatings, electric shocks and immersion in cold water. The death was concealed, no autopsy was conducted on Jamal Naseer's body, and the investigation was not initiated until 18 months after his death.[382] On 26 January 2007, Special Operations Command announced that the two soldiers would receive administrative reprimands for assaulting detainees and for failing to report Jamal Naseer's death, but would not be court-martialled.[383]

Finally, no US citizen will face trial by military commission. In other words, no US citizen will face the death penalty handed down by such a tribunal, applying lower standards than would apply in capital proceedings faced by a US national in civilian court or court-martial.

13. Conclusion

The first judicial interpretation of the MCA was delivered in December 2006. A US District Court Judge dismissed Salim Ahmed Hamdan's *habeas corpus* petition, finding that, as a foreign national captured and held outside the USA, he had no constitutional right to *habeas corpus,* and that his statutory access to this fundamental safeguard had been blocked by the jurisdiction-stripping language of the MCA. In his decision, Judge Robertson noted that Salim Hamdan had complained that he had never been afforded access to a proper tribunal. "That observation is obviously true, thus far," Judge Robertson noted, "but Hamdan is to face a military commission newly designed, because of his efforts, by a Congress that finally stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court. It is difficult to see how continued *habeas* jurisdiction could make further improvements in his tribunal."[384]

Amnesty International cannot accept that any legislature or any judge may countenance stripping of a basic protection against arbitrary detention, secret custody, torture and other ill-treatment. As the Supreme Court observed in 2004, "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse".[385]

Even if Salim Ahmed Hamdan, in February 2007 facing charges of "conspiracy" and "providing material support for terrorism" under the MCA, is to be tried by military commission, having already been held in custody for more than five years, the commission that will try him will not be established for the purpose of reviewing the lawfulness of his detention. In addition, as this paper outlines, the commissions do not guarantee a fair trial. They allow, for example, the admission of coerced evidence obtained under a detention regime whose *raison d'être* has been to extract information from detainees held outside the reach of the courts. Finally, under the US government's global "war" paradigm, even if a detainee is tried and acquitted by a military commission, he can still be returned to indefinite detention by the military authorities as an "unlawful enemy combatant".

The pursuit of unfettered executive power has been a thread that runs through the USA's "war on terror". Although the executive's initial attempt to establish military commissions without consulting Congress or allowing judicial scrutiny was brought to a halt by the US Supreme Court in June 2006, the replacement scheme that Congress authorized in the charged climate of the 2006 congressional elections in no way serves to guarantee that justice will either be done or be seen to be done.

It is not too late. The USA should abandon trials by military commission and turn to the federal courts. It should abandon any pursuit of the death penalty, and reject any evidence that has been obtained under unlawful methods.

14. Fair trials and an end to unlawful detentions

General [386]

1. Any detention facility which is used to hold persons beyond the protection of international human rights and humanitarian law should be closed. This applies to the detention facility at Guantánamo Bay, where, in more than five years of detention operations, the US administration has failed to establish procedures which comply with international law and standards. The USA's secret detention program should be immediately and permanently ended and any secret detention facilities, wherever in the world they may be situated, closed down.
2. Closing Guantánamo or other facilities must not result in the transfer of the human rights violations elsewhere. All detainees in US custody must be treated in accordance with international human rights law and standards, and, where relevant, international humanitarian law. All US detention facilities must be open to appropriate external scrutiny, including that of the International Committee of the Red Cross (ICRC).
3. The responsibility for finding a solution for the detainees held in Guantánamo and elsewhere rests first and foremost with the USA. The US government has created a system of detention in which detainees have been held without charge or trial, outside the framework of international law and without the possibility of full recourse to US courts. It must redress this situation in full compliance with international law and standards.
4. All US officials should desist from further undermining the presumption of innocence in relation to the Guantánamo detainees. The continued public commentary on their presumed guilt puts them at risk in at least two ways – it is dangerous to the prospect for a fair trial and dangerous to the safety of any detainee who is released. It may also put them at further risk of ill-treatment in detention.[387]
5. All detainees must be able to challenge the lawfulness of their detention in an independent and impartial court, so that that court may order the release of anyone whose detention is not lawful. The Military Commissions Act should be repealed or substantially amended to bring it into conformity with international law, including by fully ensuring the right to *habeas corpus*.
6. President George W. Bush should fully rescind his 13 November 2001 Military Order authorizing detention without charge or trial, as well as his executive order of 14 February 2007 establishing military commissions under the Military Commissions Act.[388]
7. Those currently held in Guantánamo should be released unless they are to be charged and tried in accordance with international standards of fair trial.
8. No detainees should be forcibly sent to their country of origin if they would face serious human rights abuses there, or to any other country where they may face such abuses or from where they may in turn be forcibly sent to a country where they are at such risk.

Fair trials

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

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

Solutions for those to be released

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

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

    (b) **Diplomatic assurances**. The US authorities must not seek or accept diplomatic assurances from the prospective receiving government about how a detainee will be treated after return to that country as a basis for sending individuals to countries where they would otherwise be considered at risk of torture or other ill-treatment. Diplomatic assurances under these circumstances breach international human rights obligations; are unreliable and unenforceable; and are inherently discriminatory in that they apply only

to particular individuals. In addition, the USA must not impose conditions upon the transfer of detainees under which the receiving state would, by accepting such conditions, be violating their obligations under international human rights law.[389]

(c) **Asylum in the USA**. The US authorities should provide released detainees with the opportunity to apply for asylum in the USA if they so wish, and recognize them as refugees if they meet the requirements international refugee law. The US authorities must ensure that any asylum applicants have access to proper legal advice and to fair and effective procedures that are in compliance with international refugee law and standards, including the opportunity to contact UNHCR. Asylum applicants should not be detained except in the most exceptional circumstances.

(d) **Other forms of protection in the USA**. Persons who do not qualify for refugee status, but are at risk of serious human rights abuses in the prospective country of return must receive other forms of protection and should be allowed to stay in the USA if they wish, pursuant to obligations under domestic and international human rights law, including the International Covenant on Civil and Political Rights, and the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. They should not be detained, unless in each individual case it is established before a court that their detention is lawful, for a purpose recognized as legitimate by international human rights law, and necessary and proportionate to the objective to be achieved, with the lawfulness of the detention periodically reviewed by the courts, in accordance with international human rights law and standards.

(e) **Transfer to third countries**. The US authorities should facilitate the search for durable solutions in third countries for those who cannot be returned to their countries of origin or habitual residence, because they would be at risk of serious human rights abuses, and who do not wish to remain in the USA. Any such solution should address the protection needs of the individuals, fully respect all of their human rights, and take into account their views. All transfers to third countries should be with the informed consent of the individuals concerned. UNHCR should be allowed to assist in such a process, in accordance with its mandate and policies. Released detainees should not be subjected to any pressures and restrictions that may compel them to choose to resettle in a third country. Transfers must not occur to third countries from where individuals may in turn be forcibly sent to a country where they would be at such risk.

Reparations

12. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, compensation, rehabilitation, satisfaction, and fair and

guarantees of non-repetition, to released detainees for the period spent unlawfully detained and for other violations that they may have suffered, such as torture or other ill-treatment.[390] The right of victims to seek reparations in the US courts must not be limited.

Transparency pending closure

13. The USA should invite the five UN experts who have sought access – the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention – to visit Guantánamo without the restrictions that led them to turn down the USA's previous invitation. In particular, there should be no restrictions on the experts' ability to talk privately with detainees.

Other countries

14. Other countries should give serious consideration to accepting released detainees voluntarily seeking resettlement there, especially countries of former habitual residence or countries where released detainees have had close family or other ties.
15. Other governments should reject conditions attached to detainee transfers requested by the USA which would violate the receiving country's obligations under international human rights law.[391]
16. All countries should actively support closure of the Guantánamo detention camp and all other facilities operating outside the rule of international human rights and humanitarian law, and an end to secret detentions and interrogations.
17. No state should transfer anyone to US custody in circumstances where they could be detained in Guantánamo or elsewhere where they may be held outside the protections of international law, or in cases where they could face trial by military commission.
18. No state should provide any information to assist the prosecution in military commission trials. This applies in all instances, and is especially compelling in cases where the death penalty is sought.

Appendix 1: Guantánamo detainees charged under the Military Order and the MCA

This table lists 10 detainees charged under the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism signed by President George W. Bush on 13 November 2001. According to the US authorities, these detainees are likely to be among the first to be brought to trial by military commission under the MCA. In February 2007, charges were levelled against three of them, David Hicks, Salim Hamdan, and Omar Khadr. On 1 March 2007, Hicks became the first detainee to be charged under the MCA.

Name	Nationality	Detained	Chronology and notes
Salim Ahmed Hamdan	Yemeni	Afghanistan	Detained by Northern Alliance in November 2001 during international armed conflict. Made subject to Military Order in July 2003. Assigned military lawyer in December 2003. Charged in July 2004 with "conspiracy". In February 2007 charges were sworn in his case under the MCA: "conspiracy" and "material support for terrorism".
Ali Hamza al Bahlul	Yemeni	Afghanistan	Detained by Northern Alliance in December 2001 during international armed conflict. Transferred to US custody and held for several weeks on US Navy vessels. Transferred to Guantánamo in February 2002. Made subject to Military Order in July 2003. Charged in February 2004 with "conspiracy".
Ibrahim Ahmed al Qosi	Sudanese	Pakistan	Detained by Pakistani authorities in December 2001 after crossing the Afghanistan border. Taken to Peshawar and interrogated over a period of two weeks. Turned over to the USA and transferred to Afghanistan. Allegedly ill-treated by US agents in Kandahar. Allegedly coerced into making statements, particularly under threat of being sent to Egypt for interrogation. Made subject to Military Order in July 2003. Charged in February 2004 with "conspiracy". Assigned a military lawyer in February 2004.
David Matthew Hicks	Australian	Afghanistan	Detained by Northern Alliance in December 2001 during international armed conflict. Transferred to US Navy vessel for interrogation. Transferred to Guantánamo in January 2002. Made subject to Military Order in July 2003. Australian government assured that he would not face death penalty. In November 2003, Australian and US governments announced that they were in agreement that military

			commission process would provide "full and fair trials for any charged Australian detainees" held in Guantánamo. The US Supreme Court's *Hamdan* ruling dispelled that notion. Assigned a military lawyer in December 2003. Charged in June 2004 with "conspiracy"; "attempted murder by an unprivileged belligerent" and "aiding the enemy". In February 2007 charges were sworn in his case under the MCA: "providing material support for terrorism" and "attempted murder in violation of the law of war". On 1 March 2007, he was charged with the first of these two charges. The attempted murder charge was dropped.
Abdul Zahir	Afghan	Afghanistan	Detained in July 2002. Made subject to Military Order in July 2004. Charged in January 2006 with "conspiracy"; "aiding the enemy"; and "attacking civilians".
Binyam Muhammad	Ethiopian	Pakistan	Detained in Karachi airport in April 2002. Transferred to Morocco, possibly aboard CIA-leased jet registration N379P on 21 July 2002, and thence to Guantánamo in 2004. Made subject to Military Order in July 2004. Charged in November 2005 with "conspiracy".
Omar Ahmed Khadr	Canadian	Afghanistan	Detained in late July 2002. Fifteen years old at the time he was taken into custody. Made subject to Military Order in July 2004. Charged in November 2005 with "conspiracy"; "murder by an unprivileged belligerent"; "attempted murder by an unprivileged belligerent"; and "aiding the enemy". In February 2007 charges sworn in his case under the MCA: "murder in violation of the law of war"; "attempted murder in violation of the law of war"; "conspiracy"; "providing material support for terrorism"; and "spying".
Sufyian Barhoumi	Algerian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005 with "conspiracy".
Jabran Said bin al Qahtani	Saudi Arabian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005 with "conspiracy".
Ghassan al Sharbi	Saudi Arabian	Pakistan	Detained in Faisalabad on 28 March 2002. Made subject to Military Order in July 2004. Charged in November 2005 with "conspiracy".

