

[This is an extract from the document '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) issued by Amnesty International in June 2006. Anyone wishing further details should consult the full document. An extensive range of our materials on this and other subjects is available at <http://www.amnesty.org>]

United States of America Ending Guantánamo Bay detentions

When I hear US officials describe the suicides of three Muslim prisoners at Guantánamo Bay last Saturday as 'asymmetric warfare' and 'a good PR move', I know it's time to close that camp – not just because of what it's doing to the prisoners but because of how it is dehumanizing the American captors.

David Ignatius, Washington Post, 14 June 2006¹

The continuing indefinite detention of some 460 people in Guantánamo remains a violation of international law, a distressing fact in their and their families' lives, a stain upon the United States, and a contradiction of the US administration's National Security Strategy, which takes the position that respect for the "non-negotiable demands of human dignity" is the route to security not an obstacle to it.

Amnesty International deeply regrets that it took four years and required court action before the USA named the detainees held in Department of Defense custody in the base. The organization notes, however, that the numbers do not add up. The authorities released a list of 759 names of people held in Department of Defense custody at the base between January 2002 and 15 May 2006. However, three days later it stated that 287 detainees have been released or transferred from the base and "approximately 460" remain there, making a total of 747.² Amnesty International requests clarification as to why there is a difference of 12 detainees.³

Indeed, many questions surrounding the Guantánamo detentions remain unanswered. For example:

- Were there ever people held at the base who were not in Department of Defense custody, who have not shown up on the Pentagon's list? For example, as already noted, the Central Intelligence Agency (CIA) operated its own area at the Guantánamo facility. Did the CIA only ever interrogate those in Defense Department custody? Were there any detainees held in exclusive CIA custody, or perhaps later

¹ *A prison we need to escape.* David Ignatius, Washington Post 14 June 2006.

² *Detainee Transfer Announced.* Department of Defense News Release, 18 May 2006, <http://www.defenselink.mil/releases/2006/nr20060518-13076.html>.

³ Amnesty International has previously raised concern that the lack of precision over detainee numbers raised the possibility that individual detainees could be moved to and from their places of detention, or between different US agencies, without any public knowledge of such transfers. See page 101-102, *USA: Human dignity denied, op.cit.*

transferred from the CIA to the Department of Defense? The 2005 Schmidt/Furlow report into FBI allegations of abuse in Guantánamo said that it found no evidence of “ghost detainees” having been held at the base, but there is no indication that the CIA was included within the scope of the investigation.⁴ In the earlier Church report, the CIA did not provide any information on its activities in Guantánamo, Afghanistan or at undisclosed locations.⁵

- In addition to the inadequacy of investigations into alleged abuses by US personnel, to Amnesty International’s knowledge, none of the military investigations conducted to date has looked into allegations that detainees have been ill-treated by or with the involvement of agents of other countries while held in Guantánamo.⁶ The US administration has never refuted allegations first raised by Amnesty International in May 2004 that agents of the Chinese government visited Guantánamo in September 2002 and participated in interrogations of ethnic Uighur detainees held there.⁷ This allegation was again raised in federal court in 2005 and again the government did not refute it.⁸ It is alleged that during the agents’ visit, the detainees were subjected to intimidation and threats⁹, and to interrogation techniques such as environmental (temperature) manipulation, forced sitting for many hours, and sleep deprivation, some of which was on the instruction of the Chinese delegation. Similarly Omar Deghayes has claimed that he was twice interrogated by Libyan agents in

⁴ Army Regulation 15-6: Final Report. Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility. Unclassified executive summary. (Schmidt/Furlow Report), 1 April 2005 (amended 9 June 2005), <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

⁵ “(The CIA cooperated with our investigation, but provided information only on activities in Iraq.) It is important to highlight that it was beyond the scope of our tasking to investigate the existence, location or policies governing detention facilities that may be exclusively operated by OGAs, rather than by DoD.” *Unclassified executive summary of Church Report*, <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>. (OGA = other government agencies, eg. CIA); DoD = Department of Defense.)

⁶ Amnesty International notes that the Pentagon’s *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, 4 April 2003, recommended an interrogation technique known as “false flag” which consisted of “convincing the detainee that individuals from a country other than the United States are interrogating him”, 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”. The detainees in the cases cited here believe that the interrogators who threatened them were agents of their home countries. It is for the USA to investigate these allegations and to publish the findings in full.

⁷ Amnesty International Urgent Action. Further information on UA 356/03. AI Index: AMR 51/090/2004, 25 May 2004. <http://web.amnesty.org/library/Index/ENGAMR510902004>.

