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amnesty international

UNITED STATES OF AMERICA

No substitute for *habeas corpus*

Six years without judicial review in Guantánamo

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We, the States Members of the United Nations, resolve...to recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law, and international humanitarian law.

Global Counter-Terrorism Strategy, adopted by the UN General Assembly, 8 September 2006

Anyone who is deprived of his liberty by arrest or detention shall be entitled 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

Article 9(4), International Covenant on Civil and Political Rights

1. Summary

On 5 December 2007, the United States (US) Supreme Court is due to hear oral argument in the consolidated cases of *Boumediene v. Bush* and *al-Odah v. USA (Boumediene)*, concerning detainees held in indefinite executive detention without charge or trial in the US Naval Base at Guantánamo Bay, Cuba. The issue before the Court centres on whether the Military Commissions Act (MCA), signed into law on 17 October 2006, violates the US Constitution by stripping the courts of jurisdiction to consider *habeas corpus* petitions from the Guantánamo detainees. Embedded in this legal controversy is the Combatant Status Review Tribunal (CSRT), an executive body established under an order signed by the then Deputy Secretary of Defense Paul Wolfowitz in July 2004, some two and a half years after detentions began at Guantánamo, to determine whether the detainees held in the base were “properly detained” as “enemy combatants”.

The CSRT – a scheme described by the administration as “intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay”¹ – consists of panels of three military officers who can consider any

¹ Memorandum for the Secretary of the Navy. Order establishing Combatant Status Review Tribunal, 7 July 2004, § j, <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (CSRT Order).

information, including information that is hearsay, classified, or that has been obtained under torture or other ill-treatment, in making their determinations. The detainee, held thousands of miles from home (or any battlefield) and virtually cut off from the outside world, does not have a lawyer or access to any classified evidence used against him. There is a presumption in favour of the government's information presented to the tribunal. Under the Detainee Treatment Act (DTA), enacted in December 2005, judicial review is limited to a single court, the US Court of Appeals for the District of Columbia (DC) Circuit, and to review of the CSRT's "propriety of detention" decisions.²

Amnesty International is among the organizations and individuals, including the UN High Commissioner for Human Rights, a number of former US judges, diplomats and military officers, a senior US Senator and nearly 400 UK and European parliamentarians, to have filed *amicus curiae* briefs in the Supreme Court in August 2007, seeking to have the Court recognize the right to *habeas corpus*, as a right that is guaranteed to the detainees regardless of whether they are deemed to be within reach of the US Constitution.³ This companion report to Amnesty International's brief outlines the international right to *habeas corpus*, a fundamental protection against detainee abuse and unaccountable government (see Sections 2 and 3). It traces the development of the CSRT scheme in Guantánamo, describing its origins as part of the administration's pursuit of unchecked executive power in the "war on terror", a pursuit that has undermined the rule of law. When the Supreme Court has intervened previously in "war on terror" detention cases, the executive has interpreted its rulings in narrow, cramped fashion and in a way that violates fundamental human rights principles. In so doing, and now aided by the DTA and MCA, it has flouted the USA's international obligations and contradicted its own National Security Strategy and National Strategy for Combating Terrorism, which promised to put respect for human dignity, the rule of law and limits on the absolute power of the state at the heart of its counterterrorism policies.⁴

The decision of a CSRT represents a potential life sentence for a detainee. As a federal judge has noted, "it is the government's position that in the event a conclusion by the tribunal that a detainee is an 'enemy combatant' is affirmed, it is legal to hold the detainee in custody until the war on terrorism has been declared by the President to have concluded or until the President or his designees have determined that the detainee is no longer a threat to national security". "At a minimum", the judge noted, "the government has conceded that the war could last several generations".⁵ In his State of the Union address in January 2007, President Bush reiterated that the "war on terror we fight today is a generational struggle". The Chairman of the Joint Chiefs of Staff has since said that the "war on terror" will last at least another 20 to 30 years.⁶

² Detainee Treatment Act § 1005 (e)(2).

³ Amnesty International filed a brief jointly with the International Federation for Human Rights, the Human Rights Institute of the International Bar Association, and the International Law Association.

⁴ National Security Strategy (2002), <http://www.whitehouse.gov/nsc/nss.pdf>. National Strategy for Combating Terrorism (2003) <http://www.whitehouse.gov/news/releases/2003/02/20030214-7.html>.

⁵ *In re Guantánamo detainee cases*. Memorandum Opinion, US District Court, DC, 31 January 2005.

⁶ Pace says war on terror will require decades of effort, American Forces Press Service, 18 July 2007.

The CSRT was established following the 28 June 2004 *Rasul v. Bush* judgment of the Supreme Court which ruled that the US courts had jurisdiction, at least under federal law, to consider *habeas corpus* petitions filed on behalf of the Guantánamo detainees. The *Rasul* opinion was a setback to the administration's Guantánamo regime. However, although the Court remanded the case to the lower court to consider "the merits" of the detainees' claims, and indicated that those claims "unquestionably describe custody in violation of the Constitution or laws or treaties of the United States", the narrowly framed ruling did not specify the content of any rights the detainees held.⁷ Over three years after the *Rasul* opinion, none of the more than 300 detainees still held in Guantánamo has had the lawfulness of his detention reviewed on the merits. None of the over 400 detainees freed from the base to release or further custody in their own or other countries was transferred by judicial order.⁸

Habeas corpus is a remedy that protects fundamental human rights, including the right not to be subjected to enforced disappearance, secret detention, arbitrary detention, unlawful transfer, torture and other cruel, inhuman or degrading treatment, and the right to a fair trial by an independent and impartial tribunal established by law. Violations of these rights have occurred in the context of these executive detentions.

Applying its global war framework, the US administration has viewed *habeas corpus* as an abuse rather than as a protection against abuse. With echoes of President Bush's assertion in November 2001 that "we must not let foreign enemies use the forums of liberty to destroy liberty",⁹ the version of the *habeas*-stripping MCA which the administration sent to Congress on 6 September 2006, for example, stated that the legislation was necessary because "the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment... to the abuse of American legal processes" (that is, via *habeas corpus* petitions). The CSRT is an *administrative* review scheme established by the same Department of Defense which the following year appeared to equate *judicial* process with terrorism when listing "vulnerabilities" of the USA. Its National Defense Strategy, released in March 2005, asserted that "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."¹⁰

Amnesty International considers that the CSRT scheme cannot and does not serve as an adequate or acceptable substitute for *habeas corpus*. The right of someone deprived of their liberty to challenge the lawfulness of his or her detention in an *independent, impartial and competent court with the power of remedy* is a right which each and every Guantánamo detainee is owed and have so far been denied. The CSRTs do not and cannot meet this standard. Section 5 of this report details the shortcomings of the CSRT scheme, including that:

⁷ *Rasul v. Bush*, 542 U.S. 466 (2004).

⁸ Note, however, that David Hicks was transferred to Australia after pleading guilty in a military commission under a pre-trial agreement that would obtain his release from Guantánamo. On alleged politicization of his case, see *At Gitmo, no room for justice*, Harper's Magazine, 22 October 2007.

⁹ President says US Attorneys in front line in war, 29 November 2001, <http://www.whitehouse.gov/news/releases/2001/11/20011129-12.html>.

¹⁰ The National Defense Strategy of the United States of America, March 2005, <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>.

- The CSRTs lack independence from the executive, the branch that entirely controls the detentions and applied the “enemy combatant” label to the detainees in the first place. Some detainees initially found not to be “enemy combatants” had that determination reversed after Pentagon authorities sent their cases back to the CSRT for reconsideration;
- The CSRTs are not a competent tribunal as they lack the power of remedy, including release. Indeed, detainees have been held for as long as 20 months after a CSRT finding of “no longer enemy combatant”. In addition, Amnesty International considers that a military body such as the CSRT lacks competence to review the cases of civilian detainees;
- There is no meaningful way for the detainee to challenge the government’s information. He has little or no access to witnesses, no access to classified information used against him, and little way of challenging hearsay information;
- The detainee is denied access to a lawyer for the CSRT process. He is merely assigned a “personal representative”, a US military officer, with whom his relationship is not confidential;
- The CSRT can rely upon information obtained by unlawful methods, including information coerced from detainees subjected to enforced disappearance, torture or other cruel, inhuman or degrading treatment, including secret and prolonged incommunicado detention;
- The CSRT considers the status of “enemy combatant” as synonymous with “lawfully held”, and the detainee has no meaningful opportunity to challenge this;
- The CSRT is a procedure that is applied only to foreign nationals, in violation of the international prohibition against discrimination;
- The CSRTs were conducted after an unreasonable delay of more than two years after the detentions began. Once started they were conducted with undue haste;
- The CSRT can be used to facilitate unlawful custody and to obscure the reasons behind the detention. It also leaves detainees exposed to a range of human rights violations inflicted by the same branch of government that is reviewing the detentions.

In its October 2007 brief to the Supreme Court, the government maintains that the judicial review under the DTA “is a fully adequate substitute for habeas corpus in this extraordinary wartime context”.¹¹ International law, however, requires that detainees be able to access a competent, independent and impartial court, *as a tribunal of first instance*, to challenge their detention, not merely be provided with (narrow) appellate review of an administrative review procedure. The judicial review which the DTA allows the DC Circuit Court of Appeals to undertake – it has not yet been conducted – is too little and too late to overcome the CSRTs flaws or to guarantee the detainees a remedy. As one of the petitions to the US

¹¹ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

Supreme Court argues, “even if a [detainee] were to succeed against this stacked deck, the only remedy may well be another CSRT and an endless cycle of DTA review and remand.”¹²

Amnesty International is concerned that the CSRT scheme has been manipulated to suit the unlawful objectives of the executive. For example, prior to a federal court ruling in 2005 that the CSRT scheme was inherently unfair, 0.8 per cent of the CSRT decisions were of “no longer enemy combatant” (NLEC) (three out of 365). After the ruling, but before the appeal against it was heard, this figure rose to 18 per cent (35 out of 193), a rate more than 20 times greater. The administration has continued to promote the 38 NLEC decisions as indicators of a fair process, including in testimony to Congress and in legal briefs to the courts. In its October 2007 brief to the Supreme Court in the *Boumediene* case, for example, it argues that these 38 cases show that the CSRT is “far from being a rubber stamp” for the executive.

Perhaps the sudden spate of NLEC decisions was unrelated to the ruling against the CSRTs. However, as this report details, there is a wider pattern of evidence (detailed in Section 4) that the administration has manipulated detainee cases to avoid judicial scrutiny of executive action – the reason Guantánamo was chosen for these detentions in the first place. For example,

- Late on a Friday afternoon in October 2004, the government told a federal judge that Yemeni detainee Salim Hamdan had been moved out of the solitary confinement in Guantánamo in which he had been held for the previous 10 months. The court had been due hear oral arguments the following Monday to consider the “urgent and striking claim” brought on behalf of Hamdan in a *habeas corpus* petition that his solitary confinement amounted to inhumane treatment. The judge found that the administration’s move meant that he could not now review the claim.
- In January 2005, five days after allegations of the earlier rendition to Egypt and torture of Guantánamo detainee Mamdouh Habib were made public in documents filed in *habeas corpus* proceedings in District Court, the Pentagon announced that this Australian national – detained since October 2001 – would be transferred from Guantánamo to Australia. The US administration reportedly told Australian officials that the CIA did not want the rendition and torture evidence aired in court.
- On 22 December 2005 a federal judge ruled that the continued indefinite detention of two detainees, Abu Bakker Qassim and Adel Abdul Hakim, nine months after they had been found to be “no longer enemy combatants” by CSRTs at Guantánamo, was unlawful, but the judge decided that he could provide no remedy. The case was scheduled to be argued in the DC Court of Appeals at 9.30am on Monday 8 May 2006. At 4.30pm on Friday 5 May 2006, the detainees’ lawyers received a telephone call from the Department of Justice informing them that their clients, along with three other Uighur detainees, had been transported to Albania. At 4.39pm on 5 May 2006, the administration filed an emergency motion that the case should be dismissed as moot because the detainees were now in Albania.

¹² *Boumediene v. Bush*, Brief for the *Boumediene* petitioners, August 2007.

More generally the timing of releases and transfers of detainees from Guantánamo and the filing of charges against a small number of detainees – all events entirely within the control and discretion of the executive – provide further evidence of detainee case manipulation. Drawing from a chronology of litigation and detainee transfer decisions, Appendix 2 to the report reveals evidence of a pattern of increased, publicly-announced, activity relating to “process” provided to detainees in periods leading up to crucial judicial interventions.

With such evidence in mind, and the requirement on governments to ensure that justice is not only done but is seen to be done, Amnesty International considers that the issue pending before the Supreme Court goes beyond questions of the rights of the Guantánamo detainees through to the very concepts of accountable government, the separation of powers, and the rule of law. Eight decades ago, a Supreme Court Justice wrote of the US system of government established following the Constitutional Convention of 1787 in Philadelphia:

“Checks and balances were established in order that this should be a government of laws and not of men... The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power... And protection of the individual... from the arbitrary or capricious exercise of power was then believed to be an essential of free government.”¹³

The rule of law requires that the judiciary, independent of the other branches of government, play a fundamental role in preventing executive or legislative abuse and protecting human rights. Under the UN Basic Principles on the Independence of the Judiciary, “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”.¹⁴ The jurisdiction-stripping provisions of the DTA and the MCA and their affirmation of the administrative review scheme contravene this principle, as do the CSRTs themselves, which are “not bound by the rules of evidence such as would apply in a court of law”.¹⁵

The Guantánamo detainees, noted Justice Kennedy in the *Rasul* decision in 2004, were being held “indefinitely, and without benefit of any legal proceeding to determine their status”. This remains the case more than three years later. Not only is the CSRT not a legal proceeding, as the Pentagon has stated, it is not even one that reviews the lawfulness of detention, but merely provides executive review of existing executive “enemy combatant” labels. Nor does judicial review under the DTA determine status, but only examines whether the CSRT system operated according to its own flawed procedures and consistent with applicable US law. Moreover, six years after detentions began, no such reviews by the DC Court of Appeals had been conducted. Section 6 raises concerns about the government’s approach to DTA review.

In a “war on terror” detention case in 2004, the US Supreme Court said that for the judiciary to “forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of

¹³ *Myers v. United States*, 272 U.S. 52 (1926), Justice Brandeis dissenting.

¹⁴ UN General Assembly, Resolution 40/146, 13 December 1985.

¹⁵ CSRT Order, §g (9).

government”.¹⁶ Such “concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution’s three-part system is designed to avoid.”¹⁷ *Habeas corpus*, on the other hand “allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”¹⁸

At the outset of the “war on terror”, by passing an overbroad Authorization for the Use of Military Force (AUMF), Congress failed to restrain an executive which has, *inter alia*, expressed the view over recent years that presidential authority can override international and US law.¹⁹ Since then, Congress has passed legislation, such as the DTA and MCA, provisions of which contravene the USA’s international obligations. In so doing the legislature has allowed the executive to pursue a detention regime that operates in a “rights-free” zone.

Whatever inefficiencies, frictions or degrees of deference may exist within and between the three branches of government in the USA, the internal workings of federal government must not be used to justify the USA’s failure to comply with its international treaty obligations.

“All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party...This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.”²⁰

Amnesty International calls on the USA to fully restore *habeas corpus*, a procedure reflecting a fundamental rule of law principle that serves to protect detainees and to promote government accountability. It urges the USA to abolish the CSRTs – and the Administrative Review Boards (ARBs) established two months later to provide a “discretionary” annual review of CSRT-approved detentions – as ill-judged constructs in its “war on terror” and as part of closing the Guantánamo detention camp. In closing the Guantánamo facility, there must be no transfer of the lawlessness elsewhere. Amnesty International’s framework to end unlawful detentions is reproduced in Appendix 1.

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁷ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), Justice Kennedy concurring.

¹⁸ *Hamdi v. Rumsfeld*, *op. cit.*

¹⁹ Amnesty International considers that the administration has abused the already overbroad AUMF passed by Congress on 14 September 2001, and has called for its revocation. See 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, <http://web.amnesty.org/library/Index/ENGAMR511462006>.

²⁰ UN Human Rights Committee, General Comment 31, UN CCPR/C/21/Rev.1/Add.13, 26 May 2004. See also *Hamdi v. Rumsfeld* (“[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances... Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake”).

1.1 Timeline of denial: Six years pursuing a ‘rights-free’ zone

It is often said that ‘justice delayed is justice denied’. Nothing could be closer to the truth with reference to the Guantánamo Bay cases²¹

The first CSRT hearing was held at Guantánamo on 30 July 2004, two and a half years after detentions began at the base in January 2002. The administration improvised the CSRTs following *Rasul v. Bush*, the Supreme Court’s judgment of 28 June 2004 that the federal courts had jurisdiction to hear *habeas corpus* appeals from the Guantánamo detainees.

The CSRTs provided the administration with a façade of process and the detainees no remedy for the injustice they faced. Although the CSRT Order required that the detainees be informed that they had “the right to seek a writ of habeas corpus” in the US courts, the administration at the same time embarked upon a litigation strategy under which it argued in those same courts that the *Rasul* ruling meant no more than that the detainees could file *habeas corpus* petitions only to have them necessarily dismissed. Effectively maintaining its pre-*Rasul* position that led it to choose Guantánamo as a location for “war on terror” detentions, the administration argued that, as foreign nationals held on territory that was ultimately part of Cuba, the detainees had no rights that could be enforced in the US courts. Even the CSRT was more process than the detainees were due, according to the government.²²

In the space of two weeks in January 2005, two judges faced with *habeas corpus* petitions from Guantánamo detainees, issued two dramatically different interpretations of the *Rasul* ruling. The first favoured the government position – finding “no viable legal theory” under federal, constitutional or international law by which to issue writs of *habeas corpus*.²³ The second judge largely rejected the government’s position, finding that the detainees “possess enforceable constitutional rights”, that the right not to be deprived of liberty without due process of law “is one of the most fundamental rights recognized by the US Constitution”, and that the CSRTs did not provide due process.²⁴ These divergent rulings would require resolution by a higher court, and the matter went to the Court of Appeals for the District of Columbia (DC) Circuit. However, although it first heard arguments in the case in September 2005, the Court would not rule on the question until February 2007, because its consideration of the issue was deflected by the passage in US Congress of two pieces of legislation.

In December 2005, a few weeks after the Supreme Court agreed to consider the *habeas corpus* petition brought on behalf of Yemeni detainee Salim Ahmed Hamdan challenging the military commission system that was set to try him in Guantánamo, Congress passed the Detainee Treatment Act (DTA). The DTA stripped the courts of jurisdiction to consider

²¹ *Al-Razak v. Bush*, Memorandum Order. US District Court, District of Columbia, 1 December 2006.

²² The CSRT “manifestly satisfies the requirements of due process (if any) in the unique context of ongoing armed hostilities”. *Al Odah v. USA*. Opening brief for the United States. US Court of Appeals for the DC Circuit, 27 April 2005. “The enemy combatant status proceedings that the Department of Defense is completing provide all the process that petitioners are due (and then some)”. *Hicks v. Bush*, Response to petitions for writ of habeas corpus... DC District Court, 4 October 2004.

²³ *Khalid v. Bush*, Memorandum opinion, District Court for the District of Columbia, 21 January 2005.

²⁴ *In re Guantanamo detainee cases*, 31 January 2005, *op. cit.*

certain *habeas corpus* petitions from Guantánamo detainees. In place of such *habeas* review in the District Courts, Section 1005 of the DTA provided for narrow review by the DC Circuit Court of Appeals of any final CSRT decision that “an alien is properly detained as an enemy combatant” and whether the CSRT determination was consistent with the standards and procedures established for the tribunals by the administration. The Court of Appeals could also consider whether the CSRT’s standards and procedures were consistent with the Constitution and laws of the United States, to the extent that they were applicable. Section 1005 also stated, however, that nothing in it “shall be construed to confer any constitutional right on an alien detained as an enemy combatant outside the United States”, and added that for the purposes of the Act, the “United States, when used in a geographic sense..., in particular, does not include the United States Naval Station, Guantánamo Bay, Cuba.”

Signing the DTA into law, President George W. Bush said that he “appreciate[d] the legislation’s elimination of the hundreds of claims brought by terrorists at Guantánamo Bay, Cuba, that challenge many different aspects of their detention and that are now pending in our courts.”²⁵ This is not how the Supreme Court interpreted the Act, however. It rejected the government’s motion to dismiss the case and ruled in *Hamdan v. Rumsfeld* in June 2006 that the DTA did not apply to those *habeas corpus* petitions, like Salim Hamdan’s, that had been filed prior to the enactment of the DTA.

The administration responded to the *Hamdan* ruling by calling on Congress to pass further legislation that would allow secret US detentions abroad to continue, authorize the President to establish revised military commissions, amend the US War Crimes Act to decriminalize under that Act certain Geneva Convention violations by US personnel, and strip the courts of jurisdiction to consider any *habeas corpus* petition filed on behalf of any foreign national held in US custody anywhere as an “enemy combatant”. In September 2006, Congress duly passed the Military Commissions Act (MCA), which President Bush signed into law on 17 October 2006. Under the MCA, judicial review is limited to that provided under the DTA, that is, to whether the administration is applying its CSRT rules properly. Specifically, the MCA states,

“(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in... section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

The administration has asserted that this system of review does not amount to an unconstitutional suspension of *habeas corpus*, but rather constitutes an “adequate substitute

²⁵ President’s Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 30 December 2005.

remedy” for foreign detainees it claims have no rights under the US Constitution and no rights under international law enforceable in the courts. This claim of adequate substitution is another sign of improvisation, given what the administration said after setting up the CSRTs, namely that they were “not a substitute for the habeas” and that *habeas corpus* was “separate” from the administrative review system (see below). In its October 2007 brief to the Supreme Court, the government states of the CSRT that the detainees have had “the benefit of a legal proceeding...to review their status, and they have been adjudged to be enemy combatants”.²⁶ This indicates further improvisation – soon after the CSRTs were set up, the official overseeing the scheme, the Secretary of the Navy, emphasised that the CSRT was “not a legal proceeding”, something that the CSRT panels themselves have emphasised to detainees (see case of Feroz Abbasi below). The government has sought to bolster its position by stating that “the DTA and the MCA expressly recognize and affirm the CSRT process”.²⁷ However, the vast majority of the CSRT proceedings and decisions have been carried out and finalized long before either of these Acts was passed. Moreover, recognition of the CSRT scheme through adoption of this legislation does not render it compatible with international law.

On 20 February 2007, the Court of Appeals for the DC Circuit issued its long-delayed decision on the Guantánamo cases which had produced the divergent post-*Rasul* District Court opinions in January 2005. The Court of Appeals ruled that the MCA’s *habeas*-stripping provisions expressly applied to “all cases, without exception, pending on or after the enactment of this Act”, and therefore that the “federal courts have no jurisdiction in these cases”.²⁸ It further ruled that because the detainees – as foreign nationals captured and held outside US sovereign territory – had no constitutional rights, Congress had not violated the Suspension Clause of the Constitution which prohibits suspension of *habeas corpus* except if required for public safety “in cases of rebellion or invasion”. One of the three judges dissented, arguing *inter alia* that Congress had violated the Suspension Clause by failing to provide an adequate alternative remedy for the Guantánamo detainees who had the common law right to *habeas corpus*.²⁹

On 2 April 2007, the Supreme Court dismissed the appeal from the Court of Appeals decision. Lawyers for the detainees asked it to reconsider. The government opposed reconsideration on the grounds that it was an unwarranted and “extraordinary remedy”, but lawyers for the detainees responded with a declaration from a military intelligence officer, Lieutenant Colonel Stephen Abraham, who described the CSRT system’s shortcomings from an insider’s perspective. Another officer, a US Army Major and military lawyer who sat on 49 CSRT panels, has since made a declaration adding further evidence of the system’s flaws.

On 29 June, the Supreme Court agreed to take the case, and is due to hear oral arguments on 5 December 2007. A decision is not expected until the first part of 2008, by which time the Guantánamo detentions will be well into their seventh year. All branches of the US government must ensure justice and remedy as a matter of urgency.

²⁶ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

²⁷ *Ibid.*

²⁸ *Boumediene v. Bush*, US Court of Appeals for the District of Columbia Circuit, 20 February 2007.

²⁹ *Boumediene v. Bush*, Judge Rogers dissenting.

1.2 A brief chronology of the denial of *habeas corpus*

“It appears that it was in the sixteenth century that the writ of *habeas corpus* first began to be used as a means of testing the validity of executive committals”. Brief for the Commonwealth Lawyers Association as *amicus curiae* filed in support of Guantánamo detainees, in the US Supreme Court, 24 August 2007

28 December 2001 – US Justice Department advises Pentagon that holding foreign detainees in the non-sovereign territory of Guantánamo Bay should prevent *habeas corpus* review by US courts. It warns of “potential legal exposure” if a US court was ever able to exercise *habeas* jurisdiction over the detainees

10/11 January 2002 – first detainees transferred to Guantánamo. Litigation begins soon after

31 July 2002 – District Court for District of Columbia (DC) rules in *Rasul v. Bush* that it has no jurisdiction to hear *habeas corpus* appeals from Guantánamo detainees

11 March 2003 – Court of Appeals for the DC Circuit upholds the District Court *Rasul* ruling

28 June 2004 – US Supreme Court rules in *Rasul v. Bush* that US courts do have jurisdiction to consider *habeas corpus* petitions from Guantánamo detainees. *Hamdi v. Rumsfeld* ruling issued on the same day

7 July 2004 – Combatant Status Review Tribunals (CSRTs) established for Guantánamo detainees

14 September 2004 – Administrative Review Board established as annual review for Guantánamo detainees

21 and 31 January 2005 – two District Court judges issue opposing interpretations of the *Rasul* ruling. Cases go to the Court of Appeals for the DC Circuit, but no ruling will emerge for another two years

30 December 2005 – Detainee Treatment Act (DTA) signed into law, containing *habeas*-stripping provisions in relation to Guantánamo and providing for limited judicial review of CSRT decisions by DC Court of Appeals

29 June 2006 – US Supreme Court issues *Hamdan v. Rumsfeld* decision. It holds that the DTA did not strip federal courts of jurisdiction over *habeas corpus* petitions pending when the DTA was enacted

2/3 September 2006 – 14 “high-value” detainees transferred from years of secret CIA custody to Guantánamo; administration exploits their cases to push for legislation favouring its detention policies

17 October 2006 – Military Commissions Act (MCA) signed into law stripping the US courts of jurisdiction to consider *habeas corpus* petitions from foreign nationals held as “enemy combatants”, and limiting judicial review to that enacted under the DTA of 2005

20 February 2007 – In the case it first heard in 2005, DC Circuit Court rules in *Boumediene v. Bush* that under the MCA, the US courts have no jurisdiction to consider *habeas corpus* petitions from Guantánamo detainees

29 June 2007 – US Supreme Court agrees to take *Boumediene* case. In April it had said it would not.

10 July 2007 – Office of the President warns Congress that it “strongly opposes” any amendments that would modify or repeal *habeas corpus* provisions of the MCA, and that President would be advised to veto

20 July 2007 – First ruling from DC Circuit Court of Appeals in relation to the framework under which it will review CSRT decisions under the MCA/DTA regime. Denies government petition for rehearing on 3 October.

19 September 2007 – Habeas Restoration Act, legislation to repeal *habeas*-stripping provisions of the MCA, fails in Senate after Senators vote 56-43 to break a Republican filibuster, four short of the 60 needed to cut off debate and bring the legislation to a final vote

9 October 2007 – Government files its brief in *Boumediene* case in Supreme Court. Guantánamo detainees “enjoy more procedural protections than any other captured enemy combatants in the history of warfare” and “DTA review is a fully adequate substitute for *habeas corpus* in this extraordinary wartime context”.

2. Habeas corpus – protecting individual rights

The United States takes its obligations under the International Covenant on Civil and Political Rights very seriously... One thing that sets the ICCPR apart from other treaties is its enormous substantive scope covering virtually everything modern democratic societies think of as essential civil and political rights. In many senses a truly democratic society and government could not long exist without the vigilant protection of these rights.

Head of US delegation to the UN Human Rights Committee, Geneva, July 2006³⁰

Everyone has the right to liberty and security of person.³¹ A government may only arrest, detain or imprison a person strictly in accordance with the law.³² Arbitrary detention, the antithesis of this legal obligation, is absolutely prohibited under international human rights law. Human rights law applies at all times, even in times of emergency or war, however defined (also see text box below).³³ The notion of arbitrariness of detention under human rights law, in accordance with the United Nations (UN) Human Rights Committee's "constant jurisprudence", is "not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".³⁴ Amnesty International considers that an absence of due process has left all those held in US custody in Guantánamo arbitrarily detained. In addition, the indefinite, isolating, and virtually incommunicado detention without charge or trial to which they have been and continue to be subjected *per se* constitutes cruel, inhuman or degrading treatment. Indeed, from the outset, Guantánamo rapidly became a coercive threat used against detainees not held there and a coercive reality for those who were.³⁵

³⁰ Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Media roundtable with senior government officials, Geneva, Switzerland, 17 July 2006, <http://www.usmission.ch/Press2006/0717PressBriefing.html>.

³¹ E.g., Article 3, Universal Declaration of Human Rights; Article 9, International Covenant on Civil and Political Rights (ICCPR).

³² Article 9, ICCPR. Principle 2, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

³³ See e.g., International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, para. 25 ("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"); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 106 ("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..."). The USA has made no such derogation and could not, legitimately, with respect to *habeas corpus*.

³⁴ Communication No 1128/2002: Angola. UN Doc: CCPR/C/83/D/1128/2002.

³⁵ The first detainees to be taken to Guantánamo were not even told where they were, and apparently thought they were "being taken to be shot", a situation exacerbated by the reddish colour of their jumpsuits, which "in their culture...is a sign that someone is about to be put to death", according to a Pentagon memorandum on initial observations of the ICRC. The camp authorities considered whether to "continue not to tell them what is going on and keep them scared. ICRC says that they are very scared". The authorities only agreed to consider telling the detainees where they were "after the first

In 2003, a US federal court noted that “there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention” which is “codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions”.³⁶ The prohibition of arbitrary detention has long been recognized by the international community in the Universal Declaration of Human Rights and in treaties developed since the Declaration was adopted in 1948.³⁷ In an address to the UN General Assembly on 25 September 2007, and repeated in a proclamation on 23 October, President Bush said the UDHR “stands as a landmark achievement in the history of human liberty”,³⁸ and the US government continues to assert that the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, “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.”³⁹ These protections include the right not to be arbitrarily deprived of one’s life (article 6), the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (article 7), the right of any detainee to be treated with humanity and with respect for the inherent dignity of the human person (article 10), the right to a fair trial (article 14), the right to non-discriminatory application of the rights recognized in the treaty (article 2), the right to effective remedy for violations of rights in the treaty (article 2), and the right to be free from arbitrary detention (article 9). The US Supreme Court has said that the ICCPR “does bind the United States as a matter of international law”.⁴⁰

The ICCPR, ratified by 160 countries, provides the mechanism to protect against arbitrary detention and other violations, namely the right of every detainee to challenge the lawfulness of his or her detention in an independent, impartial and competent court and to release if that court finds that the detention is unlawful (article 9.4). Courts examining the lawfulness of detention must decide the issue “without delay” (article 9.4). The Human Rights Committee has stressed that “in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention,” not just those facing criminal charges.⁴¹ In the USA the right to challenge the lawfulness of detention, and to seek remedy, is invoked by application for a writ

round of interrogations” in incommunicado detention. See page 26, *USA: Human dignity denied: Torture and accountability in the ‘war on terror’*, AMR 51/145/2004, October 2004,

[http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/\\$File/AMR5114504.pdf](http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/$File/AMR5114504.pdf). Detainees in Iraq were threatened with transfer to Guantánamo as an interrogation method. *Ibid.* pp. 27, 72, 77, 132.

³⁶ *Alvarez-Machain v. USA*, US Court of Appeals for the Ninth Circuit, 3 June 2003.

³⁷ ICCPR, article 9; American Convention on Human Rights, article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5; African Charter on Human and Peoples’ Rights, articles 6, 7; Arab Charter on Human Rights (2004), article 14.

³⁸ President Bush addresses the United Nations General Assembly, UN Headquarters, New York, 25 September 2007, <http://www.whitehouse.gov/news/releases/2007/09/print/20070925-4.html>. United Nations Day, proclamation, <http://www.whitehouse.gov/news/releases/2007/10/20071023-2.html>.

³⁹ Opening statement to the UN Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of the US Delegation, Geneva, Switzerland, 17 July 2006, <http://www.state.gov/s/p/rem/69126.htm>.

⁴⁰ *Sosa v. Alvarez-Machain*, 29 June 2004.