Appendix 2: From secret CIA custody to possible trial in Guantánamo

On or around the weekend of 2/3 September 2006, the following 14 individuals were transferred from secret CIA detention outside the USA to the US Naval Base at Guantánamo Bay in Cuba, for the stated purpose of trial by military commission. Having been gathered from various locations around the world, they were reportedly hooded, shackled, and sedated for the flight to Guantánamo.

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

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

Appendix 3: Guantánamo detainees detained outside zones of armed conflict (not exhaustive)

Name	Nationality	Capture	Notes
Mohamedou Ould Slahi	Maurit-anian	Maurit-ania	Held in Mauritanian custody for a week in December 2001. Transferred to Jordan for eight months. On 19 July 2002, flown to US air base in Bagram in Afghanistan, possibly aboard CIA-leased jet registration N379P. Transferred to Guantánamo on 4 August 2002. See *USA: Rendition – torture – trial?* 20 September 2006, http://web.amnesty.org/library/Index/ENGAMR511492006..
Bisher al-Rawi	Iraqi (UK resident)	Gambia	Detained in Gambia in November 2002. Transferred to Bagram, possibly via Cairo aboard CIA-leased jet registration N379P, and thence to Guantánamo.
Jamil al-Banna	Jordanian (UK resident)	Gambia	Detained in Gambia in November 2002. Transferred to Bagram, possibly via Cairo aboard CIA-leased jet registration N379P, and thence to Guantánamo.
Mohammed Sulaymon Barre	Somali	Pakistan	Had refugee status in Pakistan. Detained at his home in Karachi in November 2001. In Pakistan custody for four months before being handed over to the US. He claims never to have been to Afghanistan until his transfer to US custody in Kandahar and then Bagram, where he claims he was tortured. Transferred to Guantánamo. He told his ARB hearing in 2005 that he "was taken from [his family] in the middle of a very dark night and from that day I don't know anything about my family."
Saifullah Paracha	Pakistani	Pakistan	Detained in July 2003 at Karachi airport on his way to Bangkok. After having "disappeared" for several weeks, it emerged that he had been taken to US custody in Bagram. Transferred to Guantánamo in September 2004.
Abdullah Mohammad Khan	Uzbek	Pakistan	Detained in January 2002 in a house in Peshawar.
Mohhamad Ahmad Ali Tahar	Yemeni	Pakistan	Detained in a house in Faisalabad, and subsequently handed over to the USA.
Rashid Awad Rashid Al Uwaydah	Saudi Arabian	Pakistan	Arrested in Islamabad by Pakistan agents. Claims never to have been in Afghanistan until he was taken there and held in US custody.
Muhamed Hussein Abdallah	Somali	Pakistan	Reportedly had refugee status in Pakistan since about 1993. Arrested at his house in Peshawar. "The people who came to my house were Pakistani soldiers but the

			people who were in charge of them were one American man and one American woman. And they scared my children and my grandchildren and my wife." Claims to have been subjected to "mental and physical abuse" in US custody in Bagram, and to have been threatened and denied proper medical care in Guantánamo.
Muhammad Saad Iqbal al-Madni	Pakistani	Indon-esia	Detained in Jakarta on 9 January 2002. Taken to Egypt two days later and held there until 12 April 2002. Thence flown to Afghanistan where he was held in US custody from 13 April 2002 to 22 March 2003 when he was transferred to Guantánamo.
Mustafa Ahmed Hamlily	Algerian	Pakistan	Arrested at his home in Peshawar in late May 2002, and handed over to US custody.
Abdel Ghalib Ahmad Hakim	Yemeni	Pakistan	Claims never to have been to Afghanistan before being transferred to Bagram after being held in Pakistan custody for 6-8 weeks.
Fahmi Abdullah Ahmed	Yemeni	Pakistan	Arrested in a house in Faisalabad by Pakistan agents accompanied by "two civilian Americans". Transferred to prison in Lahore, and interrogated by "some civilian Americans". Transferred to Islamabad for two months, and then taken to the airport and transfer to Bagram for two to three months, and then to Kandahar for two to three weeks prior to transfer to Guantánamo. Claims never to have been to Afghanistan prior to being taken there in US custody.
Mustafa Ibrahim Mustafa al Hassan	Sudanese	Pakistan	Claims to have been arrested near Peshawar, and never to have been to Afghanistan. Claims to have been tortured in US custody in Bagram.
Jamil Mar'i	Yemeni	Pakistan	Detained in Karachi in September 2001. Taken to Jordan. Transferred to Guantánamo.
Bensayah Belkacem	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Lakhdar Boumediene	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Mohammed Lechle	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Saber Lahmar	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Boudella al Haji	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.

Mustafa Ait Idir	Algerian	Bosnia	Seized in Bosnia-Herzegovina in January 2002 and transferred to Guantánamo.
Ameur Maammar	Algerian	Pakistan	Had refugee status in Pakistan. Was arrested at his home in Pakistan on 18 July 2002 by Pakistan agents and an "American intelligence man". Transferred to Bagram.
Mohammed Mubarek Salim al Qurbi	Saudi Arabian	Pakistan	Says that he was turned over to US custody by Pakistan on 25 November 2001.
Mohammad Abdullah Tahamuttan	Palest-inian	Pakistan	Arrested in a house by Pakistan police who were allegedly with an "American armed civilian".
Omar Hamzayavich Abdulayev	Tajikistani	Pakistan	Said he was living in a refugee camp near Peshawar, when he was arrested in November 2001 in a bazaar by Pakistan intelligence agents. Claims to have been tortured into copying out incriminating documents. Transferred to another prison before being handed over to the USA and flown to Kandahar air base in Afghanistan.
Mohammed Ali Salem al Zarnuki	Yemeni	Pakistan	Arrested in Faisalabad in mid-2002. Claims to have never been to Afghanistan until the Pakistan authorities "sold me to the Americans" and he was taken to Kandahar and Bagram.
Musab Oma Ali al Mudwani	Yemeni	Pakistan	Arrested at an apartment in Karachi. He told his ARB hearing in December 2005 that "before I came to the prison in Guantanamo Bay I was in another prison in Afghanistan, under the ground; it was very dark. It was total dark, under torturing and without sleep. It was impossible that I could get out of there alive. I was really beaten and tortured". He stated that the prison had Afghan guards and Arab-American investigators.
Hassan bin Attash	Yemeni	Pakistan	Reportedly 17 when seized during a raid on his home in Karachi in September 2002. Transferred to CIA-run "dark prison" in Kabul for about a week, and then transferred, possibly aboard a CIA-leased jet registration N379P on 17 September 2002, to Jordan where he was held for 16 months and allegedly tortured. On 8 January 2004, he was reportedly returned to Kabul's "dark prison" and thence to Bagram and Guantánamo Bay.
Mohammed Mohammed Hassen	Yemeni	Pakistan	Arrested in Faisalabad, where he was a student. Has said that he has never been to Afghanistan "until I was taken to the prison by the Americans". Claims that he did not know about the conflict in Afghanistan when he went to Pakistan.

Muhammad Hamid al Qarani	Chadian	Pakistan	Was arrested in a mosque in Karachi in October 2001 at the age of 14 and held in prison for three weeks. Was denied access to his family and allegedly subjected to torture. Transferred to Peshawar, held there for 10 days before transfer to US custody in late November 2001. Claims to have been tortured in US custody in Kandahar before being transferred to Guantánamo in early January 2002.
Mohammed Yakoub	Sudanese	Pakistan	Arrested by Pakistan agents in Peshawar ("this happened because the standing government there at the time was capturing any Arab and giving them to the United States as terrorists. I never had a weapon in my hands the entire time I was there". As said he went to Pakistan in February 2002 to go to defend Afghanistan, but "after I was in Pakistan I realized it was not worth it and the purpose I came for was not true".
Mohammed Abdul Rahman	Tunisian	Pakistan	Detained in Quetta. Told his ARB that his real name is Lutfi bin Ali.
Fayad Yahya Ahmed	Yemeni	Pakistan	Was arrested by Pakistan police, and held in Pakistan custody before being handed over to the USA and transferred to Afghanistan.
Abdul Salam al Hela	Yemeni	Egypt	Detained in Cairo in September 2002. Transferred later that month to Afghanistan, possibly via Azerbaijan aboard CIA-leased jet registration N379P. Held in CIA-run "dark prison" in Kabul for over a year, taken to Guantánamo in 2004.
Emad Abdalla Hassan	Yemeni	Pakistan	Detained in Faisalabad where he was a student, and held for two months there before being transferred to Afghanistan. Interrogated by US agents in Pakistan. He claims never to have been in Afghanistan except for the 19 days that he spent in US custody in Bagram and Kandahar prior to his transfer to Guantánamo.
Adel Hassan Hamad	Sudanese	Pakistan	Taken at gunpoint from his home in Peshawar on 18 July 2002 by Pakistani agents, led by a US agent. Was held in prison for six and a half months in what he describes as very bad conditions. Held in Bagram for about two months; says that he was subjected to abuse by dogs, stripping, sleep deprivation and cruel use of shackles.
Mohammed Ali Salem al Zarnuki	Yemeni	Pakistan	Detained in a house in Faisalabad. Claims that Pakistan is the only other country in the world he has been to except for his native Yemen.

