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UNITED STATES OF AMERICA

Guantánamo – an icon of lawlessness¹

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Imagine this.

Hundreds of US nationals are picked up around the world by a foreign government fighting a “war for national security”. The government in question is reacting to evidence that a recent bombing on its territory which left thousands of civilians dead was instigated by a shadowy network based in the United States. The detainees, according to evidence the detaining power says it has but refuses to reveal, are in some way associated with this network. The detainees, a few of them children, are strapped, shackled and blindfolded, into transport planes. Some are forced to urinate and defecate on themselves during the long flights to an island military base. In this offshore prison camp they are held incommunicado in tiny cells, denied access to lawyers, relatives or the courts, and subjected to repeated interrogations and a punitive regime aimed at encouraging their “cooperation”. A presidential order announces plans to try some of the detainees in front of executive bodies with the power to hand down death sentences against which there would be no right of appeal to any court.

The months turn into years. Allegations of torture and ill-treatment of the US detainees emerge from the island base, as do reports of psychological deterioration and suicide attempts among the detainees. Interrogation teams are said to have access to the medical files of the detainees in order to help them locate individual weaknesses. The detaining power admits to having authorized interrogation techniques including sleep deprivation, stress positions, isolation, hooding, sensory deprivation and the use of dogs to induce fear. Evidence mounts that these and other techniques have been more widely used than the authorities are willing to admit. It becomes known that the detaining power earlier discussed how its agents could avoid prosecution for torture and war crimes committed during interrogations in the “war for national security”.

Some detainees are released back to the USA, appearing to have had no or only very tenuous links to the shadowy network. At every turn, the detaining power continues to resist efforts to have the lawfulness of the hundreds of remaining detentions challenged in court. All the time, it continues to profess its commitment to the rule of law and human rights. Its words are increasingly recognized as empty rhetoric, but some other governments begin to imitate its practices, using the “war for national security” as a pretext for their own repressive conduct.

Would the USA tolerate this treatment of its citizens by another government? Would the international community accept this threat to the rule of law and human rights? Surely not, and yet the USA continues to perpetrate just such abuses in the far from hypothetical Guantánamo Bay prison camp in Cuba, where almost 550 detainees of more than 30 nationalities remain detained without charge or trial. On 11 January 2005, the Guantánamo prison will enter its fourth year. In its more than 1,000 days of executive detentions, Guantánamo has become a symbol of a government’s attempt to put itself above the law. The

example it sets is of a world where basic human rights are negotiable rather than universal. Such a world, although built in the name of national security, is dangerous to us all.

The question of lawfulness in relation to Guantánamo can be divided into four categories: the legal limbo of the detainees; their treatment and conditions; secrecy and the suffering of family members; and the planned trials by military commission.

The continuing legal limbo

More than six months after the US Supreme Court ruled that the federal courts can hear appeals from the Guantánamo detainees, it is not because of the slowness of the legal system that hundreds remain held without charge or trial and virtually incommunicado in the naval base. It is the result of a government seeking to drain the Supreme Court ruling of any real meaning and aiming to keep any review of detentions as far from a judicial process as possible.

The US administration responded to the June 2004 decision by establishing the Combatant Status Review Tribunal (CSRT), panels of three military officers whose sole aim is to confirm or reject each detainee's status as a so-called "enemy combatant". This is neither a court of law, nor the "competent tribunal" required by the Third Geneva Convention. Unlike the latter which presumes a detainee to be a prisoner of war until proved otherwise, the CSRT process places the burden on the detainee to disprove his "enemy combatant" status. The detainee does not have access to legal counsel or to secret evidence. Many have boycotted the CSRT process, and to date only two have been released as a result of it, while 230 have been confirmed as "enemy combatants".

Each detainee confirmed as an "enemy combatant" will also have an annual review of his case by an Administrative Review Board (ARB) to assess whether he "continues to pose a threat to the United States or its allies, or whether there are other factors bearing upon the need for continued detention". In December 2004 the Pentagon announced that it had conducted its first ARB. Again, detainees have no access to lawyers or to secret evidence for this administrative review. Evidence extracted under torture or other coercion could be admitted by either body.

