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USA: Way of life, way of death Capital charges referred against five former secret detainees

20 May 2008

AI Index: AMR 51/041/2008

Today's war on terror is, above all, a struggle for freedom and liberty... We're fighting for our way of life...

President Bush, urging Congress to pass Military Commissions Act, 6 September 2006

On 13 May 2008, the USA opened another chapter in its relationship with the death penalty when it referred capital charges against five Guantánamo detainees for joint trial by military commission. The five are accused of involvement in the 11 September 2001 attacks in the USA, attacks which Amnesty International has described as a crime against humanity. Two weeks after those attacks, President George W. Bush had said that his was an administration that was “focused on justice. And we’re going to get justice.” That his administration’s concept of justice would include judicial killing was foreshadowed by his record on the death penalty as governor of Texas before taking the White House.¹

Today, across the globe, justice and the death penalty are increasingly seen as incompatible with each other. A clear majority of countries have turned their backs on executions, with 137 states abolitionist in law or practice. The international community has agreed that even for the most serious crimes of genocide, war crimes and crimes against humanity, the death penalty should not be an option: thus the International Criminal Court and other international criminal tribunals cannot pass death sentences. In a landmark resolution passed in late 2007, the United Nations General Assembly voted for a global moratorium on executions with a view to abolition, persuaded that “the death penalty undermines human dignity, and convinced that a moratorium on the use of the death penalty contributes to the enhancement and progressive development of human rights”.

The USA has yet to join this evolving consensus, executing more than a thousand men and women in the past two decades, willing to kill the more than 3,000 others currently on US death rows, and joining China, Iran, Libya, Myanmar, North Korea, Sudan, Syria, Zimbabwe and others in voting against the UN resolution in 2007. These are among the countries singled out for particular criticism each year in the US State Department’s human rights reports, although its criticism relating to the death penalty tends to be somewhat muted compared to other issues. President Bush had condemned a number of these states on the issue of torture in a statement in June 2003 in which he said that the USA was leading the global struggle

For example, see USA: Death and the President, Amnesty International, December 2003, <http://www.amnesty.org/en/library/info/AMR51/158/2003/en>.

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against torture “by example”. In contrast, “notorious human rights abusers”, asserted the President “including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.” The USA’s approach to torture over the past few years, like its continuing resort to the death penalty, leaves its claims to be a human rights champion drained of credibility.

The five Guantánamo detainees against whom charges have just been referred – Khalid Sheikh Mohammed, Walid bin Attash, Ramzi bin al-Shibh, ‘Ali ‘Abd al-‘Aziz ‘Ali and Mustafa al Hawsawi – were arrested in Pakistan in 2002 and 2003 and held in secret incommunicado custody by the Central Intelligence Agency (CIA) at unknown locations outside the USA for between three and four years. Their fate and whereabouts concealed, they became victims of enforced disappearance, like torture a crime under international law. Prolonged secret incommunicado detention itself amounts to torture or other cruel, inhuman or degrading treatment. At least one of the defendants, Khalid Sheikh Mohammed, was subjected to the form of water torture known as “waterboarding”. Which other “enhanced” interrogation techniques were used against these and other CIA detainees has not been revealed by the US authorities, and any such techniques, the conditions of detention, and location of CIA detention facilities, remain classified at the highest level of secrecy.

The five men – whose arraignment is currently scheduled for 5 June 2008 – were transferred with nine others from secret CIA custody to virtually incommunicado military detention at Guantánamo in September 2006.² In a speech confirming publicly for the first time that the USA had been operating a program of secret detention and interrogation, President Bush exploited these cases to obtain congressional approval for the Military Commissions Act (MCA), the legislation under which the government is now driving these five detainees towards the possibility of the execution chamber. “As soon as Congress acts to authorize the military commissions I have proposed”, the President said, “the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.” Again, for justice read execution.

On the eve of this September 2006 speech, President Bush had released the latest version of the USA’s National Strategy for Combating Terrorism. Among other things, this states that:

“The long-term solution for winning the War on Terror is the advancement of freedom and human dignity through effective democracy... Effective democracies honour and uphold basic human rights,... protect independent and impartial systems of justice, punish crime, embrace the rule of law...”

The politics of fear and haste trumped respect for human rights and the rule of law when Congress passed the MCA. Incompatible with international law, the MCA is also inconsistent with the USA’s counterterrorism strategy. Instead of meeting the promise in that strategy to “promote freedom and human dignity”, “uphold basic human rights” and “embrace the rule of law”, the USA has conducted a systematic assault on those very same principles. It is now heading towards carrying out executions after unfair trials, in further violation of international law.