Endnotes

[1] Email available at http://action.aclu.org/torturefoia/released/022306/1205.pdf.
[2] Email dated 9 July 2004. Referring to time period May to October 2002. Responses-87 at http://foia.fbi.gov/guantanamo/detainees.pdf.
[3] See page 16 of this report.
[4] Prepared Remarks of Attorney General John Ashcroft, Senate Judiciary Committee Hearing: "The Terrorist Threat: Working Together to Protect America", 4 March 2003. http://www.usdoj.gov/archive/ag/testimony/2003/030403senatejudiciaryhearing.htm.
[5] See, e.g., *Harsh CIA methods cited in top Qaeda interrogations*. New York Times, 13 May 2004. Water-boarding has been described as a method under which the detainee "is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt." *CIA's harsh interrogation techniques described*, ABC News, 18 November 2005, http://abcnews.go.com/WNT/Investigation/story?id=1322866.
[6] *USA: All allegations of torture must be investigated*, AI Index: AMR 51/045/2007, 15 March 2007, http://web.amnesty.org/library/Index/ENGAMR510452007.
[7] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.
[8] Memorandum: We're at war. 16 September 2001. Confidential. Approved for release, October 2005.
[9] The Vice President appears on Meet the Press with Tim Russert, 16 September 2001, http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20010916.html.
[10] *ACLU et al v. Department of Defense et al*. Sixth Declaration of Marilyn A. Dorn, Information Review Officer, Central Intelligence Agency, in the US District Court, Southern District of New York, 5 January 2007.
[11] The President's constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, The Deputy Counsel to the President, from John Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of the Legal Counsel, 25 September 2001.
[12] Re: Legality of the use of military commissions to try terrorists. Memorandum for Alberto R. Gonzales, Counsel to the President , from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 6 November 2001.
[13] Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Possible habeas jurisdiction over aliens held at Guantanamo Bay, Cuba. From Patrick Philbin, Deputy Assistant Attorney General and John C. Yoo, Deputy Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 28 December 2001.
[14] Memorandum for the President. Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. From Alberto R. Gonzales, draft, 25 January 2002.
[15] Letter from US Attorney General John Ashcroft to President Bush, 1 February 2002.
[16] Memorandum, Humane treatment of al Qaeda and Taliban detainees, 7 February 2002.
[17] Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002.

[18] Standards of conduct for interrogation under 18 U.S.C. §§2340-2340A. Memorandum for Alberto R. Gonzales, Counsel to the President. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 1 August 2002.
[19] *ACLU v. Department of Defense*. Sixth Declaration of Marilyn Dorn, 5 January 2007, op.cit.
[20] Counter-resistance techniques. Action memo from William J. Haynes, General Counsel of the Department of Defense, 27 November 2002.
[21] Request for approval of counter-resistance strategies. From Jerald Phifer, LTC, USA, Director J2. Memorandum for Commander, Joint Task Force 170, Guantánamo Bay, Cuba, 11 October 2002.
[22] *Hamdan v. Rumsfeld*. Memorandum. US District Court for the District of Columbia, 13 December 2006, Judge James Robertson.
[23] *Al-Razak v. Bush*, Memorandum Order. US District Court for the District of Columbia, Judge Gladys Kessler, 1 December 2006.
[24] The International Court of Justice (ICJ) has determined that the rules in common Article 3 "constitute a minimum yardstick", reflecting "elementary considerations of humanity" (Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment of 27 June 1986, ICJ Rep., para. 218.). They have evolved to reflect customary rules of international law applicable in times of armed conflict, either international or non-international. The ICJ considered that the minimum rules applicable to international and non-international conflicts were identical and that the obligation to ensure respect for them in all circumstances derived not only from the Geneva Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give expression". Ibid. Para. 220. The International Criminal Tribunal for the former Yugoslavia has also held that common Article 3 is "applicable to armed conflicts *in general*" (emphasis added). Prosecutor v. Dusko Tadic, Trial Chamber II, Opinion and Judgment of 7 May 1997, para. 559. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol. I, p. 352.
[25] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.
[26] *Ashcraft v. State of Tennessee*, 322 U.S. 143 (1944).
[27] President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
[28] *CIA's harsh interrogation techniques described*, ABC News, 18 November 2005, available at http://abcnews.go.com/WNT/Investigation/story?id=1322866. (listing techniques grabbing, slapping, and: "*Long Time Standing*: …Prisoners are forced to stand, handcuffed and with their feet shackled to an eye bolt in the floor for more than 40 hours. Exhaustion and sleep deprivation are effective in yielding confessions… *The Cold Cell*: The prisoner is left to stand naked in a cell kept near 50 degrees. Throughout the time in the cell the prisoner is doused with cold water… *Water Boarding*: The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt."
[29] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the United States District Court for the District of Columbia, 26 October 2006.
[30] "In the legislature, the promptitude of decision is oftener and evil than a benefit". Alexander Hamilton, Federalist Papers, No. 70 (1787).
[31] President Bush signs Military Commissions Act of 2006, 17 October 2006.
[32] Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, 24 October 2006, http://www.whitehouse.gov/news/releases/2006/10/20061024-7.html. Support for water-

boarding was also indicated by the Chairman of the House Homeland Security Committee, Rep. Peter King: "If we capture bin Laden tomorrow and we have to hold his head under water to find out when the next attack is going to happen, we ought to be able to do that". *An unexpected collision over detainees*, New York Times, 15 September 2006.

[33] Article 17 and Article 5. The Convention was officially opened for signature on 6 February 2007.

[34] President Bush signs Military Commissions Act of 2006, 17 October 2006, http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.

[35] The MCA strips the US courts of jurisdiction to consider *habeas corpus* appeals of any non-US citizen held as an "enemy combatant", and narrows the scope of the War Crimes Act by not expressly criminalizing as war crimes acts that constitute "outrages upon personal dignity, particularly humiliating and degrading treatment", or unfair trials, prohibited under common Article 3. See *USA: Justice at last or more of the same? Detention and trials after Hamdan v. Rumsfeld*, AI Index: AMR 51/146/2006, September 2006, http://web.amnesty.org/library/Index/ENGAMR511462006.

[36] *Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951), Justice Black concurring.

[37] *Security and Rights*, Ken Macdonald, QC, Director of Public Prosecutions, 23 January 2007. Full speech available at http://www.cps.gov.uk/news/nationalnews/security_rights.html.

[38] Guideline 16 of the UN Guidelines on the Role of Prosecutors. 1990.

[39] See *USA: Five years on 'the dark side' – A look back at 'war on terror' detentions*, AI Index: AMR 51/195/2006, 13 December 2006, http://web.amnesty.org/library/Index/ENGAMR511952006.

[40] *Stein v. New York*, 346 U.S. 156 (1953).

[41] For email, see http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf.

[42] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003. On the technique of "forced grooming" (i.e. shaving of beard and hair) – which has been used against Muslim detainees, the report noted that "where there are religious or cultural sensitivities, this technique could raise issue of 'degrading', and "could be viewed by major partner nations as degrading in some circumstances". It further noted that "this technique has not been used historically by US forces" and so no opinion was given as to whether or not it would raise issues about admissibility of evidence.

[43] MMC, Rule of Evidence 302 (c)(1).

[44] "We are holding them under the laws of war, also known as international humanitarian law, and not because they are criminal suspects". Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), http://www.state.gov/s/l/rls/77461.htm.

[45] Declaration of Vice Admiral Lowell Jacoby, Director, Defense Intelligence Agency, 9 January 2003, http://www.justicescholars.org/pegc/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf. ("[T]he intelligence cycle is continuous. This dynamic is especially important in the War on Terrorism. There is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods"). This in itself would seem to contravene the US Supreme Court's opinion in 2004 that "indefinite detention for the purpose of interrogation [had] not [been] authorized" by Congress. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[46] Testimony of US Attorney General Alberto Gonzales to the Senate Judiciary Committee, 18 January 2007. Separately, the administration has complained that *habeas corpus* petitions filed after the *Rasul v. Bush* decision "collectively have consumed enormous resources and disrupted the operation of the Guantanamo Naval Base during time of war". *Al Odah v USA*, Supplemental brief addressing Section 1005 of the Detainee Treatment Act of 2005. In the US Court of Appeals for the DC Circuit, 18 January 2006.

[47] Zakirjan Asam (Uzbekistan national), Allah Muhammed Saleem (Egyptian) and Fethi Boucetta (Algerian) received NLEC status under the Combatant Status Review Tribunal process sometime between 20 December 2004 and 29 March 2005. They were released from Guantánamo and sent to Albania on or around 17 November 2006.
[48] *Qassim v. Bush*. Memorandum, US District Court for the District of Columbia, 22 December 2005.
[49] From the outset, the possibility of a detainee being returned to detention as an "enemy combatant" after acquittal has been the position of the US government, and is now in the Manual for Military Commissions (MMC), released on 18 January 2007. MMC, Chapter XI, Rule 1101(b)(3), discussion. "This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war". Presumably, a detainee convicted by a military commission and sentenced to a term if confinement could also be returned to administrative detention after completing their sentence. Detainees charged for trial by military commission do not receive an annual Administrative Review Board (ARB) hearing as to the other detainees. However, once those convicted by military commissions have served their sentences, they can only then receive ARB hearings, suggesting that the US authorities do foresee their continuing detention.
[50] "[I]t doesn't mean that if we don't hit the 60-80 target that something has gone awry". Department of Defense press briefing on new military commissions rules, 18 January 2007, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3868.
[51] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the United States District Court for the District of Columbia, 26 October 2006.
[52] Media briefing, Department of Defense, 6 March 2007, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902.
[53] For instance, "Any procedures that the CIA would use in the future, of course, would be classified". Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, USA, 7 September 2006, http://www.state.gov/s/l/rls/71939.htm.
[54] The Manual for Military Commissions, as released on 18 January 2007, is available at http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf.
[55] On 7 February 2007, the Pentagon announced that she had accepted the appointment and was expected to take office immediately. Susan Crawford was a judge on the Court of Appeals for the Armed Forces from 1991 to 2006, and Chief Judge from 1999 to 2004. She was appointed as general counsel of the Army in 1983 and from 1989 to 1991 she served as inspector general of the Department of Defense under Secretary of Defense Dick Cheney. She was appointed to the Court of Appeals by President George H.W. Bush in 1991. For a biography, see http://www.defenselink.mil/news/d20070207crawford.pdf.
[56] From the outset, the administration has emphasised the historical use of military commissions and ignored current or evolving international standards. E.g., "Military Commissions have historically been used to prosecute enemy combatants who violate the laws of war. The last time the United States used the Military Commission process was during World War II." Fact Sheet, 8 February 2007, http://www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf.
[57] Address by the Attorney General of the United Kingdom, the Rt Hon The Lord Goldsmith QC. House of Delegates of the American Bar Association, Miami, 12 February 2007.
[58] See Principle 9 of UN Draft Principles governing the administration of justice through military tribunals ("In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as

extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes").

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

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

[61] In May 2006, the USA told the UN Committee against Torture that individuals detained by the Department of Defense in Afghanistan and at Guantánamo were held pursuant to the Military Order. This is entirely contrary to what the administration argued in federal District Court in *Rasul v. Bush*, when the government categorically denied that any detainee was held under the Order, and asserted instead that they were held more generally under the President's Commander-in-Chief powers. Clearly, a government's vague or shifting description of the legal basis for detentions is a cause for serious concern in relation to the need to protect detainees from arbitrary arrest and ill-treatment.