Also in December, six months after the US Supreme Court's ruling, the government notified the detainees that they can file *habeas corpus* petitions in federal court. It even gave them the address of a US District Court in which to file them. In this Kafkaesque world of Guantánamo, however, the government has argued to that very same court that the detainees have no basis in constitutional or international law on which to challenge the lawfulness of their detentions. It maintains that review by the Combatant Status Review Tribunal and the Administrative Review Board is more than sufficient due process. Meanwhile, the vast majority of the detainees have still not had access to lawyers.

In Amnesty International's view, international human rights law applies to all the Guantánamo detainees, and as such each and every one of them has the right to full judicial review of his detention and to release if that detention is unlawful – a basic protection against arbitrary arrest, torture and "disappearance". This was always the case for those numerous detainees who were picked up outside the international armed conflict in Afghanistan. However, even those captured in that war – who should have been treated as prisoners of war until a competent tribunal determined otherwise² – are now also covered by human rights law because the international conflict in Afghanistan ended more than two years ago and their treatment by the USA remained unchanged by that fact. When the conflict ended, presumed prisoners of war were required to be released or charged and brought to fair trial. Although the administration claims that it is holding the detainees under the laws of war, it has refused to apply those laws as it should have. Previously secret government documents now tell us that the administration refused to apply the Geneva Conventions in order to free up US

interrogators and make their prosecution for war crimes less likely. There is little sign of an apologetic mood within the administration. Indeed, one of the architects of this policy, White House Counsel Alberto Gonzales, has been nominated by President Bush to the post of Attorney General. In his draft statement to the Senate Judiciary Committee for the nomination hearing on 6 January 2005, Alberto Gonzales says that he has a “deep and abiding commitment to the rule of law”. He must be held to that pledge.

Treatment of the detainees

The very conditions in which the detainees are held – harsh, isolating and indefinite – can in themselves amount to torture or cruel, inhuman or degrading treatment. There is much additional evidence that numerous detainees in Guantánamo – as well as in Afghanistan, Iraq and elsewhere – have been subjected to direct torture or other cruel, inhuman or degrading treatment during the interrogation or detention process. This situation could be seen as an inevitable outcome where a government believes there are people “who are not legally entitled” to humane treatment, as President Bush suggested in a previously secret memorandum, dated 7 February 2002, on “war on terror” detention policy. Yet no detainee anywhere, not even “killers” or “bad people”, as the President has described those held without charge or trial in Guantánamo, can ever fall outside the prohibition on torture and ill-treatment. To suggest otherwise, as this central policy memorandum does, points to a serious gap in a government’s understanding of international law and indicates that it views human rights as privileges that can be granted, and therefore taken away, by the state.³

Secretary of Defense Donald Rumsfeld, echoing President Bush, has described Guantánamo detainee Mohammed al-Kahtani as “a very bad person”. A harsh interrogation plan was approved for this Saudi national. According to recent revelations, Mohammed al-Kahtani was put on a plane, blindfolded in conditions of sensory deprivation, and made to believe that he was being flown to the Middle East. After several hours in the air, the plane returned to Guantánamo and Mohammed al-Kahtani was allegedly put in an isolation cell and subjected to harsh interrogations conducted by people he was encouraged to believe were Egyptian security agents.⁴ This is an interrogation technique known in the USA as “false flag” and was one of several methods authorized by Secretary Rumsfeld in April 2003. Another technique promoted by the Pentagon’s April 2003 *Working Group Report on Detainee Interrogations in the Global War on Terrorism* is “threatening to transfer to a 3rd country where subject is likely to fear he would be tortured or killed”.

In February 2002, following President Bush’s decision to reject the application of the Geneva Conventions to those held in Guantánamo, the White House gave assurances that the International Committee of the Red Cross (ICRC) would be able to visit all detainees in private.⁵ The ICRC was denied access to Mohammed al-Kahtani during the period of interrogations described above. The ICRC protested such denial of access to a number of detainees in meetings with the Guantánamo authorities in late 2003. Four months later, in a meeting on 2 February 2004, the ICRC was informed that it could still not see one of the detainees “because of military necessity”.⁶ The detainee in question, reported to be Moroccan national Abdullah Tabarak, was transferred to Morocco in August 2004. In an interview last month, he alleged that he had been tortured and ill-treated in US custody. In Guantánamo, he said that he had been beaten, given forcible injections, and held in a dark cell which has left him with eyesight problems. He said that he suffers from other physical ailments as a result of his confinement, as well as insomnia and nightmares.⁷