⁴¹ General Comment 8, Right to liberty and security of persons (article 9) (1982), para. 1.

of *habeas corpus*. Suspension of *habeas corpus*, a US Supreme Court Justice wrote half a century ago, would be “sufficient to introduce emergency government with about all the freedom from judicial restraint that any dictator could ask”.⁴²

The Human Rights Committee is the expert body established by the ICCPR to monitor implementation of and compliance with this treaty. The Committee has made it clear that there are “no circumstances” that states may invoke “as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance... through arbitrary deprivations of liberty”.⁴³ It has also stressed that “a State party may not depart from the requirement of *effective judicial review* of detention” (emphasis added).⁴⁴ Even “if so-called preventive detention is used, for reasons of public security,... it must not be arbitrary, and must be based on grounds and procedures established by law (ICCPR art. 9.1), information of the reasons must be given (art. 9.2) and court control of the detention must be available (art. 9.4) as well as compensation in the case of a breach (art. 9.5).”⁴⁵

In July 2006, the Human Rights Committee called on the USA to ensure, in accordance with article 9(4) of the ICCPR, that:

“persons detained in Guantánamo are entitled to proceedings before a court to decide without delay on the lawfulness of their detention or order their release if the detention is not lawful. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.”⁴⁶

The UN Working Group on Arbitrary Detention, an expert body established in 1991 to investigate cases of arbitrary detention, has found that the “ongoing detention of the Guantánamo Bay detainees as ‘enemy combatants’ does in fact constitute arbitrary deprivations of the right to personal liberty”:

“This does not of course mean that none of the persons held at Guantánamo Bay should have been deprived of their liberty. Indeed, international obligations regarding the struggle against terrorism might make the apprehension and detention of some of these persons a duty for all States. Such deprivation of liberty is, however, governed by human rights law, and specifically articles 9 and 14 of the ICCPR. This includes the right to challenge the legality of detention before a court in proceedings affording fundamental due process rights, such as guarantees of independence and impartiality, the right to be informed of the reasons for arrest, the right to be informed about the evidence underlying these reasons, the right to assistance by counsel and the right to a

⁴² Robert H. Jackson, *Wartime security and liberty under law*. Buffalo Law Review, Vol. 1, No. 2 (1951), pages 103-117.

⁴³ Human Rights Committee, General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 11.

⁴⁴ *Ibid.* note 9.

⁴⁵ Human Rights Committee, General Comment 8, *op. cit.*, para. 4.

⁴⁶ Human Rights Committee. Conclusions on the USA, 28 July 2006, Available at <http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/CCPR.C.USA.CO.pdf>.

trial within a reasonable time or to release. Any person deprived of his or her liberty must enjoy continued and effective access to habeas corpus proceedings, and any limitations to this right should be viewed with utmost concern.”⁴⁷

Habeas corpus is a fundamental and flexible judicial remedy. As the US Supreme Court said in 1969,

“The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action... The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.”⁴⁸

In addition to protecting the right of all persons to be free from arbitrary deprivations of liberty, judicial review also protects other fundamental non-derogable human rights, including the right not to be subjected to abduction, enforced disappearance, secret detention, torture or other cruel, inhuman or degrading treatment or punishment. Even in an emergency which threatens the life of the nation, “in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished”.⁴⁹

A government’s vague or shifting description of the legal basis for detentions would highlight the urgent need for *habeas corpus* to protect detainees from arbitrary detention and other violations. In the absence of judicial oversight, the status of the Guantánamo detentions has indeed shifted. In May 2006, the administration told the UN Committee Against Torture that the detainees were held pursuant to the Military Order signed by President Bush on 13 November 2001.⁵⁰ This was entirely contrary to what it had argued in federal District Court in *Rasul v. Bush*, when it categorically denied that any detainee was held under the Military Order, and asserted instead that they were held more generally under the President’s Commander-in-Chief powers. Indeed, in the month before the *Rasul* ruling, Deputy Secretary of Defense Paul Wolfowitz issued an Order on administrative review procedures which stated that “enemy combatants whom the President has determined to be subject to his Military Order of November 13, 2001 are excepted from the procedures established in this Order until the disposition of any charges against them or the service of any sentence imposed by a

⁴⁷ 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. UN Doc.: E/CN.4.2006/120, 27 February 2006, paras. 20 and 26.

⁴⁸ *Harris v. Nelson*, 394 U.S. 286 (1969).

⁴⁹ Human Rights Committee, General Comment 29, *op. cit.*, para. 16.

⁵⁰ List of issues to be considered during the examination of the second periodic report of the USA. Responses of the USA. 5 May 2006, page 17, <http://www.state.gov/documents/organization/66172.pdf>.

military commission”.⁵¹ At this time, only six detainees had been made subject to the Military Order.⁵² On 7 July 2004 – after the *Rasul* ruling – another nine were added to this list “bring[ing] to 15 the number of detainees that the President has determined are subject to his military order”.⁵³

A lack of precision over detainee numbers raised the possibility that individual detainees could be moved to and from the base, or between different US agencies, including into secret detention, without any public knowledge of such transfers, in violation of international law or standards.⁵⁴ In the absence of judicial oversight, the numbers and identities of detainees, and who was transferred into and out of the base, remained unknown for a prolonged period. On 29 January 2004, two years after the detentions began, the Pentagon announced that, to that date, 91 detainees had been released or transferred from the base. However, it had only publicly announced the movement of 73 detainees (see appendix). It took four years and required court action before the USA named detainees held in the base. Even then, the numbers did 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, on 18 May 2006 the Pentagon stated that 287 detainees had been released or transferred from the base and “approximately 460” remained there – a total of 747. The authorities continue to provide only approximate statistics. Thus, when the Pentagon announced on 28 September 2007 that a detainee had been transferred to Mauritania, it claimed that “approximately 435 detainees have departed Guantánamo for other countries”.⁵⁵ In its next announcement, the following day, the Pentagon stated that the transfer of eight detainees meant that “approximately 445” detainees had now left the base.⁵⁶

In the absence of judicial oversight, the indefinite and isolating detention regime at Guantánamo has amounted to cruel, inhuman and degrading treatment.⁵⁷ In February 2007, for example, Uighur detainee Ali Mohammed was

“held in isolation in Camp 6, a ‘super-max’ prison, at least 22 hours a day. He never sees direct sunlight and has no access to fresh air. During his two hours per day of ‘recreational time (which on alternating days, is in the middle of the night), Ali is placed in a cage where he can sometimes see other prisoners but is punished if he tries to touch or greet them. He is compelled to complain to get clean clothes. He is

⁵¹ Order. Administrative review procedures for enemy combatants in the control of the Department of Defense at Guantanamo Bay Naval Base, Cuba. 11 May 2004, § 2 (E)(i), <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf>.

⁵² President determines enemy combatants subject to his Military Order, 3 July 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5511>.

⁵³ Presidential military order applied to nine more enemy combatants, 7 July 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7525>.

⁵⁴ See, e.g. Article 17 of the International Convention for the Protection of All Persons from Enforced Disappearance, reflecting the prohibition on secret detention and requiring safeguards against it.

⁵⁵ Detainee transfer announced. <http://www.defenselink.mil/releases/release.aspx?releaseid=11367>.

⁵⁶ Detainee transfer announced. <http://www.defenselink.mil/releases/release.aspx?releaseid=11368>.

⁵⁷ *USA: Cruel and Inhuman: Conditions of isolation for detainees at Guantánamo Bay*, AI Index: AMR 51/051/2007, April 2007, <http://web.amnesty.org/library/Index/ENGAMR510512007>.

denied privacy when he uses the toilet; even female guards can see him. His food and drinks are always cold. He eats every meal alone. Like all Guantanamo prisoners, he is not allowed any visitors other than occasional trips by counsel and the Red Cross, and he is not allowed to make phone calls. As [the US Supreme] Court recently affirmed, even convicted murderers cannot be made to endure conditions like these without first providing them the benefit of due process”.⁵⁸

On 7 December 2006, Libyan detainee Abdul Hamid al-Ghizzawi was moved to Camp 6. His US lawyer visited him in February 2007:

“I was escorted into the new, headache white, facility and brought to the tiny room where my client was waiting for me. The windowless six-by-six (feet) closet-size room had two chairs and a table. Mr Al-Ghizzawi was stooping low to the floor and huddled against the wall when I entered. His arms were wrapped around his body as he tried to warm himself from the chill he has had for over two months, and his feet were shackled to the floor.... I observed that the total isolation of camp 6 was having a profound effect on Mr Al-Ghizzawi’s mental as well as physical health.”⁵⁹

When the lawyer visited him again in July 2007, she found that the deterioration in his health was “alarming”:

“Perhaps most distressing to me was my observation that Mr Al-Ghizzawi’s mental health had noticeably deteriorated since my last visit. He confessed that in his total isolation he had begun talking to himself. He recognized that this was a sign of a fraying mental state and he was very distraught over his condition. He seemed to have great difficulty maintaining focus and concentrating on the conversation”.⁶⁰

In addition to the harsh conditions of detention, there have been numerous allegations of torture or other ill-treatment of detainees held in virtual incommunicado detention in Guantánamo, both at the base and prior to their transfer there. A Federal Bureau of Investigation (FBI) email revealed that “extreme interrogation techniques were planned and implemented” against certain detainees held in Guantánamo.⁶¹ Prolonged isolation, stress positions, cruel use of shackles, sleep deprivation, religious intolerance, forced nudity and extremes of temperature are among the techniques or conditions reported.⁶² Mohamedou Ould Slahi, for example, detained in Mauritania and subject to “rendition” to Jordan before being transferred to Guantánamo via Afghanistan, was subjected to torture or other ill-treatment while denied access to the International Committee of the Red Cross (ICRC) for more than a year in Guantánamo, where he remains. He has alleged that between June and August 2003, he was subjected to forced nudity, sexual molestation, sexual assault, subjection to cold

⁵⁸ *In re Petitioner Ali*, Petition for original writ of habeas corpus, In the US Supreme Court, 12 February 2007. The Supreme Court decision cited is *Wilkinson v. Austin*, 545 U.S. 209 (2005).

⁵⁹ Affidavit of Attorney H. Candace Gorman, 25 July 2007.

⁶⁰ *Ibid.*

⁶¹ Email dated 9 July 2004. Referring to time period May to October 2002. Responses-87 at <http://foia.fbi.gov/guantanamo/detainees.pdf>.

⁶² E.g., USA: *Human dignity denied: Torture and accountability in the ‘war on terror’*, *op. cit.*

temperatures, including while stripped naked and soaked with cold water, sleep deprivation, threats against himself and his family, and beatings.⁶³ He has said that in order to stop the ill-treatment he “yes-sed every accusation my interrogators made”.⁶⁴ Another detainee, Mohamed al-Qahtani, was interrogated in Guantánamo for 18 to 20 hours per day for 48 out of 54 consecutive days. He was subjected to intimidation by the use of a dog, to sexual and other humiliation, stripping, hooding, loud music, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.⁶⁵ FBI agents observed al-Qahtani evidencing behaviour “consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).” In the absence of any judicial involvement, a military investigation in 2005 concluded that his treatment “did not rise to the level of prohibited inhumane treatment” and the Pentagon described Mohamed al-Qahtani’s interrogation as having been guided by the “strict” and “unequivocal” standard of “humane treatment for all detainees” in military custody.⁶⁶

In the absence of judicial oversight, it was more than two and a half years before any of the Guantánamo detainees were able to gain access to lawyers. The first visit by counsel in relation to *habeas corpus* litigation following the *Rasul* ruling took place in August 2004. No detainee has had access to a lawyer during interrogation. Denial of access to legal representation has been a part of the coercive detention regime, of concern not least because information obtained in interrogations could be used in military commission trials. 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.⁶⁷ A previously classified 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”.⁶⁸

⁶³ See *USA: Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, AMR 51/149/2006, September 2006, <http://web.amnesty.org/library/Index/ENGAMR511492006>. Also Affidavit of Vincent James Iacopino, M.D., Re: Mohamedou Ould Slahi, 14 May 2007 (“Based on my knowledge of methods of torture and their physical and psychological effects, and extensive experience investigating and documenting medico-legal evidence of torture, it is my judgment that Mr. Slahi’s allegations of torture and ill-treatment are entirely consistent with and supported by physical and psychological evidence documented in the medical records”).

⁶⁴ Letter from Mohamedou Ould Slahi (unclassified), dated 9 November 2006. On file at AI.

⁶⁵ See *Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo*, June 2006. This also details allegations that Guantánamo detainees have been ill-treated with the involvement of agents of other governments, including China, Libya and Egypt, given access to them in the base, <http://web.amnesty.org/library/Index/ENGAMR510932006>.

⁶⁶ Guantanamo provides valuable intelligence information. Department of Defense news release, 12 June 2005, <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=8583>.

⁶⁷ “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>.

⁶⁸ Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003.

Also in the absence of judicial oversight, the government has formulated and operated unfair trial procedures. Ten detainees were charged for trial by military commissions established under the Military Order signed by President Bush in November 2001. That military commission scheme was found unlawful in June 2006 by the US Supreme Court after considering a *habeas corpus* challenge brought on behalf of one of the 10, Yemeni detainee Salim Ahmed Hamdan.⁶⁹ With a revised, but still fundamentally flawed, military commission process now authorized by Congress under the MCA, it is crucial that those who are charged for trial must be able to challenge the lawfulness of these revised commission procedures before an independent, impartial and competent court, characteristics which the commissions (and the new Court of Military Commissions Review) themselves lack.⁷⁰

The example the denial of *habeas corpus* sets is a dangerous one, as the US government itself has, in effect, noted. Under “arbitrary arrest or detention” in its 2004 report on human rights in other countries during 2003, the US State Department criticized Malaysia’s Internal Security Act (ISA) for allowing detention “without judicial review or the filing of formal charges”. The State Department reported that “Special security prisoners were detained in a separate detention center. In 2003, a number of persons released from detention under the ISA claimed that during the initial stages of their detention they were subjected to intensive interrogation and disoriented by isolation, deliberately interrupted sleep, and abusive treatment by police.” The State Department also noted that the Malaysian authorities had sought to justify the detention regime on the grounds that the implementation by “foreign governments” of preventive detentions to combat terrorism “underscored” Malaysia’s continued need for the ISA.⁷¹ What the State Department report failed to specify, however, was that in 2003, Malaysia’s minister of law had justified his country’s preventive detention practice as “just like the process in Guantánamo Bay”.⁷²

The following year, in a judicial opinion issued not long after the US Supreme Court’s *Rasul v. Bush* judgment on Guantánamo, the President of the Inter-American Court of Human Rights wrote:

The Anglo-Saxon term *due process* – translated in some countries as “garantías esenciales del procedimiento” [essential procedural guarantees] – is one of the most formidable tools for protection of rights... It enables or realizes effective judicial protection. It involves access to formal justice, such as a hearing, evidence, and pleadings, and to material justice, as the means to obtain a just judgment... We had gained much ground in the endeavor for due process..., yet now we must note, once again, that no progress is definitive... and that a disturbing erosion of human rights

⁶⁹ *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

⁷⁰ See USA: *Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index: AMR 51/044/2007, March 2007, <http://web.amnesty.org/library/Index/ENGAMR510442007>.

⁷¹ Malaysia. Country Reports on Human Rights Practices, 2003. Bureau of Democracy, Human Rights, and Labor, US State Department, 2004 <http://www.state.gov/g/drl/rls/hrrpt/2003/27778.htm>. This was repeated in the following year’s report.

⁷² *Malaysia slams criticism of security law allowing detention without trial*. Associated Press, 17 September 2003.

has begun to take place in the scope of the proceeding. Persistence of old forms of crime, the appearance of new expressions of crime, systematic attacks by organized crime, the extraordinary virulence of certain extremely grave crimes – such as terrorism and drug trafficking – have determined a sort of ‘exasperation or desperation’ which is ill-advised: it suggests setting aside progress and going back to systems or measures that already demonstrated their enormous ethical and practical flaws. In one of its extreme versions, this has generated phenomena such as the ‘Guantanamoization’ of the criminal proceeding, recently questioned by the jurisprudence of the Supreme Court of the United States itself.”⁷³

More than three years after the Supreme Court’s *Rasul* ruling, Guantánamo remains an international icon of the denial of due process.

3. Habeas corpus – part of accountable government

It is a part of the acceptance of the rule of law that the courts will be able to exercise jurisdiction over the executive. Otherwise, the conduct of the executive is not defined and restrained by law. It is because of that principle, that the USA, deliberately seeking to put the detainees beyond the reach of the law in Guantánamo Bay, is so shocking an affront to the principles of democracy... Without independent judicial control, we cannot give effect to the essential values of our society. To give effect to our democratic values needs the participation of executive, legislature, and judiciary together

UK Secretary of State for Constitutional Affairs, 13 September 2006⁷⁴

In addition to the protection that *habeas corpus* offers to individuals deprived of their liberty it also promotes state accountability by providing an independent judicial check on executive or legislative abuse. “Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny”, wrote the US Supreme Court in 1957.⁷⁵ A recent legal brief filed by the administration in relation to the Guantánamo detainees argued that “long-standing separation of powers principles... preclude the courts from aggressively stepping in to impose onerous procedural requirements on the Executive Branch during a time of war”.⁷⁶

By framing its response to the attacks of 11 September 2001 in terms of a global “war”, conducted under the President’s constitutional authority as Commander in Chief of the Armed Forces and his authority to conduct “foreign affairs”, the administration has demanded deference from the judiciary, and has undermined the rule of law in the process. Under this

⁷³ Separate concurring opinion of Judge Sergio Garcia Ramirez in the Judgment of the Inter-American Court of Human Rights in the *Case of Tibi v. Ecuador*, 7 September 2004 (original in Spanish).

⁷⁴ *The Role of Judges in a Modern Democracy*. UK Constitutional Affairs Secretary and Lord Chancellor, Lord Falconer of Thoroton, Magna Carta Lecture, Sydney, Australia, 13 September 2006, <http://www.dca.gov.uk/speeches/2006/sp060913.htm>.

⁷⁵ *Reid v. Covert*, 354 U.S. 1 (1957).

⁷⁶ *Bismullah v. Gates*, Brief for Respondent addressing pending preliminary motions. In the US Court of Appeals for the District of Columbia Circuit, April 2007.

“war” framework the administration took the position that the President was essentially unconstrained by US or international law. For example:

“Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon... [D]eterminations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response..., under our Constitution, are for the President alone to make”.⁷⁷

“[A]ny presidential decision in the current conflict concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a controlling Executive act that would immediately and completely override any customary international law norms... [A]llowing the federal courts to rely upon international law to restrict the President’s discretion to conduct war would raise deep structural problems...The power to override or ignore customary international law, even the law applying to armed conflict, is an integral part of the President’s foreign affairs power”.⁷⁸

“We conclude that, under the current circumstances, necessity or self-defense may justify interrogation methods that might violate [the prohibition on torture under US law]”.⁷⁹

“Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we... conclude that [the US law prohibiting torture abroad] does not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority”.⁸⁰

⁷⁷ Memorandum opinion for Timothy Flanigan, Deputy Counsel to the President. *The President’s Constitutional authority to conduct military operations against terrorists and nations supporting them*. John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001. With few exceptions, the Office of Legal Counsel’s legal opinions are binding on all executive branch agencies, although they can be overruled by the Attorney General or the President.

⁷⁸ Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense. *Application of treaties and laws to al Qaeda and Taliban detainees*. Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 22 January 2002 (internal quote marks omitted).

⁷⁹ Memorandum for Alberto R. Gonzales, Counsel to the President. *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*. Jay S. Bybee, Office of Legal Counsel, Department of Justice, 1 August 2002. A replacement memorandum, issued in December 2004, did not repudiate this notion of presidential power to authorize torture, noting instead that the “discussion” on it was “unnecessary”. The new document also noted that “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” Legal standards applicable under 18 U.S.C. §§ 2340-2340A. Memorandum opinion for the Deputy Attorney General, 30 December 2004.

⁸⁰ Pentagon Working Group Report on Detainee Interrogations, 4 April 2003, *op. cit.*, § III.3.a.

In the context of detentions, the pursuit of executive power unchecked by the judiciary has drawn the concern of a number of judges. In December 2003, for example, the Court of Appeals for the Ninth Circuit ruled in the case brought on behalf of a Libyan national, Salem Gherebi, detained in Guantánamo, and still there four years later:

“Under the government’s theory, it is free to imprison Gherebi indefinitely along with hundreds of other citizens of foreign countries, friendly nations among them, and to do with Gherebi and these detainees as it will, when it pleases, without any compliance with any rule of law of any kind, without permitting him to consult counsel, and without acknowledging any judicial forum in which its actions may be challenged. Indeed, at oral argument, the government advised us that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantánamo, the US government has never before asserted such a grave and startling proposition... a position so extreme that it raises the gravest concerns under both American and international law.”⁸¹

In 2004, four Supreme Court Justices said, “Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purposes of investigating and preventing subversive activity is the hallmark of the Star Chamber.”⁸²

The US administration appears to agree – but only in the case of other countries. It has routinely condemned detention without judicial review when it has occurred at the hands of other governments, including those it describes as “totalitarian” (Cuba), “theocratic” (Iran), “dictatorship” (North Korea), and “authoritarian” (Belarus, China, Syria and Uzbekistan).⁸³ In his address to the UN General Assembly on 25 September 2007, President Bush stated that “in Belarus, North Korea, Syria, and Iran, brutal regimes deny their people the fundamental rights enshrined in the Universal Declaration [of Human Rights]”. The US State Department’s most recent human rights report contains the following entries:

- Belarus: “the law limits arbitrary detention; however, the government did not abide by these limits... Detainees have the right to petition the legality of their detention; however, in practice, appeals by suspects seeking court review of their detentions were frequently suppressed or ignored.”⁸⁴

⁸¹ *Gherebi v. Bush*, US Court of Appeals for the Ninth Circuit, 18 December 2003.

⁸² *Rumsfeld v. Padilla*, US Supreme Court, 28 June 2004, Justice Stevens, dissenting (joined by Justices Souter, Ginsburg and Breyer). The Star Chamber was an English court created in 1487 by King Henry VII. The Star Chamber, comprising 20-30 judges, became notorious under Charles I’s reign for handing down judgments favourable to the king and to Archbishop William Laud, who supported the persecution of the Puritans. It was abolished in 1641.

⁸³ See State Department entries, below.

⁸⁴ Belarus, Country Reports on Human Rights Practices, 2006. Bureau of Democracy, Human Rights, and Labor, US State Department, 6 March 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78802.htm>.

- China: “arbitrary arrest and detention remained serious problems... Public security organs do not require court-approved warrants to detain suspects under their administrative detention powers. After detention, the procuracy can approve formal arrest without court approval.”⁸⁵
- North Korea: “Members of security forces arrested and transported citizens to prison camps without trial. There were no restrictions on the government’s ability to detain and imprison persons at will or to hold them incommunicado... Judicial review of detentions did not exist in law or in practice.”⁸⁶
- Syria: “the 1963 Emergency Law authorizes the government to conduct preventive arrests and overrides constitutional and penal code provisions against arbitrary arrest and detention, including the need to obtain warrants. In cases involving political or national security offenses, arrests were often carried out in secret with cases assigned in a seemingly arbitrary manner to military, security or criminal court personnel. Suspects were detained incommunicado for prolonged periods without charge or trial and denied the right to a judicial determination regarding pretrial detention.”⁸⁷
- Cuba: arbitrary detention continued, with “government officials routinely... deny[ing] due process to persons detained on purported state security grounds.”⁸⁸
- Uzbekistan: arbitrary detention remained a problem, not least because “there is no judicial determination of detention.”⁸⁹
- Iran: arbitrary arrest and detention remained common because “in practice, there is neither a legal time limit for incommunicado detention nor any judicial means to determine the legality of the detention.”⁹⁰

Almost 30 years ago, in the case brought against Iran by the USA in the International Court of Justice after US embassy personnel in Tehran were taken captive in November 1979, the US government stated:

“It is not necessary for the purposes of this case to define precisely what is required by an internationally recognized minimum standard of treatment. Whatever the outer limits of the law may be, it is well established that, at its core, it means that aliens are entitled to be free from arbitrary or discriminatory arrest and detention and must not be treated in a cruel, inhuman or degrading manner”.

The USA further stated that any force in the argument that such a position was not a principle of customary international law, binding on all nations, had “gradually diminished as recognition of the existence of certain fundamental human rights has spread throughout the international community”. The US government’s legal brief to the ICJ continued:

⁸⁵ China, *op. cit.*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm>.

⁸⁶ Democratic People’s Republic of Korea, *op. cit.*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78777.htm>.

⁸⁷ Syria, *op. cit.*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78863.htm>.

⁸⁸ Cuba, *op. cit.* <http://www.state.gov/g/drl/rls/hrrpt/2006/78887.htm>.

⁸⁹ Uzbekistan, *op. cit.*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78848.htm>.

⁹⁰ Iran, *op. cit.*, <http://www.state.gov/g/drl/rls/hrrpt/2006/78852.htm>.

“The existence of such fundamental rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights, regional conventions and other instruments defining basic human rights...”⁹¹

However, the administration has rejected the claim that the Guantánamo detainees have any rights under customary international law, arguing that such law is “not static” but “evolves” through state practice.⁹²

“Customary law is constantly evolving, thus implying that states can modify their practices to adapt to new or unanticipated circumstances or challenges... Even if customary international law proscribed ‘prolonged arbitrary detention’, it is not at all clear that [the Guantánamo detentions] fall within this rubric. The detention here is not arbitrary, but based on the Military’s determination that petitioners are enemy combatants. The treaties cited by petitioners as evidence of customary international law do not appear to deal with wartime detentions of this type, but rather with criminal-like matters, and petitioners cite no clear evidence of a consistent and widespread norm, followed as a matter of legal obligation, that detention of enemy combatants in a worldwide war against a terrorist organization is improper.”⁹³

Such an argument, if accepted, would give a government – any government – a green light to ignore its obligations under international law for any situation that it defined as a “war”, “new” or “unanticipated” or for any person that it defined as the “enemy”.

Under the administration’s global “war” framework, “the determination of who are enemy combatants is a quintessentially military judgment entrusted primarily to the Executive Branch.”⁹⁴ The executive has argued in the courts that it has “a unique institutional capacity to determine enemy combatant status and a unique constitutional authority to prosecute armed conflict abroad and to protect the Nation from further terrorist attacks. By contrast, the judiciary lacks the institutional competence, experience, or accountability to make such military judgments at the core of the war-making powers.”⁹⁵ This contention is necessarily undercut by the fact that the detentions at issue here are years old and conducted thousands of miles from any zone of hostilities. None of the detainees are nationals of countries at war with the USA. Many were picked up far from any battlefield.

⁹¹ United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*). International Court of Justice, Memorial of the Government of the United States of America, 12 January 1980.

⁹² See *Application of treaties and laws to al Qaeda and Taliban detainees*, *op. cit.* 22 January 2002.

⁹³ Respondents reply memorandum in support of motion to dismiss or for judgment as a matter of law. *In re Guantanamo Detainee Cases*. In the US District Court for DC, 16 November 2004.

⁹⁴ *Al Odah et al. v. USA et al.* Opening brief for the United States. In the US Court of Appeals for the District of Columbia Circuit, 27 April 2005.

⁹⁵ *Ibid.*

This will be allowed to continue if the interpretation of the Military Commissions Act by the DC Circuit Court of Appeals in its February 2007 *Boumediene* decision is upheld. “Quite simply”, as one of the legal briefs filed in the Supreme Court on behalf of the Guantánamo detainees puts it, “the DC Circuit opinion authorizes the US government to establish offshore prison camps far removed from any battlefield that are totally outside the law.”⁹⁶

The administration’s attempt to keep those it labels as “enemy combatants” as far from the courts as possible explains the choice of Guantánamo as a detention centre. It chose the Naval Base in Cuba upon Justice Department advice in December 2001 that under existing constitutional law the federal courts could not “properly entertain an application for a writ of habeas corpus by an enemy alien” captured abroad and detained in the base because it was not “sovereign” US territory.⁹⁹ In the words of a former Assistant Attorney General, “because [Guantánamo] was technically not a part of US sovereign soil, it seemed like a good bet to minimize judicial scrutiny”.¹⁰⁰ The USA occupies the base under a 1903 Lease Agreement with Cuba. Under the Agreement, “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas],” while “the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise *complete jurisdiction*

Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial... Under the best tradition of Anglo-American law, courts will not deny a hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates.

The Communist conspiratorial technique of infiltration poses a problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else...

United States officers [may not] take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.

It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone.

Justice Robert H. Jackson, US Supreme Court, 1953⁹⁷

Today’s war on terror is like the Cold War. It is an ideological struggle with an enemy that despises freedom and pursues totalitarian aims.

President George W. Bush, April 2006⁹⁸

⁹⁶ *Al-Odah v. USA*. Brief for petitioners El-Banna et al, In the US Supreme Court, 24 August 2007.

⁹⁷ *Shaughnessy v. Mezei*, 345 U.S. 206 (1953), Justices Jackson and Frankfurter, dissenting.

⁹⁸ President Bush discusses global war on terror, 10 April 2006,

<http://www.whitehouse.gov/news/releases/2006/04/20060410-1.html>.

⁹⁹ *Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba*. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, From Patrick F. Philbin and John C. Yoo, Deputy Assistant Attorneys General, US Department of Justice, 28 December 2001.

¹⁰⁰ Jack Goldsmith. *The Terror Presidency: Law and judgment inside the Bush administration*. W.W. Norton, 2007, p.108.

and control over and within said areas” (emphasis added). As Justice Kennedy wrote in the 2004 *Rasul* opinion, under this lease, the USA has long exercised “unchallenged and indefinite control” over the base.¹⁰¹ In other words, “Guantanamo Bay is in every practical respect a United States territory.”¹⁰²

The government’s brief to the Supreme Court in October 2007 in the *Boumediene* case nevertheless continues to push the sovereignty issue: “It is beyond dispute that Cuba, not the United States, possesses sovereignty over Guantánamo Bay”.¹⁰³ Yet under international law this fact is irrelevant to the rights of the detainees. Indeed, the notion that a government can deny rights to those in places under its jurisdiction or control that it would guarantee to those on its sovereign territory has been described by the UN Human Rights Committee, the ICCPR’s authoritative interpreter, as “unconscionable”.¹⁰⁴ Such an approach strips international law of its protections and sets a destructive example for other governments to follow. Article 2.1 of the ICCPR provides that the scope of this treaty’s application should extend to “all individuals within its territory and subject to its jurisdiction”. The International Court of Justice has found that this provision “did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”¹⁰⁵ The Human Rights Committee has similarly said that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party.”¹⁰⁶

The US government maintains that “the obligations assumed by a State Party to the International Covenant on Civil and Political Rights apply only within the territory of the State Party”.¹⁰⁷ It has repeated this in its brief to the US Supreme Court in October 2007, seeking to have the Court uphold the MCA’s *habeas*-stripping provisions.¹⁰⁸ The UN Human Rights Committee has rejected this interpretation of the ICCPR, and has called upon the USA

¹⁰¹ In 1934, the USA and Cuba entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect “[s]o long as the United States of America shall not abandon the ... naval station of Guantanamo.”

¹⁰² *Rasul v. Bush*, 542 U.S. 466 (2004), Justice Kennedy, concurring in the judgment. Justice Kennedy added that Guantánamo Bay is “far removed from any hostilities”.

¹⁰³ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

¹⁰⁴ “...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, ¶ 12.3.

¹⁰⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 109.

¹⁰⁶ General Comment 31, UN Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 10 (2004).

¹⁰⁷ Third periodic reports of States parties due in 2003. United States of America. UN Doc.: CCPR/C/USA/3 (2005), Annex 1.

¹⁰⁸ *Boumediene v. Bush*, Brief for the respondents, October 2007, n.34 (“in any event the ICCPR applies only within the ‘territory’ of member nations”).

to “acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war”.¹⁰⁹

Although Guantánamo was chosen by the administration on the grounds that US precedent restricts the applicability of the Constitution in the case of federal government actions outside the USA concerning foreign nationals, the administration has promoted an even broader notion of executive detention power. It has applied the “enemy combatant” label to two US nationals held in the USA (Yaser Hamdi and Jose Padilla, since released or transferred from military custody after adverse judicial rulings, see below) and to a foreign national legally resident in the USA. This latter case involves Qatari national Ali Saleh Kahlah al-Marri, who has been held in indefinite military detention on the US mainland since June 2003 on the basis of an executive order signed by President Bush designating him as an “enemy combatant”.