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

[63] MMC, Rule 106. Amnesty International stresses that no detainee should be transferred to another country where he would face unfair trial.

[64] Copy of letter available at http://www.law.yale.edu/documents/pdf/Public_Affairs/letterleahy.pdf.

[65] "I think that Guantánamo has become symbolic, whether we like it or not, for many around the world". Defense Department Media Roundtable with Secretary Gates and Gen. Pace from the Pentagon, 7 March 2007, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3900. At the press briefing on 18 January 2007, the Principal Deputy General Counsel of the Department of Defense, Dan Dell'Orto, said that while trials by military commission could in theory be held anywhere, the "logical" place to hold them was Guantánamo, "being the place where we have facilities". http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3868.

[66] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[67] Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, 24 October 2006, http://www.whitehouse.gov/news/releases/2006/10/print/20061024-7.html.

[68] "[T]he war against terrorism ushers in a new paradigm…require[ing] new thinking in the law of war". President Bush. Memorandum, Humane treatment of al Qaeda and Taliban detainees, 7 February 2002.

[69] *Security and Rights*, Ken Macdonald, QC, 23 January 2007, *op.cit.*

[70] Developments in US policy and legislation towards detainees: the ICRC position. 19 October 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006.

[71] "I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments." President Bush, State of the Union Address, 20 January 2004, http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html. "There is a fundamental disagreement between the US and some of its allies as to whether we are still at war." Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, http://www.usdoj.gov/ag/speeches/2006/ag_speech_061025.html. "In our discussions throughout Europe over the last year we noticed a developing divide, with us tending to characterize this conflict

as a war and the Europeans saying otherwise." Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, 3 November 2006 (text revised 12 January 2007), op.cit.
[72] *The relevance of IHL in the context of terrorism*, Official statement of the International Committee of the Red Cross, 21 July 2005, http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.
[73] *International humanitarian law and terrorism: questions and answers*, 5 May 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument.
[74] UN Doc: E/CN.4/2006/120. *Situation of detainees at Guantánamo Bay*. Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 27 February 2006.
[75] See *AUMF – Surely not meant to be a 'blank check'?* Section 9 of *USA: Justice at last or more of the same? Detentions and trials after Hamdan v. Rumsfeld*, AMR 51/146/2006, September 2006, op.cit.
[76] See for instance Additional Response of the United States to Request for Precautionary Measures-Detainees in Guantánamo Bay, Cuba, July 15, 2002, addressed to the Inter-American Commission on Human Rights http://www.ccr-ny.org/v2/legal/september_11th/docs/7-23-02GovtResponsetoObservations_andIACHR_Decision.pdf pp. 3-5; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, April 4, 2003 http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, p. 6.
[77] UN Doc. A/HRC/4/20, 29 January 2007. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions.
[78] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25, http://www.icj-cij.org/icjwww/icases/iunan/iunanframe.htm.
[79] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106. http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.
[80] Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman. UN Doc. E/CN.4/205/103, 7 February 2005, para 23.
[81] UN Doc. A/HRC/4/20, 29 January 2007. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions. The Rapporteur articulates the USA's position as (a) the "war on terror" constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur(s) and the UN Human Rights Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.
[82] Human Rights Committee General Comment 31, UN Doc: CCPR/C/21/Rev.1/Add.13, 26 May 2004.
[83] Opening statement to the UN Human Rights Committee by Matthew Waxman, Head of the US Delegation, Geneva, Switzerland, 17 July 2006, http://www.state.gov/s/p/rem/69126.htm.
[84] The Human Rights Committee has characterized such an approach as "unconscionable": "…it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory". Human Rights Committee, *López Burgos v. Uruguay*, UN Doc. A/36/40, 6 June 1979, para. 12.3. Article 3 of the Convention against Torture prohibits the expulsion, return or extradition of a person to a state where there are substantial grounds for believing that he or she would face torture.

[85] Conclusions and Recommendations of the Committee against Torture: United States of America. CAT/C/USA/CO/2, 18 May 2006, http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf.
[86] Human Rights Committee, Concluding Observations: United States of America, 28 July 2006, http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf.
[87] MCA, §950p(a). However, it should be noted that the definition of "material support" under 18 U.S.C. § 2339A of the US Code is different from the definition under the MCA, § 950 v (b)(25).
[88] "They had not committed crimes that were in violation of our US criminal laws because those were not crimes that were on our books at the time in September 11, 2001… The answer is that a system needs to be designed in which those who had been conspiring to commit attacks on the United States or elsewhere around the world can be tried in a fair system for their crimes." Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, USA, 7 September 2006, op. cit. Article 15 of the ICCPR states that "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time that it was committed". This obligation on states is non-derogable, even in time of public emergency which threatens the life of the nation (article 4.2).
[89] Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op.cit.
[90] "We will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001. We'll also seek to prosecute those believed responsible for the attack on the USS Cole, which killed 17 American sailors six years ago last week. We will seek to prosecute an operative believed to have been involved in the bombings of the American embassies in Kenya and Tanzania, which killed more than 200 innocent people and wounded 5,000 more. With our actions, we will send a clear message to those who kill Americans: We will find you and we will bring you to justice." President Bush signs Military Commissions Act of 2006, The White House, 17 October 2006, http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html.
[91] *Detainee admits to helping orchestrate embassy*, USS Cole attacks. American Forces Press Service, 19 March 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=32503.
[92] The 9/11 Commission Report. Final report of the National Commission on Terrorist Attacks upon the United States, Authorized Edition. Norton Books, 2004.
[93] See *Al Qaeda associates charged in attack on USS Cole, attempted attack on another US naval vessel*, US Department of Justice, 15 May 2003, http://www.usdoj.gov/opa/pr/2003/May/03_crm_298.htm.
[94] See: *Yemen: The rule of law sidelined in the name of security*, AI Index: MDE 31/006/2003, September 2003, http://web.amnesty.org/library/Index/ENGMDE310062003.
[95] Indictment at http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/binladen/usbinladen1.pdf.
[96] Verdict rendered in the trial of four individuals associated with the 1998 bombings of the U.S. Embassies in Kenya and Tanzania. FBI press release, 29 May 2001, http://www.fbi.gov/pressrel/pressrel01/tankenbo.htm.
[97] For transcript see, http://www.cnn.com/2003/LAW/01/31/reid.transcript/.
[98] See http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf.
[99] *Lindh pleads guilty, agrees to aid inquiry*. Los Angeles Times, 16 July 2002. On 17 March 2006, Paul J. McNulty was sworn in as Deputy Attorney General of the United States after being nominated to the position by President Bush and confirmed by the Senate.
[100] *USA v. Lindh*, In the United States District Court for the Eastern District of Virginia, Alexandria Division. Plea Agreement.

[101] MCA, §949m (a).
[102] 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.
[103] Richard A. Clark, *Against all enemies. Inside America's war on terror.* 2004. Free Press, p.152-153.
[104] See: *USA: All allegations of torture must be investigated*, AMR 51/045/2007, 15 March 2007, *op.cit.*
[105] Press briefing on new military commission rules. US Department of Defense, 18 January 2007, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3868.
[106] *Security and Rights*, Ken Macdonald, QC, Director of Public Prosecutions, 23 January 2007, *op.cit.*
[107] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[108] *United States* v. *Robel,* 389 U. S. 258 (1967).
[109] Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op.cit.
[110] Reflections on Transatlantic Approaches to International Law. John B. Bellinger III, Legal Adviser Remarks at the Duke Law School Center for International and Comparative Law, Washington, DC, 15 November 2006, http://www.state.gov/s/l/rls/77279.htm.
[111] MMC, Rule 201(b)(D) and (E), and discussion.
[112] MCA, §948d (a); MMC, Rule 201 (b)(1).
[113] MCA, §948b (a).
[114] Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, op. cit.
[115] *Ibid.*
[116] MCA, § 948a (1). The term "co-belligerent" is defined as "any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy". The commissions will not have jurisdiction to try "lawful enemy combatants", who would fall under the jurisdiction of courts-martial convened under the Uniform Code of Military Justice (MCA §948b; MMC, Rule 201(b)(2)). They would presumably have been determined to be lawful enemy combatants by the "competent tribunal" required under Article 5 of the Third Geneva Convention to determine status, the tribunal denied to detainees taken into custody in Afghanistan.
[117] For example, "the United States gives Article 5-like "Combatant Status Review Tribunals" to every detainee held at Guantánamo to determine whether they should be detained as an enemy combatant at all." Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, *op.cit.*
[118] Memorandum for the President. Decision re application of the Geneva Convention on prisoners of war to the conflict with al Qaeda and the Taliban. From Alberto R. Gonzales, draft, 25 January 2002.
[119] For example, see pages 54-55 of *USA: Guantánamo and beyond – The continuing pursuit of unchecked executive power*, May 2005, http://web.amnesty.org/library/index/engamr510632005.
[120] These are limited to the consideration of whether the CRST determination is "consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals". The Court may also consider whether the use of such standards and procedures are consistent with US law and the Constitution "to the extent the Constitution and laws of the United States are applicable". The administration interprets the "standards and procedures" clause as preventing the DC Circuit Court of Appeals from considering any evidence not presented to and considered by the CSRT. In addition, it takes the position that the CSRT evidentiary record should be given "the strongest sort of presumption and regularity". On the second clause, the administration takes the view that the Constitution and the laws of the United States are inapplicable to the Court of Appeals' review of CSRT decision.