It is more than a year since the ICRC made public its concern about the serious deterioration the detention regime was having on the psychological health of the detainees. In November it emerged that it had also protested more direct torture and ill-treatment, adding yet more weight to the allegations of released detainees and others. In heavily redacted

documents released to the American Civil Liberties Union following a Freedom of Information Act lawsuit filed a year earlier, FBI agents have referred to “torture techniques” and “highly aggressive interrogation techniques” being used in Guantánamo. In one email, an FBI agent sends a colleague “an outline of coercive techniques in the military’s interviewing tool kit”. Of the military’s interrogation plan for one particular detainee, the sender writes: “You won’t believe it!” Another FBI agent reported seeing a detainee in Guantánamo “sitting on the floor of the interview room with an Israeli flag draped around him, loud music being played and a strobe light flashing”. Another tells of having witnessed the use of a dog to intimidate a Guantánamo detainee, who was also subjected to three months of isolation in a cell with 24-hour illumination. The detainee was later witnessed to be displaying conduct “consistent with extreme psychological trauma”. In an email, another FBI agent wrote:

“Here is a brief summary of what I observed at GTMO. On a couple of occasions (sic), I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated (sic) on themselves and had been left there for 18, 24 hours or more. On one occasion (sic), the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the [military police guards] what was going on, I was told that interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion (sic), the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion (sic), not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.”

Such evidence adds weight to earlier allegations made by released detainees. For example, in July 2004, Swedish national Mehdi Ghezali recalled to Amnesty International how:

“One prisoner had removed his ID-strap that the prisoners were forced to wear around their wrist. As punishment, the guards shackled both his hands and feet in his cell for more than 10 hours. During this time, the prisoner was not given any food and was not allowed to go to the toilet, although he had to. He could not hold himself. It was very degrading for him.”

Mehdi Ghezali also described to Amnesty International the pain of “short shackling”, temperature manipulation, and the use of loud noise and music during interrogations. He said that he was subjected to sleep deprivation, and that Australian detainee Mamdouh Habib had been subjected to sleep deprivation at the end of which “there was blood coming from both his nose and ears.” In an affidavit recently made public, another Australian national David Hicks alleges that he has been “deprived of sleep as a matter of policy” and that he and other detainees have been subjected to other forms of torture and ill-treatment in US custody. UK national Moazzam Begg was held in isolation for 600 days.

The administration has yet to denounce such interrogation techniques or detention conditions. In similar vein, Amnesty International has still not received a substantive response from the US authorities to the allegation that a Chinese delegation visited Guantánamo in September 2002 and participated in interrogations of ethnic Uighurs held there. An inside source told the organization that during this time, the detainees were subjected to intimidation and threats, and other torture or ill-treatment, some of it on the instruction of the Chinese delegation. Other detainees, the source has informed Amnesty International, were subjected to

sexual humiliation during interrogations. A former interrogator recently confirmed that female interrogators had sexually harassed detainees.⁸

The administration has continued with its assurances that all detainees in US custody are treated humanely and all allegations of abuse investigated. The evidence is mounting that this is simply false. “They don’t use dogs in Guantánamo Bay during the interrogation process and never did”, the Senate Armed Services Committee was told in September 2004.⁹ The former commander of Guantánamo, Major General Geoffrey Miller, testified on oath that dogs were never used to intimidate detainees at the base. Yet, now FBI agents have added to the allegations of detainees that dogs have been used. For example, FBI agents have reported witnessing sleep deprivation and “the utilization of loud music/bright lights/growling dogs” in interrogations at Guantánamo.

According to a leaked military document, the ICRC raised allegations in a meeting with the Guantánamo authorities in October 2003 that interrogators at the base had had access to the medical files of detainees, that the files were “being used by interrogators to gain information in developing an interrogation plan”, and “that there is a link between the interrogation team and the medical team”. Major General Miller rejected the allegations.¹⁰ However, in a new article published in The New England Medical Journal of Medicine, two medical doctors write that their own research into “medical involvement in military intelligence gathering in Iraq and Guantánamo Bay has revealed a more troublesome picture”:

“Not only did caregivers pass health information to military intelligence personnel; physicians assisted in the design of interrogation strategies, including sleep deprivation and other coercive methods tailored to detainees’ medical conditions. Medical personnel also coached interrogators on questioning technique...”