⁸ Declaration of Sabin Willett, 16 July 2005. *Abu Bakker Qassim and A’Del Abdu Al-Hakim v. George W. Bush et al.*, Memorandum in support of petitioners’ emergency motion to vacate stay order and issue writ directing immediate release of petitioners. Civil Action No. O5 CV 0497 in the United States District Court for the District of Columbia, 21 July 2005.

⁹ According to the above affidavit, A’Del Abdu al-Hakim was told by the Chinese agents that “he was lucky the Pakistanis had turned him over to the Americans, rather than them, as if he thought this [i.e., Guantánamo Bay] was a prison, just wait until we [i.e., the Chinese] get you”.

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.¹⁰ 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.¹¹ 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.

- The USA has not answered the question of how many children it has held in Afghanistan and Guantánamo. The authorities have apparently limited their definition of child to someone who is under 16, contradicting most international legal standards which hold that children are those who are under 18 years old and subject to particular protections.¹² Research suggests that there may have been at least 17 detainees who were taken to Guantánamo when they were under 18 years old.¹³

The latest questions to be raised in relation to the Guantánamo detainees surround the apparent suicides of three of them, Saudi nationals Mane’i bin Shaman bin Turki al-Habardi al-‘Otaybi and Yassar Talal ‘Abdullah Yahia al-Zahrani, who was reportedly 17 when he was taken into custody, and Yemeni national Salah ‘Ali ‘Abdullah Ahmed al-Salami. All three had previously participated in hunger-strikes and subjected to force feeding. All were held in a maximum security section of the detention camp. There are no records publicly available of the men’s Combatant Status Review Tribunals. Amnesty International is disturbed by the Guantánamo Commander’s description of the deaths as acts of “asymmetric warfare”, by which he was tending to prejudge the outcome of the Naval Criminal Investigation Service

¹⁰ See pages 22-23, *USA: Guantánamo and beyond*, op. cit. This Gulfstream V jet was operated by Premier Executive Transport, a CIA front company, and has been identified with a number of known renditions. (see 2.2 in *USA: Below the Radar – Secret flights to torture and ‘disappearance’*, April 2006, [http://web.amnesty.org/library/pdf/AMR510512006ENGLISH/\\$File/AMR5105106.pdf](http://web.amnesty.org/library/pdf/AMR510512006ENGLISH/$File/AMR5105106.pdf)).

¹¹ See *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.

¹² See pages 21-22 of *USA: The threat of a bad example – undermining international standards as ‘war on terror’ detentions continue*, August 2003, [http://web.amnesty.org/library/pdf/AMR511142003ENGLISH/\\$File/AMR5111403.pdf](http://web.amnesty.org/library/pdf/AMR511142003ENGLISH/$File/AMR5111403.pdf).

¹³ Information provided from research project of Reprieve, London, UK.

investigation into the deaths.¹⁴ Amnesty International believes that the military and the executive, as the authorities that have instigated and maintained a detention regime that has caused serious psychological suffering, and as they continue to rely on the war paradigm that they have used to justify rejection of fundamental human rights law and standards, will be unable to conduct the necessary investigation into the deaths and be seen by the outside world to have done so. Amnesty International reiterates its call for a full independent and impartial investigation into these deaths.¹⁵

Amnesty International urges the President to rescind his 13 November 2001 Military Order establishing military commissions and authorizing detention without charge or trial. The organization notes that in its responses to the Committee Against Torture, the USA asserted that individuals detained by the Department of Defense in Afghanistan and at Guantánamo are now held pursuant to this Military Order. However, 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. Amnesty International calls for precise clarification as to when the detainees, apart from the 15 who have been made eligible for trial by military commission (including 10 charged for trial), were made subject to the Military Order. 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.

A framework for closing Guantánamo

I'd like to end Guantánamo. I'd like it to be over with. One of the things we will do is we'll send people back to their home countries.... There are some who need to be tried in U.S. courts. They're cold-blooded killers...And yet, we believe there's a – there ought to be a way forward in a court of law, and I'm waiting for the Supreme Court of the United States to determine the proper venue in which these people can be tried.

President George W. Bush, 21 June 2006¹⁶

¹⁴ Three Guantánamo Bay detainees die of apparent suicide. American Forces Information Service, News Article, http://www.defenselink.mil/news/Jun2006/20060610_5379.html.

¹⁵ USA: *Independent investigation must be held into deaths of three Guantánamo detainees*, 12 June 2006, <http://web.amnesty.org/library/index/engamr510912006>.