[121] *Boumediene et al v. Bush* and *Al-Odah et al. v. USA*. US Court of Appeals for the District of Columbia Circuit, 20 February 2007, Judge Rogers dissenting.
[122] *UN expert on human rights and counter terrorism concerned that Military Commissions Act is now law in United States*, United Nations press release, 27 October 2006.
[123] MMC, Rule 406 (b)(3).
[124] MMC, Rule 103 (a)(15).
[125] MMC, Rule 907(b)(1)(A).
[126] MMC, Rule 202 (b) discussion notes. If the defendant files a motion challenging the jurisdiction of the commission to try him, "the burden of persuasion shall be on the prosecution"; MMC, Rule 905(c)(2)(B).
[127] The authorities have said that by the time the initial CSRT process was completed in March 2005, all the detainees in military custody in Guantánamo at that time had received CSRT determinations of their status. *Khan v. Bush*, Declaration of Karen L. Hecker. In the United States District Court for the District of Columbia, 3 November 2006. On 6 March 2007, the Pentagon announced that the commencement of CSRT hearings, to be held in secret, for the 14 detainees transferred to Guantánamo in September 2006 from secret custody. *Administrative Tribunals to Begin for High-Value Guantanamo Detainees*. American Forces Press Service, 6 March 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=3283. See also, *USA: Single day, double standards*, AI Index: AMR 51/039/2007, 7 March 2007, http://web.amnesty.org/library/Index/ENGAMR510392007.
[128] MMC, Rule 707(b)(4)(F).
[129] MCA, §950g (the US Court of Appeals for the DC Circuit "shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission… the Court of Appeals may act only with respect to matters of law…The jurisdiction of the Court of Appeals… shall be limited to the consideration of (1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States.")
[130] These include two more of the 10 detainees originally charged for trial under the military commissions established under the Military Order of November 2001 – Ali Hamza al Bahlul and David Hicks (see Appendix 1). As already noted, the CSRT is not the competent tribunal envisaged by the Third Geneva Convention for determining status. The determination that no detainee captured in Afghanistan would qualify as a PoW had been taken by President Bush two years before the CSRTs were even set up.
[131] Unjustifiable delay in the repatriation of prisoners of war or civilians is a war crime. Article 85(4)(b) of Protocol I Additional to the Geneva Conventions of 194; Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Volume 1, p. 588, Cambridge University Press/ICRC.
[132] Under Article 45.2 of Additional Protocol 1 to the Geneva Conventions, a person charged with a criminal offence in the context of an international armed conflict has the right to assert his entitlement to prisoner of war status before a judicial tribunal and to have that question adjudicated, whenever possible prior to trial. A determination by the commission that a person is a prisoner of war or a protected person under the Geneva Conventions should have the effect of stripping the commission of jurisdiction to try the person. The USA is not a state party to Additional Protocol 1.
[133] This, for example, raises questions in relation to the crime of torture under the MCA. There is no crime of torture under the UCMJ, and no member of the US armed forces (or any US citizen) has been charged or convicted of torture under the USA's extraterritorial anti-torture statute or the USA's War Crimes Act. In 2006, both the Committee against Torture and the Human Rights Committee expressed

their concern about evidence of leniency and impunity for US personnel for human rights violations committed in the "war on terror".
[134] Article 130, Third Geneva Convention; article 147, Fourth Geneva Convention and article 85(4)(e), Additional Protocol I.
[135] ICRC operational update, 31 December 2006, http://www.icrc.org/web/eng/siteeng0.nsf/html/usa-detention-update-121205?opendocument.
[136] *International humanitarian law and terrorism: questions and answers*, 5 May 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument.
[137] United States of America, concluding observations, 28 July 2006, *op.cit.*
[138] The MCA amended the USA's War Crimes Act by not expressly criminalizing violations of common Article 3's prohibition on unfair trials as war crimes prosecutable under the Act.
[139] Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op.cit.
[140] Abu Bakker Qassim's continued detention for nine months (and eventually 14) after he had been found not to be an "enemy combatant" by the CSRT was found by a federal judge to be unlawful (although the judge concluded that he could offer no remedy). *Qassim v. Bush.* Memorandum, US District Court for the District of Columbia, 22 December 2005. Abu Bakker Qassim and four other Uighur detainees were eventually released into Albania in May 2006.
[141] Military Commissions Act: Legislation and Implication, John Bellinger, Legal Adviser, Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op.cit.
[142] In an interview on 16 September 2001 (see note 9), Vice-President Cheney echoed President Bush's "with us or with the terrorists" choice faced by all countries: "Are they going to stand with the United States and believe in freedom and democracy and civilization", he asked, "or are they going to stand with the terrorists and the barbarians?" The Vice-President added that he was "delighted" that Pakistan for one had decided to fall in behind the US. In his recent memoirs, President Musharraf recalled that the choice the USA had presented Pakistan had been even starker: choose us or "be prepared to be bombed back to the Stone Age".
[143] In charge sheet under the Military Order, it was alleged that Binyam Muhammad left Afghanistan during the international armed conflict, and in Pakistan met with Abu Zubaydah and Jose Padilla. It is alleged that "Abu Zubaydah stated that he preferred Binyam Muhammad conduct an "overseas" operation instead of going back into Afghanistan as originally planned. Binyam Muhammad agreed to carry out an operation inside the United States". He was arrested at Karachi airport attempting to go to London on a forged passport. Jose Padilla, a US citizen, was arrested at Chicago airport on 8 May 2002 and on 9 June 2002 designated by President Bush as an "enemy combatant". He was held without charge or trial in military custody for three years and five months years. He was charged in November 2005 and transferred to Department of Justice custody in January 2006. The announcement of the indictment – which made no mention of the alleged bomb plot for which Padilla was originally detained – came only two days before the government's brief in response to Padilla's appeal to the US Supreme Court was due to be filed. The District Court was also scheduled to accept briefings from the government on the question of whether Padilla had been properly designated as an enemy combatant.
[144] Human Rights Committee, Concluding observations: Lebanon, UN Doc. CCPR/C/79/Add.78, 5 May 1997, para. 14; Concluding observations: Cameroon, UN Doc. CCPR/C/79/Add.116, 4 November 1999, para. 21; Concluding Observations: Uzbekistan, UN Doc. CCPR/CO/71/UZB, 26 April 2001, para. 15.
[145] Human Rights Committee, concluding observations: Peru. UN Doc. CCPR/CO/70/PER, 15 November 2000, para. 12. Also, official records of the General Assembly, Fifty-sixth session,

Supplement no. 40 (A/56/40), chap. IV, para. 76 (12). Cited in report to the Secretary General of the Special Rapporteur on the independence of judges and lawyers (A/61/384), 12 September 2006.
[146] Human Rights Committee, concluding observations: Peru. UN Doc. CCPR/CO/70/PER, 15 November 2000, para. 12. Human Rights Committee, Preliminary observations: Peru, UN Doc. CCPR/C/79/Add.67, 25 July 1996, para. 12; Concluding observations: Slovakia, UN Doc. CCPR/C/79/Add.79, 4 August 1997, para. 20; Concluding observations: Egypt, UN Doc. CCPR/CO/76/EGY, 28 November 2002, para. 16; Concluding observations: Serbia and Montenegro, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, para. 20.
[147] Committee against Torture, Conclusions and recommendations: Peru, UN Doc. A/50/44, 26 July 1995, paras. 69 and 73; Conclusions and recommendations: Cameroon, UN Doc. CAT/C/CR/31/6, 5 February 2004, paras. 7 and 11; List of issues to be considered during the examination of the fourth periodic report of Peru, UN Doc. CAT/C/PER/Q/4, 21 February 2006, para. 22.
[148] UN Doc. E/CN.4/Sub.2/2006/58, 13 January 2006.
[149] Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V/II.85 doc.9 rev., 11 February 1994, at 507 (Peru).
[150] Inter-American Court of Human Rights, Castillo Petruzzi et al. Case, Judgment of 30 May 1999, para. 128.
[151] African Commission on Human and Peoples' Rights, Principles and guidelines on the right to a fair trial and legal assistance in Africa, May 2003. See also: African Commission on Human and Peoples' Rights, *Media Rights Agenda v. Nigeria*, Comm. No. 224/98, paras. 58-65, in 14th Annual Activity report 2000 – 2001.
[152] Special Rapporteur on the independence of judges and lawyers, Report to the Commission on Human Rights, UN Doc. E/CN.4/2004/60, 31 December 2003, para. 60.
[153] For example, *Transfer of juvenile detainees completed*. Department of Defense news release, 29 January 2004, http://www.defenselink.mil/releases/2004/nr20040129-0934.html.
[154] See, for example, *Guantánamo Bay: Overview of the ICRC's work for internees*. 30 January 2004, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5qrc5v?opendocument.
[155] Vienna Convention on the Law of Treaties, article 18.
[156] Report of the Special Rapporteur on the administration of justice through military tribunals to the Sub-Commission on the Protection and Promotion of Human Rights, UN Doc. E/CN.4/2006/58, 13 January 2006.
[157] Human Rights Committee, González del Río v. Peru, (communication no. 263/1987), UN Doc. CCPR/C/46/D/263/1987, 2 November 1992, par. 5.1.
[158] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 4, in UN Doc. HRI/GEN/Rev.7. A version of the MCA drafted by the administration and leaked in August 2006, stated that "in a time of ongoing armed conflict, it is neither practicable nor appropriate for alien enemy combatants like al Qaeda terrorists to be tried like American citizens in Federal courts or courts-martial".
[159] Principle 2 of the UN Basic Principles on the Independence of the Judiciary.
[160] *Ibid.* Principle 10.
[161] General Comment 13, 1984, op. cit.
[162] UN Doc. E/CN.4/2006/58, 13 January 2006.
[163] UN Doc. E/CN.4/2006/58, 13 January 2006.
[164] MMC Chapter V, Rule 502(c) quotes the MCA, stating: "A military judge shall be a commissioned officer of the armed forces, serving on active duty who is a member of the bar of a Federal court or a member of the bar of the highest court of a State or the District of Columbia and who is certified to be

qualified for duty…as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member."

[165] Under Article 26 of the UCMJ, a military judge has to be a member of the armed forces who is a member of the bar of a Federal court or of the highest court of one of the US states, and who is certified as qualified to serve as military judge by the Judge Advocate General of the armed force of which the judge is a member. The military judge is then assigned to try particular cases by a chief judge.

[166] MMC, Rule 503 (b)(1).

[167] MCA §948j(a).

[168] Principle 14 of the UN Principles on the Independence of the Judiciary states that "the assignment of cases to judges within the court to which they belong is an internal matter of judicial administration".

[169] MMC, Rule 503 (b)(2).

[170] Military Commissions Act: Legislation and Implication. John Bellinger, Legal Adviser. Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op. cit.

[171] *Weiss v. United States*, 510 U.S. 163 (1994).

[172] Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice, May 2001. The Commission was sponsored by the non-profit National Institute of Military Justice. The report is available at http://www.nimj.org/documents/Cox_Comm_Report.pdf.

[173] For example, in the entry on Egypt in its 2000 report, the USA noted that the Egyptian government "defends the use of military courts as necessary in terrorism cases" and "claims that civilian defendants receive fair trials in the military courts". However, the US report continued, "the military courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also military officers appointed by the Minister of Defense and subject to military discipline. They are neither as independent nor as qualified as civilian judges in applying the civilian Penal Code." Egypt. Country Reports on Human Rights Practices - 2000, US State Department, March 2001, http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm.

[174] Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, 7 September 2006, op. cit.

[175] MCA §948i(b).

[176] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' expedited motion for reconsideration of the Court's November 17, 2006 order, or in the alternative, renewed expedited motion for emergency access to counsel and entry of amended protective order. In the US District Court for the District of Columbia, 21 December 2006.

[177] *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.

[178] *Al Odah v. USA; Boumediene v. Bush*. Brief of *amici curiae* retired federal jurists in support of petitioners' supplemental brief regarding the Military Commissions Act of 2006. In the US Court of Appeals for the District of Columbia Circuit, 1 November 2006.