“There is a popular impression, fostered by ignorance of our history, that civil liberties in this country are not so vulnerable, and that courts are always open as the sanctuary from arbitrary government... Liberties are not so inflexibly buttressed as most persons suppose and a public sentiment that would sustain closing of the courts could lead to serious consequences... It is easy, by giving way to the passion, intolerance and suspicions of wartime, to reduce our liberties to a shadow, often in answer to exaggerated claims of security.” US Supreme Court Justice, 1951¹¹⁰

In June 2007, a three-judge panel of the US Court of Appeals for the Fourth Circuit ruled that the *habeas*-stripping provision of the Military Commissions Act does not apply to Ali al-Marri, and after consideration of this detainee’s *habeas corpus* petition, ordered that his military detention “must cease”.¹¹¹ The urgent concern that the Fourth Circuit expressed about the assertion of executive power mirrors that expressed by the Ninth Circuit four years earlier (above). In its ruling, the Fourth Circuit said:

“[A]ccording to the government, the President has ‘inherent’ authority to subject persons legally residing in this country and protected by our Constitution to military arrest and detention without the benefit of any criminal process, if the President believes that these individuals have ‘engaged in conduct in preparation for acts of international terrorism’. This is a breathtaking claim, for the government nowhere represents that this ‘inherent’ power to order indefinite military detention extends only to aliens or only to those who ‘qualify’ within the ‘legal category’ of enemy combatants... The President cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention... To sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them ‘enemy combatants’, would have disastrous consequences for the Constitution – and the country... It is that power – were a court to recognize it – that

¹⁰⁹ Concluding observations of the Human Rights Committee, United States of America, UN Doc.: CCPR/C/USA/CO/3 (2006), para. 10.

¹¹⁰ Robert H. Jackson, *Wartime security and liberty under law*. Buffalo Law Review, *op. cit.*

¹¹¹ *Al-Marri v. Wright*, 11 June 2007. The Fourth Circuit agreed to rehear the case in front of the full court (oral argument due 31 October 2007). Ali al-Marri remains in indefinite military custody.

could lead to all our laws to go unexecuted, and the government itself to go to pieces. We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic”.¹¹²

The dangerous erosion of constitutional protections posed by the US administration’s treatment of Ali al-Marri applies just as urgently to the destructive effect on international law threatened by the USA’s treatment of foreign nationals seized and held abroad, as case after case in the “war on terror” has illustrated. Majid Khan, for example, was seized in his brother’s home in Karachi in March 2003. Held in Pakistan, Majid Khan was reportedly subjected to torture by US agents, including by being bound tightly in awkward positions in a small chair, hooding, beatings, slapping in the face, sleep deprivation, and confinement to a dark cell that was so small he could not lie down.¹¹³ Majid Khan became the victim of enforced disappearance in secret CIA custody at unknown locations, his fate and whereabouts concealed for more than three years, his family not knowing if he was alive or dead, until he was transferred in September 2006 to Guantánamo, where he remains virtually incommunicado over a year later.¹¹⁴ There has been no meaningful judicial involvement in his case for the entire period of his detention.

At his CSRT hearing in April 2007 in Guantánamo, Majid Khan said: “It has been four years. Can the United States government call me a terrorist and not yet, and not yet charge me? What is stopping them?” Rejecting the government’s labelling of him as an “enemy combatant”, he said that he should be given a proper trial rather than administrative review by a Combatant Status Review Tribunal. The CSRT cannot provide any remedy, such as ensuring the initiation of fair trial proceedings – indeed a CSRT decision of “enemy combatant” leaves a detainee exposed to the possibility of unfair trial by military commission.

Despite being transferred to Guantánamo for the stated purpose of bringing him to trial, neither Khan nor the other 13 men transferred with him had been charged more than a year later.¹¹⁵ The USA continues to undermine the presumption of innocence. Announcing that Majid Khan was being granted access to legal counsel for the purpose of having his CSRT classification as an “enemy combatant” reviewed under the DTA, the Pentagon emphasised that “Khan exemplifies the significant and genuine threat that the United States and other countries face throughout the world.”¹¹⁶

¹¹² *Ibid.*, internal quote marks omitted.

¹¹³ Written statement of Ali Khan, transcript of CSRT hearing for Majid Khan conducted on 15 April 2007, Guantánamo Bay.

¹¹⁴ Majid Khan was granted access to a lawyer on 16 October 2007 – for the purpose of DTA review – four and a half years after he was taken into custody.

¹¹⁵ Because “we have largely completed our questioning of the men” they were being brought “into the open” and transferred from CIA custody to Guantánamo in order “to start the process for bringing them to trial”. 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>.

¹¹⁶ *Majid Khan meets with private attorney at Guantánamo*. Department of Defense, 16 October 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=11415>. (“Under the Detainee Treatment Act, each detainee at Guantanamo is entitled to have his enemy combatant designation reviewed by the

Fifty years ago, the US Supreme Court stated that “Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience.”¹¹⁷

The CSRT scheme provides the administration with a convenient façade of process. It provides the detainees and their families with nothing but more injustice. All detainees should be able to challenge the lawfulness of their detention directly in a court of law. Anyone against whom there is evidence of criminal wrongdoing should promptly be charged with recognizable criminal offences and brought to a full and fair trial in accordance with international standards, or else released.

My name is Ali Khan and I am Majid's father. I am writing this statement on behalf of my family because the military will not let us travel to Guantanamo and participate in Majid's [CSRT] hearing... I have not seen my son in more than four years since before he was kidnapped from his brother's house in Karachi on March 5, 2003... If you think that he did something wrong, show me the evidence. Charge him with a crime and give him a fair trial in a real court. This Tribunal is not a real court. It is not a legitimate proceeding. It is only for show and the outcome has probably already been decided... He cannot see any evidence or question any witnesses against him... Anything he may have confessed to, or that other prisoners may have said about him, should be considered with suspicion because these statements were probably tortured or coerced out of them. Under these circumstances, how could anyone believe what the government says about my son?

Ali Khan, father of Majid Khan, statement for inclusion at CSRT held on 15 April 2007 in Guantánamo. On 9 August 2007, the Pentagon announced that the CSRT had confirmed Majid Khan's status as an “enemy combatant”.

The UN General Assembly has called on all States, “while countering terrorism, to ensure due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949, in their respective fields of applicability”. It has expressed its opposition to “any form of deprivation of liberty that amounts to placing a detained person outside the protection of the law” and has urged all States to “respect the safeguards concerning the liberty, security and dignity of the person and to treat all prisoners in all places of detention in accordance with international law”.¹¹⁸

Habeas corpus review is a fundamental safeguard protecting against abuse by providing an independent check on executive action. The CSRT, in contrast, set up and run by the branch of government responsible for the alleged human rights violations, allows abuse to continue, is able to turn a blind eye to illegality, and facilitates impunity. The CSRT, in other words, serves to undermine the rights that *habeas corpus* is meant to protect.

US Court of Appeals for the DC Circuit. Providing review of such determination in a nation's own domestic courts is an unprecedented protection for captured enemy fighters in the history of warfare.”)

¹¹⁷ *Reid v. Covert*, 354 U.S. 1 (1957).

¹¹⁸ General Assembly Resolution 61/171. Protection of human rights and fundamental freedoms while countering terrorism. Adopted on 19 December 2006. UN Doc.: A/RES/61/171, 1 March 2007.

3.1 Human rights do not disappear in ‘war’, however defined¹¹⁹

A global war paradigm has characterized the USA’s response to the attacks of 11 September 2001. The US administration maintains that its activities outside the USA in the “war on terror” are exclusively regulated by the law of war (international humanitarian law, IHL), as it defines and interprets it, and that human rights law is generally inapplicable in this global armed conflict.

International concern about this war framework has grown. The ICRC, the authoritative interpreter of the Geneva Conventions and other IHL, has said that it does “not believe that IHL is the overarching legal framework” applicable to the “war on terror”. A February 2006 report by five UN experts stated 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”.

Even where it does apply, IHL does not displace international human rights law. Rather, the two bodies of law complement each other. The International Court of Justice (ICJ) has stated that: “The protection of the International Covenant on Civil and Political Rights [ICCPR] 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.” 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...” The USA has made no such derogation, and even if it had, a number of fundamental human rights provisions are non-derogable, including the right to *habeas corpus* which protects other rights which are expressly non-derogable.

In an authoritative opinion, 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.” In July 2006, the 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”. 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”. In October 2007, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism stated that “the international fight against terrorism is not a ‘war’ in the true sense of the word, and reminds the United States that even during an armed conflict triggering the application of international humanitarian law, international human rights law continues to apply.”¹²⁰

In January 2007, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions stated that acceptance of the USA’s global war paradigm “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”.

¹¹⁹ For references to the quotations in this box, unless otherwise noted, see Section 2 of *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, March 2007, *op. cit.*

¹²⁰ UN Doc. A/HRC/6/17/Add. 3. Advanced Edited Version, 25 October 2007. Summary.

4. CSRT: A façade of process to avoid judicial scrutiny

This is not a legal proceeding. This is an administrative proceeding... This is fact-based determination of [whether] you're an enemy combatant. Separate from that is habeas corpus review

Secretary of the Navy, on Combatant Status Review Tribunals, 30 July 2004¹²¹

In its December 2001 memorandum giving the green light for Guantánamo as a “war on terror” detention facility, the Justice Department advised the Pentagon of the “potential legal exposure” that would arise if a US court was ever able to exercise *habeas* jurisdiction over Guantánamo detainees. If this were to happen, the Justice Department warned, a detainee would be able “to challenge the legality of his status and treatment under international treaties, such as the Geneva Conventions and the International Covenant on Civil and Political Rights”, and could challenge the use of military commissions and the “validity of any charges brought as violation of the laws of war under both international and domestic law”. “There is little doubt”, the Justice Department said, “that such a result could interfere with the operation of the system that has been developed to address the detainment and trial of enemy aliens”.¹²² This detention regime has systematically violated international law.

When the US Supreme Court ruled in *Rasul v. Bush* on 28 June 2004 that the US courts, at least under statutory law, did have jurisdiction to consider challenges to the legality of the detention of the Guantánamo detainees, and that “aliens, no less than American citizens, are entitled to invoke the federal courts’ authority under [the federal statute]”, the administration was forced to adjust its approach. However, although the Supreme Court emphasised that “at its historical core, the writ of *habeas corpus* has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest”; that the “historic purpose of the writ has been to relieve detention by executive authorities without judicial trial”; and that “application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus”, the administration did not accept *habeas corpus* as it had historically functioned. Instead it fashioned the narrowest possible adjustment to its offshore detention regime, based on another ruling that the Supreme Court handed down on 28 June 2004, *Hamdi v. Rumsfeld*.

That second case involved Yaser Esam Hamdi who had been captured in Afghanistan in late 2001 before being transferred to Guantánamo in January 2002. Three months later, upon discovering that he was a US citizen, the authorities transferred him to the mainland where he was held in indefinite military detention as an “enemy combatant”. In *Hamdi*, the Supreme Court ruled that “although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that

¹²¹ Special Department of Defense Briefing with Navy Secretary Gordon England, 30 July 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2907>.

¹²² *Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba. op. cit.*

detention before a neutral decision-maker”.¹²³ Although the *Hamdi* majority emphasised that “a state of war is not a blank check for the President”, its ruling opened a door through which an administration pursuing the demolition of *habeas corpus* in the “war on terror” stepped, focussing on “procedural” rather than substantive rights:

“The Justice Department is pleased that the US Supreme Court today upheld the authority of the President as Commander-in-Chief of the armed forces to detain enemy combatants... The Court also held that individuals detained by the United States as enemy combatants have certain procedural rights to contest their detention. But the Court recognized that those procedures must reflect the unique context of the detention of enemy combatants and the need of the executive to prosecute the war. We are reviewing the Courts decision to determine how to modify existing processes to satisfy the Court’s rulings.”¹²⁴

The Supreme Court had suggested that “the exigencies of the circumstances may demand that... enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict” and pointed to Army Regulation (AR) 190-8 as providing a possible detention review forum in the form of “an appropriately authorized and properly constituted military tribunal”. AR 190-8 is the regulation under which the US armed forces convene the “competent tribunal” required under Article 5 of the Third Geneva Convention to determine the status of detainees picked up on the battlefield.¹²⁵

Amnesty International regrets that the Supreme Court’s *Hamdi* ruling provided this opportunity to an administration that was seeking to avoid judicial scrutiny in a situation that it defined as a global armed conflict to which its version of the laws of war applied and human rights law did not. The organization also regrets that the *Rasul* judgment was so narrowly framed. One of the first two federal judges to interpret the *Rasul* ruling noted that she “would have welcomed a clearer indication in the *Rasul* opinion regarding the specific constitutional and other substantive rights” of the Guantánamo detainees.¹²⁶ Over three years later, and almost six years into the Guantánamo detentions, due process and justice are long overdue.

The administration could have responded to the *Rasul* and *Hamdi* rulings with a fundamental change in direction and recognition not only of the USA’s international human rights obligations but of its constitutional origins in which the “establishment of the writ of *habeas corpus*” would serve as a protection against arbitrary executive detention, one of the “favourite and formidable instruments of tyranny”.¹²⁷ It chose not to. Instead, it viewed the rulings handed down on 28 June 2004 as ones that simply “defined the landscape for future

¹²³ The congressional authorization referred to is the Authorization for the Use of Military Force (AUMF) a resolution passed by Congress in the immediate wake of the 9/11 attacks. See footnote 19.

¹²⁴ Department of Justice news release, 28 June 2004.

¹²⁵ Army Regulation 190-8. Enemy prisoners of war, retained personnel, civilian internees and other detainees. October 1997.

¹²⁶ *In re Guantanamo detainee cases*, 31 January 2005, *op. cit.*

¹²⁷ Alexander Hamilton. Federalist Papers, No. 84. 1787.

litigation involving military detention of enemy combatants”.¹²⁸ While that litigation slowly progressed through the courts over the ensuing years, the detainees would remain entirely at the whim of the executive.

The former head of the Justice Department’s Office of Legal Counsel has characterized the *Hamdi* and *Rasul* rulings as “really little more than slaps on the wrist” which “did not at that time require the President to alter many of his actions”. Instead, Jack Goldsmith has suggested: “What the Court really did was send a signal to the President that GTMO could not be a law-free zone, that the President did not have a ‘blank check’ to conduct the war on terrorism, and that the Court was willing to step in to do more if the executive did not get its legal house in better order”.¹²⁹ The time has surely come for the US Supreme Court to restore the rule of law.

Nine days after the *Rasul* and *Hamdi* rulings, the Department of Defense announced the formation of the Combatant Status Review Tribunal, to provide Guantánamo detainees with administrative review of their detentions in a system “modelled on the tribunals created under Article 5 of the Third Geneva Convention, implemented by Army Regulation 190-8”.¹³⁰ On 7 July 2004, Deputy Secretary of Defense Wolfowitz issued the Order establishing the CSRT, and on 29 July, Navy Secretary Gordon England, who had been “appointed to operate and oversee this process”, issued a memorandum with a more detailed set of procedures that would apply to the CSRTs, and which remain applicable today.¹³¹ The first CSRT hearing was conducted on 30 July 2004, in the case of an unidentified detainee who “elected to appear in person before the tribunal and did not call any witnesses”.¹³²

A senior Justice Department official admitted that the CSRTs were taking the US authorities into “uncharted territory to figure out what sort of process would be sufficient”.¹³³ This uncharted territory would consist of panels of three military officers who were “not bound by the rules of evidence such as would apply in a court of law” and could consider any information – including classified, hearsay, and information coerced under torture or other ill-treatment – in making their determination as to whether, by a “preponderance of the evidence”, the detainee was “properly detained as an enemy combatant”. The detainee – thousands of miles from home, virtually cut off from the outside world, held for years and facing a culturally and linguistically unfamiliar administrative proceeding – would neither

¹²⁸ Statement of J. Michael Wiggins, Deputy Associate Attorney General, Department of Justice, to US Senate Committee on the Judiciary, 15 June 2005.

¹²⁹ Jack Goldsmith, *The Terror Presidency* (2007), op. cit., page 135.

¹³⁰ E.g. *Bismullah v. Gates*, Brief for Respondent addressing pending preliminary motions. In the US Court of Appeals for the District of Columbia Circuit, April 2007.

¹³¹ Memorandum for distribution. Implementation of Combatant Status Review Tribunal procedures for enemy combatants detained at Guantanamo Bay Naval Base, 29 July 2004. This was reissued with a post-DTA addendum in July 2006. (hereinafter, “CSRT procedures”).

¹³² First Combatant Status Tribunal conducted at Guantanamo today. US Department of Defense news release, 30 July 2004.

¹³³ “It is admittedly uncharted territory to figure out what sort of process would be sufficient or is required at all for alien enemy combatant detainees held outside the United States”. Defense Department background briefing on the Combatant Status Review Tribunal. 7 July 2004.

have access to a lawyer nor be entitled to have access to or know the details of any classified evidence used against him.

In the absence of any independent judicial component, it is the executive which decides what information or which witnesses are “reasonably available”, and what information is classified and therefore inaccessible to the detainee. The CSRT is authorized to “request the production of such reasonably available information in the possession of the US Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant” (known as “Government Information”). A central role is played by the “Recorder”, a US military officer, “preferably” a military lawyer. According to Lt. Col. Stephen Abraham, however,

“The Recorders of the tribunals were typically relatively junior officers with little training or experience in matters relating to the collection, processing, analyzing, and/or dissemination of intelligence material. In no instances known to me did any of the Recorders have any significant personal experience in the field of military intelligence. Similarly, I was unaware of any Recorder having any significant or relevant experience dealing with the agencies providing information to be used as a part of the CSRT process.”¹³⁴

It is the Recorder’s role to obtain and examine the Government Information and present to the CSRT such part of it “as may be sufficient to support the detainee’s classification as an enemy combatant” (this portion of the Government Information is known as the “Government Evidence”). A US Army Major, a lawyer, who sat on 49 CSRT panels has recalled that:

“The role of the recorder differed from hearing to hearing. The general role of the recorder was to generate the evidence to present to the CSRT panel. Some of the recorders would just present a stack of documentary evidence and ask the panel members to review it. Other recorders took a much more prosecutorial position... It was generally known that the recorders had the most difficult job in the process and were overwhelmed... The recorders did not have much control over the content of the information to be presented to the CSRT hearings. Much of the material presented was supplied by intelligence agencies and were summaries that were not necessarily justified by the underlying evidence.”¹³⁵

There is a presumption that the Government Evidence is “genuine and accurate”. This presumption is not attached to any information in the possession of the government presented to the CSRT suggesting that the detainee should not be designated as an “enemy combatant”. In regard to such information, the above US Army Major has stated that:

“There was no exculpatory evidence presented separately, as required in the CSRT rules, in any CSRT hearing that I sat on. From time to time, the CSRT panels did

¹³⁴ Declaration of Stephen Abraham, 15 June 2007.

¹³⁵ *Hamad v. Gates*, Response to omnibus motion to stay orders to file certified index of record. In the US Court of Appeals for the DC Circuit, 4 October 2007, Exhibit A.

encounter exculpatory evidence by accident because some of the evidence presented by the recorder would contradict the allegations made against the detainee”.¹³⁶

The CSRTs for all of the detainees then in Department of Defense custody at Guantánamo (any detainees who may have been in CIA custody at the base were not covered by the CSRT scheme) was completed on 29 March 2005 (the actual hearings were carried out between 30 July 2004 and 22 January 2005). Of the 558 CSRT decisions finalized by 29 March 2005, all but 38 (93 per cent) affirmed that the detainee was indeed an “enemy combatant”. Of the 38 cases where the detainee was found to be “no longer enemy combatant” (NLEC), 35 (92 per cent) were decided after 1 February 2005, that is, after Senior District Court Judge Green had ruled that the CSRT system was inherently unfair and constitutionally defective, but before the appeal against her decision was heard.

In its April 2005 brief to the DC Court of Appeals appealing her ruling, and in testimony to Congress, the government emphasised these 38 cases as a sign of a fair system. It repeated this emphasis in its brief to the Court of Appeals in April 2007 seeking the narrowest possible judicial review of CSRT decisions, and to Congress in July 2007 seeking to justify its detention policies.

	CSRT hearings	Final decisions	Not “enemy combatant”
August 2004	42	19	0
September 2004	52	34	1
October 2004	129	48	0
November 2004	205	60	0
December 2004	79	69	1
January 2005	51	135	1
District Court Judge rules that CSRTs are unfair			
February 2005	0	93	15
March 2005	0	100	20
Total	558	558	38

In its October 2007 brief in *Boumediene v. Bush* to the Supreme Court seeking to have the Court uphold the MCA’s stripping of *habeas corpus*, the administration does not point out that 520 detainees were confirmed as “enemy combatants”, choosing instead to highlight that “the CSRT process has led to determinations that 38 now-released detainees were no longer enemy combatants”. It goes on to reiterate later in the brief that “far from being a rubber stamp, the CSRT process has led to favourable determinations for 38 detainees”, and any argument that the CSRTs

lack independence from the executive ignores these “dozens of cases in which favourable determinations were made for detainees”.¹³⁷ The Department of Defense has likewise recently stressed that “all detainees at Guantánamo Bay have been through the CSRT process, and dozens have been found to no longer be enemy combatants and released or transferred to their

¹³⁶ *Ibid.*

¹³⁷ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

home countries”. This has also been highlighted as proof that “the CSRT’s are working” in a brief just filed in the Supreme Court in support of the government’s position.¹³⁸

Clearly these 38 NLEC decisions have become important to the government. Yet none of these legal briefs to the courts or the testimony to Congress has pointed out that all but three of the NLEC decisions had been decided after Judge Green’s finding that the CSRT scheme denied detainees a fair opportunity to challenge their detention.¹³⁹ Prior to her ruling, 0.8 per cent of the CSRT’s decisions were “NLEC” (three out of 365). After the ruling, this rose to 18 per cent (35 out of 193), a rate more than 20 times greater. If the 0.8 per cent rate of NLEC findings had continued beyond Judge Green’s ruling, and throughout the process, only about five detainees would have received favourable decisions (or if the 18 per cent rate had applied throughout, approximately 100 NLEC decisions would have been handed down). In any event, the impression left was of a system of administrative review that could be manipulated to suit the ends of the administration.

Amnesty International acknowledges that the sudden spate of NLEC decisions following Judge Green’s decision against the CSRT system could have been purely coincidental. It is appropriate, then, to consider if there are any other indications that the administration has sought to manipulate detainee cases to bypass judicial scrutiny. There is a disturbing pattern. For example:

- Jose Padilla was arrested at Chicago Airport in May 2002 on the suspicion of plotting to detonate a radioactive “dirty” bomb against a US target. On the basis of an executive order signed by President Bush on 9 June 2002, he was transferred from civilian to military custody *two days* before there was to be a court hearing on his case. He was held without charge or trial in military custody for the next three and a half years. The Pentagon announced it was granting him access to a lawyer *nine days*

¹³⁸ Department releases audio recording of 9/11 mastermind’s tribunal. American Forces Press Service, 17 September 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=47437>, cited in *Boumediene v. Bush*, Motion for leave to file and brief amicus curiae of the American Center for Law and Justice in support of respondents, In the US Supreme Court, 9 October 2007.

¹³⁹ *Al Odah v. USA*. Opening brief for the United States. In the US Court of Appeals for the DC Circuit, 27 April 2005, page 51. *Bismullah v. Gates*, Brief for respondent addressing preliminary motions. In the US Court of Appeals for the DC Circuit, 9 April 2007 (“Out of 558 CSRTs conducted as of March 2005, 38 resulted in determinations that detainees no longer met the criteria to be enemy combatants”). The USA also emphasised these 38 cases in its Second Periodic Report to the UN Committee against Torture, submitted on 6 May 2005, and to Congress. E.g. Testimony to the Senate Committee on the Judiciary, 15 June 2005, of Rear Admiral James M. McGarrah, Director of Administrative Review of the Detention of Enemy Combatants, Department of the Navy (“Of the 558 cases heard, the CSRT panels determined that 520 detainees were properly classified as enemy combatants, and that 38 detainees no longer met the criteria for designation as enemy combatants”); and Michael Wiggins, Deputy Associate Attorney General, Department of Justice (“Out of 558 tribunals, 38 have resulted in determinations that detainees are not enemy combatants”). Gregory G. Katsas, Principal Deputy Associate Attorney General, testimony to House Armed Services Committee, 27 July 2007, arguing against restoration of *habeas corpus* (“Of the 558 CSRT hearings conducted through the end of 2006, 38 resulted in determinations that the detainee in question was not an enemy combatant.”)

before the Supreme Court agreed to take the appeal challenging the lawfulness of his detention, 20 months after he had been put in incommunicado military custody.¹⁴⁰ The Court ultimately did not review the case, on the grounds that it had been filed in the wrong jurisdiction. In November 2005, with the question of the lawfulness of his detention again pending before the Supreme Court, President Bush issued a memorandum to the Secretary of Defense authorizing Padilla's transfer back to Justice Department custody to face criminal charges (not including any reference to a "dirty" bomb plot), and the government moved to have the Supreme Court dismiss consideration of the case. The Court did so over the dissent of three Justices. Three other Justices who agreed with dismissing the case acknowledged that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts".¹⁴¹

- Qatar national Ali Saleh Kahlah al-Marri was due to go to trial on 21 July 2003 in an ordinary US federal court on charges of credit card fraud and making false statements to the FBI. On Friday 20 June 2003, the judge scheduled a hearing on pre-trial motions, including a motion to suppress evidence against Ali al-Marri allegedly coerced under torture. On the following Monday, 23 June 2003, before the hearing could be held, the government moved to have the indictment dismissed, and transferred Ali al-Marri to military custody on the basis of an executive order signed that morning by President Bush designating al-Marri as an "enemy combatant" by executive order. Over four years later, Ali al-Marri remains in untried military custody in the USA. For the first 16 months of this custody, he was held entirely incommunicado, during which time he was allegedly subjected to torture or other ill-treatment.
- Ahmed Omar Abu Ali, a dual US/Jordanian national, was held for nearly two years in incommunicado detention in Saudi Arabia, allegedly at the behest of the US government. His parents filed a petition for a writ of *habeas corpus* in the US District Court claiming that the administration wanted to keep him so detained in order that he could be held and interrogated free from constitutional constraints. In a ruling in late 2004, Judge John Bates pointed out that there was "at least some circumstantial evidence that Abu Ali has been tortured during interrogations with the knowledge of the United States".¹⁴² Judge Bates ordered further "jurisdictional discovery" under which the government would have to present evidence to confirm or refute the allegations made by the petitioners, which Judge Bates described as "considerable" and almost entirely un rebutted by the government. He ordered that the two parties

¹⁴⁰ Padilla allowed access to lawyer, 11 February 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7070>. The US Supreme Court granted *certiorari* in the *Padilla* case on 20 February 2004.

¹⁴¹ *Padilla v. Hanft*, US Supreme Court, Justice Kennedy, with whom the Chief Justice and Justice Stevens join, concurring in the denial of *certiorari*.

¹⁴² *Abu Ali et al. v. Ashcroft et al.*, Civil Action No. 04-1258 (JDB), Memorandum Opinion, 16 December 2004, US District Court for the District of Columbia.

submit a proposal of how they would go forward by 10 January 2005. Rather than respond to the discovery order, after more than a year-and-a-half of detention without charge or trial, the authorities transferred 23-year-old Ahmed Abu Ali back to the USA. He arrived back in the United States on 21 February 2005 to face various terrorism-related charges.¹⁴³

- The Pentagon only allowed Yaser Hamdi access to a lawyer in late 2003 after he had been in detention for two years and, notably, only four weeks before the US Supreme Court would announce whether it would review the lawfulness of his detention.¹⁴⁴ After the *Hamdi* ruling, in late August 2004, a federal judge ordered the government to explain why Yaser Hamdi was still being held in indefinite solitary confinement, as he had been held for more than two years. District Judge Robert Doumar ruled that such treatment “without question”, raised issues under the constitutional ban on “cruel and unusual punishment”.¹⁴⁵ In a further order in early October 2004, Judge Doumar expressed concern that three months since the Supreme Court’s ruling, the detainee had not been provided “with a hearing of any kind by this Court, the military, or any other tribunal.”¹⁴⁶ Judge Doumar ordered that either Yaser Hamdi be released or a hearing on the merits of his *habeas corpus* petition would be heard in his court on 12 October 2004, a hearing at which the government would have to produce Yaser Hamdi. On 11 October, the government released the detainee and transferred him to Saudi Arabia under a deal in which among other things, Hamdi renounced his US citizenship.¹⁴⁷
- Late on a Friday afternoon in October 2004, the government told the US District Court that Yemeni detainee Salim Hamdan had been moved out of the solitary confinement in Guantánamo in which he had been held for the previous 10 months. The Court had been due hear oral arguments the following Monday to consider the “urgent and striking claim” brought on behalf of Hamdan in a *habeas corpus* petition that this solitary confinement regime amounted to inhumane treatment. The judge stated that although the government was “capable of repeating” the solitary confinement regime, its announcement that it had moved Hamdan meant that the court could not review the claim.
- On 11 January 2005, five days after allegations of the earlier rendition to Egypt and torture of Guantánamo detainee Mamdouh Habib were made public in documents

¹⁴³ See pages 133-136 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](http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf).

¹⁴⁴ Department of Defense announces detainee allowed access to lawyer, 2 December 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5831>. The US Supreme Court granted *certiorari* in the *Hamdi* case on 9 January 2004.

¹⁴⁵ *Hamdi v. Rumsfeld*. Order. US District Court for the Eastern District of Virginia, 27 August 2004.

¹⁴⁶ *Hamdi v. Rumsfeld*, Order. US District Court for the Eastern District of Virginia, 5 October 2004.

¹⁴⁷ And agreed not to visit the USA for 10 years, and never to travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the West Bank or the Gaza Strip.

filed in *habeas corpus* proceedings in District Court, the Pentagon announced that this Australian detainee – taken into custody in Pakistan in October 2001 – would be transferred from Guantánamo to Australia. Mamdouh Habib was flown to Australia two weeks later and released. According to the *New York Times*, Australian officials said that “the Bush administration told the Australians in January [2005] that it would not prosecute him because the CIA did not want the evidence about Mr. Habib being taken to Egypt, and his allegations of torture, raised in court”.¹⁴⁸

- On 22 December 2005 a federal judge ruled that the continued indefinite detention of two Uighur detainees, Abu Bakker Qassim and Adel Abdul Hakim, nine months after they had been found to be “no longer enemy combatants” by CSRTs at Guantánamo, was unlawful, but the judge decided that he could provide no remedy.¹⁴⁹ The case was scheduled to be argued in the DC Court of Appeals at 9.30am on Monday 8 May 2006. At 4.30pm on Friday 5 May 2006, the detainees’ lawyers received a telephone call from the Department of Justice informing them that their clients, along with three other Uighur detainees, had been transported to Albania, where they had landed about one hour earlier. At 4.39pm on 5 May 2006, the administration filed an emergency motion in the District Court arguing that the case should be dismissed as moot because the detainees were now in Albania. It transpired that the detainees had been told by their military captors on or around 2 May 2006 that they were going to be sent to Albania, but had no way of contacting their lawyers. The lawyers had been informed “by highly placed sources that two western governments, each of which has a Uighur expatriate population, had made substantial progress toward a resettlement of the Uighurs in those countries prior to May 5, 2006. Yet the Executive elected to send the men to one of the poorest countries in Europe, a place with no real economic prospects for the men, and where the men have no family, friends, common language, or point of reference”.¹⁵⁰

Amnesty International considers that such examples indicate an administration that was not only pursuing a broad strategy aimed at avoiding meaningful judicial review, violating the rights of a whole category of detainees in the process, but one that has also been willing to exploit the cases of individual detainees to serve this end.

The former head of the Justice Department’s Office of Legal Counsel (2003-04) has recently written that: “When the executive branch acts outside the reach of the courts..., it is both law interpreter and law enforcer, and runs the danger... of interpreting the law opportunistically to serve its own ends”.¹⁵¹ He further revealed that “whenever the Supreme Court threatened to review one of the administration’s terrorism policies, Paul Clement [then Deputy Solicitor

¹⁴⁸ *Australia uneasy about US detainee case*, *New York Times*, 10 April 2005.

¹⁴⁹ *Qassim v. Bush*, US District Court for the District of Columbia, Memorandum of 22 December 2005. The judge noted that the government “advised nobody” about the NLEC determinations.

¹⁵⁰ *Qassim v. Bush*, Status report concerning petitioners-appellants and request for briefing schedule. US Court of Appeals for the DC Circuit, 16 May 2006.

¹⁵¹ Jack Goldsmith, *The Terror Presidency* (2007), *op. cit.*, page 33.