¹⁶ 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>. A few days earlier, President Bush had said that “I’d like to close Guantanamo, but I also recognize that we’re holding some people that are darn dangerous, and that we better have a plan to deal with them in our courts. And the best way to handle – in my judgment, handle these types of people is through our military courts. And that’s why we’re waiting on the Supreme Court to make a decision. Press conference, <http://www.whitehouse.gov/news/releases/2006/06/20060614.html>. Prior to that, the President had said: “we would like to end the Guantánamo. We’d like it to be empty”, and of the detainees: “I believe they ought to be tried in courts here in the United States. We will file such court claims once the Supreme Court makes its decision as to whether or not – as to the proper venue for these trials. And

In its 19 May 2006 conclusions, the Committee against Torture called for the closure of the Guantánamo detention camp. Following the reported suicides of the three detainees on 10 June 2006, five UN human rights experts reiterated their call for urgent closure of the facility.¹⁷ It is these calls for closure of Guantánamo which have drawn a series of comments from President Bush and a number of officials in the US administration.

Amnesty International was among the first to call for the closure of Guantánamo over a year ago and welcomes President Bush's statement of 8 May 2006 in which he said that he would "very much like to end Guantánamo", and "to get people to a court".¹⁸ The President noted that the US administration was waiting for the Supreme Court to rule in *Hamdan v. Rumsfeld* on the question of trials. Amnesty International stresses, however, that the President does not have to wait for the Supreme Court to rule. He can announce now that the Guantánamo detention facility will close and that all the detainees will either be charged and tried without further delay in a US court or released with full non-*refoulement* guarantees.

While the possibility of Guantánamo's closure is now publicly being entertained within the US administration, various officials have questioned how this end can be brought about, raising legitimate questions about public security on the one hand and the safety of the detainees on the other. Amnesty International notes that several officials have indicated that the administration is open to suggestions as to how to resolve the Guantánamo situation. On 4 May, for example, John Bellinger said that the USA would "welcome the assistance of the international community" on this issue.¹⁹ Earlier, Secretary of Defense Rumsfeld said of the continuing detentions at Guantánamo, that "if someone has a better idea, I'd like to hear it".²⁰ In similar vein, on 4 May, Attorney General Gonzales said that "I hear some critics say we should close down Guantánamo and yet no one is willing to offer the United States an alternative."²¹

On 21 May 2006, US Secretary of State Condoleezza Rice said that "We will be delighted when we can close down Guantánamo. Everybody wants to close down Guantánamo".²² However, she asked those who have called for the closing of the detention camp – who include the United Nations Secretary General, the UN Committee Against Torture, the European Parliament and various European leaders and officials – to consider the security and human rights implications of releasing the detainees. Amnesty International does

we're waiting on our Supreme Court to act." President Bush and Prime Minister Rasmussen of Denmark Participate in Joint Press Availability, Camp David,
<http://www.whitehouse.gov/news/releases/2006/06/20060609-2.html>.

¹⁷ United Nations human rights experts request urgent closure of Guantánamo detention center.
<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/D916F2EB424D1588C1257188004EDB76?opendocument>.

¹⁸ See <http://www.whitehouse.gov/news/releases/2006/05/20060519.html>.

¹⁹ Transcript of Legal Advisor Bellinger's Media Roundtable in Brussels, 4 May 2006,
http://useu.usmission.gov/Dossiers/Detainee_Issues/May0406_Bellinger_CIA_Flights.asp.

²⁰ Secretary Rumsfeld remarks at Council on Foreign Relations, 17 February 2006,
<http://www.defenselink.mil/transcripts/2006/tr20060217-12538.html>.

²¹ US attorney general defends Guantanamo, Agence France Presse, 4 May 2006.

²² Interview on Fox News Sunday, <http://www.state.gov/secretary/rm/2006/66536.htm>.

not claim that the closure of the Guantánamo detention facility is without its challenges. Yet the US government has the responsibility to meet this challenge.

Amnesty International here details its recommendations for an alternative to continued detentions at Guantánamo. In brief, those held in the base should be released unless they are to be charged and tried in accordance with international standards of fair trial. No detainees who are released should be forcibly sent to their country of origin or other countries where they may face serious human rights abuses. Indeed, it is crucial that emptying and closing down the Guantánamo camp not result in a transfer of the human rights violations elsewhere. In more detail, the organization recommends the following framework for determining what should happen to the detainees who are still held there.