[179] MCA § 950j (b).

[180] Prepared remarks of Attorney General Alberto R. Gonzales at the US Air Force Academy regarding civil liberties and the war on terrorism. Colorado Springs, Colorado, 20 November 2006, http://www.usdoj.gov/ag/speeches/2006/ag_speech_061120.html.

[181] MCA §948b (g).

[182] MCA §948b (c). and MMC Preamble 1(a).

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

[184] Articles 2, 7 and 10 of the Universal Declaration, articles 2(1), 3 and 26 of the ICCPR, articles 2 and 5 of the Convention on the Elimination of Racial Discrimination, articles 1, 8(2) and 24 of the American Convention, article 75 of Additional Protocol I to the Geneva Conventions. Also, Human Rights Committee General Comment 15: The position of aliens under the Covenant, 1986, par. 7, in UN Doc. HRI\GEN\1\Rev.1.
[185] General Comment 15, 1986. The position of aliens under the Covenant.
[186] General Recommendation no. 30 (general comments) (2004).
[187] *Ibid.*
[188] Department of Defense News Briefing - ASD PA Clarke and Brig. Gen. Rosa, 4 April 2002, http://www.defenselink.mil/Transcripts/Transcript.aspx?TranscriptID=3391. Also as part of the plea agreement, Lindh agreed to withdraw his claims of ill-treatment by the US military and to acknowledge that he was "not intentionally mistreated by the US military". According to earlier documents filed in court, during his period of lengthy interrogations, he had been stripped, tied to a stretcher, blindfolded, subjected to cruel use of restraints, deprived of heat and light, and denied access to medical treatment and legal counsel. More than two years after he was sentenced, in the wake of the Abu Ghraib torture revelations, "documents, read to The [Los Angeles] Times by two sources critical of how the government handled the Lindh case, show that after an Army intelligence officer began to question Lindh, a Navy admiral told the intelligence officer that 'the secretary of Defense's counsel has authorized him to 'take the gloves off' and ask whatever he wanted." *Prison interrogators' gloves came off before Abu Ghraib*, Los Angeles Times, 9 June 2004.
[189] *USA v. Lindh*, In the United States District Court for the Eastern District of Virginia, Alexandria Division. Plea Agreement.
[190] MCM, Rule 904: "Arraignment shall be conducted in a military commission session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading."
[191] Doorstep interview, Adelaide, 2 March 2007, transcript available at http://www.foreignminister.gov.au/transcripts/2007/070302_ds.html.
[192] Article 11 of the Universal Declaration, article 14(2) of the ICCPR, article 7(1)(b) of the African Charter, article 8(2) of the American Convention, article 6(2) of the European Convention, article 75(4)(d) of Additional Protocol I, article 6(2)(d) of Additional Protocol II.
[193] Human Rights Committee, General Comment 29, States of Emergency (article 4), UN Doc: CCPR/C/21/Rev.1/Add.11, para. 11.
[194] Human Rights Committee, General Comment 13 (1984).
[195] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 7, in UN Doc. HRI/GEN/Rev.7.
[196] President Bush Participates in Press Availability at 2006 U.S.-EU Summit, 21 June 2006, http://www.whitehouse.gov/news/releases/2006/06/20060621-6.html.
[197] President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html.
[198] Radio Interview of the Vice President by Steve Gill, The Steve Gill Show, 17 June 2005, http://www.whitehouse.gov/news/releases/2005/06/20050617-9.html.
[199] *ACLU v. Department of Defense*. Sixth Declaration of Marilyn A. Dorn, 5 January 2007, op.cit.
[200] Interview of the President by Alhurra Television, 5 May 2004, http://www.whitehouse.gov/news/releases/2004/05/20040505-5.html.
[201] Articles 9(3) of the ICCPR, article 7(5) of the American Convention, article 5(3) of the European Convention, article 60(4) of the ICC Statute.

[202] Article 14(3)(c) of the ICCPR, article 8(1) of the American Convention, article 6(1) of the European Convention, article 67(1)(c) of the ICC Statute.
[203] *Barker v. Wingo*, 407 U.S. 514 (1972).
[204] UCMJ, Rule 707.
[205] *Barker v. Wingo*, 407 U.S. 514 (1972).
[206] "We're now approaching the five-year anniversary of the 9/11 attacks – and the families of those murdered that day have waited patiently for justice. Some of the families are with us today – they should have to wait no longer." President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, op.cit.
[207] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.
[208] Amnesty International, for one, opposed the Military Order, and the military commission trials it provided, from the outset. See, for example, *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. See also letter to Senator Leahy from 700 law professors and lawyers, http://www.law.yale.edu/documents/pdf/Public_Affairs/letterleahy.pdf. See also Open letter to President Bush on Military Commissions from International Commission of Jurists, 6 December 2001, http://www.icj.org/news.php3?id_article=2609&lang=en.
[209] Military Commissions Act: Legislation and Implication. John Bellinger, Legal Adviser. Remarks to Harvard Law School, Boston, Massachusetts, 3 November 2006 (text revised 12 January 2007), op. cit.
[210] Uniform Code of Military Justice, Appendix 21, analysis of rules for courts-martial, Rule 707 (a).
[211] MMC, Rule 602.
[212] MMC, Rule 707(a)(1).
[213] MMC, Rule 707(a)(2).
[214] MMC, Rule 911, discussion.
[215] MMC, Rule 707(a)(3).
[216] MMC, Rule 707(b)(4)(E)(i).
[217] MMC, Rule 707(d).
[218] MMC, Rule 1101(b)(3), discussion. "This section acknowledges that even in the face of an acquittal, continued detention may be appropriate under the law of war".
[219] Principle 1 of the UN Basic Principles on the Role of Lawyers, principle 17(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 55(2)(c) of the ICC Statute.
[220] Principles 1 and 5 of the UN Basic Principles on the Role of Lawyers, article 105 of the Third Geneva Convention of 1949, article 55(2)(c) of the ICC Statute.
[221] Article 14(3)(d) of the ICCPR, article 8(2)(d) of the American Convention, article 6(3)(c) of the European Convention, article 21(4)(d) of the ICTY Statute, article 20(4)(d) of the ICTR Statute, article 67(1)(d) of the ICC Statute. The right to defend oneself is guaranteed also by Additional Protocol I, which requires that "the procedure . . . shall afford the accused before and during his trial all necessary rights and means of defence" (article 75(4)(a)).
[222] *Miranda v. Arizona*, 384 U.S. 486 (1966).
[223] *Ibid.*
[224] Memorandum for William J. Haynes, II, General Counsel, Department of Defense. Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan. From Jay S. Bybee, Assistant Attorney General, US Department of Justice, Office of Legal Counsel, 26 February 2002.

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

[226] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

[227] See http://action.aclu.org/torturefoia/released/022306/1261.pdf.

[228] In May 2004, AI raised allegations with the US authorities that Chinese officials were in Guantánamo in September 2002. See Further information on Urgent Action 356/03. AI Index: AMR 51/090/2004, 25 May 2004. http://web.amnesty.org/library/Index/ENGAMR510902004. Since then Uighur detainees have confirmed at CSRT hearings that they were questioned by members of a Chinese delegation to the US naval base. The detainees have said that they were mistreated. In another case, Ala Abdel Maqsud Muhammad Salim, an Egyptian national, has alleged that he was interrogated on a number of occasions in late 2004 by a delegation from Egypt. These Egyptian agents threatened him that he would be "disappeared" or subjected to other harm after he was returned to Egypt. During these interrogations he alleges that he was subjected to cruel use of shackles and chains and to environmental (temperature) manipulation via the air conditioning (*Sherif el-Mashad, et al. v. George W. Bush*, et al, Petitioner's supplemental memorandum opposing his rendition. Case no. 05-CV-270, United States District Court for the District of Columbia, 17 January 2006). Similarly, Libyan national Omar Deghayes has 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 said 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 flight records showing that a Gulfstream V jet, registration N8068V (previously registered as N379P), flew direct from Tripoli in Libya to Guantánamo Bay the day before Omar Deghayes says he was first interrogated by the Libyan agents. The detainees in these cases apparently believe that the interrogators who threatened them were agents of their home countries. Amnesty International notes that the Pentagon's Working Group Report on Detainee Interrogations in the Global War on Terrorism, 4 April 2003, recommended an interrogation technique known as "false flag" which consists of "convincing the detainee that individuals from a country other than the United States are interrogating him", and another known as "threat of transfer" characterized by "threatening to transfer to a 3rd country that subject is likely to fear would subject him to torture and death". It is for the USA to investigate these detainees' allegations and to publish the findings in full.

[229] Prepared remarks of Attorney General Alberto R. Gonzales at the US Air Force Academy regarding civil liberties and the war on terrorism. Colorado Springs, Colorado, 20 November 2006, http://www.usdoj.gov/ag/speeches/2006/ag_speech_061120.html.

[230] *US decries abuse but defends interrogations.* Washington Post, 26 December 2002.

[231] *Mincey v. Arizona*, 437 U.S. 385 (1978).

[232] *Chavez v. Martinez* (2003), Justice Stevens, concurring in part and dissenting in part.

[233] President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, *op. cit*.
[234] Summary of the high value terrorist detainee program. Office of the Director of National Intelligence, undated, http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.
[235] *Khan v. Bush*, Respondents' memorandum in opposition to petitioners' motion for emergency access to counsel and entry of amended protective order. In the US District Court for the District of Columbia, 26 October 2006.
[236] (1) ICTY: Rules of Procedure and Evidence. Section 1. Rule 42. (2) ICTR: Rules of Procedure and Evidence. Part 4, Section 1, Rule 42. And Part 5, Section 1, Rule 63. (3) Rome Statute of the ICC: Part 5. Article 55 (2) states that any suspect has the right: "(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing..; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."
[237] *US preparing for trials of top al Qaeda detainees*. New York Times, 11 January 2007.
[238] For example, see Manfred Nowak, CCPR Commentary, 2nd Revised Edition (2005), N.P. Publishers, page 321.
[239] MCA § 949a (3).
[240] The lawyer would have to have been "determined to be eligible for access to classified information that is classified at the level Secret or higher". § 949c (b)(3)(D).
[241] MCA §949c (a)(5), "If the accused is represented by civilian counsel, detailed military counsel shall act as associate counsel".
[242] MMC, Rule 506 (b). The military judge may require that a defence counsel remain present even if the defendant waives his right to counsel and conducts his own defence. MMC, Rule 506 (c).
[243] *USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power*, AI Index: AMR 51/063/2005, May 2005, http://web.amnesty.org/library/index/engamr510632005.
[244] *Dusky v. United States*, 362 U.S. 402 (1960). *Godinez v. Moran*, 509 U.S. 389 (1993).
[245] MMC, Rule 909 (a).
[246] Pages 93-96 of *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, October 2004, http://web.amnesty.org/library/Index/ENGAMR5114520064
[247] See *USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, AI Index: AMR 51/093/2006, June 2006, http://web.amnesty.org/library/Index/ENGAMR510932006. See also, Steven Miles, *Medical ethics and the interrogation of Guantánamo 063*, The American Journal of Bioethics 7(1):W3, January-February 2007. http://www.bioethics.net/journal/j_articles.php?aid=1140.
[248] Human Rights Committee General Comment 13 (1984).
[249] *No-hearing hearings. CSRT: The modern habeas corpus? An analysis of the proceedings of the government's Combatant Status Review Tribunals at Guantánamo.* Mark Denbeaux and Joshua Denbeaux. http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.
[250] Latter fact sheet, dated 8 February 2007, available at http://www.defenselink.mil/news/d2007OMC%20Fact%20Sheet%2008%20Feb%2007.pdf. Earlier version has now been removed from the website. Copy on file at Amnesty International.
[251] MCA § 949a (b)(A).
[252] MMC, Rule of Evidence 611(d)(2), and Rule 914A.
[253] Mirroring Rule 801(c) of the US Federal Rules of Evidence, "hearsay" is defined in the MMC as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". MMC, Section VIII, Rule 801(c).