General, now Solicitor General] was able to eke out small concessions from the White House”.¹⁵²

With this in mind, the pattern of public announcements relating to detainees, including in relation to releases and transfers into and out of Guantánamo, and the timing of charging decisions – all of which have to date been entirely controlled by the executive – may reveal further evidence of self-serving executive action. This pattern is one of increased, publicly-announced, activity relating to “process” provided to detainees in periods leading up to crucial judicial interventions (see appendix). For example:

- In early March 2004, after more than *two years* of detentions, with oral argument in the US Supreme Court on the *Rasul* case only *six weeks* away, the Pentagon issued a draft administrative review process for Guantánamo detainees, stating that it expected the procedures to be finalized “in a few weeks”.¹⁵³ On 18 May 2004, the Pentagon announced that the Deputy Secretary of Defense had signed an Order establishing an annual administrative review process for the Guantánamo detainees, and on 23 June 2004, *five days* before the *Rasul* ruling, the Secretary of the Navy held a press conference at which he announced that he had been designated to oversee the administrative review process. Two and a half years after the detentions began at the base, Secretary England said that “we are anxious to start this process”.¹⁵⁴ In the end, the “discretionary” annual Administrative Review Board (ARB) scheme was not implemented until 14 September 2004 and the first ARB was held in mid-December 2004, nearly three years after detentions began (see further below).
- Until the *Rasul v. Bush* case concerning whether the courts had jurisdiction to consider *habeas corpus* petitions filed on behalf of Guantánamo detainees had been decided by the DC Circuit Court of Appeals and was to be appealed to the Supreme Court, the Pentagon announced the release or transfer of *four* foreign detainees from the base over a period of *14* months.
- In the *five* months between the Supreme Court agreeing to consider the *Rasul* case and submission of written and oral arguments in the Court, at least 78 detainees were transferred or released. In the *six weeks* before oral argument, 46 detainees were released. In its brief to the Court, the administration emphasised the number of releases and the “thorough process” of review;¹⁵⁵
- In the more than two months between oral arguments in the *Rasul* case in the Supreme Court and the Court’s ruling in the case – that is, after all the briefing to the

¹⁵² *Ibid.*, page 125.

¹⁵³ Department of Defense announces draft detainee review policy, 3 March 2004,

<http://www.defenselink.mil/releases/release.aspx?releaseid=7103>.

¹⁵⁴ Special Defense Department briefing with Secretary of the Navy Gordon England, 23 June 2004.

¹⁵⁵ *Rasul v. Bush*, Brief for the Respondents, In the US Supreme Court, March 2004.

Court was completed – not a single detainee was released or transferred from Guantánamo.¹⁵⁶

- On the same day, 11 July 2005, that the Supreme Court agreed to hear the *Hamdan v. Rumsfeld* case challenging the lawfulness of the military commission system, five Guantánamo detainees were charged for trial by military commission. This was more detainees than had been charged in the past *three and a half years*, and came *16 months* after the last detainee (Salim Hamdan) was charged.¹⁵⁷

A federal court has suggested that the administration has manipulated the CSRT process. In 2007, in the case of Ali al-Marri, the Qatari national held in indefinite military custody in the USA since June 2003 (see above), the government sought to have the US Court of Appeals for the Fourth Circuit dismiss al-Marri's *habeas corpus* petition under the Military Commissions Act. As already noted, under the MCA no court can hear any *habeas corpus* petitions from any foreign national detained by the USA as an "enemy combatant" and judicial review is limited under the Detainee Treatment Act to review by the DC Court of Appeals of final CSRT decisions. The government claimed that it was planning to provide Ali al-Marri with a CSRT in the future, although it did not say when. A three-judge panel of the Fourth Circuit rejected the government's position:

"[T]he Government's treatment of al-Marri suggests that, despite its litigation posture, it does not actually believe that the CSRT process in the DTA and MCA applies to al-Marri. In the four years since the President ordered al-Marri detained as an enemy combatant, the Government has completed CSRTs for each of the more than five hundred detainees held at Guantanamo Bay. Yet it was not until November 13, 2006, the very day that the Government filed its motion to dismiss the case at hand, that the Government even suggested that al-Marri might be given a CSRT. At that time the Government proffered a memorandum from Deputy Secretary of Defense Gordon England directing that al-Marri be provided a CSRT 'upon dismissal' of this case. This memorandum is too little too late."¹⁵⁸

¹⁵⁶ "After the justices hear the oral arguments, they meet in private conference to deliberate... Then the justices vote, and the majority opinion is assigned [to a justice to author]. The majority opinion later circulates among the justices, and on rare occasions a justice may then change his or her vote..." *The Dissenter*, by Jeffrey Rosen, in the New York Times Magazine, 23 September 2007.

¹⁵⁷ The apparent willingness of the administration to manipulate the timing of prosecutions was revealed in a previously secret Pentagon report which stated that "the timing of prosecutions" by military commission as well as the openness of any such proceedings would have to be weighed against the need not to publicize interrogation techniques, including the "more coercive" methods. Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003, Section IV, D.

¹⁵⁸ *Al-Marri v. Wright*, US Court of Appeals for the Fourth Circuit, 11 June 2007. Ali al-Marri is held in military custody on the US mainland. What the Fourth Circuit omitted to note is that the Order establishing the CSRTs "applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the *Guantanamo Bay Naval Base, Cuba*" (emphasis added). The CSRT procedures issued in 2004 and reissued in 2006 equally apply only to the Guantánamo detainees.

The CSRT is a scheme designed to achieve a degree of nominal compliance with the Supreme Court's *Rasul* and *Hamdi* decisions in a manner that preserved the administration's objectives, rather than safeguarding the rights of the detainees. Indeed, the CSRT order itself stated that it was "intended solely to improve *management* within the Department of Defense concerning its detention of enemy combatants at Guantanamo Bay Naval Base, Cuba, and *is not intended to, and does not, create any right* or benefit, substantive or procedural, enforceable at law, in equity, or otherwise by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person" (emphasis added).

Once a detainee's "enemy combatant" status is confirmed by the CSRT he becomes eligible for an annual review by the Administrative Review Board (ARB). According to the Pentagon, this "process is discretionary, administrative and is not required by the Geneva Convention or by US or international law".¹⁵⁹ All "enemy combatants" are supposed to receive an ARB, except those who are awaiting trial by military commission or those who have already been determined to be eligible for transfer or release. To date, two ARB rounds have been completed (see table). In making its arguments justifying the Guantánamo detention regime, the October 2007 brief of the US government to the Supreme Court in the *Boumediene* case points to the number of detainees found eligible for release or transfer by the ARBs.

The ARB mirrors the CSRT scheme – panels of three military officers determine whether the detainee, unrepresented by legal counsel, should continue to be detained or whether he can be transferred to the custody of another government or released. The detainee may participate in the proceedings, but may waive such involvement. Participation seems to have little impact. Of the 55 detainees cleared for transfer or release by the second round of ARBs completed in March 2007, only 14 had participated in their hearings.¹⁶⁰

The ARB may consider "any reasonably available information that is relevant to its determination of whether the enemy combatant poses a continuing threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters, and any other factors bearing upon the need for continued detention".¹⁶¹ These other factors can include, *but are not limited to*, that a detainee may be subjected to trial by military commission or that he is of continuing intelligence value.¹⁶²

The ARB does not serve to cure the defects of the CSRTS, but rather to reproduce them. Indeed, because the ARB was instituted "as a matter of discretion", the Secretary of Defense "may suspend or amend" its procedures "at any time in his complete discretion", a clear indicator that they are not independent.¹⁶³ The ARB scheme is not subject to judicial review

¹⁵⁹ Guantanamo Bay 2006 Administrative Review Board results announced. Department of Defense, 6 March 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=10582>.

¹⁶⁰ *Files raise questions on Gitmo decisions*. Miami Herald, 3 October 2007.

¹⁶¹ Implementation of Administrative Review procedures for enemy combatants detained at US Naval Base Guantanamo Bay, Cuba. 14 September 2004. Section 3(e)(2).

¹⁶² *Ibid.* Section 3(f)(1)(c).

¹⁶³ *Ibid.* Covering memorandum. Repeated in 2006 version.

under the terms of the Detainee Treatment Act or Military Commissions Act (and is thus not a main focus of this report), does not have the authority to change the “enemy combatant” classification, and cannot require the release of a detainee. It is an executive body that makes recommendations to the executive.

29 March 2005: CSRTs completed for existing detainee population at Guantánamo

558 decisions: 520 “enemy combatants”; 38 “no longer enemy combatants”; 202 detainees had been released or transferred before they had a CSRT

August 2007: CSRTs confirm 14 “high-value” detainees transferred to Guantánamo in September 2006 as “enemy combatants”. Other CSRTs to be held for new transfers into the base in 2007.

9 February 2006: Round 1 of ARBs completed

463 decisions: 329 continued detentions / 14 cleared for release / 120 cleared for transfer to other government

6 March 2007: Round 2 of ARBs completed

328 decisions: 273 continued detentions / 0 releases / 55 transfers

By 31 October 2007

Approx. 445 detainees released or transferred

Approx. 330 detainees still held

Approx. 70 eligible for transfer or release

Executive control

$38 + 14 + 120 + 55 = 227$ detainees found eligible for release or transfer by CSRTs and ARBs.

Pentagon says approx. 70 of these remain in detention. $227 - 70 = 157$ who have been released or transferred as a result of CSRT/ARBs (119 via ARBs)

$445 - 157 = 288$ who have been released or transferred as a result of other executive decision-making, none as a direct result of judicial intervention

On 10 November 2005, the ARB recommended Sudanese hospital administrator Adel Hassan Hamad for transfer from Guantánamo. Nearly two years later, and over five years after he was arrested by Pakistani intelligence agents at gunpoint in his bed in Pakistan in July 2002 (see below), he remained held in the base. Although the ARB determined that he “continues to be a threat to the United States and its allies”, his *habeas* lawyers in the USA have seen no evidence to substantiate this contention, and their own investigations add weight to their assertions of his innocence of any wrongdoing. They state that “he has not even been accused in either the CSRT or ARB of taking any negative action toward the United States; all the allegations against him involve guilt by association... There is no allegation in the CSRT record, let alone any evidence, that Mr Hamad was ever on a battlefield, took any action adverse to the United States or any of its allies, or violated any of the laws of war”.¹⁶⁴

On 7 May 2007, the Pentagon’s Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) published OARDEC Instruction 5421.1, detailing the “procedure for review of ‘new evidence’

relating to ‘enemy combatant’ status.”¹⁶⁵ Under the procedures, new “evidence” or “information” that “merely” challenges the lawfulness of the detainee’s custody will not be reviewed. If documentary or witness information meets the standard of “new”, “every effort

¹⁶⁴ *Hamad v. Gates*, Response to omnibus motion to stay orders to file certified index of record. In the US Court of Appeals for the DC Circuit, 4 October 2007.

¹⁶⁵ Available at <http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf>.

will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the “new evidence” being received by the relevant authorities. The decision on whether to conduct a new CSRT is a matter for the “unreviewable discretion” of the Deputy Secretary of Defense.

Lawyers for Adel Hassan Hamad first submitted the new information – sworn witness statements, documents and photographs – supporting his re-designation as not an “enemy combatant” to OARDEC in October 2006, and followed up with repeated letters for the next year. At the time of writing, five months after the publication of Instruction 5421.1, Adel Hassan Hamad had still not received a new CSRT, or any indication that he would receive one, as far as Amnesty International was aware.

“On 18 July, 2007, Mr Hamad began his sixth year of unlawful incarceration. On that date, his family began their sixth year of a broken life deprived of its primary support. Every day Mr Hamad spends in prison in Guantánamo is a day of freedom lost to him forever. As the Supreme Court recently reiterated, the right to be free from official restraint ‘is the most elemental of liberty interests’.”¹⁶⁶

After the first 558 CSRT decisions were finalized, the Secretary of the Navy said: “Is the system perfect? It’s human beings, so obviously it’s not perfect, but it is as perfect as we can make the system and as fair as we can make the system for the detainee while protecting America”.¹⁶⁷ The CSRT system is not only far from perfect, it is being used to seek to persuade the judiciary to accept the internationally unlawful denial of *habeas corpus*, thereby protecting not the public from terrorist attacks but the executive from judicial scrutiny of its actions.

5. CSRTs: no substitute for *habeas corpus*

So the Combatant Status Review Tribunals are going to establish – are going to provide a forum for a determination of the enemy – the detainee’s status as an enemy combatant... It’s not a substitute for the habeas.

Senior official from the US Department of Defense, 7 July 2004¹⁶⁸

Guantánamo detainees are not granted access to an independent, impartial and competent court established by law to challenge the lawfulness of their detention, as required under international law. Instead, unrepresented by legal counsel, they are subjected to a tribunal that is part of the executive, the branch of government that is holding them. The sole task of this tribunal is to review the status attached to the detainee on the basis of information that

¹⁶⁶ *Hamad v. Gates*, Response to omnibus motion to stay orders to file certified index of record. In the US Court of Appeals for the DC Circuit, 4 October 2007 (the Supreme Court ruling cited was *Hamdi v. Rumsfeld*, which in turn quoted *Foucha v. Louisiana* (1992)).

¹⁶⁷ Defense Department special briefing on Combatant Status Review Tribunals, 29 March 2005, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2504>.

¹⁶⁸ Defense Department Background Briefing on the Combatant Status Review Tribunal, 7 July 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751>.

those lower down the chain of command and sitting on the tribunal are ordered to presume is correct. The tribunal itself is military – even if the detainee is a civilian arrested on a city street or in a house far from any battlefield. In addition, the status which the tribunal is asked to review – as a status with the legal consequences ascribed by the USA – is unknown in international law.

At his CSRT hearing in 2004, UK national Feroz Abbasi asked for a lawyer. He was told that he could not have one because “this is not a legal proceeding”. When the detainee himself tried to raise the question of the lawfulness of his detention under international law, the CSRT President replied that “international law does not apply, Geneva Conventions do not apply”. When Feroz Abbasi questioned this, the CSRT President repeated,

“Once again, international law does not matter here. Geneva Convention does not matter here. What matters here and what I am concerned about and what I really want to get to, is your status as enemy combatant based upon the evidence that has been provided and your actions while you were in Afghanistan. If you deviate from that one more time, you will be removed from this Tribunal and we will continue to hear evidence without you being present”.¹⁶⁹

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

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

Feroz Abbasi was eventually removed from the hearing and the proceedings continued in his absence. Abbasi had sought to have a number of witnesses and records for his CSRT hearing. For example, he had requested certain US government employees to address issues relating to his health and alleged ill-treatment at Guantánamo Bay, and for his medical records to substantiate his claims of ill-health and abuse. The CSRT President determined that such witnesses and records were not relevant to the CSRT system. Feroz Abbasi, who had previously been made eligible for military commission under President Bush’s Military Order, was found by a unanimous vote of the CSRT to be an “enemy combatant”.¹⁷⁰ He was transferred to the UK three months later and released.

In its October 2007 brief to the US Supreme Court, the government emphasizes its “war” paradigm in arguing that the Guantánamo detainees “enjoy more procedural protections than any other captured enemy combatants in the history of warfare”, and that even if they “could

¹⁶⁹ Under the CSRT rules, the President of the tribunal can order the removal of the detainee if he is “disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning”.

¹⁷⁰ To be made subject to the Military Order, the detainee has been determined by the President, in his role as Commander-in-Chief of the Armed Forces, to be or have been a member of *al-Qa’ida*, or to have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism” against US interests, or to have “knowingly harbored one or more [such] individuals”. It has to be considered unlikely that a CSRT made up of military officers under the command of the President would subsequently have decided not to affirm “enemy combatant” status.

show a historical precedent for habeas corpus in the extraordinary circumstances here, Congress has afforded them a constitutionally adequate substitute for challenging their detention”. This review under the DTA, it continues, “is a fully adequate substitute for habeas corpus in this extraordinary wartime context”.¹⁷¹

Feroz Abbasi was released in spite of the fact that his designation as an “enemy combatant” had not been rescinded by the US authorities. The UK authorities evidently did not consider that this designation required his detention. Yet had he had remained in US custody his CSRT decision likely could not have been judicially reviewed until years later by the DC Court of Appeals and that review would have been highly limited. The DTA “limits judicial review to the question of whether the standards and procedures used by the CSRTs are ‘consistent with the Constitution and laws of the United States’, to the extent the ‘Constitution and laws of the United States’ are applicable.” This vague standard, the administration has pointed out in a recent brief, contrasts to the *habeas corpus* statute [28 U.S.C. §2241(c)(3)], which permits review of claims that a detainee’s custody is “in violation of the Constitution or laws or *treaties* of the United States” (emphasis added).¹⁷²

The CSRT’s refusal to allow Feroz Abbasi to challenge his detention under international law would likely not be remedied, according to the government’s position. The administration maintains that the findings of the CSRTs are “entitled to a strong presumption of regularity”.¹⁷³ Under the MCA, “no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding... as a source of rights in any court of the United States”.¹⁷⁴ Furthermore, the administration maintains that

Detainee: *The Pakistanis rounded up all the people like me that had issues or problems with their visa. We were all put in one place...*

CSRT: *Have you always told the same story since you have been detained?*

Detainee: *I have told the same story from Pakistan to the prison [in Afghanistan] that was underground. The Americans were there underground. Then in Bagram, I said the same thing. And here, after over one hundred interrogations, I have said the same thing.*

Yemeni detainee Musab Omar Ali al Mudwani, CSRT hearing 2004. At his ARB hearing in December 2005, he said that “before I came to the prison in Guantánamo Bay, I was in another prison in Afghanistan, under the ground, it was very dark. It was totally dark, under torturing and without sleep. It was impossible that I could get out of there alive. I was really beaten and tortured.” He asserted that there were Afghan soldiers and Arab-American interrogators in the underground prison. He was believed to still be in Guantánamo in October 2007.

¹⁷¹ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

¹⁷² *Taher v. Bush*. Respondents’ reply in support of motion to dismiss or, in the alternative, to transfer, and in opposition to petitioners’ cross-motion for habeas hearing and related relief. In the US Court of Appeals for the DC Circuit, 21 December 2006.

¹⁷³ *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.

¹⁷⁴ MCA, §5(a).

“Congress specifically intended to preclude all treaty claims in any challenges to CSRT determinations”.

In spite of these stark limitations, the administration has said that “the CSRT and ARB processes provide detainees with a measure of process significantly beyond that which is required by international law”.¹⁷⁵ As the above case illustrates – with Feroz Abbasi denied any reasonable opportunity to challenge the lawfulness of his detention or the government’s information against him – this is far from the case.

In the ruling by the three-judge panel of the DC Circuit Court of Appeals in February 2007 finding that the MCA had constitutionally stripped the courts of jurisdiction to hear *habeas corpus* appeals from the Guantánamo detainees, the dissenting judge argued that

“the government is mistaken in contending that the combatant status review tribunals (‘CSRTs’)...suitably test the legitimacy of Executive detention. Far from merely adjusting the mechanism for vindicating the habeas right, the DTA imposes a series of hurdles while saddling each Guantánamo detainee with an assortment of handicaps that make the obstacles insurmountable.

At the core of [habeas corpus] is the ability to inquire into illegal detention with a view to an order releasing the petitioner. An examination of the CSRT procedure and this court’s CSRT review powers reveals that these alternatives are neither adequate to test whether detention is unlawful nor directed toward releasing those who are unlawfully held...

Insofar as each of [the CSRT procedures] impedes the process of determining the true facts underlying the lawfulness of the challenged detention, they are inimical to the nature of habeas review.”¹⁷⁶

In its October 2007 brief to the Supreme Court in the *Boumediene* case, the government asserts that the CSRT scheme *plus DTA review* is a “constitutionally adequate substitute for challenging their detention”.¹⁷⁷ However, Amnesty International emphasises that the CSRTs themselves must be measured against the standards for a competent, independent and impartial tribunal. International law requires that detainees be able to access competent, independent and impartial court, *as a tribunal of first instance*, to challenge their detention, not merely be provided with (narrow) appellate review of an administrative review procedure. The CSRT system fails to measure up to these standards. The scope of the judicial review which the DTA allows the DC Circuit Court of Appeals to undertake is too narrow to overcome these flaws.

¹⁷⁵ Statement of Daniel J. Dell’Orto, Principal Deputy General Counsel, Office of General Counsel, US Department of Defense, to Armed Services Committee, US House of Representatives, 27 July 2007, http://armedservices.house.gov/pdfs/FC072607/DellOrto_Testimony072607.pdf.

¹⁷⁶ *Boumediene v. Bush*, Judge Rogers dissenting.

¹⁷⁷ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

5.1 Lack of independence and impartiality

*The DTA fails to provide an independent forum in which to contest executive detention in the first instance, contrary to the requirements of habeas corpus and fundamental due process... Plainly, the CSRTs (and, similarly, the ARBs) are in no sense independent*¹⁷⁸

Under international law, review of the lawfulness of detention must be by a court that is independent and impartial. This stems from Article 10 of the Universal Declaration of Human Rights which applies to detainees whether they are charged with criminal offences or not. Article 10 states that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, *in the determination of his rights and obligations and of any criminal charge against him*” (emphasis added). This standard is fully reflected in the legal obligations assumed by the USA in Article 14.1 of the ICCPR.¹⁷⁹ The UN Human Rights Committee has stated that “the requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception”, and refers, *inter alia*, to “the actual independence of the judiciary from political interference by the executive branch and legislature.”¹⁸⁰ In other words, the court must function independently of any other branch of government – in the case of the Guantánamo detentions specifically the executive branch which has carried out the detentions in the first place.

The Human Rights Committee has stated that Article 9(4) of the ICCPR requires that “the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence”.¹⁸¹ Not only is the CSRT not a court, or even a body which reviews the lawfulness of the detentions (merely reviewing existing “enemy combatant” classification), neither does it provide independent review. A CSRT consists of a panel of three “neutral” members of the US armed forces. They cannot be considered neutral however. Rather, a CSRT panel, composed entirely of military personnel whom the executive can “control [and] direct... is incompatible with the notion of an independent and impartial tribunal”.¹⁸² In 2006, the Human Rights Committee expressed its concern at the “lack of independence from the executive branch and the army” of the CSRTs and ARBs.¹⁸³ As the UN High Commissioner for Human Rights has stated in her submission to the US Supreme Court, “the administrative CSRTs clearly cannot themselves qualify as “courts” under Article 9(4), if only because their structure within the executive branch and their composition of

¹⁷⁸ *Boumediene v. Bush*, Brief *amicus curiae* of United States Senator Arlen Specter in support of petitioners, in the US Supreme Court, 24 August 2007.

¹⁷⁹ “In the determination of any criminal charge against him, *or of his rights and obligations in a suit at law*, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” (emphasis added).

¹⁸⁰ General Comment 32. Article 14: Right to equality before courts and tribunals and to a fair trial. UN Doc.: CCPR/C/GC/32 (2007).

¹⁸¹ *Torres v. Finland*, UN Human Rights Committee, Comm. No. 291/1988, para. 7.2 (1990)

¹⁸² *Olo Bahamonde v. Equatorial Guinea*, UN Human Rights Committee, Comm. No. 468/1991, UN Doc. CCPR/C/49/D/468/1991, para. 9.4 (1993).

¹⁸³ Concluding observations on the USA, UN Doc.: CCPR/C/USA/CO/3 (2006), para. 3.

military officers render them insufficiently independent and impartial to discharge the judicial function”.¹⁸⁴

The Pentagon’s Order establishing the CSRT expressly states that every detainee subject to it has already been “determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense”.¹⁸⁵ The official responsible for overseeing the CSRTs during the period when most of them were conducted, Secretary of the Navy Gordon England,¹⁸⁶ emphasised that the CSRT system “is only to determine, again, if you’re an enemy combatant. And there’s already been prior determinations. This is a much more formal process, but there’s been a number of determinations in the past, so I would expect that most would indeed be enemy combatants, just because of prior reviews.”¹⁸⁷ Questioned by a journalist in October 2004 about the high rate of “enemy combatant” findings by the CSRTs (at that stage, 63 out of 64 decisions finalized), Secretary England responded: “Well, this is only to determine, again, if you’re an enemy combatant. And there’s already been prior determinations”.¹⁸⁸

On the question of these prior determinations, in its brief to the US Supreme Court in the *Rasul* case in 2004, the government stated that the commander of the US Southern Command and the Secretary of Defense or his designee were among those who had personally reviewed and approved the classification of Guantánamo detainees as “enemy combatants”. Meanwhile, the CSRT is instructed to presume that the government’s information presented in support of its classification of the detainee as an “enemy combatant” is “genuine and accurate”.¹⁹⁰

Unlike in US court-martials, the members of CSRT panels have no protections against command influence. Of particular concern, then, is

Detainee: *Do you belong to the American military?*

CSRT: *Yes, we are all military members*

Detainee: *The American military is my adversary, and all the laws require that the panel or the board have to be third party, that is completely neutral and has nothing to do with adversaries.*

CSRT: *That may be true in a legal proceeding, but this is an administrative proceeding.*

Sami Abdul Aziz Salim Allaithy, Egyptian detainee, CSRT hearing, 2004.¹⁸⁹

¹⁸⁴ *Boumediene v. Bush*, Brief of amicus curiae United Nations High Commissioner for Human Rights in support of petitioners, In the US Supreme Court, 24 August 2004.

¹⁸⁵ CSRT Order, *op. cit.*, § a. In her ruling finding that CSRTs did not provide due process, District Judge Green called into “serious question” the “nature and thoroughness” of any such review that preceded the CSRT. *In re Guantanamo detainee cases*, *op. cit.*

¹⁸⁶ Secretary England was subsequently appointed to the position of Deputy Secretary of Defense to replace Paul Wolfowitz who signed the original CSRT order.

¹⁸⁷ Special Defense Department Briefing, 1 October 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2242>.

¹⁸⁸ *Ibid.*

¹⁸⁹ He became one of the 38 detainees found to be “no longer enemy combatants” and he was released in October 2005, nearly four years after he was taken into custody in Pakistan. This and other quotes from detainees and CSRT panels in the following sections are taken from CSRT transcripts.

¹⁹⁰ CSRT Procedures. § G(11).

the fact that both before and since the establishment of the CSRTs, senior administration officials, including the Commander-in-Chief of the Armed Forces (the President) under whose authority the CSRT was established, and the Secretary and Deputy Secretary of Defense and the Secretary of the Navy who were central to its establishment and implementation, engaged in a pattern of public commentary on the presumed “guilt” of the Guantánamo detainees. For example:¹⁹¹

- *First of all, these people were involved in an effort to kill thousands of Americans. Second, they were captured and they are unlawful combatants... These people that are in Guantanamo Bay, Cuba,... are very tough, hard-core, well-trained terrorists.* Secretary of Defense Donald Rumsfeld, 20 January 2002
- *These are among the most dangerous, best-trained, vicious killers on the face of the earth.* Secretary of Defense Rumsfeld, 27 January 2002
- *These are the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans, innocent Americans, if they can, and they are perfectly prepared to die in the effort.* Vice President Dick Cheney, 27 January 2002
- *These killers – these are killers.... These are killers. These are terrorists.* President George Bush 28 January 2002
- *I think the most important thing right now is to focus on the fact that, first of all, these are dangerous people, and they’re still trying to hurt people. They make threats all the time, and we’ve got to keep them secure... The people we’re holding in Guantanamo are very dangerous.* Deputy Secretary of Defense Paul Wolfowitz, 17 February 2002¹⁹²
- *Remember, these are – the ones in Guantánamo Bay are killers. They don’t share the same values we share.* President Bush, 20 March 2002
- *So they’re dangerous people, whether or not they go before a military commission... We’re dealing with a special breed of person here...* Deputy Secretary Wolfowitz, 21 March 2002
- *The only thing I know for certain is that these are bad people.* President Bush, 17 July 2003
- *We’ve been through all the data. We’ve had interviews with a lot of the detainees – well, with all of them. And we have a lot of very bad people at Gitmo.* Secretary of the Navy Gordon England, 8 September 2004¹⁹³

¹⁹¹ Unless otherwise stated, quotes taken from *USA: A deepening stain on US justice*, AI Index: AMR 51/130/2004, August 2004, <http://web.amnesty.org/library/Index/ENGAMR511302004>.

¹⁹² Deputy Secretary Wolfowitz Interview with Fox News Sunday, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2710>.

¹⁹³ Special Department of Defense briefing with Navy Secretary Gordon England, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2362>.

- *They're terrorists. They're bomb-makers. They're facilitators of terror. They're members of al Qaeda and the Taliban. We've screened everybody we had. We had some 800 people down there. We've screened them all, and we've let go those that we've deemed not to be a continuing threat. But the 520 some that are there now are serious, deadly threats to the United States. For the most part, if you let them out, they'll go back to trying to kill Americans.* Vice President Cheney, 23 June 2005¹⁹⁴
- *If you think of the people down there, these are people all of whom were captured on a battlefield. They're terrorists, trainers, bomb makers, recruiters, financiers, [Osama bin Laden's] body guards, would-be suicide bombers, probably the 20th hijacker, 9/11 hijacker.* Secretary of Defense Rumsfeld, 27 June 2005¹⁹⁵
- *At this moment, Guardsmen and women are... standing watch over the world's most dangerous terrorists in Guantanamo Bay, Cuba.* President Bush, 9 February 2006¹⁹⁶
- *It's important for Americans and others across the world to understand the kind of people held at Guantanamo.... Those held at Guantanamo include suspected bomb makers, terrorist trainers, recruiters and facilitators, and potential suicide bombers. They are in our custody so they cannot murder our people.* President Bush, 6 September 2006¹⁹⁷
- *A lot of these people are killers.* President Bush, 9 August 2007¹⁹⁸

This prejudicial commentary by senior officials in the branch of government that controls the detentions highlights the need for independent judicial review. Instead, the review has been carried out by more junior officials within that very same branch, the executive. The tribunal itself is part of a wider executive structure that has already determined the detainees to be “enemy combatants”, and is instructed that there is a presumption in favour of the executive’s information presented in support of “enemy combatant” classification.

Lieutenant Colonel Stephen Abraham, a US military intelligence officer who assisted in the administrative review process, and served as a member of a CSRT panel, told a congressional committee in July 2007 that:

“What I expected to see was a fundamentally fair process in which we were charged to seek the truth, free from command influence. In reality, command influence determined not only the lightning fast pace of the 500-plus proceedings, but in large

¹⁹⁴ Interview of the Vice President by Wolf Blitzer, CNN,

<http://www.whitehouse.gov/news/releases/2005/06/20050623-8.html>.

¹⁹⁵ Secretary Rumsfeld Interview with Jerry Agar KMBZ News Radio 980 Kansas City, 27 June 2005,

<http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3246>.

¹⁹⁶ President discusses progress in war on terror to National Guard,

<http://www.whitehouse.gov/news/releases/2006/02/20060209-2.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 President Bush discusses American Competitiveness Initiative during press conference,

<http://www.whitehouse.gov/news/releases/2007/08/20070809-1.html>.

part, the outcome – little more than a validation of prior determinations that the detainees at Guantanamo were enemy combatants, and...presumed to be terrorists who could be detained indefinitely”.¹⁹⁹

“In short, the CSRT process was not structured to yield reliable determinations as to whether the detainees held in Guantanamo were properly detained as enemy combatants. Rather, the Executive put in place a process to legitimize, without substantial corroborated evidence or any meaningful independent review, earlier determinations that were not the product of a thoughtful, deliberative process directed to the ascertainment of truth. The process ensured that panels would rubber-stamp decisions already made rather than applying independent judgment as to whether those decisions were correct. Under the guise of implementing the Supreme Court’s decision in *Rasul*, the CSRT process completely frustrated it. In my opinion, it is time for Congress to restore the judicial mechanism – habeas corpus – that will both honor our commitment to justice and keep America secure.”²⁰⁰

After the hearing, the panel’s decision and supporting documents are provided to the CSRT legal advisor, a military lawyer, who conducts a “legal sufficiency review”. In the case of Afghan detainee Abib Sarajuddin, for example, the legal advisor noted not only “the Tribunal’s poor documentation”, but also that the CSRT panel, by denying the detainee’s request to present exculpatory evidence from witnesses in Afghanistan on the basis that they were not “disinterested”, had abused its discretion: “I believe it would be an abuse of discretion for the Tribunal to consider *all* Government hearsay and at the same time deny *all* hearsay tendered by the detainee” (emphasis in original). Nevertheless, the legal advisor decided that there was “no reason for us to turn a blind eye to reality when reviewing the Tribunal’s decision”. Because it was “extraordinarily unlikely” that the Afghanistan government would facilitate such witness testimony, the CSRT’s error was “an error without an effective solution”. The legal advisor further noted that “the evidence to support the detainee’s classification as an enemy combatant was relatively small.” Nonetheless, he found that “it is not the role of the legal advisor to second-guess the tribunal’s decision”. He let the “enemy combatant” decision stand.²⁰¹

The legal advisor forwards the record to the CSRT Director who can either approve the decision of the tribunal or send the case back for further proceedings.²⁰² On the day of the first CSRT panel hearing, the Pentagon again emphasised that “the legal advisor will forward a recommendation to the Convening Authority, Rear Adm. James McGarrah, who will either approve the tribunal’s decision or return the record to the tribunal for further proceedings”.²⁰³

¹⁹⁹ Testimony of Stephen E. Abraham, Lieutenant Colonel, US Army Reserve, before the Armed Services Committee, US House of Representatives, 26 July 2007.