*The conclusion that doctors participated in torture is premature, but there is probable cause for suspecting it. Follow-up investigation is essential...”*¹¹

On 5 January 2005, US Southern Command announced that it would carry out an internal investigation into the FBI allegations of abuses.¹² In Amnesty International’s view, more is needed. There is a need for a full independent commission of inquiry into the USA’s detentions in Guantánamo and elsewhere. Such a commission, called for by Amnesty International since May 2004, must have the power to investigate the role of officials in the highest echelons of government, including in the White House and the Office of the Secretary of Defense, and must cover all aspects of the USA’s “war on terror” detention and interrogation policy and practices, in all locations.

Secrecy and imprecision as avenues for abuse and suffering

The Pentagon refuses to give precise numbers of detainees held in Guantánamo. The concern is that this could allow secret detainee transfers to take place. In early 2004, for example, approximately seven detainees remained unaccounted for in the official announcements about transfers to and from Guantánamo.¹³ In the light of revelations about so-called “ghost detainees” in US custody in Iraq and the continued allegations of secret transfers between the USA and countries with records of torture, there is reason for deep concern in this regard.

A legal motion filed in federal court in November 2004 and declassified on 5 January 2005, renews concern on the case of Australian detainee Mamdouh Habib. The motion begins:

“In October, 2001, the United States military – in cooperation with the Pakistani and Egyptian Governments – rendered Mamdouh Habib to Egypt, knowing and intending he would be tortured. Mr. Habib spent six months in Egyptian custody, where he was subjected to unspeakable brutality. Afterwards, Mr. Habib was returned to United States custody, travelling first to Bagram Air Force Base, then to the U.S. military

facility at Kandahar, then to Guantánamo Bay, Cuba, where he has been held since May, 2002.

Recently, undersigned counsel learned from press reports that the United States Government is negotiating with Egypt to render Mr. Habib back to that country, where he would once again be tortured.”

The motion seeks a restraining order to prevent the feared transfer of Mamdouh Habib to Egypt or the Egyptian authorities.¹⁴ The document details the alleged torture to which Mamdouh Habib was previously subjected in Egypt, including electric shocks, water torture, physical assaults, suspension from hooks, and threats with dogs. It gives details about how US agents were present at his interrogations in Pakistan after his arrest, and during his secret transfer to Egypt. The details echo those given by others who claim to have been subjected to such “rendition”. For example, Amnesty International is still awaiting a reply to a letter it sent to the US authorities in August 2004 on the case of Khalid El Masri, a German national of Lebanese origin who alleges that he was secretly flown to incommunicado detention in Afghanistan from Macedonia in early 2004, and that US agents were present during interrogations in secret detention in Kabul.¹⁵ His claims that he was taken to a plane by agents dressed in black, that he had his clothes cut from him with scissors, and that he was made to wear a blue track suit, match the allegations raised in federal court about Mamdouh Habib’s previous transfer to Egypt with the involvement of US agents.

Amnesty International has spoken to many relatives of Guantánamo detainees who themselves are in deep distress from the lack of transparency and information about their loved ones. In November 2004, for example, the sister and brother of Kuwaiti detainee Abdullah Al Kandari told the organization of how their parents “are not the same people they were three years ago” because of losing their son to the black hole of Guantánamo. Earlier in the year, the brother of Yemeni detainee Jamal Mar’i related how his mother has developed high blood pressure and sinks into bouts of depression from the strain of not knowing what is happening to the son she has not seen for more than three years. In other contexts, the suffering of the relatives of the “disappeared” has been found by the UN Human Rights Committee to amount to torture or cruel, inhuman or degrading treatment. Similar cruelty is inflicted upon the relatives of people held in indefinite virtual incommunicado detention without charge or trial. It is notable that numerous relatives of the Guantánamo detainees have referred to their loved one as having disappeared.

Military commissions

The fourth category of unlawfulness in relation to the Guantánamo concerns the US administration’s continuing efforts to bring selected detainees to trial by military commission. These bodies entirely lack independence from the executive. Set up to obtain convictions on lesser standards of evidence, they can admit secret or coerced testimony. Their verdicts cannot be appealed to any court. Only non-US nationals can be so tried, in violation of the prohibition on the discriminatory application of fair trial rights.