[254] For example, see: Fact Sheet: The Administration's Legislation to Create Military Commissions, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html.
[255] UN Safeguards guaranteeing protection of the rights of those facing the death penalty. 1984.
[256] *Crawford v. Washington*, 8 March 2004.
[257] *Ibid*.
[258] Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, *op.cit*.
[259] MCA, §949a (b)(2)(A). The US Supreme Court has said that "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination". *Crawford v. Washington*, 8 March 2004.
[260] MCA, §949a (b)(2)(E).
[261] MCA, §949a (b)(2)(F).
[262] MMC, Rule 703(f)(2).
[263] MMC, Rule 703(b)(B), and discussion.
[264] MMC, Rule of Evidence 802, discussion.
[265] See, e.g., *USA: Five years on 'the dark side' – A look back at 'war on terror' detentions*, AI Index: AMR 51/195/2006, December 2006, http://web.amnesty.org/library/Index/ENGAMR511952006.
[266] MMC Rule of Evidence 803(b)(1)(B).
[267] See, Myth/Fact: The administration's legislation to create military commissions. The White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html. Also, Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, *op.cit*. ("if we are to put terrorists on trial, military commissions must be permitted to hear a broad range of evidence, including hearsay evidence where it is reliable. International war crimes tribunals, such as the International Criminal Tribunal for the former Yugoslavia, have similarly adopted broad rules of admissibility"). Under the rules of evidence for the International Criminal Tribunal for the former Yugoslavia, the court "may admit any relevant evidence which it deems to have probative value", but "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial". Also, the tribunal "may request verification of the authenticity of evidence obtained out of court" (Rule 89). Written instead of oral witness testimony may be admitted, but only if it "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". Factors against admitting such evidence include whether "there is an overriding public interest in the evidence in question being presented orally", or "a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or "there are any other factors which make it appropriate for the witness to attend for cross-examination." (Rule 92*bis*). Under Articles 68 and 69 of the Rome Statute of the International Criminal Court, "the testimony of a witness at trial shall be given in person", except in certain regulated circumstances such as to protect the safety of the witness. The Court may also permit testimony of a witness to be given by means of video or audio technology, as well as the introduction of documents or written transcripts. Any measures taken must "not be prejudicial to or inconsistent with the rights of the accused". Under Article 69, the "Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".
[268] Under the UCMJ, a duly authenticated deposition from a witness who refuses or is unable to appear at the court martial may be read or played (in the case of audio or video) into evidence. However, in such a case, the death penalty may not be an option. There is no such exclusion clause under the MCA.

UCMJ §849 Article 49.
[269] Human Rights Committee, General Comment 13 (1984).
[270] MCA, § 949d (d).
[271] For instance, "Any procedures that the CIA would use in the future, of course, would be classified". Update on detainee issues and military commissions legislation. John Bellinger III, State Department Legal Advisor, Foreign Press Center Briefing, Washington DC, USA, 7 September 2006, http://www.state.gov/s/l/rls/71939.htm.
[272] Media briefing, Department of Defense, 6 March 2007, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902.
[273] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.
[274] Brian Z. Tamanaha, *A critical review of the Classified Information Procedures Act*, American Journal of Criminal Law, Vol. 13, pages 277-328 (1986). For information on CIPA and M.R.E. 505, see also *Secret evidence in the war on terror*, Harvard Law Review, Vol. 118 Issue 6, pages 1962-1984, May 2005.
[275] *USA v. Moussaoui*, US Court of Appeals for the Fourth Circuit, 13 September 2004.
[276] Prepared Remarks of Deputy Attorney General Paul J. McNulty at the American Enterprise Institute, Washington, DC, 24 May 2006, http://www.usdoj.gov/dag/speech/2006/dag_speech_060524.html.
[277] MCA, § 949d (f)(1).
[278] MMC, Rule 701(f).
[279] MCA, § 949d (f)(2)(A).
[280] MCA, § 949d (f)(2)(B).
[281] MCA, § 949j (d)(1).
[282] MCA, § 949d (f)(2)(C).
[283] MMC, Rule of Evidence 505(h).
[284] "We believe that Congress should enact a new code of military commissions… the military commission procedures should be separate from those used to try our own service members… because military necessity would not permit the strict application of all court-martial procedures…" Attorney General Alberto Gonzales, Senate Armed Services Committee hearing, 2 August 2006.
[285] See, for example, William A. Weaver and Robert M. Pallitto, *State secrets and executive power*. Political Science Quarterly, volume 120, number 1, 2005, pages 85-112. ("First, when agencies violate the constitutional rights of citizens and commit crimes, it is perverse and antithetical to the rule of law that they may avoid judgment in court and exposure of these activities to the public by refusing to disclose inculpatory information. Second, if the privilege protects the executive and agencies from investigation and judicial power, then the incentive on the part of administrators is to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action. In these circumstances, the privilege may have the effect of encouraging or tempting agencies to engage in illegal activity.")
[286] Tamanaha, *A critical review of the Classified Information Procedures Act, op cit*, page 306.
[287] Tamanaha, *A critical review of the Classified Information Procedures Act, op cit.,* note 168.
[288] MMC, Rule of Evidence 806.
[289] MCA, §949d (f)(C)(4). "The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter".
[290] *The secrecy problem in terrorism trials*. By Serrin Turner and Stephen J. Schulhofer, Liberty & National Security Project, Brennan Center for Justice at NYU School of Law, available at http://www.brennancenter.org/secrecyproblem.pdf. The passage continues: "Indeed, 9/11 Commission

Chairman Thomas Kean observed that roughly three-quarters of the classified material he reviewed during the Commission's investigation should not have been classified in the first place" (citing US Senators Trent Lott and Ron Wyden in their op-ed article *Hiding the truth in a cloud of black ink*, New York Times, 26 August 2004).

[291] Former Solicitor-General Erwin Griswold, quoted in *Secrets not worth keeping: The courts and classified information.* Washington Post, 15 February 1989, cited in Weaver and Pallitto, *State secrets and executive power*. Political Science Quarterly, op.cit.

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

[293] "Assertions of the need for secrecy, long associated with the activities of the executive branch, have proliferated under the administration of George W. Bush to the point where criticisms are being voiced by Republicans as well as Democrats and by members of the federal judiciary… Secrecy claims are raised so routinely and broadly that in some cases, the administration officials involved do not even know what the allegedly secret documents contain." Weaver and Pallitto, *State secrets and executive power*. Political Science Quarterly, op.cit. Early in the "war on terror", President Bush issued an executive order extending the power to assert the state secrets privilege to former US presidents to prevent disclosure of materials from their time in office. Under the order, the former President "independently retains the right to assert constitutionally based privileges" which may include "privileges for records that reflect: military, diplomatic, or national security secrets (the state secrets privilege)" as well as communications of the President or his advisors, legal advice or legal work; and the deliberative processes of the President or his advisors. Executive Order 13233, Further Implementation of the Presidential Records Act, 1 November 2001.

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

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

[296] *ACLU et al. v. CIA et al*., Brief for Defendant-Appellee: Central Intelligence Agency, Docket No. 06-0205-cv, United States Court of Appeals for the Second Circuit, 1 May 2006.

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

[298] *ACLU v. Department of Defense*. Sixth Declaration of Marilyn A. Dorn, 5 January 2007, op.cit.

[299] *Ibid.*

[300] "Many specifics of this program, including where the detainees have been held and details of their confinement, cannot be divulged". Of the "alternative" interrogation techniques employed by the CIA in the secret program, the President said "I cannot describe the specific methods used". President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, op. cit.

[301] Article 14.3(g), International Covenant on Civil and Political Rights. Article 75.4(f) of Additional Protocol 1 to the Geneva Conventions.
[302] UN Human Rights Committee, General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment), 1992, par. 12, in UN Doc. HRI/GEN/Rev.7.
[303] General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law. 1984, para. 14.
[304] *Culombe v. Connecticut*, 367 U.S. 568 (1961).
[305] 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.
[306] General Comment 20, para. 12 (1992).
[307] *A and others v. Secretary of State*. House of Lords. Opinions of the Lords of Appeal for Judgment in the Cause. [2005] UKHL 71, http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand.pdf.
[308] *Rochin v. California* 342 U.S. 165 (1952).
[309] *Jackson v. Denno*, 378 U.S. 368 (1964).
[310] *Brown v. Mississippi*, 297 U.S. 278 (1936).
[311] *Bruton v. United States*, 391 U.S. 123 (1968), Justice White dissenting.
[312] *Payne v. Arkansas*, 356 U.S. 560 (1958).
[313] *Brown v. Mississippi*, 297 U.S. 278 (1936).
[314] "we must have the ability to detain and remove terrorists from the battlefields of this conflict; to collect from them the vital intelligence that enables us to capture their associates and break up future terrorist plots; and to create effective and fair procedures that will allow us to prosecute and punish captured terrorists for their war crimes." Prepared remarks of Attorney General Alberto R. Gonzales on the Military Commissions Act of 2006 at the German Marshall Fund, Berlin, Germany, 25 October 2006, *op.cit.*
[315] *Brown v. Mississippi*, 297 U.S. 278 (1936).
[316] The Star Chamber was an English court created in 1487 by King Henry VII. Comprising 20-30 judges, the Chamber 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.
[317] *Culombe v. Connecticut*, 367 U.S. 568 (1961).
[318] For a list, see Appendix 3, pages 152-153, of *USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power*. AI Index: AMR 51/063/2005, May 2005, http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf.
[319] *Watts v. Indiana*, 356 U.S. 560 (1949).
[320] *Blackburn v. Alabama*, 361 U.S. 199 (1960).
[321] *Jackson v. Denno*, 378 U.S. 368 (1964).
[322] Metin Başoğlu, Maria Livanou, and Cvetana Crnobarić. *Torture vs Other Cruel, Inhuman, and Degrading Treatment. Is the Distinction real or apparent?* Arch. Gen. Psychiatry, 2007; 64:277-285.
[323] In January 2005, 11 months before the DTA was passed and more than three years after "war on terror" detentions by the USA began, Attorney General Alberto Gonzales revealed that "as a direct result of the reservation the Senate attached to the CAT [Convention Against Torture], 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". Responses of Alberto R. Gonzales, Nominee to be Attorney General, to the written questions of Senator Dianne Feinstein. January 2005.
[324] *Duckworth v. Eagan*, 492 U.S. 195 (1989), Justice O'Connor concurring, joined by Justice Scalia.