General

1. Any detention facility which is used to hold persons beyond the protection of international human rights and humanitarian law should be closed. The detention camp at Guantánamo Bay Naval Base falls into this category, and in more than four years of detention operations there, the US administration has failed to bring the facility into compliance with international law and standards.
2. Closing Guantánamo must not result in the transfer of the human rights violations elsewhere. All detainees in US custody must be treated in accordance with international human rights standards, and, where relevant, international humanitarian law. All US detention centres must be open to appropriate external scrutiny, in particular that of the International Committee of the Red Cross (ICRC).
3. The responsibility for finding a solution for the detainees held in Guantánamo rests first and foremost with the USA. The US administration created the system of detention Guantánamo in which detainees – many of whom were transferred to the facility unlawfully – have been held without charge or trial, outside the framework of international law and without the possibility of full recourse to US courts. It is therefore the US administration's responsibility to redress this situation in full compliance with international human rights standards.
4. All US officials in the administration should desist from further undermining the presumption of innocence in relation to the Guantánamo detainees. The continued commentary on their presumed guilt applies a dangerous label to them – dangerous to the prospect for a fair trial and dangerous to the safety of any detainee who is released. This can only make the USA's task of resolving the Guantánamo issue more difficult.
5. Those currently held in Guantánamo should be released unless they are to be charged and tried in accordance with international standards of fair trial.
6. No detainees who are released should be forcibly sent to their country of origin or other countries where they may face serious human rights abuses.

Fair trials

7. Those to be charged and tried must be charged with a recognizable crime under law and tried before an independent and impartial tribunal, such as a US federal court, in full accordance with international standards of fair trial. There should be no recourse to the death penalty.
8. Any evidence obtained under torture or other cruel, inhuman or degrading treatment or punishment should not be admissible. In light of the years of legal, physical and mental abuse to which detainees held in Guantánamo have been subjected, any trials must scrupulously respect international standards of fairness and any sentencing take into account the length and conditions of detention in Guantánamo or elsewhere prior to be transported to Guantánamo.
9. President George W. Bush should rescind his 13 November 2001 Military Order establishing military commissions and authorizing detention without charge or trial. The military commissions do not afford proper safeguards for a fair trial. They are not independent, the procedures before them do not secure a fair process (eg statements extracted under cruel, inhuman or degrading treatment may be used as evidence), the defendant may be excluded from hearing all of the evidence against him and, under the Detainee Treatment Act, there is only a limited right of appeal against their sentences to a court of law.

Solutions for those to be released

10. There must be a fair and transparent process to assess the cases of each of the detainees who is to be released, in order to establish whether they can return safely to their country of origin or whether another solution ought to be found. In all cases detainees must be individually assessed, be properly represented by their lawyers and given a full opportunity to express their views. Relevant international agencies, such as the Office of the United Nations High Commissioner for Refugees (UNHCR), could be invited to assist in this task, in line with their respective mandates. The options before the US Administration to deal in a manner which fully respects the rights of detainees who are not to be tried and who therefore ought to be released without further delay include the following:
 - (a) **Return.** The US authorities should return released detainees to their country of origin or habitual residence unless they are at risk of grave human rights violations, including prolonged arbitrary detention, enforced disappearances, unfair trial, torture or other ill-treatment, extrajudicial executions, or the death penalty. Among those to be returned are all those who according to the laws of war (Geneva Conventions and their Additional Protocols) should have been recognized after their capture as prisoners of war, and then released at the end of the international armed conflict in Afghanistan, unless they are to be tried for war crimes or other serious human rights abuses.
 - (b) **Asylum in the USA.** The US authorities should provide released detainees with the opportunity to apply for asylum in the USA if they so wish, and recognize them as refugees if they meet the requirements of the 1951 UN

Convention on Refugees (well-founded fear of persecution on certain grounds if returned to their country of origin). The US authorities must ensure that any asylum applicants have access to proper legal advice and to fair and effective procedures that are in compliance with international refugee law and standards, including the opportunity to contact UNHCR. Asylum applicants should not be detained except in the most exceptional circumstances.

- (c) **Other forms of protection in the USA.** Persons who do not meet the criteria of the 1951 UN Convention on Refugees, but are at risk of grave human rights abuses in the prospective country of return and wish to remain in the USA must receive other forms of protection and should be allowed to stay in the USA. They should not be detained, unless it is established that their detention is lawful, necessary and proportionate to the objective to be achieved, in accordance with international human rights law and standards.
- (d) **Transfer to third countries.** The US authorities may seek durable solutions in third countries for those who cannot be returned to their countries of origin or habitual residence, because they would be at risk of grave human rights abuses, and who do not wish to remain in the USA. Any such solution should address the protection needs of the individuals, respect their human rights and take into account their views. All transfers to third countries should be with the informed consent of the individuals concerned. UNHCR should be allowed to assist in such a process, in accordance with its mandate and policies. Released detainees should not be subjected to any pressures and restrictions that may compel them to choose to resettle in a third country. Other countries should consider accepting released detainees voluntarily seeking resettlement there, especially countries of former habitual residence or countries where released detainees had close family or other ties.

Reparation

11. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, rehabilitation and fair and adequate financial compensation to released detainees for the period spent unlawfully detained and other violations that they may have suffered, such as torture or other ill-treatment.²³ The right of victims to seek reparations in the US courts must not be limited.

²³ 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.

Transparency pending closure

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

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