Another of the 14 detainees, Ahmed Khalfan Ghailani, is also facing capital charges, but these charges have not yet been referred to trial. See <http://www.amnesty.org/en/library/info/AMR51/027/2008/en>.

The MCA is discriminatory legislation – no US citizen would be subject to its flawed provisions. It blocks detainees from obtaining judicial remedies for unlawful treatment by preventing them from pursuing *habeas corpus* challenges. It authorizes the President to convene military commissions the procedures of which do not comply with international fair trial standards. Indeed, the commissions lack structural independence from the executive branch that has authorized human rights violations against those brought to trial. The MCA allows the government to introduce information extracted under cruel, inhuman or degrading treatment, while keeping secret any classified methods used to obtain it. This secrecy, the use of hearsay, and the USA's narrow definition of torture may also allow information obtained under torture to be admitted as evidence. The government, for example, has refused to rule out the admission into evidence of information obtained under waterboarding or other “enhanced” techniques.

At the same time, the government – undoubtedly aware of the widespread criticism of its interrogation, detention and trial policies – has reportedly employed “clean teams” in Guantánamo to re-interrogate detainees, including those previously in CIA custody, in a bid to obtain incriminating information using supposedly “non-coercive” methods. Officials are reported to have said that incriminating information has been obtained using these methods, although not in the case of a detainee against whom charges have been dropped.³ These detainees have been subjected to years of secret detention and torture or other ill-treatment, remain without remedy, rehabilitation or redress for past abuses, and continue to be held in isolation and virtually incommunicado detention. Amnesty International considers that applying interrogation techniques that may be considered non-coercive in other circumstances, to a person in such a situation, provides no assurance that any self-incriminating statements they may make are truly voluntary.

While the “clean teams” have set about their work, the MCA also threatens to be part of a whitewashing of past abuses. It facilitates impunity for those who have authorized or carried out human rights violations, particularly in the CIA program. The MCA was the legislative response to the US Supreme Court's June 2006 conclusion in *Hamdan v. Rumsfeld*, a case involving a Guantánamo detainee captured in late 2001 in Afghanistan, that Article 3 common to the Geneva Conventions was applicable. This reversed President Bush's 2002 determination to the contrary. Violations of common Article 3 were prosecutable as war crimes in the USA under its War Crimes Act (WCA). The President's decision not to apply Geneva Convention protections had followed advice from his then White House Counsel that this would “preserve flexibility” for interrogations and “substantially” reduce “the threat of domestic criminal prosecution” under the WCA in the future.

In his speech of 6 September 2006, President Bush said that the *Hamdan* ruling had thrown into doubt the future of the secret detention program, and described as “unacceptable” the prospect that any “military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act”. The subsequent MCA narrowed the scope of the WCA, effectively decriminalizing under that act certain violations of common Article 3, including “outrages upon personal dignity, in particular, humiliating and degrading treatment” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial

See: Charges against 9/11 suspect dropped, Washington Post, 14 May 2008, and USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, <http://www.amnesty.org/en/library/info/AMR51/042/2008/en>.

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guarantees which are recognized as indispensable by civilized peoples”, in other words, unfair trials. Under the MCA, executions may follow such trials, even as impunity is enjoyed by those responsible for authorizing or carrying out international crimes against the condemned.

The 2007 UN General Assembly resolution called upon all states that still maintain the death penalty to respect international safeguards in capital cases, in particular the minimum standards set out in 1984 by the UN Economic and Social Council (ECOSOC). Safeguard 5 of the ECOSOC resolution states: “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights [ICCPR]”. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has also emphasised that fair trial safeguards in death penalty cases must be implemented without exception or discrimination, and that “proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments.” The military commissions do not comply with these standards. The USA holds that neither the protections of the ICCPR nor the mandates of the Special Rapporteurs extend to the trials or treatment of “enemy combatants”.