²⁰⁰ Written statement of Stephen E. Abraham before the House Armed Services Committee, 26 July 2007, http://armedservices.house.gov/pdfs/FC072607/Abraham_Testimony072607.pdf.

²⁰¹ Legal sufficiency review of Combatant Status Review Tribunal for detainee #458, 8 March 2005.

²⁰² CSRT procedures, § I(8).

²⁰³ First Combatant Status Tribunals conducted at Guantanamo today. Department of Defense news release, 30 July 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7593>.

The government's October 2007 brief to the US Supreme Court suggests that this "review by a higher authority" is an indicator of the strong protections offered by the CSRT.²⁰⁴ In fact, it opens the door to repeat proceedings, highlighting concern about command control over the scheme. A study of CSRT records revealed that in at least three cases, detainees were initially found not to be "enemy combatants" before their cases were subjected to repeat proceedings, in the absence of the detainees, and they were determined to be "enemy combatants".²⁰⁵

A US Army Major, a military lawyer, who sat on 49 CSRT panels, has indicated that in six of these hearings "there was a unanimous decision that the detainee was a Non Enemy Combatant ('NEC'). In all of these NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened. In each of those cases, the 'new evidence' that was presented was in fact a different conclusory intelligence finding, which was not justified by the underlying evidence".²⁰⁶ The Major has described command influence over the CSRT process, including in relation to cases of Uighur detainees. Some of these detainees had been found not to be "enemy combatants", while others had been affirmed as "enemy combatants" based on "evidence that was essentially the same. Briefings were held for CSRT members, in which intelligence officials "attempt[ed] to explain why the CSRT panel was mistaken in finding the person to be an NEC". The US Army Major has recalled another meeting, in which the OARDEC Director, Rear Admiral James McGarrah, participated: "The conference was to discuss NEC findings in Uighur cases. The Admiral expressed the desire to obtain more uniformity of result across the spectrum of those cases."²⁰⁷

In the case of Libyan national Abdul Hamid al-Ghizzawi, reportedly handed over to US custody by Afghan forces in late 2001 in return for a bounty, the CSRT determined that there was no basis on which to conclude that he should be classified as an "enemy combatant". Lt. Col. Stephen Abraham was on the panel that made this decision, and has said that he was not assigned to another panel after this determination. Lt. Col Abraham continues,

"I subsequently learned, based on the government's factual return in Mr Al-Ghazawy's [sic] habeas corpus case, that he was subjected, without his knowledge or participation, to a second CSRT panel two months later that reversed my panel's unanimous determination that he was not an enemy combatant. I also learned that this particular panel, Panel 32, also reconsidered and reversed the finding of Panel 18 that detainee ISN#250, Anwar Hassan, also known as 'Ali' in his court filings, was not properly designated as an enemy combatant [see below]. So it appears that Panel 32 was convened precisely for the purpose of overturning prior findings that were favourable to the detainees".²⁰⁸

²⁰⁴ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

²⁰⁵ *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.

²⁰⁶ *Hamad v. Gates*, Response to omnibus motion to stay orders to file certified index of record. In the US Court of Appeals for the DC Circuit, 4 October 2007, Exhibit A.

²⁰⁷ *Ibid.* (See also case of Ali Mohammed, below).

²⁰⁸ Written statement of Stephen Abraham before the House Armed Services Committee, 26 July 2007,

As a leading US lawyer put it, “unlike in a conventional hearing, where the tribunal listens to the evidence and then announces its result, in a CSRT, the superiors announce the result, and then convene a hearing.”²⁰⁹ If the result is ever not to the liking of the superiors, they can order a new hearing.

5.2 Not a competent tribunal; an absence of remedy

*This Order [establishing CSRTs] is intended solely to improve management within the Department of Defense concerning its detention of enemy combatants at Guantánamo*²¹⁰

Under international law, not only must the tribunal that reviews the lawfulness of the detention be independent and impartial, it must be competent. A competent court is one that has jurisdiction over the detainee, can determine the legality of the detention and has the authority to order the release of the detainee if the detention is found to be unlawful.

On the question of jurisdiction, the UN Human Rights Committee has concluded that “the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice.”²¹¹ Principle 11 of the draft UN Principles governing the administration of justice through military tribunals, submitted to the UN Human Rights Commission by the UN Special Rapporteur on this issue to the Sub-Commission on the Promotion and Protection of Human Rights, provides that

“In all circumstances, anyone who is deprived of his or her liberty shall be entitled to take proceedings, such as habeas corpus proceedings, before a court, in order that that court may decide without delay on the lawfulness of his or her detention and order his or her release if the detention is not lawful. The right to petition for a writ of habeas corpus or other remedy should be considered as a personal right, the guarantee of which should, in all circumstances, fall within the exclusive jurisdiction of the ordinary courts. In all circumstances, the judge must be able to have access to any place where the detainee may be held.”²¹²

The CSRT is not competent to review the lawfulness of the detention, but instead only competent to review “enemy combatant” status. Moreover, it cannot order the release even if it finds the detainee not “properly” classified under its narrow remit. This limitation is incompatible with the express requirements of article 9(4) of the ICCPR. The Human Rights Committee has affirmed that “what is decisive for the purposes of [art. 9(4)] is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, requires that the court be empowered to order release”.²¹³ This requirement is also embodied in other

²⁰⁹ Joseph Margulies, *Guantánamo and the abuse of presidential power*, Simon and Schuster (2006), p. 166. Joseph Margulies was the lead lawyer for the petitioners in *Rasul v. Bush*.

²¹⁰ CSRT Order. § j.

²¹¹ Human Rights Committee, concluding observations: Peru. UN Doc. CCPR/CO/70/PER, 15 November 2000, para. 12.

²¹² UN Doc. E/CN.4/Sub.2/2006/58, 13 January 2006.

²¹³ *A v. Australia*, UN GAOR, 59th Session, UN Doc. CCPR/2/59/D/560/1993 (1997).

international instruments. For example, Article 7 of the American Convention on Human Rights requires that any person deprived of their liberty “shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful” (art. 7.6).²¹⁴ Judicial review of CSRT decisions under the Detainee Treatment Act does not resolve this shortcoming. As a UN Special Rapporteur has pointed out, “the most that a reviewing court may do is to order reconsideration of a [CSRT] decision, not release”.²¹⁵

A detainee’s indefinite detention may continue even after a CSRT determination that he is “No Longer Enemy Combatant” (NLEC).²¹⁶ Even the detainee may not be told for a protracted period that he has been “cleared”.²¹⁷ Although the authorities stated that it would be a “matter of days or weeks... certainly not a long time” for NLECs to be released from Guantánamo, this was far from the case.²¹⁸ For example, three of the 38 detainees found to be NLECs in the initial round of CSRT determinations which ended in March 2005 were still in Guantánamo 20 months later, “pending diplomatic discussions regarding their release”.²¹⁹ 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”.²²⁰

International law, including the ICCPR (article 2.3), provides for the right to a remedy to persons who claim a deprivation of rights. However, remedies here remain entirely within the executive branch and releases from Guantánamo matters of foreign policy rather than of due process, as is written into the CSRT Order.²²¹ To date, not a single release or transfer of a detainee has been by judicial order.²²²

²¹⁴ The USA is a signatory to the American Convention on Human Rights and as such it is under an obligation not to do anything to defeat the object and purpose of the treaty pending its ratification decision (Article 18, Vienna Convention on the Law of Treaties).

²¹⁵ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Advanced Edited Version, 25 October 2007, *op. cit.*, para. 14.

²¹⁶ A “Kafkaesque term [which] deliberately begs the question of whether these [detainees] ever were enemy combatants”. *Qassim v. Bush*, *op. cit.*

²¹⁷ “If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO”. CSRT procedures, § I(10).

²¹⁸ Special Department of Defense briefing with Navy Secretary Gordon England, 8 September 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2362>.

²¹⁹ Declaration of Karen L. Hecker. 3 November 2006, *Taher v. Bush*, Respondents’ response to order to show cause and motion to dismiss petition for want of jurisdiction or, in the alternative, to transfer petition to the US Court of Appeals for the District of Columbia Circuit, 6 November 2006. The three detainees, Zakirjan Asam (Uzbekistan national), Allah Muhammed Saleem (Egyptian) and Fethi Boucetta (Algerian), who received NLEC status under the CSRT scheme between 20 December 2004 and 29 March 2005, were eventually sent to Albania on or around 16 November 2006.

²²⁰ *Qassim v. Bush*. Memorandum, US District Court for the District of Columbia, 22 December 2005.

²²¹ The Order states that upon an NLEC determination, the Pentagon shall advise the State Department “in order to permit the Secretary of State to coordinate the transfer for release to the detainee’s country

The absence of independent judicial involvement in this process has a number of implications with respect to the protection of other rights. For example, the US administration maintains a policy of using “diplomatic assurances” when transferring a detainee to a state where there is substantial risk that the detainee will be subjected to torture or other ill-treatment. Lack of judicial involvement in these transfers and on the treatment of returned detainees increases the risk that detainees will be transferred to human rights violations elsewhere.²²³ For example, after nearly five years in untried military custody at Guantánamo, on 17 June 2007 Abdellah al Hajji was transferred to the custody of the Tunisian authorities and was allegedly subjected to ill-treatment after his arrival in Tunisia. His US *habeas corpus* lawyer was not notified of his transfer until after it had been carried out.²²⁴ Just as a CSRT does not have the authority to order the release of a detainee, it cannot prevent a transfer of a detainee to human rights violations elsewhere, ensure legal representation for the detainee, or order investigations into a detainee’s allegations of torture or ill-treatment.

Article 9(4) of the ICCPR “must be interpreted broadly and expansively”.²²⁵ As already noted, the right to go to a court to challenge the legality of one’s detention not only protects against arbitrary detention, but also against other violations of fundamental human rights, including enforced disappearance, torture and other cruel, inhuman or degrading treatment or punishment. The scope of judicial review clearly must be wide enough to allow for an examination of all the conditions essential for lawful detention. To do otherwise is for the courts to nurture a climate of impunity.

As a flexible procedure that protects against various violations of fundamental human rights, not only arbitrary detention, the reviewing tribunal must be able to provide remedies beyond release. Under Article 2.3 of the ICCPR, a state must ensure that any person whose rights under the treaty are violated – including violations of Article 9.4 – “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”.²²⁶ Such access must be to an “effective judicial remedy”, as required by the

of citizenship or other disposition consistent with domestic and international obligations *and the foreign policy of the United States*” (emphasis added). CSRT Order, § i.

²²² Although see case of David Hicks, note 8.

²²³ *Diplomatic Assurances – No protection against Torture and Ill-treatment*, AI Index: ACT 40/021/2005, 1 December 2005, <http://web.amnesty.org/library/index/engact400212005>.

²²⁴ See Amnesty International Urgent Action, AI Index: MDE 30/005/2007, 20 June 2007 <http://web.amnesty.org/library/Index/ENGMDE300052007> and update issued on 23 July 2007, available at <http://web.amnesty.org/library/Index/ENGMDE300062007>. See also, *Alhami v. Bush*, US DC District Court, 2 October 2007 (Issuing injunction to prevent the US government from forcibly sending Mohammed Rahman, a Tunisian national allegedly captured by Pakistani bounty hunters, handed over to the USA and transported to Guantánamo, back to Tunisia, on the grounds of the “grave harm” that he could face in Tunisian custody (torture and denial of adequate medical care for his serious health problems). The judge ruled that the case should be held at least until the Supreme Court decided the jurisdictional question relating to *habeas corpus* in the *Boumediene* case.

²²⁵ *A v. Australia*, *op. cit.* (Mr Bhagwati concurring).

²²⁶ 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

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. These spell out the obligations in relation to remedy and reparation in some detail.²²⁷

Under Principle 12, “obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws”. The CSRTs, the Detainee Treatment Act, and the Military Commissions Act fail to comply with this obligation. The CSRTs lack the power of remedy, as does the narrow judicial review under the DTA. The *habeas*-stripping provisions of the MCA are incompatible with international law, as is the provision that, except for review under the DTA, “no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

The Basic Principles and Guidelines must be applied and interpreted “without any discrimination of any kind or on any ground, without exception” (Principle 25). The CSRT system fails in this regard (see below). States are obliged to provide victims with equal and effective access to justice” and to “provide effective remedies to victims, including reparation” (Principle 3(c, d)). Reparation should take the form of “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition” (Principle 18).

Restitution should, whenever possible, restore the victim to the original situation before the violation occurred. This may include “restoration of liberty”. *Compensation* should be provided for any economically assessable damage. *Rehabilitation* should include medical and psychological care as well as legal and social services. *Satisfaction* may include effective measures aimed at the cessation of violations, public apology, and judicial and administrative sanctions against persons responsible for the violations. *Guarantees of non-repetition* should include ensuring that “all civilian and military proceedings abide by international standards of due process, fairness and impartiality”, strengthening the independence of the judiciary, and reviewing and reforming laws contributing to the violations (Principles 19-23).

Asked whether there would be any compensation for people who had been detained for years before being found to be NLECs, Navy Secretary Gordon England in his capacity as overseer

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.” General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 14.

²²⁷ GA RES. 60/147 16 December 2005.

of the CSRT scheme replied, “I wouldn’t think so”.²²⁸ Article 9.5 of the ICCPR requires that “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”. Apologies have not been issued either. Sayed Abassin, an Afghan taxi driver, was released from Guantánamo in April 2003 after a year in US custody. Like others, he was made to sign a statement that he would not have any involvement with the Taliban or *al-Qa’ida*, despite the absence of any evidence of previous involvement.²²⁹

The treatment to which detainees have been subjected – enforced disappearance, secret detention, secret transfers, torture or other ill-treatment, unfair trial procedures – are unchallengeable in the CSRT system. This leaves the detainees not only without remedy for past violations, but exposed to future abuse. The CSRT is an aspect of the absence of accountability that has characterized US conduct in the “war on terror”. It is anathema to full and effective judicial review. On the question of trials, not only can the CSRT not provide remedial action for detainees held in indefinite executive detention, including ordering the release of the detainee or the initiation of fair trial proceedings, confirmation of “enemy combatant” status leaves the detainees exposed to unfair trial by military commission.²³⁰

Denial of *habeas corpus* denies justice to the victims of terrorism, by indefinitely delaying and jeopardizing fair trials, and to those accused, rightly or wrongly, of involvement in terrorism.²³¹ The CSRT is a tool of this injustice.

²²⁸ Special Department of Defense briefing with Navy Secretary Gordon England, 8 September 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2362>.

²²⁹ See *USA: The threat of a bad example: Undermining international standards as ‘war on terror’ detentions continue*, August 2003, <http://web.amnesty.org/library/index/engamr511142003>.

²³⁰ Amnesty International has concluded that this military commission system fails to comply with international fair trial standards. See *USA: Justice delayed and justice denied? Trials under the Military Commissions Act*, March 2007, *op. cit.* A CSRT determination that a detainee is “no longer enemy combatant” means that he is no longer eligible for trial by military commission under the MCA.

²³¹ 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), but instead put into secret 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 March 2003. <http://www.usdoj.gov/archive/ag/testimony/2003/030403senatejudiciaryhearing.htm>. 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”. For email, see <http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf>. See also, *FBI working to bolster Al Qaeda cases*. Los Angeles Times, 21 October 2007 (“The FBI is quietly reconstructing the cases against Khalid Shaikh Mohammed and 14 other accused Al Qaeda leaders being held at Guantánamo Bay, Cuba, spurred in part by US concerns that years of CIA interrogations have yielded evidence that is inadmissible or too controversial to present at their upcoming war crimes tribunals...”).

5.3 No meaningful way to confront government information

The CSRT relies on a black box of information provided by the military and withheld from the prisoner, who must confront this unseen information without counsel. The military controls what information passes into the box, and orders the tribunal to presume that information to be correct. While a prisoner may add his contrary account, it is not likely to be different from the information the military has already heard and discounted. Moreover, there is no meaningful opportunity for the prisoner to gather and present contrary evidence²³²

For two years, from a month before oral arguments in the US Supreme Court in the *Rasul* case in April 2004, to six weeks after oral arguments in the *Hamdan* case in March 2006, the Pentagon's announcements relating to detainee transfers from Guantánamo emphasized that "the circumstances in which detainees are apprehended can be ambiguous, and many detainees are highly skilled in concealing the truth".²³³ The undoubted "ambiguity" of the circumstances of many of the detentions underscores the imperative of independent judicial scrutiny of them. Sudanese national Adel Hassan Hamad, for example, told his CSRT in 2004 that he had been arrested in his bed at his house at 1.30 in the morning of 18 July 2002 in Pakistan, where he worked as a hospital administrator:

"I woke up and found myself in front of policemen from the Pakistani Intelligence pointing their weapons in my face like I was in a dream or a disturbing nightmare... And with them was a tall man who did not look Pakistani which I think he was American... [T]hey took me and detained me in jail for six months and ten days. Later I was moved to Bagram and then to Cuba²³⁴... I assure you that I did not and don't pose a threat to the United States government, and I have no enmity towards them and I never was with any organization or any group that was planning to disarray the US government... This classification of me as an enemy combatant is an injustice".

The CSRT found Adel Hassan Hamad to be an "enemy combatant". One of the three CSRT panelists had dissented against the affirmation of "enemy combatant" status. This US Army Major argued that the unclassified information used against Adel Hassan Hamad "amounts to saying that the Detainee is an enemy combatant because he was employed by NGOs that

²³² Joseph Margulies, *Guantánamo and the abuse of presidential power* (2006), *op. cit.*, p. 169.

²³³ E.g. news releases on: 18 May 2006, 9 February 2006, 5 November 2005, 3 November 2005, 1 October 2005, 12 September 2005, 22 August 2005, 20 July 2005, 26 April 2005, 19 April 2005, 12 March 2005, 7 March 2005, 16 January 2005, 22 September 2004, 18 September 2004, 2 August 2004, 27 July 2004, 8 July 2004, 2 April 2004, and 15 March 2004. From June 2006, five days before the Supreme Court's *Hamdan* ruling, the Pentagon's public message switched to: "A determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified"; this switched again from March 2007, as the Supreme Court was considering whether to take the *Boumediene* challenge to the MCA, to "[the transfer] underscores the processes put in place to assess each individual and make a determination about their detention while hostilities are ongoing – an unprecedented step in the history of warfare".

²³⁴ He has alleged that in Bagram he was beaten, terrorised by dogs, stripped, humiliated by guards, subjected to forced standing, sleep deprivation and to use of shackles that left him with leg injuries

provided some support for ‘terrorist ideals and causes’ and because he ‘came into contact’ with al Qaida members” and “fails to even state a *prima facie* case that he has been properly classified as an enemy combatant”. The dissenting CSRT member characterized the outcome as “unconscionable” and argued that “the Detainee has constructively been denied his right to prepare and participate in the Tribunal. The Detainee could not prepare for an overall allegation that he is an enemy combatant when the supporting allegations do not even qualify him as an enemy combatant”. Even after taking into account the classified evidence, the dissenting officer considered that Adel Hamad had been “improperly classified as an enemy combatant.”²³⁵ In 2007, Adel Hassan Hamad’s *habeas* lawyers located the Army Major who had dissented in their client’s case. This reservist, a military lawyer who worked as a prosecutor in civilian life, revealed that “in Mr Hamad’s CSRT tribunal proceeding, the tribunal members had very little discussion of the evidence in his case”.²³⁶

Many of the Guantánamo detainees were not captured in armed combat but handed over to the USA by Pakistani and Afghan agents in return for bounties. A month after the invasion of Afghanistan, the US Secretary of Defense said that “we have large rewards out, and our hope is that the incentive – the dual incentive of helping to free that country from a very repressive regime and to get the foreigners in the al Qaeda out of there, coupled with substantial monetary rewards, will incentivize... a large number of people to begin... looking for the bad folks... We have leaflets [advertising the rewards] that are dropping like snowflakes in December in Chicago.”²³⁷ A study of CSRT records and *habeas corpus* petitions by the National Journal concluded in 2006 that

“a high percentage, perhaps the majority, of the 500-odd men now held at Guantanamo were not captured on any battlefield” and “the majority were not captured by US forces but rather handed over by reward-seeking Pakistanis and Afghan warlords and by villagers of highly doubtful reliability. These locals had strong incentives to tar as terrorists any and all Arabs they could get their hands on as the Arabs fled war-torn Afghanistan in 2001 and 2002”.²³⁸

Paying for detainees undoubtedly increases the risk of arbitrary detention and heightens the need for independent judicial scrutiny. Even children were not exempt from this form of handover. Chadian national Muhammad Hamid al Qarani, for example, was arrested in a mosque in Karachi in Pakistan in October 2001 at the reported age of 14. He has said that he was sold “to the Americans for \$5000”. He was taken to Afghanistan in late November 2001, before being transferred in early January 2002 to Guantánamo, where he remains after a

²³⁵ Unclassified transcript of CSRT.

²³⁶ *Hamad v. Gates*, Response to omnibus motion to stay orders to file certified index of record. In the US Court of Appeals for the DC Circuit, 4 October 2007, Exhibit A.

²³⁷ Department of Defense news briefing – Secretary Rumsfeld, 19 November 2001, transcript at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2444>. Examples of leaflets available at <http://www.psywarrior.com/afghanleaf40.html> (e.g. “Get wealth and power beyond your dreams. Help the Anti-Taliban forces rid Afghanistan of murderers and terrorists”).

²³⁸ Stuart Taylor, *Falsehoods about Guantanamo*; and Corine Hegland, *Guantanamo’s grip; Empty Evidence; Who is at Guantanamo Bay*. National Journal, 3 February 2006.

CSRT affirmed his “enemy combatant” status in 2005 when he had just turned 18 and after more than three years in custody.

All persons deprived of their liberty must be informed, at the time they are taken into custody, of the reasons for their detention.²³⁹ This requirement has typically been breached. Not only did CSRTs begin some *two and a half years* after the detentions began, detainees still only had access to unclassified information used to support his designation as an “enemy combatant”. They have had no access to or right to knowledge of any classified information used against him, as the following dialogue at the 2004 CSRT of Mohammed Ahmed Salam, a Yemeni national arrested by Pakistani police in late 2001 or early 2002 and handed over to the USA, illustrates:

Detainee: I have a question. If there is classified evidence to be presented, it should be presented in front of me, so I can see it, and make sure it is correct. Is that possible, or no?

Tribunal President: I understand your request, and it is not possible as it is not releasable to you. And I stated earlier that we do not have the authority to change that classification...

Detainee: Yes, but maybe this evidence is a lie.

Tribunal President: Yes, I understand your concern.²⁴⁰

In similar vein, Abdul al Hilal said to his CSRT, “It’s not fair for me that you mask some of the secret information. How can I defend myself... It is unfair that the government is going to be talking about me, and I don’t have an attorney”. In its October 2007 brief to the US Supreme Court in the *Boumediene* case, the government notes that “in most cases”, classified information “formed part of the basis for the government’s determination that they were enemy combatants”, and rejected as a “startling proposition” that a detainee should know what that information was.²⁴¹

Principle 11 of the draft UN Principles governing the administration of justice through military tribunals emphasises the need for strict limitations on military secrecy:

“The rules that make it possible to invoke the secrecy of military information should not be diverted from their original purpose in order to obstruct the course of justice nor to violate human rights. Military secrecy may be invoked, under the supervision of independent monitoring bodies, when it is strictly necessary to protect information concerning national defence.”

²³⁹ Article 9.2, ICCPR; Principle 10, UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

²⁴⁰ Mohammed Salam asked for his brother to be a witness. The CSRT found that he was “not reasonably available” on the grounds that the Yemen government had not responded to the USA’s request for assistance in locating him.

²⁴¹ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

However, military secrecy may not be invoked in illegitimate circumstances, including “where measures involving deprivation of liberty are concerned”; to “deny judges and authorities delegated by law to exercise judicial activities access to documents and areas classified or restricted for reasons of national security; or “to obstruct the effective exercise of habeas corpus and other similar judicial remedies”.²⁴²

The CSRT plainly serves to obstruct *habeas corpus*, and its reliance on classified information entirely kept from the detainee, unrepresented by legal counsel, violates the detainee’s right to know the basis for his detention. It is the executive that determines what is classified and what is not for the purposes of the CSRT. There is no judicial or any other independent oversight.

The military authorities have acknowledged that “in many cases much of the information about a detainee is classified”.²⁴³ The government has likewise told the US Supreme Court that “most of the CSRT conclusions are based in significant part on classified information”.²⁴⁴ In her January 2005 ruling, Judge Green on the DC District Court noted that in all the cases before her, the CSRTs had “substantially relied upon classified evidence”.²⁴⁵ In the case of Khalid Bin Abdullah Mishal Thamer Al Hameydani, for example, the CSRT, describing the unclassified evidence on the case as “unpersuasive”, relied wholly upon classified evidence to find that the detainee was an “enemy combatant”. The detainee did not participate in the hearing, and his personal representative presented no evidence and called no witnesses on his behalf. A study of CSRT records found that more than 14 per cent of detainees asked to see the classified evidence against them. All such requests were denied.²⁴⁶

Under the CSRT regulations, the detainee “shall be permitted to present evidence and question any witnesses”.²⁴⁷ The above study found that the government did not produce any witnesses at any CSRT hearing.²⁴⁸

Detainee: *Is it possible to see this [classified] evidence, in order to refute it?*

CSRT: *The classified information cannot be made available to you for reasons of national security. You may see the unclassified evidence.*

Detainee: *The past three years, through all of my interrogations, the evidence presented in the Unclassified Summary is basically a summary of what I’ve said in the interrogations before...*

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

Kuwaiti detainee Omar Rajab Amin, CSRT hearing, Guantánamo, 1 November 2004.

²⁴² UN Doc. E/CN.4/Sub.2/2006/58, 13 January 2006.

²⁴³ Secretary of the Navy, Defense Department special briefing on CSRTs, 29 March 2005.

²⁴⁴ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

²⁴⁵ *In re Guantanamo detainee cases*, op.cit.

²⁴⁶ *No-hearing hearings*, op. cit.

²⁴⁷ CSRT implementing procedures, § H. 7.

²⁴⁸ *No-hearing hearings*, op. cit..

The detainee is allowed to call witnesses, but only if “reasonably available”. Reasonableness, as defined under this system, sets a high hurdle for a detainee to overcome. The above study found that where the witness requested was another detainee, the request was denied in 74 per cent of cases. 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

Mohamed Nechla, an Algerian national seized in Bosnia and Herzegovina in January 2002 and transferred to Guantánamo, sought to have his supervisor with the Red Crescent in Bosnia to testify as a witness at his CSRT. The request was denied on the grounds that the witness “was not reasonably available in that after a period of reasonable diligence the Department of State could not locate the witness in Bosnia or in any other location”.²⁵⁰ However, Mohamed Nechla’s *habeas* lawyers in the USA have said that they “easily located [the witness] by calling the Red Crescent number listed in the Sarajevo telephone directory”.²⁵¹

Information obtained through torture or other ill-treatment can 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 (see below) “provided detailed information about 30 of Osama Bin Laden’s bodyguards who are also held at Guantánamo”.²⁵² In such circumstances, detainees whose “enemy combatant” status and continued detention may depend on information provided in such interrogations, would not be in a position to challenge it. This is not least because the details of the interrogations and interrogators would remain classified and therefore unavailable to the detainee.

According to Lt. Col. Stephen Abraham, who served on a CSRT panel and in the Pentagon’s Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC):

“What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the source of the information or providing a basis for establishing the reliability or credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of ‘enemy combatant’”.²⁵³

The detainee is allowed to attend the proceedings unless such attendance would compromise national security. When classified information is reviewed, in other words, he cannot be

²⁴⁹ *Ibid.*

²⁵⁰ Unclassified summary of basis for tribunal decision.

²⁵¹ *Boumediene v. Bush*, Brief for the Boumediene petitioners, in the US Supreme Court, August 2007.

²⁵² Guantanamo Provides Valuable Intelligence Information. US Department of Defense news release, 12 June 2005.

²⁵³ Statement of Stephen E. Abraham, Lieutenant Colonel, US Army Reserve, before the Armed Services Committee, US House of Representatives, 26 July 2007.-

present. A detainee may elect to participate in the CSRT process or may waive such participation, which many detainees are reported to have done. Yemeni national Adil Said Al Haj Obeid Al Busayss declined to participate in the CSRT on the grounds that he did not have anything with which to counter the government's brief summary of unclassified evidence against him, the only evidence he was allowed to see. Of the 14 "high-value" detainees whose CSRT hearings were held between 9 March and 28 April 2007, four did not appear at their hearing. Abu Faraj al-Libi, for example, elected not to attend his CSRT hearing on 9 March 2007 because he had "decided that his freedom is far too important to be decided by an administrative process and is waiting for legal proceedings", according to the US military officer assigned as his "personal representative".

A number of detainees initially chose to participate in the CSRT scheme and then changed their minds. Yemeni detainee Khalid al Qadasi had originally said that he would participate and requested his medical records. His "personal representative" (see below) informed him that a doctor had "viewed his medical records and stated that he could have been a combatant". Khalid al Qadasi then decided not to appear at the hearing.

A personal representative can infer that a detainee has decided to waive participation in the CSRT by the detainee's "silence or actions when the Personal Representative explains the CSRT process to the detainee".²⁵⁴ In the case of Khalid al Hameydani, his personal representative informed the CSRT that "detainee [was] unresponsive" during a meeting prior to the scheduled CSRT hearing: "Sat in chair with head down, did not speak at any time." The CSRT decided that "because the Personal Representative fully explained the Tribunal process to the detainee, the Tribunal finds the detainee made a knowing, intelligent and voluntary decision not to participate in the Tribunal process". The CSRT stated that "no evidence was produced that caused the Tribunal to question whether the detainee was mentally and physically capable of participating in the proceeding, had he wanted to do so. Accordingly no medical or mental health evaluation was requested or deemed necessary." Under the CSRT rules, no assessment of any such detainee's psychological condition is required, including in the case of an individual who has been in indefinite detention for several years virtually incommunicado in more than one location, subjected to torture or other ill-treatment, and now faced by a culturally unfamiliar administrative review system about which he has been advised and which is staffed by members of the same military forces that are among those that have violated his human rights.

If the CSRT deems a detainee physically or mentally unable to participate in the process, the proceedings will be held as if he had chosen not to participate. The determination of this "is intended to be the perception of a layperson". The CSRT "may direct a medical or mental health evaluation of a detainee, if deemed appropriate". In other words, mental or physical ill-health, possibly brought about by his treatment in detention, may disqualify a detainee from participation in this, albeit inadequate, process of review. Independent expert evaluation will not be sought by the CSRT.

²⁵⁴ CSRT Implementing Procedures, § F(1).

5.4 Denial of legal counsel

*It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer, to the untrained layman may appear intricate, complex, and mysterious*²⁵⁵

At his CSRT hearing in October 2004, a year and a half after he was taken to Guantánamo, the first words Afghan national Mohi Bullar said were “Please tell me when it’s my turn to speak, because I don’t know what is going on here”. His last were: “I was not Taliban. I was not against the Americans. I was a bus driver. Why am I still here? I want to go home.” The CSRT affirmed his “enemy combatant” status.

