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UNITED STATES OF AMERICA

No impunity for war crimes

US administration seeking to amend the War Crimes Act

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Amnesty International is concerned that the United States administration is seeking to persuade Congress to narrow the scope of the US War Crimes Act to prevent prosecutions of US personnel for humiliating and degrading treatment of detainees in the “war on terror”. The organization believes that any such measure would undermine the rule of law and send a dangerous message about impunity. Torture and ill-treatment thrive on impunity.

Discussions are underway within the administration with a view to presenting a bill to Congress to amend the War Crimes Act (18 U.S.C. § 2441) following the *Hamdan v. Rumsfeld* ruling of the US Supreme Court on 29 June 2006. In the *Hamdan* decision, the Supreme Court overturned a central tenet of the executive’s “war on terror” policy. In a case involving the armed conflict in Afghanistan, it ruled that Article 3 common to the four Geneva Conventions of 1949 – which prohibits torture, cruel, humiliating or degrading treatment – applied. In his concurring opinion, Justice Kennedy noted that under the War Crimes Act, violations of common Article 3 are war crimes.

The administration is concerned that what it views as “vague terms” in common Article 3 – including the prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment” – are “susceptible to different interpretations”. According to the *Washington Post*, a leaked amendment drafted within the administration narrows the scope of the Act to exclude war crimes that might be considered to fall under this part of the article.¹ When interpreting common Article 3, Amnesty International urges the US authorities to take full account of the views of the International Committee of the Red Cross, the most authoritative body on the provisions of the Geneva Conventions.

In an early “war on terror” policy memorandum, dated 7 February 2002, President Bush had decided that common Article 3 did not apply “to either al-Qaeda or Taliban detainees”. This had followed advice drafted by the then White House Counsel, Alberto Gonzales, recommending such a determination on the grounds, *inter alia*, that it would make future prosecutions of US agents under the War Crimes Act more difficult.² Former Attorney General John Ashcroft had also advised President Bush that not applying the Geneva Conventions to the Afghanistan situation would “provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States”.³

Subsequent human rights violations by the USA in the “war on terror” have been systemic, and interrogation techniques that violate common Article 3 have been authorized.⁴

For example, the same sort of techniques authorized in late 2002 by Secretary of Defense Donald Rumsfeld for use in Guantánamo were being used in Afghanistan where, according to military investigators, interrogators were “removing clothing, isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation.”⁵ No one has ever been charged under the War Crimes Act.⁶

On 2 August 2006, repeating his opinion on common Article 3 drafted four and half years earlier, Alberto Gonzales, now Attorney General, told the Senate Armed Services Committee at a post-*Hamdan* hearing that the prohibition on “outrages upon personal dignity, in particular, humiliating and degrading treatment” is “vague” and a phrase “susceptible of uncertain and unpredictable application”. He stressed that defining the terms of common Article 3 was important because the War Crimes Act makes any violation of the article a crime prosecutable in the USA.

Yet in 1997, supporting expansion of the War Crimes Act to criminalize violations of common Article 3 under US law, the administration had stated:

“We believe H.R. 2587 should make it a crime under US law to commit violations of the rules specified in Common Article 3 and Additional Protocol II to the 1949 Geneva Conventions... As evidence of the importance of the protections of international law in non-international armed conflicts, the United States has taken the position that the Statute of International Criminal Tribunal for the Former Yugoslavia, which give the Tribunal jurisdiction over ‘persons violating the laws or customs of war,’ includes violations of Common Article 3 and the additional protocols to the Geneva Conventions. We believe that such violations should similarly be treated as war crimes for purposes of US law, and thus should be covered by an expanded H.R. 2587.”⁷

The war crime of “outrages upon personal dignity” has been prosecuted in the International Criminal Tribunal for the former Yugoslavia on numerous occasions without the slightest hint in the decisions that this war crime was too “vague” or a phrase “susceptible of uncertain and unpredictable application.”⁸

At the 2 August 2006 hearing in front of the Senate Armed Services Committee, Deputy Secretary of Defense Gordon England said that the “international interpretation” of common Article 3 was “generally frankly different than our own”. In similar vein, Attorney General Gonzales referred to “foreign decisions” relating to common Article 3 “that provide a source of concern” and heightened the need to define the Article in US terms. Senator Levin asked the Attorney General whether he believed that techniques such as “water-boarding, stress positions, intimidating use of military dogs, sleep deprivation, forced nudity” would be “consistent with common Article 3”. The Attorney General did not answer this question, instead confining his answer to the likely unreliability of statements obtained under such techniques. In response to a question by Senator Dayton, the Attorney General said that the administration was considering, and that Congress should also consider, giving retroactive immunity for prior violations committed by US personnel “who’ve relied in good faith upon decisions made by their superiors”. Amnesty International is already concerned by the section of the Detainee Treatment Act of 2005 which seeks to provide a defence against conviction for detainee abuse in the case of US personnel using officially authorized interrogation techniques and detention conditions against foreign nationals held in the “war on terror”.⁹ This problem should not be compounded.