In his inaugural address in January 2001, President Bush promised to be a leader who would “speak for greater justice”. His term in office has included two of the most infamous injustices in US history – the Guantánamo detention regime and the CIA’s secret detention program. Echoing notions of US exceptionalism voiced by several of his predecessors, he said that “If our country does not lead the cause of freedom, it will not be led.” Seven years later, the UN High Commissioner for Human Rights spoke for many when she said that the US-led “war on terror has inflicted a very serious setback for the international human rights agenda”.⁴

In his 2001 speech, President Bush also spoke of “the American story – a story of flawed and fallible people, united across the generations by grand and enduring ideals.” According to former US Supreme Court Justice William Brennan in 1987, the story of the USA includes chapters in which there is “a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along”.⁵

Two weeks after the 11 September 2001 attacks, Amnesty International urged President Bush to lead the US government in taking “every necessary human rights precaution in the pursuit of justice, rather than revenge, for the victims of this terrible crime.” The organization’s letter to the President continued:

“Amnesty International believes that in any action taken, it is vital to maintain the highest respect for human rights and international human rights standards. This should include using every means available to bring those responsible for the 11

UN human rights chief to leave post, Washington Post, 3 March 2008.

Quoted in *The Rule of Law*, lecture by The Rt. Hon. Lord Bingham of Cornhill KG, House of Lords, Centre for Public Law, University of Cambridge, 16 November 2006.

September attacks to justice within the framework of a fair and accountable criminal justice system, and with full respect for international standards for a fair trial. We urge your administration to adhere to such standards every step of the way towards the objective of justice, and to reject any resort to the death penalty in pursuit of this goal.”⁶

In the context of a pursuit of unchecked executive power under a global “war” framework, the USA has bypassed and undermined international law and standards. Even in the latter stages of his term in office, however, President Bush can act to begin to repair the damage done. He should immediately end the secret detention program and, as part of injecting urgency and commitment into his stated aim of closing the Guantánamo detention facility, abandon trials by military commission. The administration should turn to the existing federal courts for any trials of the detainees and release those who are not to be charged. It should restore full *habeas corpus* review, and end any pursuit of the death penalty by the federal government.

The USA should incorporate international law into its notions of justice. The “way of life” it seeks to preserve should be one that rejects the death penalty and respects human rights and the rule of law.

Take action for human rights

Please send an appeal to President Bush, in your own words:

- expressing sympathy for the families and friends of those killed and injured in the attacks in the USA of 11 September 2001, attacks which Amnesty International among others have described as a crime against humanity;
- pointing out that while governments have a duty to protect public safety, they must do so while respecting international law, as the UN Security Council and General Assembly have stated;⁷
- pointing out that the USA's own National Strategy for Combating Terrorism promotes respect for human rights as the route to security;
- opposing the US military commissions, the procedures of which do not comply with international fair trial standards, including because the tribunals lack independence and can admit information extracted under unlawful methods, including cruel, inhuman or degrading treatment;

Letter available at <http://www.amnesty.org/en/library/info/AMR51/144/2001/en>.

Indeed, the UN General Assembly has emphasised that “respect for human rights for all and the rule of law” is “the fundamental basis of the fight against terrorism”. UN General Assembly resolution 60/288, “The United Nations Global Counter-Terrorism Strategy”, 20 September 2006, adopted by consensus. In similar vein, the UN Security Council, noting the obligation on states to bring to justice those involved in terrorism, including through extradition and prosecution, has emphasised the obligation upon states to “ensure that any measures taken to combat terrorism comply with all their obligations under international law... in particular international human rights, refugee, and humanitarian law”. UN Security Council Resolution 1456, 20 January 2003, S/RES/1456 (2003).

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- expressing concern that the USA intends to seek the death penalty against five defendants accused of involvement in the 9/11 attacks, pointing out that any executions after unfair trials would violate international law;
- noting that the defendants in this case are among those who have been subjected to enforced disappearance by the USA, a crime under international law, and that at least one of them has been confirmed by the US authorities as having been subjected to a form of water torture;
- calling for an end to the USA's secret detention program and an end to impunity for abuses committed as part of it
- urging President Bush to call an end to the military commission system, and to ensure that detainees against whom there is evidence of criminal wrongdoing be brought to trial in the ordinary US federal courts, without resort to the death penalty;
- calling on President Bush to make good his stated aim of bringing an end to the Guantánamo detentions, and to make this an urgent priority in his final months in office.

Appeals to:

President George W. Bush
The White House
Office of the President
1600 Pennsylvania Avenue NW
Washington DC 20500
USA
Fax: + 1 202 456 2461.
Email: president@whitehouse.gov.
Salutation: Dear Mr President

Please send a copy of your appeal to the US Embassy in your country.

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