Thousands of miles from home, perhaps already detained for years or traumatized by their experiences in custody, detainees facing indefinite detention without charge or trial and little meaningful ability to challenge the government’s information against them, are denied access to legal counsel for the unfamiliar and unfair CSRT system that will determine their future. As already stated, a CSRT decision can potentially mean a life prison sentence for a detainee. Under international law, even those accused of crimes against humanity, war crimes or genocide, have the right to access to counsel immediately upon detention and during the investigation stage of the case.²⁵⁶ If they are brought to trial and convicted, they face a maximum sentence of 30 years imprisonment, minus any time spent in pre-trial detention.²⁵⁷

The USA criticizes other countries for denying detainees access to of legal counsel. In its most recent report on Myanmar, for example, the State Department reports that “There is no provision in the law for judicial determination of the legality of detention, and the government routinely used arbitrary arrest and incommunicado detention...The government continued to arrest and detain citizens for extended periods without charging them, often under the Emergency Act of 1950, which allows for indefinite detention... The government regularly refused detainees the right to consult a lawyer, denied them or their families the right to select independent legal representation, or forced them to use government appointed lawyers.”²⁵⁸ Its entry on Israel reports that Israel’s “Illegal

Detainee: *Does this tribunal follow the laws of the United States?*

CSRT: *Yes.*

Detainee: *Based on this, I don’t understand or I don’t know who makes the laws, and because of this I will require a lawyer. I have nothing to say here.*

Qatari national Jarallah al-Marri, CSRT hearing, Guantánamo, 30 October 2004. He subsequently replied to questions with “no comment” and was affirmed as an “enemy combatant”. He remains in Guantánamo

²⁵⁵ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

²⁵⁶ Rome Statute of the International Criminal Court, Article 55.2

²⁵⁷ *Ibid.*, Article 77.1(a) and Article 78.1.

²⁵⁸ Country Reports on Human Rights Practices – 2006, Burma. US State Department (March 2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78768.htm>.

Combatant Law” allows for detainees to be held for up to 14 days without access to a lawyer.²⁵⁹

The administration claims that its war paradigm justifies its approach to legal counsel, with the Pentagon maintaining that “We have afforded detainees at Guantánamo with greater access to attorneys than any other combatants in the history of warfare”.²⁶⁰ Under the CSRT procedures “the detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee’s election, assist the detainee at the Tribunal”.²⁶¹ The government-selected Personal Representative is a US military officer, who cannot be a lawyer, and whose relationship with the detainee is not confidential. Indeed, the Personal Representative can be obligated to divulge to the CSRT any information provided by the detainee. This includes details of the detainee’s response to being asked to choose whether to participate in the CSRT scheme or not. Thus in the case of Yemeni detainee Abd al Rahman al Jallil, his personal representative informed the CSRT that the detainee “rambles for long periods and does not answer questions. He has clearly been trained to ramble as a resistance technique... This detainee is likely to be disruptive during the Tribunal”.²⁶² At the CSRT hearing, the following dialogue occurred between the detainee and the Tribunal President:

Detainee: Why have I been here for three years? Why have I been away from my home and family for three years?

CSRT: That is what we are trying to determine today.

Detainee: Why did you come after three years? Why wasn’t it done much sooner after my arrest?

CSRT: I cannot answer to what has happened in the past...

Detainee: Why I am not allowed freedom here?

CSRT: Because you have been classified as an enemy combatant.

Detainee: How can they classify me as an enemy combatant? You don’t have the right documents.

CSRT: That is what we are here to determine.

Detainee: For three years I haven’t been treated very well because of wrong information. Would you let that happen to you? What will be your position if you find out what happened to me was based on wrong information and I am innocent?

CSRT: Your current conduct is unacceptable. If you keep interrupting the proceedings, you will be removed and the hearing will continue without you.

²⁵⁹ *Ibid.* Israel and the Occupied Territories, <http://www.state.gov/g/drl/rls/hrrpt/2006/78854.htm>.

²⁶⁰ *Gitmo ruling clouds attorney access*, Miami Herald, 22 September 2007.

²⁶¹ CSRT procedures, § F(5).

²⁶² Detainee Election Form, 27 September 2004.

In her 2005 ruling finding that the CSRT scheme was unfair, District Court Judge Joyce Hens Green pointed out that “there is inherent risk and little corresponding benefit should the detainee decide to use the services of the Personal Representative”.²⁶³ Yet the government maintains that the “personal representative fulfils some of the most important functions of counsel”.²⁶⁴ A study of CSRT cases, has found that in 78 per cent of cases, the detainee and his Personal Representative met only once, and in 91 per cent of these cases their meeting was less than two hours. In a third of cases, the meeting lasted for less than half an hour (this included the time needed for interpretation).²⁶⁵

Under international law and standards, a detainee must not only be able to challenge the lawfulness of their detention in an independent, impartial and competent court, he or she must have access to legal counsel for assistance in so doing. In its concluding observations in 2006 on the USA’s compliance with its obligations under the ICCPR, in relation to the right of Guantánamo detainees to such judicial review under article 9(4) of the treaty, the UN Human Rights Committee found that “access of detainees to counsel of their choice... should be guaranteed in this regard.”²⁶⁶ The UN Basic Principles on the Role of Lawyers require governments to respect the right of anyone deprived of their liberty, “with or without criminal charge”, to have prompt access to and confidential assistance of a lawyer, and to be informed of that right (Principles 5, 6, 7 and 8). Under the Principles, it is the duty of lawyers to assist their clients “before courts, tribunals or administrative authorities, where appropriate” (Principle 13c). It is the duty of governments to ensure that the lawyer has “access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients” (Principle 17). Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that “a detained person shall be entitled to have the assistance of a legal counsel”. If he cannot afford a lawyer, he has the right to have one assigned to him free of charge. Under Principle 18, a detainee “shall be entitled to communicate with his legal counsel”, and “adequate time and facilities” to do this.

The absence of legal representation for the CSRT process may form part of a detainee’s decision not to participate in the proceedings in the atmosphere of mistrust among detainees that has been generated by their treatment over the years. In the case of Faiz Mohammad Ahmed Al Kandari, for example, he initially elected to attend his CSRT hearing. After he learned that the CSRT had denied his request for two non-detainee witnesses to testify on his behalf, he changed his mind. When informed that this decision could be revisited, he declined to have any participation in the scheme. According to his personal representative, Al Kandari “stated he did not believe the Tribunals were real and he was electing to wait until an attorney represented him. He also stated he thought this was a trick to get him to talk”. Algerian detainee Saiid Farhi decided not to participate in the CSRT scheme, according to his personal representative, “because he does not believe that the CSRT process is real. He believes that it

²⁶³ *In re Guantanamo detainee cases, op. cit.*

²⁶⁴ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

²⁶⁵ *No-hearing hearings, op. cit.*

²⁶⁶ Concluding observations on USA, *op. cit.*, para. 18.

is a joke and that his case has been pre-decided”. Saudi national Abdul Rahman Shalabi declined to participate in the CSRT process after “indicating that he did not trust the [personal representative] as he did not know him, did not trust the process as it is another game that the US is playing”. According to Yemeni detainee Mohamed al Edah’s personal representative, the detainee initially refused to talk to him, but subsequently explained that he had decided not to speak “because of some previous bad experiences with interrogators”. At their meeting in October 2004, the personal representative told him that the CSRT was a “legal process and that it may be to his advantage to speak at his tribunal”. As noted above, however, the authorities have repeatedly stated that the CSRT is not a legal proceeding. Mohammed al Edah, arrested on a bus in Pakistan, was confirmed as an “enemy combatant”.

Denial of access to counsel has formed part of a coercive regime aimed at extracting information from detainees. The administration has generally viewed lawyers as obstacles to its “war on terror” detention regime. In Yaser Hamdi’s case, for example, the executive sought to persuade the courts to allow Hamdi to be held incommunicado. To provide legal representation, it argued, would be to break the “continuous” interrogation cycle (see below). The Pentagon stated that it only allowed Yaser Hamdi access to counsel after two years of his incommunicado detention because it had “completed its intelligence collection” from him.²⁶⁷ The government maintains that “just as the [Guantánamo] detainees have no constitutional right to counsel, there is no right on the part of counsel to access to detained aliens on a secure military base in a foreign country”.²⁶⁸

The administration has displayed antipathy towards lawyers given access to the Guantánamo detainees after the *Rasul* ruling, as reflected in barely concealed attacks on such counsel. In a recent brief, for example, the government suggested that the lawyers had “caused unrest on the base by informing detainees about terrorist attacks and other incidents”, including the “abuse at Abu Ghraib prison”. The resulting unrest, according to the government, “has resulted in riots, violence, hunger strikes, and suicides”.²⁶⁹ A response filed by counsel for the detainees speaks for itself:

“It is not imprisonment without charge, it is not solitary confinement of men approved for release, it is not five years in cages, it is not ridicule while men pray that causes unrest – it is lawyers. This is the single most ignorant and offensive statement in [the government’s] brief.”²⁷⁰

The US Supreme Court said in its *Hamdi* decision, Yaser Hamdi “unquestionably has the right to access to counsel in connection with the [*habeas corpus*] proceedings”.²⁷¹ In the case

²⁶⁷ Department of Defense announces detainee allowed access to lawyer, 2 December 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5831>.

²⁶⁸ *Bismullah v. Gates*, Brief for Respondent addressing pending preliminary motions. In the US Court of Appeals for the DC Circuit, April 2007.

²⁶⁹ *Bismullah v. Gates*, Brief for Respondent addressing pending preliminary motions. In the US Court of Appeals for the DC Circuit, April 2007.

²⁷⁰ *Bismullah v. Gates / Parhat v. Gates*, petitioners’ joint reply brief in support of pending motions to set procedures and for entry of protective order. In US Court of Appeals for DC Circuit, 17 April 2007

²⁷¹ *Hamdi v. Rumsfeld*, *op. cit.*

of Jose Padilla, four Supreme Court Justices said that “access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process”.²⁷² While both these cases concerned US citizens held as “enemy combatants”, to deny to foreign nationals a hallmark of due process that is deemed owing to US nationals would violate the international prohibition on discrimination (see below). Under the US Basic Principles on the Role of Lawyers, governments must ensure “equal access to lawyers” to all persons “within their territory and subject to their jurisdiction, without distinction of any kind”, including national origin.

The fact that detainees will be represented by legal counsel in the DC Court of Appeals for the narrow review scheme provided under the DTA does not make up for the denial of legal counsel during the CSRT process itself. As one of the briefs filed in the US Supreme Court in August 2007 on behalf of the Guantánamo detainees puts it, “when counsel belatedly becomes available to detainees at the stage of DTA review, the damage has been done.”²⁷³

5.5 Use of information obtained by unlawful methods

*Even when detainees suspected that the accusations against them resulted from the torture of another detainee, it was impossible for them to prove it*²⁷⁴

Under the procedures implemented in July 2004, the CSRT was “free to consider any information it deems relevant and helpful to a resolution of the issues before it”. The admission of coerced information was not prohibited. In her ruling in January 2005, US District Judge Joyce Hens Green ruled 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.”²⁷⁵ Lt. Col. Stephen Abraham, who was assigned to the Office for the Administrative Review of Enemy Combatants (OARDEC) and served on a CSRT panel, has said that CSRT panel members were “rarely provided any information about the source of the information..., including “whether the source was detained or subjected to coercive interrogation techniques”. In cases where the source was identified as the detainee on whose case the CSRT was being convened, OARDEC “would not be advised as to whether information had been provided under duress.”²⁷⁶ A study of CSRT records found that:

“No Tribunal considered the extent to which any hearsay evidence was obtained through coercion... [T]he Tribunal usually makes note of allegations of torture, and refers them to the convening authority. This is less surprising than the fact that several Tribunals found a detainee to be an enemy combatant before receiving any results from such an investigation. While there is no way to ascertain the extent, if

²⁷² *Rumsfeld v. Padilla, op. cit.*

²⁷³ *Al Odah v. USA*, Brief for petitioners al Odah et al, In the US Supreme Court, August 2007.

²⁷⁴ *Boumediene v. Bush*. Brief on behalf of [20] former federal judges as amici curiae in support of petitioners, In the US Supreme Court, 24 August 2007.

²⁷⁵ *In re Guantanamo detainee cases. op. cit.*

²⁷⁶ Statement to House Armed Services Committee, 26 July 2007.

any, that witness statements might have been affected by coercion, fully 18% of the detainees alleged torture; in each case, the detainee volunteered the information rather than being asked by the Tribunal.... In each case, the panel proceeded to decide the case before any investigation was undertaken”.²⁷⁷

The CSRT procedures were amended in July 2006 – *after* more than 550 CSRTs had been conducted – to take account of the passage of the Detainee Treatment Act in December 2005. The DTA prohibits cruel, inhuman or degrading treatment by US agents abroad (as defined under US rather than international law). Under the 2006 procedures, “in making a determination regarding the status of any detainee, the CSRT shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.” The same sentence, taken from the DTA, is added to the 2006 procedures for the Administrative Review Board.

In other words, the CSRTs and ARBs can continue to accept information coerced by torture or other cruel, inhuman or degrading treatment. Under international law, 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. The UN Human Rights Committee has stressed that “the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.”²⁷⁸ In its July 2006 conclusions on the USA’s compliance with its obligations under the ICCPR, the Human Rights Committee expressed particular concern that under the DTA, the CSRTs and the follow-up annual Administrative Review Boards were allowed to “weigh evidence obtained by coercion for its probative value”, rather than finding it inadmissible.²⁷⁹

CSRT: *I understand that you were abused while at Bagram detention facility.*

Detainee: *I had to stay standing for up to ten days, twenty-four hours a day. Sometimes because I am human and I get tired I might have done something and they handcuffed me and they tied me up there with my hands over my head.*

CSRT: *This occurred in the Bagram detention facility?*

Detainee: *Yes.*

CSRT: *The people who were doing this were Americans?*

Detainee: *Yes, American...*

CSRT: *Regarding your physical abuse in Bagram, have you ever reported this before?*

Detainee: *This is the first time I see you and I tell you my story. I told the interrogators and they get upset with me. They called me a liar and I stayed quiet because they gave me a hard time.*

Afghan detainee, Abdul Nasir, CSRT hearing, 2004, Guantánamo. There is no indication in the transcript that the CSRT forwarded the allegations for investigation.

²⁷⁷ *No-hearing hearings, op. cit.*

²⁷⁸ 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.

²⁷⁹ Concluding observations on the USA, paras. 14 and 18.

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. Under Article 13, detainees alleging torture, or other cruel, inhuman or degrading treatment (Article 16), have the right to prompt and impartial investigation of their allegations. In its conclusions in 2006 on the USA compliance with its obligations under the Convention, the UN Committee against Torture expressed its concern about the CSRTs and ARBs in this regard and called upon the USA to ensure that its obligations under articles 13 and 15 were “fulfilled in all circumstances”.²⁸⁰

Whatever its origins, the admission of information that has been obtained by torture or other cruel, inhuman or degrading treatment is antithetical to the rule of law. As the Supreme Court ruled more than half a century ago, the rationale for excluding coerced statements 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.²⁸¹

The absence of judicial oversight is allowing the government to use national security justifications to obscure human rights violations. A previously classified Pentagon report on interrogations noted that the degree to which military commission proceedings would be open to the public would have to be weighed against the “need not to publicize interrogation techniques”.²⁸² The same seems to apply to the CSRT scheme. After setting up the CSRTs, the administration said that it would make the hearings “as open and transparent as we can”, but that “the data in most of the files is highly classified data”.²⁸³ On 6 March 2007, the Pentagon announced the commencement of CSRT hearings for the 14 detainees transferred to Guantánamo in September 2006 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”.²⁸⁴ The government maintains 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 – is classified as top secret, and would cause “exceptionally grave damage” to national security if revealed.²⁸⁵ All details of allegations of torture that were made to the CSRTs by at least three of the 10 detainees who elected to appear before the CSRT were redacted from the subsequent unclassified transcripts of their CSRT proceedings.

²⁸⁰ Conclusions and recommendations of the Committee against Torture, UN Doc.: CAT/C/USA/CO/2 (2006), para. 30.

²⁸¹ *Rochin v. California* 342 U.S. 165 (1952).

²⁸² Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations. 4 April 2003, § D

²⁸³ Secretary of the Navy England briefing on Combatant Status Review Tribunal, 9 July 2004.

²⁸⁴ Media briefing, Department of Defense, 6 March 2007, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902>.

²⁸⁵ *Khan v. Bush*, Respondents’ memorandum in opposition to petitioners’ motion for emergency access to counsel and entry of amended protective order. In US District Court for DC, 26 October 2006.

At his CSRT hearing on 27 March 2007, it was revealed that Abu Zubaydah referred to “months of torture” carried out during his time in secret CIA custody. Details he provided to the CSRT about the torture are redacted from the unclassified transcript of the hearing.²⁸⁶ He has reportedly said that as well as being subjected to “waterboarding”, he was also kept for a prolonged period in a cage known as a “dog box”, in which there was not enough room to stand.²⁸⁷ Since being transferred to Guantánamo, Khaled Sheikh Mohammed has also alleged that he was tortured in CIA custody, but the details of his allegations have similarly not been made public by the authorities. Prior to his transfer, there were reports that he had been subjected to “waterboarding”. He is also reported to have alleged that he was kept naked in a cell for several days, suspended from the ceiling by his arms with his toes barely touching the ground, and to have been chained naked to a metal ring in his cell in a painful crouching position for prolonged periods.²⁸⁸

‘Abd al-Rahim al-Nashiri was arrested in November 2002 in the United Arab Emirates – again, far from any battlefield. Rather than being brought to trial – he was named on an indictment in US federal court in New York only months after his arrest – he was hidden away in secret CIA custody until he was transferred to Guantánamo in September 2006.²⁸⁹ At his CSRT hearing on 14 March 2007, he alleged that he had been tortured in CIA custody, and that he had made false statements in order to stop the torture. Through a translator, he claimed that: “From the time I was arrested five years ago, they [“Americans”] have been torturing me. It happened during interviews. One time they tortured me one way and another time they tortured me in a different way.” The following exchange between the CSRT President and ‘Abd al-Nashiri then took place, according to the unclassified version of the transcript:

President: Please describe the methods that were used.

Detainee: [Redacted]. What else do I want to say? [Redacted]. Many things happened. They were doing so many things. What else did they did? [Redacted]. They do so many things. So so many things. What else did they did? [Redacted]. After that another method of torture began [Redacted].²⁹⁰

Majid Khan has written a “torture report”, which contains details of the abuse to which he says he was subjected while in the custody of the CIA, the Department of Defense, and another agency the identity of which has been censored by the US authorities. Indeed, his allegations relating to his treatment prior to his transfer to Guantánamo have been censored from the transcript.

²⁸⁶ Transcript available at http://www.defenselink.mil/news/transcript_ISN10016.pdf.

²⁸⁷ *The black sites*. By Jane Mayer, *The New Yorker*, 13 August 2007.

²⁸⁸ *Ibid.*

²⁸⁹ In May 2003, *after* his arrest, the USA charged two Yemeni nationals – who were not in US custody – in connection with the *USS Cole* bombing in Yemen in October 2000. In the indictment, ‘Abd al-Nashiri was named as an “un-indicted co-conspirator”. See *USA: Justice delayed and justice denied? Trials under the Military Commissions Act, op.cit.*

²⁹⁰ Transcript available at http://www.defenselink.mil/news/transcript_ISN10015.pdf.

On 9 August 2007, the Pentagon announced that the CSRTs had determined that all 14 detainees transferred from CIA custody to Guantánamo in September 2006 met the criteria for designation as “enemy combatants”.²⁹¹ The announcement made no reference to the torture allegations, what investigation, if any, had been ordered or carried out into the allegations, or whether the CSRT had relied upon allegedly coerced testimony in making its determinations.

The CSRT system leaves the determination as to what constitutes torture and other ill-treatment and whether information extracted under it can be relied upon 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.

Again, the limited judicial review of CSRT decisions by the DC Circuit Court of Appeals does not resolve the problem. Indeed, 20 former federal judges have stated that, the DTA “does not appear to permit an adequate inquiry into whether inculpatory statements are unreliable because extracted by torture or other impermissible coercion, an inquiry that is essential to a meaningful judicial review of the validity of a CSRT detention determination”. The former judges continue:

“CSRT panels chronically failed to identify and root out evidence extracted by torture or other impermissible coercion..., and the system provides no meaningful opportunity for the detainee himself to make such a record. Thus, there can be no assurance that the record presented to the court of appeals will provide the information necessary to assess whether, and to what extent, the detainee’s detention is based upon such evidence. This is so no matter how broadly the ‘record’ is defined. Consequently, the court of appeals would be unable to make a meaningful decision about the legality of the detention... Forcing judges to proceed to adjudicate the validity of an Executive detention without such inquiry and based on statements extracted by torture or other impermissible coercion contravenes legal history and degrades the legal system. It is also a clearly inadequate substitute for the common law writ of habeas corpus”.²⁹²

CSRT: *You understand that nobody here in the Tribunal is forcing you either to say thing or not to say things? Is that clear to you?*

Detainee: *My emotional state right now, I’m nervous... Even just the mental state, being in a prison, you can’t say everything you want to say. I’m telling you, I’m talking to you right now and I’m scared that you might take me to Romeo Block or any of the other blocks you take people to.*

Yemeni detainee Saeed Sarem Jarabh, CSRT hearing, Guantánamo, September 2004.

²⁹¹ Guantanamo High-Value Detainees Combatant Status Review Tribunals completed. US Department of Defence, 9 August 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=11218>.

²⁹² *Boumediene v. Bush*. Brief on behalf of [20] former federal judges as amici curiae in support of petitioners, In the US Supreme Court, 24 August 2007.

5.6 ‘Enemy combatant’ is not synonymous with ‘lawfully held’

*In the context of detainees at Guantánamo Bay, the Special Rapporteur concludes that the categorization of detainees as ‘unlawful enemy combatants’ is a term of convenience without legal effect. He expresses grave concern about the inability of detainees to seek full judicial review of determinations as to their combatant status, which amounts to non-compliance with the [ICCPR’s] prohibitions against arbitrary detention, the right to judicial review capable of ordering release, and the right to a fair trial within a reasonable time*²⁹³

The sole purpose of the CSRT is to determine whether the detainee before it is “properly detained” as an “enemy combatant”. “Lawfully held” and “enemy combatant”, according to the government, are effectively synonymous:

Senior US Department of Defense official: The single issue before this tribunal will be, is this person lawfully held as an enemy combatant? There’s not really a distinction between ‘lawfully held’ and ‘enemy combatant’. It’s – the reason they would be lawfully held is that they’re an enemy combatant.

Senior US Department of Justice official: So it’s really the same question.²⁹⁴

The then Secretary of the Navy, tasked with implementing the CSRTs, similarly stated: “So it is strictly is or is not an enemy combatant. That’s the only determination made by those boards.”²⁹⁵

“Enemy combatant” is a term that a federal judge has noted has “proven to have an elastic nature”.²⁹⁶ Under the July 2004 CSRT Order, an “enemy combatant” is defined as:

“an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”

This is broader than the definition the administration had proposed to the Supreme Court in the *Hamdi* litigation.²⁹⁷ In *Hamdi v. Rumsfeld*, the Supreme Court noted that

²⁹³ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America, Advanced Edited Version, UN Doc: A/HRC/6/17/Add.3, 25 October 2007. Summary.

²⁹⁴ Defense Department Background Briefing on the Combatant Status Review Tribunal, 7 July 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751>.

²⁹⁵ Special Defense Department Briefing on Status of Military Tribunals, 20 December 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2043>.

²⁹⁶ *Bismullah v Gates*, US Court of Appeals for the DC Circuit, 20 July 2007, Judge Rogers concurring.

²⁹⁷ The flexible notion of an “enemy combatant” is further illustrated by the fact that, as already noted, in May 2006, the administration told the UN Committee Against Torture that the Guantánamo detainees were held pursuant to the Military Order signed by President Bush on 13 November 2001. Under this Order, detention without charge or trial in military custody is authorized for those foreign nationals whom the President has determined there is “reason to believe”: “(i) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts

“There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the ‘enemy combatant’ that it is seeking to detain is an individual who, it alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States *there*”.²⁹⁸

In other words, the *Hamdi* ruling – which led directly, nine days later, to the establishment of the CSRTs, was based on a definition that assumed the individual was located, and directly engaged in armed conflict, in Afghanistan. Under the CSRT, however, the definition of “enemy combatant” is global in reach and not limited to those directly engaged in armed conflict.

This definition casts a broad net. Among those affirmed as “enemy combatants” by CSRTs are people picked up far from any conflict zone, including in Bosnia, Thailand, Indonesia, Gambia and Mauritania. For example, Pakistan national Muhammad Saad Iqbal al-Madni told his CSRT that he had been 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 via Pakistan 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. At his CSRT, Muhammad al-Madni said: “I have this question, that you people did not capture me from Afghanistan. You arrested me from Indonesia, how are you charging that I am an enemy combatant?” The CSRT President explained that “we want to be certain that you are properly classified”. Again “proper” classification as an “enemy combatant” is taken to be synonymous with “lawfully held”.

CSRT: *This is not a judicial process or a court of law. We are not here to punish you...*

Detainee: *In the beginning, you said you were here to decide if I am an enemy combatant or if I'm against the United States of America. That is a punishment.*

CSRT hearing, Afghan detainee Abdul Rahim Muslimdost, Guantánamo, 2004

A federal judge noted that “although many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States of its allies, the military nonetheless has deemed them detainable as ‘enemy combatants’ based on conclusions that they have ties to al Qaeda or other terrorist organizations”.²⁹⁹ A similarly

of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii)...; and... it is in the interest of the United States that such individual be subject to this order.”

²⁹⁸ *Hamdi v. Rumsfeld*, *op. cit.* (internal quote marks omitted, emphasis added).

²⁹⁹ *In re Guantanamo cases*, *op. cit.*

“very broad definition” of “unlawful enemy combatant” under the Military Commissions Act has drawn the concern of, among others, the ICRC.³⁰⁰

Under the CSRT order, there is no differentiation between a lawful and an unlawful “enemy combatant”. In contrast, under both the MCA and a Department of Defense Directive issued on 5 September 2006, the term “enemy combatant” includes both “lawful enemy combatants” and “unlawful enemy combatants”.³⁰¹ Yet the detainee has no guaranteed and meaningful opportunity to challenge the concept or definition of “enemy combatant”, either at his CSRT hearing or under the DTA review system, even though this label could result in his lifelong detention.

The government maintains that it can hold anyone it classifies as an “enemy combatant” until the end of the global “war on terror”. “There is no question”, the US government asserted to the UN Committee against Torture, “that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end.”³⁰² It maintains that the Guantánamo detainees “enjoy more procedural protections than any other captured enemy combatants in the history of warfare”.³⁰³ Clearly, the government’s global “war” framework, which the US Supreme Court has recognized has “broad and malleable” underpinnings, is crucial to its position.³⁰⁴

There has been widespread international criticism, and condemnation, of the USA’s position. The ICRC, the only international organization that has had access to Guantánamo detainees, and the authoritative interpreter of the Geneva Conventions, does “not believe that IHL is the overarching legal framework” applicable to the “war on terror”.³⁰⁵ On Guantánamo, the ICRC “does not believe that there is presently a legal regime that appropriately addresses either the

³⁰⁰ 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?opendocument>.

Under the MCA, an “unlawful enemy combatant” 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.”

³⁰¹ Department of Defense Directive No. 2310.01E, 5 September 2006. In June 2007, military judges dismissed charges against two Guantánamo detainees facing trial by military commission. Under the MCA, such trials are reserved for foreign nationals classified as “unlawful enemy combatants”. Yet the two detainees had been determined by CSRTs to be “enemy combatants”. In September, the newly formed Court of Military Commission Review overturned these rulings.

³⁰² Second Periodic reports of States parties due in 1999, United States of America, UN Doc: CAT/C/48/Add. 3 (2005), Annex 1.

³⁰³ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

³⁰⁴ *Hamdi v. Rumsfeld*, *op. cit.*

³⁰⁵ 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>.

detainees' status or the future of their detention."³⁰⁶ A 2006 report on the situation of the Guantánamo detainees by five independent UN experts noted that "the global struggle against international terrorism does not, as such, constitute an armed conflict for the purposes of international humanitarian law" (IHL, the law of war). The report further explained that one of the reasons why CSRT review does not comply with international law is that "in determining the status of detainees the CSRT has recourse to the concepts recently and unilaterally developed by the United States Government, and not to the existing international humanitarian law regarding belligerency and combatant status".³⁰⁷

Justifying the establishment of the CSRTs, the Pentagon has repeatedly pointed out that, consistent with the Supreme Court's ruling in *Hamdi v Rumsfeld*, the CSRTs are modelled on the hearings used to determine prisoner of war (POW) status under Article 5 of the Third Geneva Convention, which are conducted under Army Regulation (AR) 190-8 (see above). Although a senior Justice Department official acknowledged at the outset that the CSRTs were "not really Geneva Convention procedures... we're not implementing requirements [of] the Geneva Convention",³⁰⁸ the US authorities have since repeatedly promoted the CSRTs as being based on and exceeding the requirements of AR 190-8, and hence Article 5 of the Third Geneva Convention.³⁰⁹

While international humanitarian law is not applicable to a civilian criminal suspect, the CSRT's do not, in function or objective, serve as Article 5 competent tribunals even for those to whom the law of war does or did apply. The purpose of an Article 5 tribunal is to determine if a detainee is a protected person under the Third Geneva Convention, or is a prisoner of war or not. The CSRT does not have the power to determine PoW status due to President Bush's categorical rejection in February 2002 of this status for any detainee, a decision he reaffirmed on 20 July 2007.³¹⁰ Detainees appearing before the CSRTs were told that the tribunals did not have the authority to make such a determination.

The CSRT scheme is incompatible with an Article 5 "competent tribunal" in other ways. Its use and tolerance of information allegedly coerced under torture or other ill-treatment, for example, violates the same Geneva Convention under which such a tribunal would be set

³⁰⁶ US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC. Operational update, 31 May 2007, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument>.

³⁰⁷ Situation of detainees at Guantánamo Bay. UN Doc: E/CN.4.2006/120, *op. cit.*, paras. 21, 28(d).

³⁰⁸ Defense Department background briefing on the Combatant Status Review Tribunal. 7 July 2004.

³⁰⁹ 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.*

³¹⁰ Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007, <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>. ("On February 7, 2002, I determined for the United States that members of al Qaeda, the Taliban, and associated forces are unlawful enemy combatants who are not entitled to the protections that the Third Geneva Convention provides to prisoners of war. I hereby reaffirm that determination").

up.³¹¹ In any event, the time for Article 5 tribunals for any of the Guantánamo detainees has long since passed. Article 5 tribunals “are intended to be implemented on the spot, or as soon thereafter as practicable, in order to determine a detainee’s status in the first instance. That is how the United States has applied Article 5 in every military conflict since World War II”.³¹² According to the former US military officers who have filed an *amicus curiae* brief in support of the Guantánamo petitioners, “Regulation 190-8’s stripped-down procedures are necessary for the battlefields on which they operate, where captured people must be sorted quickly”.³¹³ The majority of Guantánamo detainees received their CSRTs some two and a half years after the first of them were taken to Cuba, thousands of miles from the conflict in Afghanistan where many, although by no means all, had been taken into custody.

Many detainees subsequently transferred to Guantánamo were originally taken into custody in Pakistan.³¹⁴ Some had 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”.

None of the 14 “high-value” detainees transferred in September 2006 from secret CIA custody to Guantánamo and given CSRT proceedings there in March and April 2007 had been taken into custody in Afghanistan. Abu Zubaydah, for example, was taken into custody on 28 March 2002 in Pakistan. His CSRT hearing was held five years later on 27 March 2007. Riduan bin Isomuddin (Hambali), Mohammed Nazir bin Lep (Lillie) and Mohd Farik bin

³¹¹ Article 17 of the Third Geneva Convention relative to the Treatment of Prisoners of War prohibits “physical or mental torture” and “any other form of coercion”. Refusal to answer must not lead to the prisoner of war being “threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind”. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War prohibits “physical or moral coercion..., in particular to obtain information from them or from third parties”. Article 3 common to the four Geneva Conventions prohibits, *inter alia*, torture, cruel treatment and “outrages upon personal dignity, in particular, humiliating and degrading treatment”.

³¹² *Al Odah et al v. USA et al*. Brief for the Guantánamo detainees. In the US Court of Appeals for the District of Columbia Circuit, 27 May 2005.

³¹³ *Boumediene v. Bush*, Brief *amicus curiae* of retired military officers in support of petitioners, In the US Supreme Court, August 2007.

³¹⁴ 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.” 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).

Amin (Zubair) were taken into custody in Thailand in the summer of 2003. They were put into the secret CIA program for the next three years, held incommunicado at unknown locations before being transferred in September 2006 to Guantánamo where they received CSRT hearings in March and April 2007, more than six months later.

The administration suggests that a detainee will be able to challenge the definition of “enemy combatant” in the DC Circuit Court of Appeals under the DTA, and therefore will be allowed to challenge the legal basis of the detention.³¹⁶ As already noted, however, the government will argue that no international law claim can be made. More generally, under the DTA, the Court of Appeals does not review the lawfulness of the detention, but instead is restricted to examining the CSRT’s “propriety of detention” decisions.³¹⁷

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

Testimony to CSRT of Uighur detainee Abu Bakker Qassim³¹⁵

Restoration of full and effective *habeas corpus* proceedings – at which the concept of “enemy combatant”, its relationship to international law, and its ramifications for the individual so labelled, should be open to effective challenge – is crucial.