Amnesty International had an observer at the recent pre-trial hearings for the first four detainees charged in preparation for trial by commission. Her observations confirmed the organization’s worst fears that this is a system unable to deliver a fair trial. The commission panel’s ignorance of the law and the disparity of resources allocated to prosecution and defence team in a process controlled by the executive, were particularly obvious. So too was the low quality of interpreting and translation standards – on several occasions the defence had to request that proceedings be halted because the quality of interpreting was so bad. The commission rejected the defence counsel’s attempt to bring in six expert witnesses to explain various aspects of international law and military law. The prosecution asserted that the only law that binds the panel is “commission law”, a set of rules and orders developed in the US

Department of Defense. It is shocking that people could face execution after such trials, which clearly fail to meet basic international standards.

Commission proceedings were suspended in November 2004 after a federal judge concluded that those captured in Afghanistan should have been presumed to be prisoners of war, which precluded their trial by military commission. Even if they were found not to be POWs by a competent tribunal, the judge said, the commission rules allowing the use of secret evidence would still violate due process. The administration has appealed to a higher court arguing that the judge's ruling "constitutes an extraordinary intrusion into the Executive's power to conduct military operations". The outgoing Attorney General, presumably referring not only to this judge's ruling, but also that of the Supreme Court in June, condemned what he characterized as a "profoundly disturbing trend" of "intrusive judicial oversight and second-guessing of presidential determinations".

With the US administration showing disdain for its own courts, the international community faces an uphill task to persuade it to change course. The USA should be reminded not only of the various aspects of unlawfulness raised by the Guantánamo detentions, but that this regime also contravenes the USA's National Security Strategy which proclaims that respect for human dignity and the rule of law is the route to security, as well as its National Strategy for Combating Terrorism, which asserts that a world in which such standards are embraced as the norm will be "the best antidote to the spread of terrorism". "This", the latter strategy concludes "is the world we must build today". Instead, the USA built a prison camp which has become an affront to human rights and the rule of law. The international community must redouble its efforts to bring this intolerable situation to an end.

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¹ Amnesty International delivered a shorter version of this text at a hearing on the *Lawfulness of Detentions by the United States in Guantánamo Bay* held by the Council of Europe's Committee on Legal Affairs and Human Rights in Paris, France, on 17 December 2004.

² Even the US Army's interrogation Field Manual FM 34-52 of 1992 states that "Captured insurgents and other detained personnel whose status is not clear, such as suspected terrorists, are entitled to [Prisoner of War] protection until their precise status has been determined by competent authority".

³ See *USA: Human dignity denied: Torture and accountability in the 'war on terror'*, AI Index: AMR 51/145/2004, October 2004, <http://web.amnesty.org/library/Index/ENGAMR511452004>.

⁴ *Fresh details emerge on harsh methods at Guantánamo*. New York Times, 1 January 2005.

⁵ *Fact Sheet. Status of detainees at Guantánamo*. The White House, 7 February 2002.

⁶ *ICRC meeting*, 2 February 2004. <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo02-02-04.pdf>.

⁷ *Released Moroccan Guantánamo detainee tells Islamist paper of his 'ordeal'*. BBC, 30 December 2004.

⁸ *Fresh details emerge on harsh methods at Guantánamo*. New York Times, 1 January 2005.

⁹ Major General George Fay. Testimony to Senate Armed Services Committee, 9 September 2004.

¹⁰ See page 94 of *Human dignity denied: Torture and accountability in the 'war on terror'*.

¹¹ *When doctors go to war*. By M. Gregg Bloche and Jonathan H. Marks. The New England Medical Journal of Medicine, Volume 352:3-6, 6 January 2005, Number 1.

¹² *Southcom investigates abuse allegations at Guantánamo*. United States Southern Command News Release, 5 January 2004.

¹³ See page 101-102 of *Human dignity denied: Torture and accountability in the 'war on terror'*.

¹⁴ *Habib v Bush*. Petitioner's memorandum of points and authorities in support of his application for injunctive relief. Civil Action No. O2-CV-1130 (CKK), in the United States District Court for the District of Columbia.

¹⁵ See page 186 of *Human dignity denied: Torture and accountability in the 'war on terror'*.