The Attorney General’s emphasis on the need for Congress to define common Article 3 in US terms raises concern because, as Amnesty International has repeatedly pointed out, it is clear from the USA’s conduct in the “war on terror”, that when US officials have spoken of

the “humane treatment” of all detainees in US custody they are clearly employing a definition that does not comply with the international prohibition on torture and ill-treatment.

As an example of this problem and of the impunity that has flowed from it, Amnesty International has highlighted the case of Mohamed al-Qahtani with the US authorities. The torture and ill-treatment to which this Guantánamo detainee was treated – including under techniques authorized by Secretary Rumsfeld – clearly violated international law. Mohamed al-Qahtani was subjected to intense isolation for three months in late 2002 and early 2003. He was variously forced to wear a woman’s bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number dog tricks; was forced to dance with a male interrogator while forced to wear a towel on his head “like a burka”; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, culturally inappropriate use of female interrogators, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of “swimsuit models” hung round his neck; was subjected to hooding, loud music, white noise, and to extremes of heat and cold through manipulation of air conditioning. Other forms of humiliation included being forced to urinate in his clothing when interrogators refused to allow him to go to the toilet. He was subjected to intimidation by the use of a dog on at least one occasion. Mohamed al-Qahtani was interrogated for 18-20 hours per day for 48 out of 54 consecutive days. According to a military investigator, in the four hours that he was not under interrogation, “he was taken to a white room... with all the lights and stuff going on and everything...” Thus sleep deprivation is added to the list of techniques used against this detainee.¹⁰

Shockingly, a military investigation concluded that Mohamed al-Qahtani’s treatment, while cumulatively “degrading and abusive”, “did not rise to the level of prohibited inhumane treatment”.¹¹

Any narrowing of the War Crimes Act could be seen as much about protecting senior administration officials – including those who have authorized interrogation techniques and detention conditions that violate common Article 3 – as about the administration protecting soldiers, Central Intelligence Agency personnel and others from prosecution.

In any event, even if the administration were to submit impunity amendments to Congress and the latter was then to enact them as part of US law, it would to some extent be futile since any state in the world may exercise universal jurisdiction over war crimes such as serious violations of common Article 3.¹²

On 26 June 2004, two months after the revelations about the torture, humiliation and degradation of detainees in Abu Ghraib prison by US personnel, President Bush asserted the USA’s “commitment to the worldwide elimination of torture”. He said that “the non-negotiable demands of human dignity must be protected... and we are committed to building a world where human rights are respected and protected by the rule of law.” He added that “the United States also remains steadfastly committed to upholding the Geneva Conventions, which have been the bedrock of protection in armed conflict for more than 50 years... We expect other nations to treat our service members and civilians in accordance with the Geneva Conventions. Our Armed Forces are committed to complying with them and to holding accountable those in our military who do not.”

President Bush should live up to his word and not approve any proposal that narrows the scope for prosecutions under the War Crimes Act, which would undermine the Geneva Conventions. Congress should reject any such proposal that is presented to it.

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¹ *War Crimes Act would reduce threat of prosecution*. Washington Post, 9 August 2006.

² Memorandum for the President from Alberto R. Gonzales. *Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban*. Draft 25 January 2002.

³ Letter to President Bush from Attorney General John Ashcroft, 1 February 2002, available at <http://news.findlaw.com/wp/docs/torture/jash20102ltr.html>.

⁴ Amnesty International notes Senator Levin's statement at a post-*Hamdan* hearing in the Senate Armed Services Committee on 2 August 2006, when he said: "If we torture or mistreat persons whom we detain on the battlefield..., we increase the risk that our own troops will be subject to similar abuses at the hands of others."

⁵ Page 64, AR 15-6 Investigation of Intelligence Activities at Abu Ghraib. Conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones. <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

⁶ While some soldiers have been prosecuted under the Uniform Code of Military Justice, there are serious concerns – as recently expressed by the UN Committee against Torture and the Human Rights Committee – relating to the adequacy of investigations into abuses and about the leniency of sentences. On 7 August 2006, the trial of David Passaro began in federal court in North Carolina. This ex-CIA contractor is accused of beating Afghan detainee Abdul Wali, who died in a US military base in Afghanistan in 2003. David Passaro was not charged under the War Crimes Act. Instead, charges were brought under a provision of the USA PATRIOT Act of 2001.

⁷ House Report 105-204 - EXPANDED WAR CRIMES ACT OF 1997.

⁸ *Prosecutor v. Kunarac*, Appeals Chamber, 12 June 2002, paras. 161 - 162, and Trial Chamber, 22 February 2001, para. 501; *Prosecutor v. Kovaka*, Trial Chamber, 2 November 2001, para. 172; *Prosecutor v. Aleksovski*, Trial Chamber 25 June 1999, paras. 54-57; *Prosecutor v. Furundzija*, Trial Chamber, 10 December 1998, paras. 172 - 173.

⁹ Section 1004 of the Detainee Treatment Act includes the following: "In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful."

¹⁰ For further information on the case and the ill-treatment of another detainee believed to be Mohamdou Ould Slahi, subjected to rendition to Guantánamo from Mauritania, 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>.

¹¹ Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, 1 April 2005 (amended 9 June 2005) (Schmidt/Furlow Report), <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

¹² See *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002-018/2001, September 2001, <http://web.amnesty.org/library/index/engior530022001>.