5.7 Discriminatory scheme, in violation of international law

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 law³¹⁸

The CSRTs are reserved for use against foreign nationals. While not all differential treatment on the basis of nationality violates international law, states must ensure and respect human

³¹⁵ His 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.

³¹⁶ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007 (“Petitioner also suggest that the DTA is inadequate because they cannot challenge the legal basis for detention. That ignores the express statutory requirement that the court of appeals consider ‘whether the use of [the CSRT’s] standards and procedures... is consistent with the Constitution and laws of the United States’. That provision allows a petitioner to argue that the CSRT standards and procedures – including the definition of an enemy combatant – is inconsistent with the AUMF”). On AI’s position on AUMF, see footnote 19.

³¹⁷ Detainee Treatment Act § 1005 (e)(2).

³¹⁸ Alberto Gonzales hosts ‘Ask the White House’. 18 October 2006, The Attorney General was responding to the question: “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?”

<http://www.whitehouse.gov/ask/20061018.html>.

rights without distinction as to national origin.³¹⁹ The UN Human Rights Committee, for example, in its authoritative interpretation of the ICCPR in relation to aliens who come within the jurisdiction of the state party, has stated:

“Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person.... Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law... Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights.”³²⁰

As a state party to Convention on the Elimination of All Forms of Racial Discrimination, 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). 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.

The US government has created for foreign detainees it labels as “enemy combatants” a system of irremediableness and discrimination, central to which is the CSRT. The fact that the DTA and 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 these laws themselves discriminatory, in violation of international law.

³¹⁹ Thus, for example, “the [Human Rights] Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]”. General Comment 18, Non-discrimination (1989), para. 13. See also General Comment 23 (1994), “a State party is required under [article 2.1 of the ICCPR] to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25.”

³²⁰ General Comment 15, The position of aliens under the Covenant (1986).

5.8 Unreasonable delay and undue haste

*This tribunal was supposed to have happened three years ago. I have been here three years and I am not guilty. My complaint is whether guilty or not, [my case] is supposed to go to a tribunal or court at the time of capture.*³²¹

Article 9(4) of the International Covenant on Civil and Political Rights requires that anyone deprived of their liberty be given access to an independent, impartial and competent court, in order that that court can decide “without delay” on the lawfulness of the detention.

Not only is the CSRT not independent, not competent, and not empowered genuinely to review the lawfulness of the detention, the timing of its review was entirely determined by the executive (although prompted into establishing this improvised tribunal by the *Rasul* ruling). The CSRT was set up in July 2004 some *two and a half years* after the detentions began at Guantánamo. Some detainees did not have decisions on their cases until more than three years after detentions began.

In the case of the 14 “high-value” detainees transferred to Guantánamo in September 2006, CSRTs were not held until six months later, despite the fact that the detainees had been in custody for years, and the decisions of the CSRTs did not emerge until nearly a year after their transfers. The detainees had been held for up to five years by the time that a CSRT was held on their cases.

At the same time, after the CSRT hearings began, the authorities emphasised that the speed with which they were aiming to conduct the process. In briefings on the CSRTs in August and September 2004, the Secretary of the Navy repeatedly emphasised the “acceleration” of the process. For example, on 8 September 2004, he said that although speed was secondary to thoroughness, “we are accelerating... We are accelerating and the number of cases are now starting to pick up each day... we are starting to accelerate the process... We definitely want to do this as fast as we can, but as you know, I keep saying we want to do it as fast as we can”.³²²

According to a study of 102 CSRTs, in 81 per cent of cases the CSRT panel’s decision about status was reached on the same day as the tribunal hearing.³²³ The pace of CSRT hearings peaked in November 2004, when 205 were held (see table on page 35). Lt. Col. Stephen Abraham has described as the overall pace of hearings as “lightning fast”.³²⁴ He has said that:

“There was a constant push by Rear Admiral [James] McGarrah [Director of OARDEC] and Captain [Frank] Sweigart [Deputy Director of OARDEC] to complete CSRT hearings quickly. Captain Sweigart routinely issued reports showing how

³²¹ Afghan national Gholam Ruhani, CSRT hearing, 2004.

³²² Special Department of Defense briefing with Navy Secretary Gordon England, 8 September 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2362>.

³²³ *No-hearing hearings, op. cit.*

³²⁴ Testimony of Stephen E. Abraham, Lieutenant Colonel, US Army Reserve, before the Armed Services Committee, US House of Representatives, concerning the principle of *habeas corpus* for detainees, 26 July 2007.

many hearings had been completed, and he continually demanded that the hearings be conducted at a faster pace. The only thing that would slow down the process was a finding that a detainee was not an enemy combatant. Therefore, there was a strong incentive on the part of the panel members and other participants in the process to find the detainees to be enemy combatants”.³²⁵

Abdul Rahim Abdul Razak al Gingo, a Syrian national, has been in prison for all but a few months of the past eight years, first at the hands of the Taleban in Afghanistan for some 18 months and then in US custody for three times as long. At the time of writing he had been in Guantánamo for more than five years. His case is cited in the US government’s brief to the US Supreme Court in October 2007 as an illustration of the fairness of the CSRT scheme. Yet his plight starkly illustrates the obstacles faced by the Guantánamo detainees in obtaining any form of resolution in their cases within anything approaching a reasonable time, in the face of a government seeking to delay or avoid judicial scrutiny.

At his CSRT hearing on 4 December 2004 – nearly three years after he was taken into US custody in Afghanistan – Abdul Rahim al Gingo told the panel that he was not an “enemy combatant” but someone who had been taken “from prison to prison”. At the time of the attacks in the USA on 11 September 2001, the 23-year-old Abdul al Gingo was in prison in Afghanistan. He said he had gone to Afghanistan from the United Arab Emirates to escape his abusive father, and that he had been imprisoned by the Taleban in Kandahar from May 2000. He told the CSRT that he had been accused of being an “American” spy and tortured for three months, including by electric shocks, as a result of which he had lost much of the use of his right hand and arm. He said he confessed to being a spy under torture, and that he was also coerced into making statements on video about being a suicide martyr.

After the US-led invasion of Afghanistan in October 2001, five videotapes were found in the rubble of suspected *al-Qa’ida* operative Mohammed Atef’s house near Kabul bombed in a US air strike on 16 November 2001. In January 2002 in the USA, Attorney General John Ashcroft and FBI Director Robert Mueller held a press conference about the tapes. The Attorney General said that they “depict young men delivering what appear to be martyrdom messages from suicide terrorists”, although there was no specific targets or timing indicated. He named one of the five as “Abd Al-Rahim”, and stated that the men “may be trained and prepared to commit future suicide terrorist attacks”.³²⁶

Abdul Rahim al Gingo told his CSRT that after the fall of the Taleban he and a co-prisoner had told reporters that “we wanted to go to the Americans” and that “we wanted to be witnesses against the Taliban and al Qaida”. However, after he was identified as one of the men on the tapes, he was taken into US custody in Kandahar, where he says interrogators “kept pushing me, they beat and tortured me... Military intelligence, they told me to say I’m al Qaida, so I told them, ok, I’m al Qaida... I told the Taliban I’m a spy, now I tell you guys I’m al Qaida”. He was transported to Guantánamo in May 2002.

³²⁵ Written statement of Stephen Abraham before the House Armed Services Committee, 26 July 2007.

³²⁶ Attorney General news conference with FBI Director regarding terrorist tapes, 17 January 2002, Department of Justice, <http://www.usdoj.gov/archive/ag/speeches/2002/agcrisisremarks011702.htm>.

The CSRT decided that Abdul al Gingo was an “enemy combatant”. In 2005, the Administrative Review Board listed as a “primary factor” favouring his continued detention the video obtained in Mohamed Atef’s house. If Abdul al Gingo’s allegations that the video was the result of torture are true, the USA is acting in violation of Article 15 of the UN Convention Against Torture.³²⁷

Every step of the way, the US government has blocked judicial scrutiny of Abdul Al Gingo’s detention. Detained in Guantánamo along with hundreds of others for that very reason, it was two and a half years before he received a CSRT hearing. With the passage of the DTA, and then the MCA, judicial review has continued to be denied. In January 2007, for example, US lawyers filed an emergency motion requesting a hearing on Abdul al Gingo’s deteriorating mental state, and filing evidence that he was not receiving treatment appropriate to a victim of torture. In February, it submitted evidence that he had made a suicide attempt and was in continuing psychological distress. On 21 February 2007, the day after the DC Circuit Court of Appeals issued its *Boumediene* ruling that the MCA had stripped the courts of jurisdiction to hear habeas corpus petitions from the detainees, the District Court denied the emergency request for a hearing.

The DTA requires the government, within 180 days of the Act’s enactment on 30 December 2005, to inform Congress of procedures for “periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee”.³²⁸ In July 2006, the Pentagon issued revised CSRT and ARB procedures allowing the Deputy Secretary of Defense to order a new CSRT for a detainee if warranted “in light of new information”.³²⁹ On 5 October 2006, Abdul al Gingo’s *habeas* lawyers filed new evidence with the ARB, including sworn witness statements, supporting his assertions that he should not be designated as an “enemy combatant”.

On 23 and 24 August 2007, the DC Court of Appeals granted a motion to expedite Abdul al Gingo’s case for review under the DTA and set a schedule for briefing by the end of December 2007. However, in another possible indicator of an administration seeking to avoid judicial scrutiny (see above), on 24 August 2007 – nearly a year after the lawyers had filed the new evidence, the Deputy Secretary of Defense ordered that a new CSRT be convened for Abdul al Gingo based on “new evidence”, under OARDEC Instruction 5421.1 of 7 May 2007 (see above). The Director of OARDEC signed a declaration on 13 September 2007 that he expected to convene a new CSRT panel within 60 days, and the government filed a motion in the DC Court of Appeals for the court to delay consideration of the case pending the new CSRT.³³⁰

³²⁷ “Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.”

³²⁸ DTA § 1005(a)(3).

³²⁹ CSRT procedures, 14 July 2006, Enclosure 10A. ARB procedures, 14 July 2006, Enclosure 13A.

³³⁰ *Al Gingo v. Gates*, Respondent’s motion to remand, or, in the alternative, to hold in abeyance pending further proceedings of the Combatant Status Review Tribunal. Including declaration of Frank Sweighart, In the US District Court of Appeals for the DC Circuit, 13 September 2007.

On 9 October 2007, less than a month later, the government filed its brief to the US Supreme Court in *Boumediene*. In support of its position that the CSRT is a fair system, the government cited Abdul al Gincó's case as one in which "a new CSRT was ordered in response to counsel's submission of new evidence bearing on a detainee's status".³³¹

The government brief also seeks to inflict further delays on the detainees in the event that the Supreme Court finds that the detainees have *habeas corpus* rights, and that therefore are owed at least an adequate substitute. If the Court does so, the government argues, it "should decline to rule on the adequacy of the DTA at this time, but should instead require petitioners to exhaust their available DTA remedies. Because petitioners have not exhausted their remedies under the DTA, the exact nature of DTA review remains uncertain". The Court "should not attempt to evaluate the adequacy of the DTA" until it can do so "in a concrete setting".³³² For the detainees, it has been as if their right to due process has been *buried* in concrete over the past six years. There must be no more delays and no more lack of legal clarity for the detainees and their families. "Liberty finds no refuge in a jurisprudence of doubt".³³³

5.9 Non-transparent: obscuring the reason for (unlawful) detention

*Executive detention... may not be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.*³³⁴

The government has said that the detention of an "enemy combatant" – possibly for his lifetime – is "not an act of punishment but of security and military necessity."³³⁵ In the *Rasul* decision in 2004, a US Supreme Court Justice noted that

"Indefinite detention without trial or other proceeding... suggests a weaker case of military necessity and much greater alignment with the traditional function of *habeas corpus*. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of

³³¹ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

³³² *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

³³³ *Planned Parenthood v. Casey*, 505, U.S. 833 (1992). The government's October 2007 brief to the US Supreme Court in *Boumediene* cites *Planned Parenthood v. Casey* in arguing that the Court must respect the doctrine of *stare decisis* (precedent) in not undermining *Johnson v. Eisentrager* (1950), a ruling that has been central to its choice and defence of Guantánamo as a location to hold "war on terror" detainees. E.g., "The basis for denying jurisdiction to entertain a habeas petition filed by an alien held at [Guantánamo] rests on *Eisentrager v. Johnson*... In that case, the Supreme Court held that federal courts did not have authority to entertain an application for habeas relief filed by an enemy alien who had been seized and held at all relevant times outside the territory of the United States".

Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba. 28 December 2001, *op. cit.*

³³⁴ *Rumsfeld v. Padilla*, dissent, *op. cit.*

³³⁵ Response of the United States of America dated 21 October 2005, to inquiry of the UNHCR Special Rapporteurs dated 8 August 2005, pertaining to detainees at Guantánamo Bay, p. 3. The government has repeated this in its October 2007 brief to the US Supreme Court in the *Boumediene* case ("Petitioners are being detained for non-punitive reasons during the ongoing conflict").

weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”³³⁶

What was two and a half years of detention by the time of the *Rasul* ruling has now more than doubled. The use of the CSRT, with which the government seeks to obliterate the traditional function of *habeas corpus*, constitutes a substantial part of the problem.

Article 9.1 of the International Covenant on Civil and Political Rights states that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.” These grounds and procedures must be compatible with international law. Prompt and transparent review by an independent, impartial and competent court serves to protect this right and prevent the executive from holding detainees for unlawful reasons and exploiting them in unlawful ways. The opposite is true of the CSRT system. The lack of independence and transparency of the CSRT means that it can be used to facilitate unlawful custody and to obscure the reasons behind the detention, also violating article 9.2 of the ICCPR which requires detainees to be informed of the (real) reason they have been deprived of their liberty.

Chinese Uighur detainee Ali Mohammed, also known as Anvar Hassan, has been held in Guantánamo since February 2002 after being taken into custody in December 2001 in Pakistan to where he and other Uighurs had fled from Afghanistan following the US bombing campaign there. Even before Ali Mohammed’s CSRT in November 2004, government interrogators had concluded that he had been in Afghanistan “to train and learn to fight for the Uyghur [sic] cause against Chinese oppression and was not fighting for the Taliban or Al Qaida” and that

I went to the Pakistani government to turn myself into the Yemeni embassy. The Pakistanis then sold us. We were tortured in Kandahar by beatings. Since we arrived in Cuba we have been mentally persuaded. We have been here for three years. We have nothing here, no rights, no trials, nothing.

Abd al Malik Abd Al Wahab, Yemeni national, CSRT hearing, 2004.

he did not “represent a threat to the United States or its interests”. They advised that “all efforts be made to expedite” his release to and asylum in a country not under Chinese rule. On 16 November 2004, a CSRT panel (Panel 18) decided that he was not properly classified as an “enemy combatant”.³³⁷ The Pentagon then ordered that a second CSRT panel be convened “to review additional classified evidence, unavailable to the previous Tribunal”.³³⁸ Panel 32 was convened and on 25 January 2005 it decided that Ali Mohammed was “properly designated as an enemy combatant”, a decision finalized by the CSRT authorities on 25 February 2005. It has come to light that, prior to Panel 32’s consideration of the case, an email from Pentagon authorities told it that “points to consider” in determining Ali Mohammed’s status included the fact that other identically situated Uighurs had been classified as “enemy combatants” and that “inconsistencies will not cast a favorable light on the CSRT process” (see also page 53). The email further noted that “properly classifying” the

³³⁶ *Rasul v. Bush*, *op. cit.*, Justice Kennedy concurring.

³³⁷ *In re Ali*, Petition for original writ of *habeas corpus*, In the US Supreme Court, 12 February 2007.

³³⁸ *In re Ali*. Government motion to dismiss. In the US Supreme Court, May 2007.

detainees as “enemy combatants” would provide an opportunity to “further exploit them here in GTMO”.³³⁹

Exploitation in this context means exploiting the detainees’ “intelligence value”. Since the attacks on 11 September 2001, events which raised questions about the quality of US counterterrorism intelligence and generated fears of further attacks, the US administration has viewed those it brands as “enemy combatants” as potential sources of intelligence to be subjected to a “continuous” interrogation cycle.³⁴⁰ Information gleaned from one detainee may be used to detain another, who is then himself put into indefinite detention as an “enemy combatant”.³⁴¹ This “continuous” cycle supposes that intelligence can be obtained from a detainee “years” after the interrogation process began.³⁴² Under this process – “especially important in the War on Terrorism” and especially in the case of those identified as “enemy combatants” – 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”.³⁴³ Access to lawyers disrupts the process and puts national security at risk.³⁴⁴

The use of coercion against detainees forms part of the cycle.³⁴⁵ Information obtained under such coercion can then be relied upon by the CSRT and ARB to justify continued detention, while the detainee seeking to challenge his “enemy combatant” status is denied access to the classified methods used to obtain the (often classified) information against him (see above).

The former head of the Justice Department’s Office of Legal Counsel has written that “the administration’s aim was to go right to the edge of what the torture law prohibited, to exploit

³³⁹ *In re Ali*, Petition for original writ of *habeas corpus*, 12 February 2007, *op. cit.*

³⁴⁰ Declaration of US Army Colonel Donald D. Woolfolk, 13 June 2002, filed in *Hamdi v. Rumsfeld*, <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdi61302wlfkdec.pdf>. (“As new intelligence information is derived from any source, the opportunity to learn additional information through interrogation is presented... Disruption of the interrogation environment, such as through access to a detainee by counsel, undermines this interrogation dynamic.... [T]he intelligence gathering process must be continuous. As new information is learned from other sources it serves a new avenue of interrogation with detained enemy combatants”).

³⁴¹ Ali al-Marri for example was in the civilian law enforcement system in June 2003 when “due to recent credible information provided by other detainees in the War on Terrorism” he was labeled as an “enemy combatant” by presidential order and transferred to indefinite military custody without charge where he remains over four years later. Enemy combatant taken into custody. Department of Defense news release, 23 June 2003, <http://www.defenselink.mil/releases/release.aspx?releaseid=5481>.

³⁴² Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9 January 2003, http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

³⁴³ *Ibid.*

³⁴⁴ Woolfolk and Jacoby declarations, *op. cit.*

³⁴⁵ For example, the torture and other ill-treatment of Mohamedou Ould Slahi, who has been held in Guantánamo since August 2002, appears to have been influenced by what a detainee held in secret US custody told his interrogators. *USA: Rendition – torture – trial?* September 2006, *op. cit.* And, as noted above, the interrogation of Mohammed al-Qahtani allegedly “provided detailed information about 30 of Osama Bin Laden’s bodyguards who are also held at Guantánamo”.

every conceivable loophole in order to do everything legally possible to uncover information that might stop an attack”.³⁴⁶ Treating detainees as “enemy combatants” from whom information could be taken rather than due process given led to the removal of these detentions from the scrutiny of the courts, the erosion of other protections against torture and other ill-treatment, and the creation of military commissions and the CSRT scheme that could rely upon coerced information.³⁴⁷

The protection of public security is a duty of government, including as an obligation of international human rights law, and intelligence-gathering is a necessary function in pursuit of this objective. This must be pursued within the rule of law, however, and in a manner consistent with other human rights obligations.³⁴⁸ Using detainees held indefinitely and incommunicado or virtually incommunicado in order to compensate for past intelligence failures or to fill perceived intelligence gaps through a “continuous” interrogation cycle is abusive, unlawful and unreliable.³⁴⁹ It denies the possibility of faulty intelligence lying behind the detainee’s deprivation of liberty, dismisses the inherent human dignity of the human being, flouts the presumption of innocence, and violates the right of all human being to be equal before the law, not separated out depending on what they might or might not know.

³⁴⁶ Jack Goldsmith, *The Terror Presidency* (2007), *op. cit.*, page 146. Amnesty International believes that the government has used policy to drive the law rather than vice versa. See, *USA: Five years on the ‘dark side’: A look back at five years of ‘war on terror’ detentions*, AI Index: AMR 51/195/2005, December 2005, <http://web.amnesty.org/library/Index/ENGAMR511952005>, and also *USA: Law and executive disorder: President gives green light to secret detention program*, AI Index: AMR 51/135/2007, August 2007, <http://web.amnesty.org/library/Index/ENGAMR511352007>.

³⁴⁷ The presidential decision not to apply Geneva Convention protections to the detainees followed advice from the then White House Counsel that such a decision would “preserve flexibility” in a “new kind of war” which “places a high premium on...the ability to quickly obtain information from captured terrorists and their sponsors” and “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners”. He also advised that it would “substantially” reduce the threat of future domestic criminal prosecutions of US agents for war crimes. Alberto R. Gonzales. Memorandum for the President: Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban, Draft, 25 January 2002.

³⁴⁸ “We, the States Members of the United Nations, resolve...to recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law, and international humanitarian law”. Global Counter-Terrorism Strategy, adopted by the UN General Assembly, 8 September 2006. “In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously.... Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law.” *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis, dissenting. “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”. *Jackson v. Denno*, 378 U.S. 368 (1964).

³⁴⁹ “[I]n the long run, intelligence under law is the only sustainable intelligence”. Former Deputy Attorney General James B. Comey (2003 to 2005), quoted in *Secret US endorsement of severe interrogations*, New York Times, 4 October 2007.

Principle 21 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prohibits governments from taking “undue 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”. As four US Supreme Court Justices stated in 2004 in relation to a “war on terror” detention:

“Executive detention...may not be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”³⁵⁰

The administration has said that all those detained at Guantánamo “represent a threat to the United States and its allies”.³⁵¹ However, the CSRTs and ARBs can confirm “enemy combatant” status and justify continued detention even if the person does not pose a direct or immediate threat. Indeed, this administrative review scheme was devised for use in Guantánamo, a “strategic interrogation facility”, as part of a system aimed at keeping detainees from the courts and interrogated for purposes “*other than in direct and immediate support of ongoing military operations*” (emphasis added).³⁵² A previously classified Pentagon report on interrogations also revealed that the concept of an “enemy combatant” includes individuals who do not themselves pose a direct or immediate threat. The report stated that “although unlawful enemy combatants *may not pose a threat to others* in the classic sense in substantive due process cases, the detainees here may be able to prevent great physical injury to countless others through their knowledge of future attacks” (emphasis added).³⁵³ According to the Secretary of Defense speaking soon after the Guantánamo detentions began, “when we have gotten out of them the information that we feel is appropriate and possible, very likely we’ll let as many countries as possible have any of their nationals they would like and they can handle the law enforcement prosecution.”³⁵⁴ More than four years later, President Bush reiterated that “enemy combatants” may be released or transferred to other governments “if we determine that they do not pose a continuing threat and no longer have significant intelligence value... In some cases, we determine that individuals we have captured pose a significant threat, *or* may have intelligence that we and

³⁵⁰ *Rumsfeld v. Padilla*, dissent, *op. cit.*

³⁵¹ Guantanamo Bay 2006 Administrative Review Board results announced. Department of Defense, 6 March 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=10582>.

³⁵² Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism, *op. cit.*, §§VII and VIII. [“The use of exceptional interrogation techniques should be limited to specified strategic interrogation facilities; when there is a good basis to believe that the detainee possesses critical intelligence... (such facilities at this time include Guantanamo, Cuba)”. and §1, Strategic interrogation is that conducted “at a fixed location created for that purpose”, by “a task force or higher level component” and “other than in direct and immediate support of ongoing military operations”].

³⁵³ *Ibid.*, §C. 2. b.

³⁵⁴ Secretary Rumsfeld interview with *The Telegraph*, 23 February 2002, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2780>.

our allies need (emphasis added)... 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. Some of these individuals are taken to the United States Naval Base at Guantánamo Bay, Cuba.”³⁵⁵

Each detainee subject to a CSRT has already been “determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense”.³⁵⁶ Once a detainee is labeled as an “enemy combatant”, according to the then Secretary of the Navy, who oversaw the CSRT scheme during the period when most of the tribunals were held, “the question is, are they still a threat *or* a value to the United States?” (emphasis added).³⁵⁷ Or, “frankly, do they have intelligence value to America, because if they do, we obviously don’t want to release them right away”.³⁵⁸ The Administrative Review Board procedures state that “although the threat determination for each detained enemy combatant by the ARB is the most critical element in the review process”, other factors in assessing the need for continuing detention include “whether the enemy combatant is of continuing intelligence value”. Indeed, such “other factors” can “form the basis for continued detention”.³⁵⁹

Even the detention of young children can be based on this criterion. Releasing three juvenile detainees from Guantánamo after more than a year in US detention – individuals who were as young as 13 years old at the time they were taken into custody – the Pentagon stated that “age is not a determining factor in detention” and that the three children had been released after the government determined that they “no longer posed a threat to our nation, *that they have no further intelligence value* and that they are not going to be tried by the US government for any crimes” (emphasis added).³⁶⁰

Such justifications for indefinite, virtually incommunicado detention, potentially for the rest of the individual’s life, continue to this day. The transfer of two “dangerous terrorist suspects” to Guantánamo in June 2007 was justified, for example, because “the detainees being held at

³⁵⁵ President Bush discusses creation of military commissions, *op. cit.*, 6 September 2006.

³⁵⁶ CSRT Order, §a.

³⁵⁷ Special Department of Defense briefing with Navy Secretary Gordon England, 30 July 2004.

³⁵⁸ Special Defense Department briefing with Secretary of the Navy Gordon England, 23 June 2004.

See also Special Defense Department briefing on status of military tribunals, 20 December 2004, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2043> (“If you are an enemy combatant, now the question arises: Are you held indefinitely?... Are they still a threat, *or* do they have value, intel value..? So we make that determination. And we can decide to release an individual ...if we decide that they’re not a threat and have no intel value to America”).

³⁵⁹ Revised Implementation of ARB Procedures, 14 July 2006, Cover memorandum §1c, and Enclosure §3(f)(1)(c), <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf>.

³⁶⁰ Transfer of juvenile detainees completed. US Department of Defense news release, 29 January 2004, <http://www.defenselink.mil/releases/release.aspx?releaseid=7041>. A UN Special Rapporteur has recently revealed that he has received “alarming reports that the young age of some detainees was only taken into account by applying interrogation methods that utilized their age-specific phobias and fears”. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America. Advanced Edited Version. UN Doc.: A/HRC/6/17/Add.3, 25 October 2007, para. 15.

Guantánamo have provided information essential to our ability to better understand how Al Qaeda operates”.³⁶¹ The Pentagon at the same time emphasized that the newly transferred detainees would receive CSRTs.

Antithetical to the function of *habeas corpus*, these executive bodies are central to an unlawful detention regime aimed at avoiding judicial scrutiny of executive conduct and denying detainees their day in court.

6. Turning to secrecy & ‘war’ to defend CSRT scheme

*[It is] a misperception that the Government Information [is] sitting in a file drawer and readily could be turned over...The reality is that there is no readily accessible set of Government Information for completed CSRTs.*³⁶²

On 20 July 2007, a three-judge panel of the DC Circuit Court of Appeals made its first ruling in relation to the framework under which it would review CSRT decisions under the MCA/DTA regime. Although the court did not grant the government the ultra-narrow review it was seeking, the government’s response to the ruling, and in turn the Court’s response to the government, gives cause for concern that what the administration considers “reasonably available” information under its global war framework, and its reliance on secrecy, will continue to severely curtail the ability of the detainees to challenge CSRT determinations of “enemy combatant” status.

In its July 2007 ruling, the Court of Appeals leant towards more rather than less information being reviewed.³⁶³ Thus the record to be reviewed will consist of all the information the CSRT “is authorized to obtain and consider pursuant to the procedures specified by the Secretary of Defense”, specifically defined under the CSRT procedures as “such reasonably available information in the possession of the US Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant” (this is known as the “Government Information”).³⁶⁴ The government had sought to have the Court of Appeals review only the “Government Evidence”, that is, the portion of the Government Information presented to the CSRT.

However, although the Court of Appeals said that it would presume that the lawyer for a detainee has “a ‘need to know’ all Government Information concerning his client, not just the portions of the Government Information presented to the Tribunal”, such a presumption is overcome “to the extent the Government seeks to withhold from counsel highly sensitive

³⁶¹ Terror suspect transferred to Guantanamo, Pentagon news releases, 6 June and 22 June 2007.

³⁶² *Bismullah v. Gates*. Government’s petition for rehearing and suggestion for rehearing *en banc*, In the US Court of Appeals for the DC Circuit, September 2007.

³⁶³ *Bismullah v. Gates*, US Court of Appeals for the District of Columbia Circuit, 20 July 2007 (“the court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the Tribunal’s status determination without seeing all the evidence, any more than one can tell whether a fraction is more or less than one half by looking only at the numerator and not at the denominator”).

³⁶⁴ CSRT procedures, § E(3).

information, or information pertaining to a highly sensitive source”. Such information would be presented to the court *ex parte* and *in camera*, out of the view of the detainee or his lawyer.

Nevertheless, the government asked the Court of Appeals to reconsider its decision, saying that it “establishes a record regime that is grossly at odds with the wartime precedent that Congress had in mind when it enacted the DTA”. Its brief to the Court said:

“The panel’s ruling appears to be based, in part, on an assumption that this broader class of material – termed ‘Government Information’ – is sitting in a file drawer and readily available for production. But, in fact, the material is not readily available, nor can it reasonably be recompiled. If the decision is allowed to stand, the Government therefore will be required to undertake searches of all relevant Department of Defense components and all federal agencies in an effort to recreate a ‘record’ that is entirely different from the record before the Tribunals that made the decision at issue in a DTA case.”³⁶⁵

The government filed five unclassified declarations in the Court of Appeals in support of its argument that the judges should reconsider their earlier decision and narrow the scope of the review. The declarations were from the Director of the CIA, the Director of the FBI, the Director of the National Security Agency (NSA), the Director of National Intelligence, and the Deputy Secretary of Defense. The government also attached a “secret declaration” from the FBI Director, and sought to file “top secret” declarations from the Directors of the CIA and NSA for access by the judges only. In essence, the five unclassified declarations stated that for the government to comply with the Court’s ruling would endanger national security and drain intelligence and military resources at a time of “war”.³⁶⁶

³⁶⁵ *Bismullah v. Gates*. Petition for rehearing and suggestion for rehearing en banc, In the US Court of Appeals for the DC Circuit, September 2007.

³⁶⁶ 1. Declaration of General Michael V. Hayden, USAF, Director, Central Intelligence Agency, 4 September 2007 (Referred to the “extremely grave damage to the national security that reasonably could be expected if the ‘Government Information’ is provided to the Court and detainee counsel”. Given the number of lawyers representing the detainees, “unauthorized disclosures” of sensitive information, including in relation to “clandestine intelligence activities”, were “not only probable, but inevitable”). 2. Declaration of Robert S. Mueller, III, Director, Federal Bureau of Investigation, 6 September 2007 (“the requirement that the FBI disclose, even to properly cleared detainee counsel, all of the information in its possession that the Combatant Status Review Tribunals were authorized to obtain and consider would cause serious damage to the national security”). 3. Declaration of Lieutenant General Keith B. Alexander, Director, National Security Agency, 7 September 2007 (“The breadth of information and dissemination to counsel for all of the detainees that is contemplated by the Court’s decision in this case, would create a very real danger of disclosure (intentional or inadvertent) of sensitive intelligence information to include sources and methods of collection...[This] could cause exceptionally grave damage to the national security of the United States”). 4. Declaration of J. Michael McConnell, Director of National Intelligence, 6 September 2007 (the ruling by the Court of Appeals “will result in the Intelligence Community having to provide the Court and detainees counsel with thousands of pages of material, including some of the Government’s most sensitive and highly classified records... I believe that exceptionally grave damage to national security reasonably can be expected to stem from the Court’s decision”). 5. Declaration of the Honorable Gordon R. England,

The Court of Appeals denied the government's petition for a rehearing. However, in its October 2007 brief to the Supreme Court in the *Boumediene* case, the government has noted that in denying the administration's request, the Court of Appeals had "issued a decision elaborating on its initial decision".³⁶⁷ In this "elaboration", the Court of Appeals emphasized that its July 2007 decision requires the government "to collect (and preserve for judicial review) *only* the relevant information in its possession that is *reasonably available*" (emphasis added).³⁶⁸ The Court suggested that the government, in claiming that the scope of the review would burden and sidetrack the intelligence community at a time of war, "is over-reading" the Court's ruling and "under-reading" the CSRT procedures. The Court emphasized that information in the possession of the government bearing on the issue of whether a detainee is an "enemy combatant" falls within the definition of Government Information "only if it is reasonably available"... A search for information without regard to whether it is 'reasonably available' is clearly not required".