[325] See Memorandum for William J. Haynes, II, General Counsel, Department of Defense. *Potential legal constraints applicable to interrogations of persons captured by US Armed Forces in Afghanistan.* From Jay S. Bybee, Assistant Attorney General, US Department of Justice, 26 February 2002.
[326] MCA, §949a (b)(2).
[327] MMC, Rule of Evidence 304(g).
[328] MCA, §948b.
[329] Article 31(a) of the UCMJ states: "No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him". Article 31(b) states: "No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used against him in a trial by court-martial". Article 31(d) states: "No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial." The burden of proof is on the prosecution to show that the statement was voluntarily made (Military Rule of Evidence 304.e).
[330] MMC, Rule of Evidence 301 (a), Discussion.
[331] MMC, Rule of Evidence 304 (d)(2)(B).
[332] MCA, §948r (b).
[333] MMC, Rule of Evidence 304(b)(3).
[334] UN Doc: CAT/C/USA/CO/2, 18 May 2006.
[335] MCA, §948b (g). Senior US officials have said that common Article 3 is "vague". President Bush has complained that "Common Article 3 says that there will be no outrages upon human dignity. It's very vague. What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation." The fact that the Commander in Chief of the Armed Forces has taken this position, and the fact that the MCA narrows the USA's War Crimes Act to exclude the criminalization of violations of this provision of common Article 3 signal concern in terms of the treatment of this issue by the military commission process. Press conference of the President, 15 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html.
[336] MMC, Rule of Evidence 304 (c)(2), Discussion.
[337] *Detainee abuse charges feared.* Washington Post, 28 July 2006.
[338] *Rochin v. California* 342 U.S. 165 (1952) and *Sacramento v. Lewis* (1998).
[339] MMC, Rule of Evidence 304 (c)(2), Discussion.
[340] *Rochin v. California* 342 U.S. 165 (1952).
[341] *Al Odah v. USA; Boumediene v. Bush.* Brief of *amici curiae* retired federal jurists in support of petitioners' supplemental brief regarding the Military Commissions Act of 2006. In the US Court of Appeals for the District of Columbia Circuit, 1 November 2006.
[342] Guantanamo Provides Valuable Intelligence Information. US Department of Defense news release, 12 June 2005, op. cit.
[343] MCA, § 949d (f)(1)(A). The military judge may permit such non-disclosure if he or she finds that the "sources , methods, or activities by which the United States acquired the evidence are classified" and "the evidence is reliable". There is no requirement to have the prosecution present an unclassified summary of the sources, methods, or activities by which the evidence was obtained. That would be up to the discretion of the military judge.
[344] In 2004, the Senate Judiciary Committee requested a copy of one such alleged document, but the administration had not done so. The document was described as: Memorandum from the Department of

Justice, Re: Liability of interrogators under the Convention against Torture and the Anti-Torture Act when a prisoner is not in US custody.

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

[346] *Haynes v. Washington*, 373 U.S. 503 (1963).

[347] For more information on the cases, see *USA: Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, AI Index: AMR 51/093/2006, June 2006, http://web.amnesty.org/library/Index/ENGAMR510932006, and *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AI Index: AMR 51/149/2006, September 2006, http://web.amnesty.org/library/Index/ENGAMR511492006.

[348] Guantanamo provides valuable intelligence information, US Department of Defense News Release, 12 June 2005, http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583.

[349] Seeking to explain al-Qahtani's interrogation after details were leaked, the Pentagon said that "to understand Kahtani's interrogation, it is important to remember the post-9/11 environment during this period…The United States was clearly a country on high alert during this period and Kahtani – a known al-Qaida terrorist – was being held at Guantanamo and was believed to possess information essential to preventing future terrorist attacks." Guantanamo provides valuable intelligence information, US Department of Defense News Release, 12 June 2005, *op. cit.* On those held in secret detention, President Bush has said: "In these cases, it has been necessary to move these individuals to an environment where they can be held secretly, questioned by experts, and -- when appropriate -- prosecuted for terrorist acts." President Bush discusses creation of military commissions to try suspected terrorists. 6 September 2006, op.cit.

[350] UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.

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

[352] DTA, § 1005(e)(3)(D).

[353] MCA, § 950b.

[354] MCA, § 950f (a).

[355] MMC, Rule 1201.

[356] MCA, § 950f (d).

[357] MMC, Rule 1201(d)(1).

[358] MCA, § 950g (a)(1)(B). According to the White House, all those convicted by military commission would be "entitled to an appeal to the US Court of Appeals for the DC Circuit, regardless of the length of their sentence". Fact Sheet: The administration's legislation to create military commissions. White House, 6 September 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html. This is different than under the DTA, where only those sentenced by military commission to death or to a term of imprisonment of 10 years or more would have the right to appeal to the US Court of Appeals for the DC Circuit. The DTA provided no such right for any other person, but left it up to the discretion of the Court of Appeals as to whether to hear an appeal.

[359] MCA, §950g (c).

[360] MCA § 950g (d).

[361] *Perera v. Australia*, No. 536/1993, para 6.4 and *Domukovsky et al. v. Georgia*, Nos. 623,624,626,627/1995, Para 18.11.
[362] MCA, § 950b (b)(2).
[363] MCA, § 950g (a)(2).
[364] MCA, § 950j (b).
[365] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 14.
[366] GA RES. 60/147 16 December 2005.
[367] Alberto Gonzales hosts 'Ask the White House'. 18 October 2006, http://www.whitehouse.gov/ask/20061018.html.
[368] For example, see *USA: The experiment that failed – A reflection on 30 years of executions*, AI Index: AMR 51/011/2007, January 2007, http://web.amnesty.org/library/Index/ENGAMR510112007.
[369] UN Safeguards guaranteeing protection of the rights of those facing the death penalty. 1984.
[370] Human Rights Committee, General Comment 29. CCPR/C/21/Rev.1/Add.11, 31 August 2001.
[371] For detailed information on cases, see http://www.deathpenaltyinfo.org/article.php?did=412&scid=6.
[372] Aaron Patterson, Madison Hobley, Leroy Orange and Stanley Howard.
[373] MMC, Rule 1210(a).
[374] *USA: No return to execution - The US death penalty as a barrier to extradition*, AI Index: AMR 51/171/2001, November 2001, http://web.amnesty.org/library/Index/ENGAMR511712001.
[375] *Ibid.*
[376] See, for example, *USA: Death and the President*, AI Index: AMR 51/158/2003, 22 December 2003, http://web.amnesty.org/library/index/engamr511582003.
[377] Interview with Diane Sawyer, Primetime, ABC News, 16 December 2003.
[378] President Bush Welcomes Chancellor Merkel of Germany to the White House, 4 January 2007, http://www.whitehouse.gov/news/releases/2007/01/20070104-2.html.
[379] See *Images of hanging make Hussein a martyr to many*, New York Times, 6 January 2007.
[380] *When the state kills… The death penalty: a human rights issue*. AI Index: ACT 51/07/89, Amnesty International Publications, 1989, page 19.
[381] *Execute terrorists at our own risk*. By Jessica Stern, New York Times, 28 February 2001. Jessica Stern served on the National Security Council from 1994 to 1995.
[382] *USA: Human dignity denied: torture and accountability in the 'war on terror'*, October 2004, op.cit.
[383] *US soldiers reprimanded for assaults on Afghan detainees*, 31 January 2007, Crimes of War Project, http://www.crimesofwar.org/news-soldiers-reprimand.html, and *2 soldiers reprimanded for assaults*, Los Angeles Times, 27 January 2007.
[384] *Hamdan v. Rumsfeld*. Memorandum. District Court for the District of Columbia, 13 December 2006.
[385] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
[386] An earlier version of this framework was first sent to President George W. Bush in June 2006. See *USA: Memorandum to the US Government on the report of the UN Committee against Torture and the question of closing Guantánamo* (AI Index: AMR 51/093/2006), 23 June 2006, *op.cit.*
[387] The prejudicial labelling of the detainees by administration officials, including the Commander-in-Chief, may put the detainees at risk of ill-treatment. See, for example, Affidavit of Sergeant Heather N. Cerveny (4 October 2006). This US Marine Corps Sergeant has related conversations she says she had in September 2006 with Guantánamo Bay personnel who described abuse of detainees, including beatings, "punching in the face", slamming a detainee's head into a cell door, depriving detainees of water, and taking their privileges away for no reason. She described how one guard called "Steven" had told her that "even when a detainee is being good, they will take their personal items away. He said they do this to anger the detainees so that they can punish them when they object or complain. I asked

Steven why he treats the detainees this way. He said it is because he hates the detainees and that they are bad people". Compare, e.g., *Press Conference of President Bush and British Prime Minister Tony Blair*, White House 17 July 2003, http://www.whitehouse.gov/news/releases/2003/07/20030717-10.html. Reporter: "What happens now in Guantanamo Bay to the people detained there…Do you have concerns they're not getting justice, the people detained there?" President Bush: "No, the only thing I know for certain is that these are bad people".

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

[389] See, for example, *USA/Yemen: Secret detention in CIA 'black sites'*, AI Index: AMR 51/177/2005, November 2005, http://web.amnesty.org/library/index/engamr511772005. In the case of the three detainees who are the subject of that report, Amnesty International was told by the Yemeni authorities that their continued detention without charge or trial in Yemen after their return from US custody was on the basis of explicit instructions from the US government. The organization was told by the Yemeni authorities that if the US authorities were to request the men's release, they would be released. The UN Working Group on Arbitrary Detention has expressed its concern about this practice, having received information that the USA is seeking what the Working Group calls "reverse diplomatic assurances", that is, "asking receiving Governments to detain the persons handed over despite the absence of criminal charges or to otherwise indefinitely place heavy restrictions on their freedom". The UN Working Group emphasised that "Governments cannot accept detainees under such conditions without incurring serious violations of their obligations under international human rights law." Report of the Working Group on Arbitrary Detention. UN Doc. A/HRC/4/40, 9 January 2007.

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

[391] See endnote 389.