An alternative to "trying to reconstruct the Government Information in its possession without regard to whether that information is reasonably available", the Court suggested, would be to "convene a new CSRT" in any particular case, using "the relevant information in its possession that is then *reasonably available*" (emphasis in original). The government has since said that it is considering holding new CSRT hearings as a way of avoiding disclosure of certain information.³⁶⁹ This would cause further delays to the detainees having even limited judicial review under the DTA, let alone the *habeas corpus* review to which they are entitled under international law.

On the question of the government's stated concern about the risk of disclosure of classified information and the damage that would cause to national security, the Court of Appeals noted that prior to its July 2007 decision, the government had told the court that it would need to withhold "only a small amount of information" from a detainee's lawyer. Now the government was anticipating that a substantial amount of information would be non-disclosable although, the Court noted, "it is unclear as to why" this shift had occurred. The Court reminded the government that under the CSRT procedures, "classified information... which the originating agency declines to authorize for use in the CSRT process is not reasonably available".³⁷⁰

In the context of the "war on terror", the administration has resorted to a level of secrecy that has been widely criticized, including by the UN Committee against Torture and the UN

Deputy Secretary of Defense, 7 September 2007 ("Compliance with the *Bismullah* court order that requires the gathering of information as has been described here will require [the Department of Defense] to pull resources away from warfighting and intelligence gathering missions that are essential to fighting the Global War on Terrorism. We cannot overstate the importance of ensuring that our components can focus on their primary missions").

³⁶⁷ *Boumediene v. Bush*. Brief for the respondents, in the US Supreme Court, October 2007.

³⁶⁸ *Bismullah v. Gates*, On Petition for Rehearing, US Court of Appeals for DC Circuit, 3 October 2007.

³⁶⁹ *US mulls new status hearings for Guantánamo inmates*. New York Times, 15 October 2007.

³⁷⁰ CSRT procedures, §D(2).

Human Rights Committee.³⁷¹ The government's resort to secrecy, including in relation to interrogation techniques and detention conditions, has contributed to human rights violations and a lack of accountability for them. Detainees must be able effectively to challenge unlawful detention practices, not least when the fruit of such abuse may be used to justify their continued detention. As described above, the use of classified evidence against detainees in justifying their indefinite detention without charge as "enemy combatants" has been one of the fundamental flaws of the CSRT process.

In 2004, the US Supreme Court stated that "a court that receives a petition for a writ of *habeas corpus* from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved... We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns."³⁷²

Restoration of *habeas corpus* must be a part of restoring transparency and lawfulness to all US detentions.

7. Conclusion

*States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law*³⁷³

*Together we must strengthen the international community and promote the rule of international law, for the sake of our collective interest and common values.*³⁷⁴

Each and every detainee being held in Guantánamo is arbitrarily detained in violation of international human rights law. Their plight continues to cause deep international concern. Recognition and enforcement of their right to *effective judicial review* of their detention is long overdue. All branches of the US government must do what they can to bring this about as a matter of priority.

The denial of *habeas corpus* to the detainees held in Guantánamo and elsewhere by the USA has been part of a detention regime developed to avoid judicial scrutiny of executive action in the "war on terror". The human rights results have been predictable. Removed from the protective mechanism of *habeas corpus*, detainees have been subjected to enforced

³⁷¹ 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 (2006). 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 (2006).

³⁷² *Hamdi v. Rumsfeld* (2004), *op. cit.*

³⁷³ United Nations Security Council, Resolution 1456 (20 January 2003), UN Doc.: S/RES/1456 (2003).

³⁷⁴ The United States and international law. John B. Bellinger III, Legal Adviser, US State Department, address in The Hague, Netherlands, 6 June 2007, <http://www.state.gov/s/l/rls/86123.htm>.

disappearance, torture or other ill-treatment, secret detentions and transfers, as well as arbitrary detentions at the hands of US forces.

The USA has continued to criticize detention without judicial review in other countries. At the same time, the administration has broken its promise to put the rule of law and “limits on the absolute power of the state” at the heart of its pursuit of national security following the attacks of 11 September 2001. Instead, the executive has been wedded to a broad strategy aimed at avoiding meaningful judicial review, violating the rights of a whole category of detainees in the process. It has also been willing to exploit the cases of individual detainees to serve this end. The CSRT is a part of this system. Narrow judicial review under the DTA does not remedy this travesty.

The Chairperson of the UN Working Group on Arbitrary Detention and the UN Special Rapporteur on the independence of judges and lawyers have expressed their deep concern about the legal regime applied by the USA to the Guantánamo detainees. In their view,

“the legal regime applied to these detainees seriously undermines the rule of law and a number of fundamental universally recognized human rights, which are the essence of democratic societies. These include the right to challenge the lawfulness of the detention before a court (ICCPR, art. 9.4) and the right to a fair trial by a competent, independent and impartial court of law (ICCPR, art. 14); they protect every person from arbitrary detention and unjust punishment and safeguard the presumption of innocence”.³⁷⁵

In an *amicus curiae* brief filed in the *Boumediene* case in the US Supreme Court in August 2007 supporting the international legal right of the Guantánamo detainees to *habeas corpus*, nearly 400 UK and European parliamentarians have stressed that “while this case presents a number of contested issues of US law, to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of States vis-à-vis individuals within their power will survive the terrorist threat.”³⁷⁶

The USA must fully recognize and adhere to *habeas corpus* rights as part of restoring the rule of law and respect for human rights principles – the only effective long-term route to security, as the USA itself acknowledges.³⁷⁷

³⁷⁵ Situation of detainees at Guantánamo Bay. 27 February 2006, *op. cit.*, para. 17.

³⁷⁶ *Al Odah v. USA*, *Amicus curiae* brief of 383 United Kingdom and European parliamentarians in support of petitioners, In the US Supreme Court, 24 August 2007.

³⁷⁷ E.g. as expressed in the National Security Strategy and National Strategy for Combating Terrorism, *op. cit.* (in the former: “America must stand firmly for the nonnegotiable demands of human dignity: the rule of law; limits on the absolute power of the state...” and in the latter: “We understand that a world in which these values are embraced as standards, not exceptions, will be the best antidote to the spread of terrorism. This is the world we must build today”). Also the State Department asserts that “The United States understands that the existence of human rights helps secure the peace, deter aggression, promote the rule of law, combat crime and corruption, strengthen democracies, and prevent humanitarian crises.” <http://www.state.gov/g/drl/hr/>.

Appendix 1: Framework to end unlawful detentions

There are undoubtedly substantial challenges to closing the Guantánamo detention facility. Yet the facility is of the USA's own making and the international opposition it has drawn is a direct result of the US government's refusal to bring the detentions into compliance with international law and standards. The government should turn its energies to bringing about closure of the Guantánamo facility without resorting to any practice which would transfer the human rights violations to other locations, including inside the USA. There must be no secret detentions or transfers, no proxy detentions, no transfers to situations of abuse, and no detentions in any other facility under US control where it is claimed that international human rights and humanitarian law do not apply. With this mind, Amnesty International calls for the following key points to be included in any strategy pursued.

General

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 nearly six 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. 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.
5. All detainees must be able to challenge the lawfulness of their detention in an independent, impartial and competent 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.
7. Those currently held in Guantánamo should be released unless they are to be promptly 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 promptly charged with a recognizable crime under law and tried before an independent, impartial and competent 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 proceedings before 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, including with regard to the admissibility of coerced evidence, and any sentencing take into account the length 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), should 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.

When considering returns, 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 legally unenforceable and inherently unreliable. In addition, the USA must not impose conditions, such as continued detention, upon the transfer of detainees under which the receiving state would, by accepting such conditions, be violating their obligations under international human rights law.

- (b) **Asylum and other forms of protection 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 criteria set out in 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 having access to UNHCR. Individuals 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 the USA's obligations under 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. Asylum applicants and those in need of other forms of protection 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.
- (c) **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 qualify for protection in the USA or 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 and preferences. Any 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. There must be no transfers to third countries from where individuals may in turn be forcibly sent to a country where they would be at risk of serious human rights violations.³⁷⁸

Reparations

12. The USA has an obligation under international law to provide prompt and adequate reparation, including restitution, compensation, rehabilitation, satisfaction, 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.³⁷⁹ There must be no limitations placed on the right of victims to seek reparations in the US courts.

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. It should also grant such access to Amnesty International, which has been seeking it since 2002.

³⁷⁸ See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America. Advanced Edited Version. UN Doc.: A/HRC/6/17/Add.3, 25 October 2007, para. 58 (“In particular, the Special Rapporteur urges the United States to invite the United Nations High Commissioner for Refugees to conduct confidential individual interviews with the detainees, in order to determine their qualification as refugees and to recommend their resettlement to other countries. He also urges the United States not to require from receiving countries the detention or monitoring of those returned in cases where such measures would not have basis in international and domestic law, and equally urges receiving States not to accept such conditions.”)

³⁷⁹ 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”.

While closure of the Guantánamo facility and full restoration of the rule of law to all US detentions remains the responsibility of the US authorities, the USA will undoubtedly need the assistance of other governments in bringing this about. Amnesty International urges other governments to do all they can to assist the USA in bringing its detentions, trials and releases of detainees into full compliance with international law and standards. All governments must ensure maximum possible transparency in their actions, and must ensure that they do not become complicit in any unlawful act proposed or perpetrated by any other government.

Other countries

1. Other governments should give active 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.³⁸⁰
2. All 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.
3. 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 should call on the USA to bring an end to secret detentions and interrogations.
4. 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.
5. 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.

³⁸⁰ See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Addendum: Mission to the United States of America. Advanced Edited Version. UN Doc.: A/HRC/6/17/Add.3, 25 October 2007, para. 57. "Notwithstanding the primary responsibility of the United States to resettle any individuals among those detained in Guantánamo Bay who are in need of international protection, the Special Rapporteur recommends that other States be willing to receive persons currently detained at Guantánamo Bay. The United States and the United Nations High Commissioner for Refugees should work together to establish a joint process by which detainees can be resettled in accordance with international law, including refugee law and the principle of non-refoulement".

Appendix 2: A chronology of transfers and litigation

Date	Detainee transfer/releases	Pentagon comment on transfer/release
11/01/02	FIRST DETAINEES ARRIVE AT GUANTÁNAMO	
05/04/02	Yaser Hamdi transferred to military custody on the USA mainland after his US citizenship is discovered	“Given the likelihood that Hamdi is an American citizen...deemed appropriate to move him to the United States”
31/07/02	District Court rules in <i>Rasul v. Bush</i> that it has no jurisdiction to hear <i>habeas corpus</i> petitions from foreign nationals held in Guantánamo. Appealed to Court of Appeals.	
26/10/02	Four detainees released	“no longer posed a threat to US security”
11/01/03	ONE YEAR OF GUANTÁNAMO DETENTIONS	
11/03/03	Court of Appeals upholds District Court <i>Rasul v. Bush</i> ruling. Appealed to Supreme Court	
09/05/03	13 detainees released	“no longer posed a threat to US security”
16/05/03	One detainee released, four transferred to Saudi Arabia for continued detention	“either no longer posed a threat to US security or no longer required detention by the United States”.
03/07/03	Six detainees made subject to Military Order of 13 November 2001, making them eligible for trial by military commission. Identities of detainees not released.	
18/07/03	27 detainees released “to their countries of origin”	“either no longer posed a threat to US security or no longer required detention by the United States”
10/11/03	Supreme Court agrees to take the <i>Rasul v. Bush</i> case to consider whether US courts have jurisdiction to consider <i>habeas corpus</i> petitions from Guantánamo detainees	
21/11/03	20 detainees released “to their home countries”	“either no longer posed a threat to US security or no longer required detention by the United States”
23/11/03	“Approximately 20 detainees” transferred to Guantánamo “from the US Central Command area of responsibility”. Pentagon states that the number of detainees at Guantánamo is “approximately 660”. This is down from the believed peak of about 680 detainees.	
11/01/04	TWO YEARS OF GUANTÁNAMO DETENTIONS	
29/01/04	Three juvenile detainees released “to their home country” (Afghanistan)	“no longer posed a threat to our nation, have no further intelligence value, and are not going to be tried by the US government for any crimes”
29/01/04	Pentagon states that, to date, 91 detainees have been transferred from Guantánamo. However, only 73 such transfers have been announced (including Yaser Hamdi).	
13/02/04	One Spanish national transferred to Spain for continued detention	“no longer required detention by the United States”

24/02/04	One Sudanese and one Yemeni Guantánamo detainee charged for trial by military commission	
25/02/04	One Danish national released to Denmark	“based on assurances provided by the Government of Denmark that it will accept responsibility for its national...”
01/03/04	Seven Russian detainees transferred for continued detention by the Russian government	“decision to transfer these detainees was made after extensive discussions between our two governments”
03/03/04	Pentagon releases a draft administrative review process that would “reassess at least annually the need to continue to detain each enemy combatant” in Department of Defense custody at Guantánamo. The Pentagon asserts that the law of war permits such detention “without the use of a review process” but that the authorities had “decided as a matter of policy to institute this review process.” The Pentagon states that it expects the procedures to be finalized “in a few weeks”.	
09/03/04	Five British detainees transferred to the British government.	“decision to transfer these detainees was made after extensive discussions between our two governments”
15/03/04	23 Afghan and three Pakistani detainees released	“there is a process to review the status of detainees”. highly skilled in concealing the truth”
From now, for the next two years, the Pentagon’s detainee transfer announcements emphasize that “the circumstances in which detainees are apprehended can be ambiguous, and many detainees are		
02/04/04	15 detainees released to Afghanistan, Turkey, Tajikistan, Sudan, Iraq, Jordan and Yemen	“there is a comprehensive interagency process to review the status of detainees”
20/04/04	Oral argument in Supreme Court in <i>Rasul v. Bush</i>	
18/05/04	Pentagon announces that Deputy Secretary of Defense has issued an Order establishing administrative review procedures to make an annual assessment of “the need to continue to detain each enemy combatant” held at Guantánamo Bay	
23/06/04	Secretary of the Navy announces that he has been designated to oversee an annual administrative review process.	
28/06/04	Supreme Court issues <i>Rasul v. Bush</i> judgment that courts have jurisdiction to hear <i>habeas corpus</i> petitions from Guantánamo detainees. Court also rules in <i>Hamdi v. Rumsfeld</i> , in the case of Yaser Hamdi, that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker”. The Court refers to “the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal” and points to US Army Regulation (AR) 190-8, under which the USA provides the “competent tribunal” required under Article 5 of the Third Geneva Convention to determine whether detainees are prisoners of war or not	
29/06/04	Charges against three Guantánamo detainees referred to military commission	

07/07/04	Combatant Status Review Tribunals established by Pentagon order to determine whether Guantánamo detainees are “properly detained” as “enemy combatants”. The government stresses that the CSRTs are modelled on AR 190-8.	
07/07/04	Pentagon announces that nine more detainees subject to Military Order of 13 November 2001, making them eligible for trial by military commission. No identities given.	
SOME NOTES ON DETAINEE CASE ACTIVITY UP TO THE RASUL RULING		
<p>- Until the <i>Rasul v. Bush</i> case concerning whether the courts had jurisdiction to consider <i>habeas corpus</i> petitions filed on behalf of Guantánamo detainees had been decided by the DC Circuit Court of Appeals and was to be appealed to the Supreme Court, the Pentagon announced the release or transfer of <i>four</i> foreign detainees from the base over a period of <i>14</i> months.</p> <p>- In the <i>eight</i> months between the DC Court of Appeals <i>Rasul</i> ruling and the decision by the Supreme Court to take the appeal from that ruling, at least <i>45</i> detainees were released from Guantánamo, according to the Pentagon in public announcements.</p> <p>- In the <i>five</i> months between the Supreme Court agreeing to consider the <i>Rasul</i> case and submission of written and oral arguments in the Court, at least <i>78</i> detainees were transferred or released, according to the Pentagon. In the <i>six weeks</i> before oral argument, <i>46</i> detainees were released – including UK detainee Shafiq Rasul whose case led the litigation. In its public announcements on the detainee releases, the Pentagon for the first time (two years after detentions began) emphasised the “comprehensive inter-agency process to review the status of detainees”. The administration also emphasised in its briefing to the Supreme Court that the detainees benefited from a “thorough process” of review in Guantánamo and that “to date, more than 90 detainees have been released (or designated for release) from Guantánamo to foreign governments”.</p> <p>- In the more than two months between oral arguments in the <i>Rasul</i> case in the Supreme Court and the Court’s ruling in the case – that is, after all the briefing to the Court was completed – not a single detainee was released or transferred from Guantánamo.</p> <p>- The day after the Supreme Court ruled against the government in the <i>Rasul</i> case, the Pentagon announced that charges against three Guantánamo detainees had been referred for trial by military commission, thereby drawing public attention back to “process”. Prior to this, there had been no announcements of charges for more than four months.</p>		
08/07/04	One Swedish detainee released	“There is a process to review the status of detainees...This release was not part of the recently announced Administrative Review Process”
14/07/04	Yemeni Guantánamo detainee Salim Hamdan charged for trial by military commission	
27/07/04	Four French detainees transferred to “the control of the government of France”	“There are ongoing processes to review the status of detainees...This transfer was not part of the recently announced Combatant Status Review Tribunal”
30/07/04	First CSRT hearing held	
02/08/04	Five Moroccan detainees transferred to the “control of the government of Morocco”	“There are ongoing processes to review the status of detainees...This transfer was not part of the recently announced

		Combatant Status Review Tribunal”
19/08/04	29 detainees transferred to Pakistan for continued detention, six to release in Pakistan	“There are ongoing processes to review the status of detainees”. This transfer includes one detainee “approved for release... and subsequently found to not be an enemy combatant” by a CSRT.
14/09/04	Administrative Review Board (ARB) process implemented	
22/09/04	11 Afghan detainees released to Afghanistan	“There are ongoing processes to review the status of detainees”
22/09/04	10 detainees transferred from Afghanistan to Guantánamo. Believed to be the last transfers to the base until September 2006.	
08/11/04	Following Guantánamo detainee Salim Ahmed Hamdan’s <i>habeas corpus</i> petition challenging the lawfulness of the military commission scheme set to try him, a DC District Court judge rules in <i>Hamdan v. Rumsfeld</i> that unless and until a competent tribunal determines that Hamdan is not entitled to prisoner of war status under the Third Geneva Convention, he may only be tried by a court martial. In addition, the court ruled that certain of the military commission rules were unlawful	
14/12/04	First ARB conducted	
11/01/05	THREE YEARS OF GUANTÁNAMO DETENTIONS	
16/01/05	One Kuwaiti detainee transferred to Kuwait for prosecution	“There are ongoing processes to review the status of detainees”
21/01/05	District Court Judge Richard Leon issues ruling favouring government interpretation of <i>Rasul</i> decision, finding “no viable legal theory” under federal, constitutional or international law by which to issue writs of <i>habeas corpus</i> to Guantánamo detainees	
25/01/05	Four British detainees transferred to the custody of the UK government	“The decision to transfer these detainees was made after extensive discussions between the two governments”
28/01/05	One Australian detainee transferred to the custody of the Australian government	“The decision to transfer these detainees was made after extensive discussions between the two governments”
31/01/05	To date, final decisions have been handed down by CSRTs in 365 cases: 362 detainees confirmed as “enemy combatants”; three found to be “no longer enemy combatants”	
31/01/05	Senior DC District Court Judge Joyce Hens Green rules against government and interprets <i>Rasul</i> to mean that detainees have constitutional rights and CSRT violates due process. Stays ruling pending appeal to the DC Circuit Court of Appeals	
07/03/05	Three detainees transferred to France for prosecution	“There are ongoing processes to review the status of detainees”
12/03/05	Three detainees released to Afghanistan, Maldives and Pakistan	three detainees found to no longer be “enemy combatants” by CSRTs

29/03/05	CSRT process completed for existing detainee population at Guantánamo – 520 “enemy combatants”, 38 “no longer enemy combatants”. All but three of the NLEC decisions made following Judge Green’s ruling against the CSRTs on 31 January 2005.	
19/04/05	17 Afghan detainees and one Turkish detainee released	18 detainees found to no longer be “enemy combatants” by CSRTs
26/04/05	Two Belgian detainees transferred to the control of the Belgian government	“The decision to transfer these detainees was made after extensive discussions between the two governments”
15/07/05	DC Court of Appeals reverses District Court <i>Hamdan</i> ruling. Court finds that Congress authorized the military commission process; that the Geneva Conventions do not confer any rights upon Hamdan that he can enforce in court; and that anyway the military commission could serve as a “competent tribunal” in which Hamdan could assert his POW claim. Case appealed to Supreme Court	
20/07/05	Seven detainees released (one to Sudan, two to Afghanistan, three to Saudi Arabia, one to Jordan) and one transferred to the government of Spain	Three detainees found no longer to be “enemy combatants” by CSRTs (Sudanese, Yemeni, Jordanian). Three detainees recommended for release by ARBs (two Afghans, one Saudi Arabian)
22/08/05	One detainee released to Yemen, one to Tajikistan, one to Iran	Two detainees found no longer to be “enemy combatants” (Yemeni, Tajik); Iranian’s release recommended by ARB
12/09/05	One detainee released to the government of Afghanistan	“There are ongoing processes to review the status of detainees”
01/10/05	One detainee released to Egypt	Detainee found no longer to be “enemy combatant” by CSRT
03/11/05	Five detainees transferred to Kuwait	Transfers recommended by ARB
05/11/05	Three detainees transferred to Bahrain; one detainee to Saudi Arabia	Bahraini detainee transfers approved by ARB
07/11/05	Five Guantánamo detainees charged for trial by military commission	
07/11/05	Supreme Court agrees to hear <i>Hamdan</i> case challenging military commission process	
30/12/05	Detainee Treatment Act signed into law, containing <i>habeas corpus</i> stripping provisions for detainees held in Guantánamo, and providing for narrow judicial review by DC Court of Appeals of CSRT decisions that detainees are “properly detained” as “enemy combatants”	
11/01/06	FOUR YEARS OF GUANTÁNAMO DETENTIONS	
20/01/06	Detainee charged for trial by military commission	
09/02/06	Seven detainees released to Afghanistan; three to Morocco; one to Uganda	Release of five Afghans, the Moroccan and the Ugandan recommended by ARB
09/02/06	First round of Administrative Review Board completed – 463 decisions; 329 continued detentions; 14 cleared for release; 120 cleared for transfer to other governments	

13/02/06	Administration files a motion in the US Supreme Court arguing for dismissal of the <i>Hamdan</i> case under the DTA	
28/03/06	Oral arguments in Supreme Court in <i>Hamdan</i> case	
05/05/06	Five Uighur detainees released to Albania	All five found “no longer enemy combatants” by CSRTs
18/05/06	15 detainees transferred to Saudi Arabia	Approved for transfer by ARBs
24/06/06	14 detainees transferred to Saudi Arabia	One found “no longer enemy combatant” by CSRT; 13 approved for transfer by ARB.
The Pentagon’s detainee transfer announcements change their emphasis from “the circumstances in which detainees are apprehended can be ambiguous, and many detainees are highly skilled in concealing the truth” (begun March 2004), to “determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified”		
29/06/06	Supreme Court rules in <i>Hamdan v. Rumsfeld</i> that Detainee Treatment Act did not apply to <i>habeas corpus</i> petitions pending at the time the legislation was enacted; that the military commissions established by presidential order were unlawful as they had not been authorized by Congress, and that Article 3 common to the four Geneva Conventions of 1949 was applicable in this context	
24/08/06	One detainee transferred to Germany	Recommended for transfer by ARB
26/08/06	Five detainees transferred to Afghanistan	Recommended for transfer “due to multiple review processes”
03/09/06	14 “high-value” detainees transferred to Guantánamo from up to four and a half years in secret CIA custody. First detainee transfers to Guantánamo since September 2004, according to the Pentagon.	
14/09/06	Two detainees transferred to Kuwait	Recommended for transfer by ARB
12/10/06	16 detainees transferred to Afghanistan and one to Morocco	Recommended for transfer “following multiple review processes”
16/10/06	One detainee transferred to Bahrain, one to Iran and two to Pakistan	Recommended for transfer by ARB
17/10/06	Military Commissions Act signed into law, stripping US courts of jurisdiction to hear <i>habeas corpus</i> petitions from foreign nationals held in US custody as “enemy combatants”	
SOME NOTES ON DETAINEE CASE ACTIVITY FROM RASUL RULING TO PASSAGE OF THE MILITARY COMMISSIONS ACT		
- On the same day, 11 July 2005, that the Supreme Court agreed to hear the <i>Hamdan</i> case challenging the lawfulness of the military commission system, five Guantánamo detainees were charged for trial by commission. This was more detainees than had been charged in the past <i>three and a half years</i> , and came <i>16 months</i> after the last detainee was charged. With oral arguments on the <i>Hamdan</i> case pending for March 2006, the Pentagon announced charges against another detainee in January.		

<p>- Two months after the Supreme Court ruled in <i>Hamdan v. Rumsfeld</i> that the <i>habeas</i>-stripping provisions of the Detainee Treatment Act did not apply to petitions filed on behalf of Guantánamo detainees before the DTA's enactment, the administration produced 14 "high-value" detainees whose fate and whereabouts to that point had been unknown for up to <i>four and a half years</i>. The 14 were transferred from secret CIA custody to Guantánamo – the first transfers to the base in two years – and their cases were successfully exploited by the administration in obtaining the <i>habeas</i>-stripping MCA.</p>		
17/11/06	Three detainees released to Albania (Algerian, Egyptian, Uzbek)	Determined to be "no longer enemy combatants" by CSRT (2004-2005)
13/12/06	District Court rules that the MCA has stripped the courts of jurisdiction to hear Salim Hamdan's <i>habeas corpus</i> petition	
14/12/06	16 detainees transferred to Saudi Arabia	Recommended for transfer by ARB
17/12/06	Seven detainees transferred to Afghanistan, six to Yemen (one for release), three to Kazakhstan, one to Libya, one to Bangladesh.	Recommended for transfer or release "by multiple review board processes"
11/01/07	FIVE YEARS OF GUANTÁNAMO DETENTIONS	
20/02/07	In <i>Boumediene v. Bush</i> , the DC Circuit Court of Appeals rules that MCA has stripped courts of jurisdiction to hear <i>habeas corpus</i> petitions from Guantánamo detainees and that they have no constitutional rights. Appealed to the Supreme Court.	
21/02/07	Seven detainees transferred to Saudi Arabia	Recommended for transfer by ARB
01/03/07	Three detainees transferred to Tajikistan; two to Afghanistan	Recommended for transfer by "multiple review board processes".
<p>From now, Pentagon's detainee transfer announcements switch their emphasis from "determination about the continued detention or transfer of a detainee is based on the best information and evidence available at the time, both classified and unclassified" (begun June 2006), to "[the transfer] underscores the processes put in place to assess each individual and make a determination about their detention while hostilities are ongoing – an unprecedented step in the history of warfare"</p>		
06/03/07	Round 2 of ARBs completed. 328 decision – 273 continued detentions; 0 cleared for release; 55 recommended for transfer to other government. The Pentagon stresses that "more detainees have been released or transferred than remain in Guantanamo, underscoring the fact that the United States has put in place processes to assess each individual and make a determination about whether they may be released or transferred during the course of ongoing hostilities. This process is discretionary, administrative and is not required by the Geneva Convention or by US or international law".	
26/03/07	Pentagon announces transfer of "dangerous terror suspect" to Guantánamo and that he will receive a CSRT. The Pentagon stresses that the capture of this detainee "exemplifies the genuine threat that the United States and other countries face throughout the world in the war on terrorism. Due to the significant threat this terror suspect represents, he has been transferred to Guantanamo."	
30/03/07	One detainee transferred to UK	"The transfer is a demonstration of the United States' desire not to hold detainees any longer than necessary"

		(detainee was taken into custody in Gambia and “rendered” to Guantánamo via Afghanistan) in 2002
02/04/07	Supreme Court refuses to take <i>Boumediene</i> appeal against the DC Court of Appeals ruling	
26/04/07	One detainee transferred to Afghanistan, one to Morocco	“These transfers are a demonstration of the United States’ desire not to hold detainees any longer than necessary.”
27/04/07	Petitions filed in US Supreme Court on behalf of Guantánamo detainees asking it to reconsider its 2 April decision not to consider the <i>Boumediene</i> challenge to the MCA	
27/04/07	Pentagon announces transfer of “high-level member of al-Qaida” from CIA custody to Guantánamo and that he will receive a CSRT	
07/05/07	Pentagon releases “procedure for review of ‘new evidence’ relating to ‘enemy combatant’ status.” If documentary or witness evidence meets the standard of “new”, “every effort will be made to make a decision regarding whether or not to convene a new CSRT within 90 days of the “new evidence” being received by the relevant authorities. The decision on whether to conduct a new CSRT is a matter for the “unreviewable discretion” of the Deputy Secretary of Defense.	
15/05/07	Oral arguments in <i>Bismullah v. Gates / Parhat v. Gates</i> in DC Court of Appeals, the first cases brought under the DTA in order for the Court to consider the scope of judicial review of CSRT decisions under the DTA	
19/05/07	One Australian detainee transferred to Australia	At a military commission, David Hicks pled guilty to providing material support for terrorism in a agreement under which he would get to serve his (nine month) prison sentence in his native Australia
06/06/07	Pentagon announces transfer of “dangerous terror suspect” to Guantánamo and that he will receive a CSRT. His capture “exemplifies the genuine threat that the United States and other countries face throughout the world from dangerous extremists”.	
19/06/07	Four detainees transferred to Yemen, two to Tunisia	“determined to be eligible for transfer following a comprehensive series of review processes”
22/06/07	Pentagon announces transfer of “dangerous terror suspect” to Guantánamo and that he will receive a CSRT. His capture “exemplifies the genuine threat that the United States and other countries face throughout the world in the war on terror. Due to the continuing threat this terrorist represents... he has been transferred to... Guantanamo Bay.”	
29/06/07	Supreme Court vacates its 2 April order and agrees to consider <i>Boumediene</i> case	
16/07/07	16 detainees transferred to Saudi Arabia	“determined to be eligible for transfer following a comprehensive series of review processes”
20/07/07	DC Circuit Court of Appeals issues ruling in <i>Bismullah</i> outlining for the first time scope of	

	its review of CSRT decision under DTA	
09/08/07	Five detainees transferred to Afghanistan, one to Bahrain	“determined to be eligible for transfer following a comprehensive series of review processes”
09/08/07	Pentagon announces completion of CSRT process for 14 “high-value” detainees transferred to Guantánamo from secret CIA custody in September 2006. All 14 are confirmed as “enemy combatants”	
06/09/07	16 detainees transferred to Saudi Arabia	“determined to be eligible for transfer following a comprehensive series of review processes”
12/09/07	Pentagon announces transfer of “dangerous terror suspect” to Guantánamo and that he will receive a CSRT	
28/09/07	One detainee transferred to Mauritania	“determined to be eligible for transfer following a comprehensive series of review processes”
29/09/07	Six detainees transferred to Afghanistan, and one each to Libya and Yemen.	“determined to be eligible for transfer following a comprehensive series of review processes”

SOME NOTES ON DETAINEE CASE ACTIVITY SINCE PASSAGE OF THE MCA

- On 26 March 2007, a month after the Court of Appeals ruled in *Boumediene v. Bush* that the MCA had stripped the courts of jurisdiction to hear *habeas corpus* petitions from Guantánamo detainees, and five days after the administration filed its brief in the Supreme Court arguing that the Court should not take the issue, the Pentagon announced that a “dangerous terrorist suspect” had been transferred to Guantánamo and that he would receive a CSRT. This was the only announced transfer in to the base for seven months. The Pentagon stressed that the detainee’s capture “exemplifies the genuine threat the United States and other countries face throughout the world in the war on terrorism” and that “due to the significant threat that this terror suspect represents, he has been transferred to Guantánamo”. A week later, on 2 April, the Supreme Court announced that it would not take the *Boumediene* appeal.

- On 27 April, the day that counsel for the detainees filed petitions in the Supreme Court asking it to reconsider its 2 April order, the Pentagon announced that a “high-level member of al-Qa’ida” had been transferred from CIA custody to Guantánamo, and that he would receive a CSRT. In the following two months, while the Court was considering whether to change its mind, the Pentagon announced the transfer to Guantánamo of two more “dangerous terrorist suspects”, stressing that their capture “exemplifies” the threat from “dangerous extremists”, and that they would receive CSRTs. On 29 June, the Supreme Court announced that it would vacate its 2 April order and hear the *Boumediene* case.

- In the three months following the Supreme Court’s about-turn, the Pentagon announced the transfer from Guantánamo of 46 detainees. This was more than twice as many transfers in half the time compared to the period before the Court’s decision. In the six months prior to the Court deciding to examine the Guantánamo regime again, only 22 detainees had been transferred from the base.